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Rethinking the signature rule and the sufficiency of signatures as evidence of notice of terms in (business-to-business) commercial contracts

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ABSTRACT

Using socio-economic analysis, this article critiques the oversimplification at the heart of the signature rule, which governs sufficiency in the notice of terms to a contractual counterparty concerning signed contracts in Commonwealth common law jurisdictions. As demonstrated in this article, two main factors account for the inadequacy of the signature rule as currently conceived. The first is the assumption that commercial entities are sophisticated. Second, in contested cases concerning notice, only manifest onerousness or unusualness of terms should warrant a heightened duty of notification on an offeror. This article argues that the signature rule lacks nuance and should be reformed to account for context-specificity. This is because: a) commercial sophistication is a matter of gradation; and b) terms need not be unusual or onerous to require heightened disclosure requirements – what matters for specific disclosure is the salience or peculiarity of a term.

Keywords: The rule in *L'Estrange v Graucob*/the signature rule; notice externalities; notice of contract terms; onerous terms.

INTRODUCTION: AN OVERVIEW OF THE ISSUES FOR DETERMINATION, METHOD AND THE THESIS PRESENTED

Consent is a fundamental factor whose absence generally deprives agreements of validity and enforceability. The rudimentary role of consent in the making of contracts tends to render new discussions about it to come across as hoary. While consent is not arcane, it can be complicated, given that consent is an elastic concept susceptible

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to subtle manipulation.[1] The intricacies of modern commercial contracting demand a re-assessment of the rules and principles that govern consent, mainly as it concerns the role of signatures as evidence of notice of terms. This specific issue – the role of signatures as the manifestation of consent – is the focus of this article.

It is crucial to state five features of this article upfront. Firstly, this article pursues a prescriptive discussion rather than a descriptive discussion. Secondly, while this article draws on case law and legal academic discussions, it also relies on relevant basic socio-economic concepts. As the reader shall discover, the rationale for drawing on concepts of socioeconomics is that legal analysis alone does not adequately highlight the complexities of modern contracting. Thirdly, the article addresses only *business-to-business* (B2B) transactions; therefore, it excludes the treatment of *business-to-consumer* (B2C) transactions. The reason for this is that the interests of consumers in B2C transactions, as regards notice of terms, are well attended by different consumer protection regimes. For example, in the United Kingdom (UK), sections 62–69 of the Consumer Rights Act 2015 address the subject of notice or incorporation of terms. Fourthly, this article relates primarily to the incorporation of terms by signature and, as such, does not address the incorporation of terms by reference, nor does it address notice in cases of unsigned presentations of terms. It concerns those contracts whereby a signature is taken as a manifestation of consent and notice of terms. Fifthly, this article does not concern the regulation of (substantive) unfairness of contract terms, which is already dealt with by different statutes across various jurisdictions (eg the UK's Unfair Contract Terms Act 1977 and New Zealand's Fair Trade Act 1986). Instead, this article is concerned with the effective communication of contract terms in ways that do not create unfair surprises as regards the nature or scope of commercial risk or liability assumed by a counterparty.

The object and thesis pursued

This article critiques the oversimplification at the core of the signature rule, which governs notice or incorporation of terms in forming signed contracts in commercial settings. As this article demonstrates, the likelihood of weakened consent increases with the possibility of an offeror presenting important terms (ie those that ought to be salient terms) in unexceptional ways. The English High Court recently

1 Chunlin Leonhard, 'The unbearable lightness of consent in contract law' (2012) 63 Case Western Reserve Law Review 57; see also, Robin West, 'Authority, autonomy, and choice: the role of consent in the moral and political visions of Franz Kafka and Richard Posner' (1985) 99 Harvard Law Review 384.

expressed this concern in *Blu-Sky Solutions Ltd v Be Caring Ltd*.[2] In that case, HHJ Stephen Davies described the contested term(s) as 'concealed within detailed T&Cs, making it very hard to see the important from the unimportant'.[3] The concern is that offerees may be lured into contracts or ambushed by terms whose purpose they may not have understood to be salient, thereby causing them to discount their likely implications.

This article demonstrates two main flaws at the heart of the signature rule. The first is the specious assumption that business entities are (to be deemed) sophisticated. The essence of this assumption is that businesspersons have business knowledge and robust levels of preparedness for transactional risks (as compared to consumers). Therefore, by signing contracts, they agree to the terms contained therein. Contrary to this assumption, sophistication is often context-specific on a spectrum. The second flaw is the principle that only onerous or unusual terms must be brought to the attention of offerees for notice to be effective in contested cases regarding the sufficiency of notice. Doubts linger concerning such an exception on the reasoning that the quality of onerousness or unusualness of terms only applies to negate notice in cases of unsigned presentations of terms or consumer contracts.[4] Such a position is contestable, as several cases acknowledge that the onerousness of terms may negate notice.[5] In any case, this limited exception to the signature rule is problematic, as this article demonstrates. Of course, one may point to case law decisions whose *ratios* correspond with the two considerations this article advances. But, then, a legion of cases continues to strengthen the unvarnished predominance of the signature rule, therefore calling into question the reliability of those other cases that otherwise correspond to the above-stated considerations. On that account, this article seeks to provide theoretical reinforcement for advancing these considerations in judicial analysis.

This article deploys socio-economic analysis to critique the predominance of the signature rule, mainly from the standpoint of contracting processes. Such a process-based approach is not novel in contract law scholarship. It has been exponentially used to analyse

2 [2021] EWHC 2619.

3 Ibid para 112.

4 See David Foxton, 'The boilerplate and bespoke: should differences in the quality of consent influence the construction and application of commercial contracts?' in Charles Mitchell and Stephen Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart 2020) 259, 261–265.

5 See, cases in footnotes 12 and 13 below.

or deconstruct judicial interpretation of contracts[6] and rationales that inform conceptions of contract terms, and so on.[7] But the novelty of its deployment, as used in this article, is deciphering how contracting patterns or processes may impact the effectiveness of communicating contract terms to counterparties. Central to its novelty is the postulation that judges be guided by two parameters that serve as essential touchstones for effective communication through a textual medium when ascertaining whether notice is sufficient. These are the factors of *relational proximity* and *informational complexity*. With these parameters, we can objectively determine what terms parties consider salient, distinguished from those that qualify as non-salient. Also, with these parameters, we can discern what terms parties to a contract ought to have reasonably expected or, at least, be on guard about when forming contracts. Building on these parameters, the main submissions of this article are as follows:

a) the signature rule should generally apply to negotiated and industry-standard terms; and
b) the signature rule should not generally apply to unilaterally dictated terms.

Structure of the article

Section two of this article highlights the formalist foundations of the signature rule. It also emphasises the importance of notice as an element of consent, particularly that (insufficient) notice can have severe private and social implications. Section three addresses the complexities of contractual consent in the contemporary marketplace. Here, the difficulties of applying the signature rule in the contemporary marketplace to contracts that are not outcomes of negotiations are highlighted. These intricacies primarily arise from informational complexity and tenuous relational proximity. With these intricacies come the possibilities of manipulating an offeree‘s consent to express terms. The fourth section addresses the assumption that business entities are sophisticated and should therefore be assumed to have notice of all express terms contained in contract documents. Section

6 John F Coyle and W Mark C Weidemaier, 'Interpreting contracts without context' (2018) 67 American University Law Review 1673, 1677–1678; see also Stephen J Choi, Mitu Gulati and Robert E Scott, 'The black hole problem in commercial boilerplate' (2017) 67 Duke Law Journal 1; see also, Ronald J Gilson, Charles F Sabel and Robert E Scott, 'Text and context: contract interpretation as contract design' (2014) 100 Cornell Law Review 23–97.

7 Ronald J Gilson, Charles F Sabel and Robert E Scott, 'Contracting for innovation: vertical disintegration and interfirm collaboration' (2009) 109 Columbia Law Review 431; Matthew Jennejohn, 'Do networks govern contracts' (2022) 47 Journal of Corporation Law 333–386.

five critiques the requirement that only onerous and unusual terms should be specifically brought to the notice of offerees. The final section provides recommendations for improving the rules on notice and concludes the article.

THE IMPERATIVE TO REVISIT NOTICE AS AN ELEMENT IN THE CONSENT MATRIX

The signature rule and its formalist foundations

In common law jurisdictions, the signature rule is the starting point for determining consent to signed express contractual terms in commercial settings.[8] A signature to express terms is taken as bearing valuable evidentiary weight against a party who signed a contract. As Lord Denning described it in *Curtis v Chemical Cleaning & Dyeing Co*, 'If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract.' Similarly, in *Harris v Great Western Railway Co*,[9] Blackburn J (as he was then) described the force of signatures, saying:

> I apprehend … that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him.[10]

According to this rule that originates from the decision in *L'Estrange v Graucob*,[11] once contractual counterparties sign commercial documents, it is taken that they have consented to the terms contained therein. This is so even if specific terms are contained in the document whose presence they have only discovered later.[12] They probably would not have entered the contract or sought to negotiate around them if they had known such terms beforehand. However, the rule does not apply where contract documents are unsigned. As this article focuses solely on signed contracts, the rules and principles that apply to unsigned contracts shall not be addressed.

Apart from agreements tainted with vitiating factors (eg fraud, misrepresentation, undue influence, or mistake), there is a heavily

8 Bruce Clarke and Stephen Kapnoullas, 'When is a signed document contractual – taking the fun out of the funfair' (2001) 1 Queensland University of Technology Law and Justice Journal 39; Matthew Chapman, 'Common law contract and consent: signature and objectivity' (1998) 49 Northern Ireland Legal Quarterly 363.

9 (1876) 1 QBD 515.

10 Ibid 530.

11 [1934] 2 KB 394.

12 *Bedford Investments Ltd v Sellman* [2021] EWHC 799 (Comm), para 65.

contested exception to the signature rule. That exception supposedly arises where the contract contains onerous or unusual terms.[13] But the viability of that exception is doubtful in English law, as its soundness has been questioned by modern cases that have ruled that mere onerousness is insufficient; rather, the import of the terms must be (evidently) extortionate.[14] McMeel labelled the English judicial philosophy of enforcing contractual agreements at face value as informed by 'documentary fundamentalism'.[15] A similar approach prevails in Australia, where governing legal authority considers a signature evidential of consent, except if the signatory was induced into the contract (or into signing) by improper or inequitable means.[16] The same judicial philosophy dominates in New Zealand,[17] Northern Ireland[18] and the Republic of Ireland,[19] to mention a few common law jurisdictions. But a different approach appears to prevail in Scotland,[20] where insufficient disclosure of the onerousness of terms may render a counterparty's signature an inadequate representation of their consent.

As Miller observes, the signature rule is a species of legal formalism that courts raise as justification for non-interference in the regulation of term incorporation because signatures represent autonomy and informed consent.[21] The attribution of autonomy and informed consent to businesspersons is (subtly) rooted in the assumption that businesspersons are sophisticated. Miller aptly describes this

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13 *One World Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB), per HHJ Behrens: 'I am content to assume (without deciding) that there is a possible exception to the rule in L'Estrange v F Graucob Ltd in relation to provisions that are onerous or unusual.' See also, Elisabeth Peden and J W Carter, 'Incorporation of terms by signature: L'Estrange Rules!' (2005) 21 Journal of Contract Law 96.

14 *DO-BUY 925 Ltd v National Westminster Bank plc* [2010] EWHC 2862 (QB); *Cargill International Trading v Uttam Galva* [2019] EWHC 476 (Comm), paras 79–94; *Woodeson & Another v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103, para 42; *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809, para 73.

15 Gerard McMeel, 'Documentary fundamentalism in the senior courts: the myth of contractual estoppel' (2011) Lloyd's Maritime and Commercial Law Quarterly 185.

16 *Fox Tucker Pty Ltd v Morgan* [2023] SASCA 11, para 57; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; *Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd* [2019] FCA 721.

17 *Whitley v Ribble Ltd* [2017] NZHC 1884; *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd (No 2)* [2017] NZCCLR 4.

18 *Lambe v AIB Group (UK) plc* [2020] NIJB 497; *Ulster Bank Ltd v Taggart* [2011] NIMaster 1.

19 *James Elliott Construction Ltd v Irish Asphalt Ltd* [2014] IESC 74.

20 See *Montgomery Litho Ltd v Maxwell* 2000 SC 56; *Difference Corporation Ltd v Unitel Direct Ltd* [2019] SC EDIN 56; *Brandon Hire plc v Steven Russell* [2010] CSIH 76.

21 Meredith Miller, 'Contract law, party sophistication, and the new formalism' (2010) Missouri Law Review 494.

assumption as based on the view that businesspersons 'have access to information, resources to allocate risk and experience or predisposition to counteract cognitive bias'.[22] In other words, sophistication connotes relevant transactional expertise or acquaintance. This reasonably explains the law's (generally) non-interventionist approach in B2B transactions compared to B2C transactions.[23] In transactions involving consumers, there is a foundational view that consumers tend to lack sophistication based on the assumption that they are unlikely to possess an awareness of the complexities and profundity of details that shape relevant commercial bargains, contexts, or environments.[24]

Two main rationales inform the signature rule. These are rationales often advanced by proponents of contractual formalism.[25] The first is the objective assessment of contractual consent, which states that to determine consent we must look at the outward manifestations of parties to a contract, as we cannot judge their subjective intentions.[26] The second is efficiency and certainty in commercial arrangements.[27] That the rule allows immediate parties to agreements and connected third parties to rely on contractual documents, taking consent as a settled matter. McLean justifies the signature rule as ensuring that businesspeople act with more prudence and caution when entering contracts.[28] It ensures that they take time to peruse documents before signing them. This rationale pivots on the assumption that businesspersons are sophisticated.[29] While the need for certainty in commercial life is understandable, the signature rule appears too formulaic and rigid to guide the ascertainment of notice of express terms. Sadly, courts applying the signature rule ignore the reality that

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22 Ibid 495.

23 See *Bankway Properties Ltd v Penfold-Dunsford* [2001] 2 EGLR 36, para 40; see also *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149, at paras 193, 206(d).

24 See Larry T Garvin, 'Small business and the false dichotomies of contract law' (2005) 40 Wake Forest Law Review 295.

25 See Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 223–224; see also Alan Schwartz and Robert Scott, 'Contract interpretation redux' (2010) 119 Yale Law Journal 926.

26 Matthew Chapman, 'Common law contract and consent: signature and objectivity' (1998) 49 Northern Ireland Legal Quarterly 363; see also R A Samek, 'The objective theory of contract and the rule in L'Estrange v Graucob' (1974) 52 Canadian Bar Review 351.

27 See, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; see also *Platform Funding Ltd v Bank of Scotland plc* [2009] 1 QB 426.

28 Hazel McLean, 'Incorporation of onerous or unusual terms' (1988) Cambridge Law Journal 172, 174;

29 See, Schwartz and Scott (n 25 above).

an inquiry as to whether a party had notice of terms, even in cases of signed documents, requires a context-specific assessment.

Understandably, heightened disclosure or notice requirements may be useless.[30] What is the point in requiring an offeror to make adequate disclosure of a term that the offeree ought reasonably to have expected as customary in a type of contract? Of what need is heightened disclosure of terms when the cost of doing so may overshadow the joint value of the transaction to the counterparties? In other words, what is the point of disclosure when it possibly exceeds the value of a given transaction? We can adapt the example supplied by Fairfield to illustrate these questions.[31]

Fairfield suggests we assume a high-volume but low-value business operated by an offeror, such as a coffee shop. Suppose each cup of coffee sold generates, on average, $1 of joint gain to the counterparties. If the law required the shop operator to specifically bring it to the notice of each patron that the shop operator shall not be liable for burns suffered by patrons while consuming hot coffee, such law would be of no good to both the patrons and the operator. It would delay transactions and increase the operator's operating cost in ways that may not be well compensated by the competitive price charged for each cup of coffee. It also adds no value to the interest of patrons as it assails them with information that they should know or are most likely to be uninterested in knowing.[32] However, disclosure is necessary for high-value transactions, which B2B bargains commonly are, where surprise can be costly to the offeree.[33] Fairfield says 'preventing contractual surprise may be worth the cost' concerning such cases.[34] Thus, we now discuss the need for heightened notice requirements in commercial settings.

The cost of notice failures

Lack of notice in commercial transactions is of particular interest because of the propensity to create notice externalities, which may impose a cost on offerees and society in aggregate. As reasoned by Menell and Meurer, notice failures resulting from the ineffective communication of an interest owned by a party to other persons likely to encounter the interest may impose both private and social costs.[35]

30 See Carl Schneider and Omri Ben-Shahar, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2016).

31 Joshua Fairfield, 'The cost of consent: optimal standardization in the law of contract' (2009) Emory Law Journal 1402, 1408.

32 Ibid 1423–1426.

33 Ibid.

34 Ibid 1425.

35 Peter Menell and Michael Meurer, 'Notice failure and notice externalities' (2013) 5 Journal of Legal Analysis 1.

Such notice failures are likely to secure opportunistic gains for a party at the expense of other persons who were not effectively aware of the said interest beforehand, and persons connected to those other persons. We can refer to the former cost species as micro-level/interpersonal effects and the latter as macro-level/social effects.

Micro-level or interpersonal effects may arise where an offeror can impose vital terms in ways that bypass the awareness of an offeree. This is because there would be a negation of genuine consent as the offeree is not allowed a fair opportunity to fully consider his assumption of contractual relations with the offeror. As Murray aptly describes it, just as, 'government must correctly design and communicate its actions so as to offer the benefit or impose the tax that it intends to bestow upon its audience of citizens',[36] in the same vein, 'private actors must correctly design and communicate their actions to accurately offer the intended inducement or impose the intended price or rent'.[37] In essence, when people are effectively or sufficiently aware of what they are getting into, we can fairly say that they have exercised their choice regarding their private assessment of costs and benefits. Or, at least, they have been given a fair opportunity to assess their options rationally. Where notice of vital contractual terms is ineffective, offerees would fall into misperception problems, creating room for transactions that allow distributive disparities between an offeror and offeree.[38] Thus, the former will likely secure gains at the latter's cost.

For example, in *Blu-Sky Solutions Ltd v Be Caring Ltd*, the judge reasoned that the actual loss likely to be suffered by the offeror from the offeree's breach was less than 13 per cent of the sum of £180,000 that the offeror sought to claim based on the remedial clause inserted in the contract.[39] Such unfair distribution of gains accruable to the offeror enables undue economic rent.[40] It must also be noted that undue economic rent resulting from notice failure is not limited to price effects. Undue rent may take non-price forms such as the forbearance, liabilities, or risks that an entity transfers to other counterparties. That is, the burden transferred to the offeree exceeds the value supplied by the offeror towards the bargain between them. As shall become evident, this article is mainly concerned with effectively communicating non-price terms.

36 Michael D Murray, 'The great recession and the rhetorical canons of law and economics' (2012) 58 Loyola Law Review 615, 643.

37 Ibid.

38 Oren Bar-Gill, 'Algorithmic price discrimination: when demand is a function of both preferences and (mis)perceptions' (2019) 86 University of Chicago Law Review 217.

39 *Blu-Sky Solutions* (n 2 above) para 107.

40 Mariana Mazzucato, *The Value of Everything: Making and Taking the Global Economy* 1st edn (Public Affairs 2018) ch 7.

We now shift to the macro-level effects of notice failures. Whittaker laments the common law's limited advertence to social interests when regulating contractual relations.[41] Most pertinently, he re-echoes the fears of the UK Competition Authority that the transfer of excessive or unexpected burdens by large retailers to their suppliers risks the propensity for a diminution in the incentives of those suppliers to invest in 'new capacity, products and production processes'.[42] The actual sufferers of such outcomes will ultimately be consumers who bear the brunt of higher living costs. This fear has already manifested itself in unfavourable welfare outcomes in society. Studies show a squeeze in living standards, bleak social mobility prospects, and high corporate and household indebtedness levels, among other dismal conditions.[43] Much of these outcomes are attributable to widening economic inequality gaps perpetuated by market concentration and power gaps. The higher the possibility of a firm possessing market powers to transfer unexpected economic burdens and costs to several counterparties, the higher the likelihood we would experience adverse social effects.[44] The concern becomes starker when offerors with market powers can subtly transfer burdens to counterparties. The consequence of this is the heightening of the cost structure of businesses across the economy.[45] Firms that have burdens transferred to them would have to shift the incidence of those costs to their customers, and their customers, to other persons down the supply chain.

THE NUANCES OF CONTRACTUAL CONSENT IN THE CONTEMPORARY MARKETPLACE

This section lays the foundation for the arguments that commercial sophistication is a matter of gradation and that terms need not be onerous or unusual to require heightened notice requirements. Pursuing this objective, this section highlights the nuances and peculiarities of different models or patterns of contracting that reflect

41 Simon Whittaker, 'Unfair terms in commercial contracts and the two laws of competition: French law and English law contrasted' (2019) 39 Oxford Journal of Legal Studies 404.

42 Ibid 428.

43 Brian Nolan, Matteo Richiardi and Luis Valenzuela, 'The drivers of income inequality in rich countries' (2019) 33 Journal of Economic Surveys 1285; see also, Atif Mian, Ludwig Straub and Amir Sufi, 'Indebted demand' (2021) Quarterly Journal of Economics 2243-2307.

44 See Kathleen Engel, 'Do cities have standing? Redressing the externalities of predatory lending' (2006) 38 Connecticut Law Review 355.

45 See Mariana Mazzucato, Josh Ryan-Collins and Giorgos Gouzoulis, 'Theorising and mapping modern economic rents' UCL Institute for Innovation and Public Purpose, Working Paper 2020.

the difficulties of a general or literal application of the signature rule. A two-step process shall be followed to establish the need for heightened disclosure in commercial settings. The first step shows that contracting is mainly conducted through terms that are not negotiated. The second is to demonstrate that, as contracts are increasingly outcomes of terms that are not negotiated, there would unavoidably be significant communication gaps between counterparties. The purpose of this exercise is to advance the case of this article for tailoring notice requirements to contextual needs.

Peculiarities of contracting processes in modern commercial settings

In theory, contracts between business entities are outcomes of negotiations.[46] But, as reality has it, commercial contracts between business entities usually result from three main contracting methods: *negotiations*, *industry standards* and *unilateral dictation of terms*. On the one hand, these three methods of contractual formation may be informed by conditions of competition in a market or a relative balance in bargaining powers between parties and, on the other, by factors of transactional convenience or transaction costs. Parties negotiate contracts where they have counterbalanced bargaining powers or because of the relative competitiveness of the market. Such situations prevent one party from dictating terms to the other without the other countering the terms proposed or shifting to alternative offerors in the market. The possibility of parties to freely negotiate terms based on relatively balanced bargaining positions is unusual in the modern marketplace. This is because negotiated contracts are mostly the reserve of parties with relatively equal bargaining powers.

An excellent example of this is merger and acquisition agreements. Most transactions in the modern economy are not negotiated; they are products of industry standards and unilaterally dictated terms. Confusingly, both contracting patterns are referred to as standard-form contracts. On account of the pervasiveness of these two patterns, Robertson suggests that 'contract scholarship must therefore take the standard form, rather than the negotiated transaction, as its central focus'.[47]

Before explaining how these three contracting methods impact effectiveness in the communication of terms, terminological clarification on the meaning of 'standard form/terms' (also called boilerplate terms) is essential. The terminology is commonly (but inaptly) used to

46 Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press 2019) 217.

47 Andrew Robertson, 'The limits of voluntariness in contract' (2005) 29 Melbourne University Law Review 179.

connote industry standards and unilaterally dictated terms. A classic example of such usage is in *Macaulay v Schroeder Music Publishing Co Ltd*,[48] where Lord Diplock asserted that 'standard form of contracts are of two kinds'. The first are 'those which set out the terms upon which mercantile transactions of common occurrence are to be carried out'. He cited as examples 'bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets'. He described this first kind as involving terms that 'have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade'.[49] He rightly describes the second kind of standard form as the result of 'the concentration of particular kinds of business in relatively few hands'.[50] They involve the use of terms dictated by one party to other persons (ie the offerees), as the terms 'have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party'.[51]

We find both judges[52] and reputable scholars using the term 'standard form' without clear distinction between both contracting methods.[53] It is submitted that both methods of contracting should be distinguished.[54] The first may be known as industry-standard terms, while the second may be regarded as unilaterally dictated terms.[55]

Industry standard terms

When parties enter contracts following industry standards, they agree to opt into a regime of terms in a manner analogous to a *plug-and-play* system. Generally, the use of industry standards is informed by transaction cost considerations and predictability in meaning and

48 [1974] 1 WLR 1308.

49 Ibid

50 Ibid

51 Ibid

52 See, for example, the UK Supreme Court decision in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29; see also the Canadian Supreme Court decisions in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Company* 2016 SCC 37 and *Uber Technologies Inc v Heller* 2020 SCC 16.

53 See, for example, Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2014); Gregory Klass, 'Boilerplate and party intent' (2019) 82 Law and Contemporary Problems 105; Douglas G Baird, 'The boilerplate puzzle' (2006) 104(5) Michigan Law Review 933.

54 See, for example, Robert Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press 2013) 47; see also, Aaron Taylor, 'What is a standard form?' (2017) 33 Professional Negligence 268.

55 Richard A Posner and Lucian A Bebchuk, 'One-sided contracts in competitive consumer markets' (2006) 104 Michigan Law Review 827.

commercial expectations. Participants within close-knit commercial communities or specialised aspects of commerce often adopt such terms. The governance mechanisms of relevant trading platforms, societies, associations, or networks standardise the terms.[56] Such terms are often prepared and systematised in a 'hub-and-spoke' fashion. Various examples of such contracting regimes abound in commercial life.

A good example is the International Swaps and Derivatives Association master agreement (ISDA) regime which standardises contract terms for transactions relating to over-the-counter derivatives in financial markets.[57] Another is the New York Produce Exchange Form (NYPE), the most used standard terms for time charterparties in the shipping industry.[58] Further examples can be found in various Technology Standards Licensing Agreements.[59] When using this route, dickering over the generality of the contractual terms is eliminated. Transacting parties may only negotiate on limited and salient terms peculiar to their particular or contextual needs, such as price, duration and quantity.[60] In effect, such a contracting route enables business entities to have predictability and certainty in their expectations, especially when the interpretation of major terms has been subject to judicial determination.[61]

Given the apparent dynamics of this contracting route, one may view that parties adopting such contract terms are often well matched in terms of resources and operate under relatively competitive conditions, as no one may unilaterally dictate terms to counterparties. But this is not necessarily so. Some business entities in an industry where such standard terms are used may have weaker bargaining

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56 See Ross Cranston, *Making Commercial Law through Practice 1830–1970* (Cambridge University Press 2021) 5–12.

57 Joanne Braithwaite, *The Financial Courts: Adjudicating Disputes in Derivatives Markets* (Cambridge University Press 2021) 31–49; see also, Sean Flanagan, 'The rise of a trade association: group interactions within the International Swaps and Derivatives Association' (2001) 6 Harvard Negotiation Law Review 21.

58 Johanna Hjalmarsson, 'Trip charterparties and their binary endgames' (2018) Lloyd's Maritime and Commercial Law Quarterly 376, 379; see also, Baris Soyer and Theodora Nikaki, 'Enhancing standardisation and legal certainty through standard charterparty contracts: the NYPE 2015 experience' in Barış Soyer and Andrew Tettenborn (eds), *Charterparties: Law, Practice and Emerging Legal Issues* (Routledge 2017) 67–89.

59 See Igor Nikolic, *Licensing Standard Essential Patents: FRAND and the Internet of Things* (Hart 2021); see also, Gregory Sidak, 'The FRAND contract' (2018) 3 Criterion Journal on Innovation 1.

60 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 2 WLR 711, 777.

61 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, 274.

powers than others (possibly a few) who are better resourced.[62] An excellent example of such a situation is in the Australian construction industry. Contracting in that industry is likened to a pyramid structure whereby head contractors, usually few, can use industry standards to lock sub-contractors into unfavourable terms.[63] But the unfairness (or otherwise) of terms, *per se*, is not this article's focus. Since the focus is on notice, our concern is the use of 'transactional expertise' as a valuable indicator of notice. It is fair to say that persons constantly engaged in a particular industry can be regarded as experts, and such notice of standard terms in their industry can be attributed to such persons. Whether they are big or small players, robustly resourced or meagrely, this is so.

Unilaterally dictated terms

We come to the deployment of unilateral dictation of terms in commercial transactions. By unilateral terms, we mean contracts whose terms are dictated by one party to counterparties on take-it-or-leave-it conditions. Terms may be offered on take-it-or-leave-it conditions, yet offerees or counterparties may engage the offeror to revise the terms individually. Such situations involve converting what would otherwise have been unilateral dictations into negotiated contracts, as the offeree would have to make counteroffers, some forbearance, or provide a reason for the offeror to revise the terms. Unilateral terms are usually outcomes of in-house conception and drafting.

In some cases, they may be products of adaptations from, or direct duplications of, relevant industry standards or other pre-existing unilateral terms used by other commercial entities.[64] Most contracts are conducted based on unilaterally dictated terms, whether in matters of transportation, commercial lease, equipment purchase or leasing, insurance, hospitality, digital and telecommunications services, or outsourcing.[65] In financial markets, we find examples of this pattern

62 Vicki Waye and Jeremy Coggins, 'Squeezing out the market for lemons: the case for extending unfair contract terms regulation in the commercial context' (2020) 36 Journal of Contract Law 230.

63 Parliament of Australia, Senate Economic References Committee, *Insolvency in the Australian Construction Industry* (Commonwealth of Australia, Canberra 2015) 12–14.

64 W Mark C Weidemaier, 'Disputing boilerplate' (2009) 82 Temple Law Review 1, 2.

65 See, generally, Jeffrey W Stempel, 'The insurance policy as thing' (2009) 44 Tort Trial and Insurance Practice Law Journal 813; Lisa Bernstein, 'Beyond relational contracts: social capital and network governance in procurement contracts' (2016) 7 Journal of Legal Studies 561; Omri Ben-Shahar and James White, 'Boilerplate and economic power in auto manufacturing contracts' (2006) 104 Michigan Law Review 953.

used in arrangements concerning corporate and sovereign bonds, syndicated loans, and collateralised debt obligations.[66]

Unilateral dictation of terms in commercial settings is often enabled by market structure effects and competitive conditions in a relevant market or transactional convenience and costs issues. Where offerees with relatively balanced or even stronger bargaining positions to offerors accept unilateral terms without negotiating them, then it is fair to assume that they did so because of transactional convenience or because they consider the terms tolerable from among other alternative market offerings. In most cases, unilateral terms are usually accepted without negotiation because of the term-giver's (or offeror's) relatively superior market or bargaining position over the term-takers (or offerees). Also, it is not uncommon for dictated terms to be imposed on another firm of (relatively) equal bargaining powers following a battle of forms between the firms.[67]

Under imperfectly competitive market conditions, we can expect that, although markets would not be perfectly competitive, business entities that secure market lead would leave significant space for other competitors to exist and operate. Unfortunately, in modern times, we are confronted with conditions of market concentration or (almost) winners-take-all states occasioned by oligopolistic and oligopsonistic conditions.[68] Studies confirm that a blend of factors has endowed certain firms with degrees of market power (usually of oligopolistic or oligopsonistic quality) that other firms cannot easily measure up to or approximate. Such factors include mergers and acquisitions; market connections; economies of scale; strong brand loyalty; cost-cutting advantages; technological superiority; a web of intellectual property rights and other intangible assets; and superb managerial capabilities.[69]

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66 See, generally, Anna Gelpern, Mitu Gulati and Jeromin Zettelmeyer, 'If boilerplate could talk: the work of standard terms in sovereign bond contracts' (2019) 44 Law and Social Inquiry 617; see also Şenay Agca and Saiyid Islam, 'Securitised debt markets' in H Kent Baker, Greg Filbeck and Andrew Spieler (eds), *Debt Markets and Investments* (Oxford University Press 2019) 131–148; see also Marcel Kahan and Mitu Gulati, 'Contracts of inattention' (2021) 46 Law and Social Inquiry 1115.

67 *Transformers & Rectifiers Ltd v Needs Ltd* [2015] BLR 336.

68 See Chris Carr, *Global Oligopoly: A Key Idea for Business and Society* (Taylor & Francis 2020); see also Luis Suarez-Villa, *Technology and Oligopoly Capitalism* (Routledge 2023).

69 Jan Eeckhout, *The Profit Paradox: How Thriving Firms Threaten the Future of Work* (Princeton University Press 2021) 52.

Firms endowed with these factors witness massive productivity levels relative to their competitors.[70] The upshot is that these firms secure a significant share of economic output, commercial transactions and profitability. For these reasons, such firms can expend more on overheads than other firms in the market. Still, they can also charge a higher markup in excess of their marginal cost of production (ie they can charge prices that compensate them for more than their cost of producing additional units of goods or services).[71] In comparison, their competitors would only struggle to maintain favourable levels of profitability and compete with these other 'superstar' firms in terms of price, costs, or quality.

The deployment of unilateral terms is not exclusive to oligopolistic/oligopsonistic firms. And as such, it is not entirely a market structure concern. The use of unilateral terms is pervasive in the economy as it is deployed by almost all small and medium-sized firms, imitating the practices of more prominent firms. Like prominent firms, these smaller firms tailor their terms towards improving their competitive positions. By presenting salient (non-price) terms as unimportant, they tend to lull offerees into discounting or ignoring the actual private cost of such terms, thereby increasing the market traction of their offers. Therefore, the imperative for heightened notice requirements in cases of term dictations is not necessitated only by market structure issues but also its pervasive use by commercial entities across the economy.

The intricacies of effectively communicating contract terms

Having identified that much of contracting in modern times is an outcome of both industrial standards and unilateral dictations, we now discuss how these contracting methods can impact the effective communication of terms. In determining the effectiveness of textual communication, two vital parameters to bear in mind are *information complexity* and *relational proximity*. We shall start by describing each of these parameters before discussing their implications on the effective communication of terms in situations of industry standards and unilateral terms.

Informational complexity relates to the degree of difficulty (or otherwise) with which the audience of a text may understand its contents. This parameter is primarily multidimensional and has

70 Sharat Ganapati, 'Growing oligopolies, prices, output, and productivity' (2021) 13 American Economic Journal: Microeconomics 309.

71 Jan De Loecker, Jan Eeckhout and Gabriel Unger, 'The rise of market power and the macroeconomic implications' (2020) 135 Quarterly Journal of Economics 561.

objective and subjective dimensions.[72] An objective indicator of information complexity is relatively measurable. Examples include the length of contract documents;[73] readability (eg whether written in fine print); and structural organisation (eg whether the document is divided into themes or headings).[74] However, subjective indicators relate to the degree of mental effort addressees require to decipher the meaning of texts. One good example is cognitive overload, which relates to an addressee's quantum of mental efforts to process and understand a body of text.[75] Another is bounded rationality, which involves addressees acting non-rationally by relying on biases and heuristics to discern the meaning of texts.[76] As scholars observe, informational complexity can pose significant challenges to addressees in knowing or understanding the content of a contract document.

Relational proximity, as a parameter, relates to the degree of connection and familiarity that a set of communication audiences share concerning each other's expectations.[77] Examples of parties sharing relational proximity include those with a history of dealings through past transactions. Such parties are commonly engaged in a particular industry and conversant with the customs and risk dynamics of the relevant industry. Persons sharing relational proximity include those who have met to negotiate the terms they intend to transact. Primary to relational proximity is the context against which we may understand the expectations objectively imputed to transacting parties when forming the contract. It becomes clear that, as relational proximity between parties becomes tenuous, the possibility of finding common expectations becomes more difficult. Tenuous relational proximity may arise from numerous conditions, such as the parties not having a history of previous dealings or that the parties barely or never met to discuss the terms of their contract.

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72 John Hagedoorn and Geerte Hesen, 'Contractual complexity and the cognitive load of R&D alliance contracts' (2009) 6 Journal of Empirical Legal Studies 818, 821–824.

73 See David T Robinson and Toby E Stuart, 'Financial contracting in biotech strategic alliances' (2007) 50 Journal of Law and Economics 559.

74 Tal Kastner, 'Systemic risk of contract' (2022) 47 Brigham Young University Law Review.

75 Hagedoorn and Hesen (n 72 above) 825: 'Cognitive load also represents something more, for example, "a detailed schedule of payment amounts … will be more difficult to understand than a simple payment formula (for example, a 25% commission). And a payment of $X per widget will impose less cognitive load than an otherwise identical contract that bases payment on a fraction of profits which may be difficult to calculate".'

76 Melvin Eisenberg, 'The limits of cognition and the limits of contract' (1995) 47 Stanford Law Journal 211, 214.

77 Mark D Janis and Timothy R Holbrook, 'Patent law's audience' (2012) 97 Minnesota Law Review 72, 80–82.

From the description of both parameters, one can glean that they are connected. Relational proximity eases the difficulties of informational complexity. That is, terms become more accessible when counterparties are acquainted with (or are experts in) the relevant aspect of commerce where such terms are customary or standard.[78] However, tenuous relational proximity may make informational complexity more difficult. Where a party is a novice to a particular field of commerce, the higher the likelihood that terms peculiar to that field can impose a learning curve or information cost on that party.

Having described both parameters, we now shift to addressing how they may impact the communication of contract terms in the contemporary marketplace. As studies show, commercial contract documents have become more detailed and lengthier.[79] In some cases, they involve a combination of documents.[80] This may arise when a contract combines two or all three contracting methods. For example, one of the parties may dictate a set of terms. Some negotiated terms may be contained in a different document. Yet, another document may, by reference, seek to incorporate industry standards.[81]

Although informational complexity has become exacerbated in modern times, it has not escaped judicial notice as judges have expressed awareness of the lethargy for reading contract terms borne by actors in commercial settings.[82] However, it is fair to expect that, with strong relational proximity shared by parties, accessibility of terms increases. Hence, notice difficulties would be minimal.

Studies show that contract documents may be strategically drafted to capitalise on human biases to present terms in ways that may effectively

78 Cathy Hwang and Matthew Jennejohn, 'The New Research on Contractual Complexity' (2019) Capital Markets Law Journal 381.

79 Cathy Hwang and Matthew Jennejohn, 'Deal structure' (2018) 113; see also, Spencer Williams, 'Contracts as systems' (2021) Delaware Journal of Corporate Law 219.

80 Cathy Hwang, 'Unbundled bargains: multi-agreement dealmaking in complex mergers and acquisitions' (2016) 164 University of Pennsylvania Law Review 1403; see also *Alan Bates and Others Claimant v Post Office Ltd* [2019] EWHC 606 (QB), para 33.

81 Hwang and Jennejohn (n 78 above).

82 Chadwick LJ in *Lidl UK Gmbh v Hertford Foods Ltd & Another* [2001] EWCA Civ 938: 'as I suspect, common experience would suggest that busy executives often do not read the fine print in which standard conditions appear'; see also *Balmoral Group v Borealis* [2006] 2 Lloyd's Rep 629, para 339.

(and without illegitimate deception) lull offerees into contracts.[83] For example, terms may be presented in systematic ways that an otherwise shrewd party could possibly be led to underestimate risks or discount the likely implications of a term because an important term was presented as though it were unimportant. In negotiated contracts, lack of notice is not expected to be a persuasive argument a party raises. It is fair to assume that both parties were the joint authors of the contract's terms. If a party had seen a term whose value or implications they did not understand, they could have sought clarification. However, if the case is that a term was inserted into the contract contrary to the parties' joint agreement, then that party's remedy would be to a rectification of the contract to revise terms to which they did not consent. Therefore, it is fair to say that the signature rule suitably applies to negotiated contracts. Having addressed negotiated contracts, we now move to the other methods of contracting that concern us – ie industry standards and unilaterally dictated terms. The question is: how complicated could the communication of terms be when these contracting methods are deployed? To answer that question, we must go by *informational complexity* and *relational proximity* parameters.

Deducing guiding postulations

Regarding unilaterally dictated contracts, terms are dictated by the offeror to the offerees, and the offerees are simply term-takers. In such cases, there are real possibilities for the offerees to be confronted with informational complexity, and the tenuous transactional proximity between the parties likely amplifies this. As an observer noted concerning some unilaterally dictated terms deployed by certain banks in the United States (US) subprime mortgage market, 'some of the exotic new mortgages were so complicated that a person with a PhD in mathematics wouldn't understand them'.[84]

Industry standards stand in the middle of the extremes between negotiated and unilaterally dictated contracts. For this reason, the parameters of relational proximity and informational complexity would likely give us different results. This is because, in some cases,

83 See, for example, the statement of Salmon LJ in *Hollier v Rambler Motors* (1972) 2 WLR 401, 402: 'I do not think that defendants should be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think – unless perhaps he happens to be a lawyer – that he would have redress against the person with whom he was dealing for any damage which he, the customer, might suffer by the negligence of that person.' See Kathleen C Engel and Patricia A McCoy, 'Turning a blind eye: Wall Street finance of predatory lending' (2007) 75 Fordham Law Review 2039, 2080; Hwang and Jennejohn (n 78 above).

84 Edmund Andrews, *Busted: Life Inside the Great Mortgage Meltdown* 1st edn (WW Norton & Company 2009) 77.

sophisticated parties with relatively equal bargaining positions may adopt industry standards that operate within close-knit or specialised markets. In such cases, the parties are very much akin to parties whose contracts are outcomes of negotiations. However, in other cases, offerees may have no choice but to accept industry standards because it is the governing standard in the industry or market in which an offeror operates. In the former case, the offerees are likely to be well-informed about the market dynamics and have the expertise and the resources to deal with the vagaries of the terms. In the latter case, the offerees may appear no different, in substance, from an offeree who is confronted with dictated terms. Yet, such offerees significantly differ from offerees (or addressees) of dictated terms. This is so because such offerees agreed to deal on industry standards, which were not authored by the offerors but are a product of market or industry consensus. Therefore, an offeror who deals with industry standards can be taken to have done everything reasonably necessary on their part to present the terms to the offeree.

We now move to test these general statements (derived from applying the parameters) against judicial outcomes concerning notice of terms. Towards that end, there are two lines of assessments to pursue. The first line addresses a central pillar of the signature rule: the assumption that businesspersons are generally sophisticated. The motive of this assessment is to critique that assumption by showing that sophistication is a gradation and is context-specific. If an offeree qualifies as possessing relevant transactional expertise or acquaintance, that would *generally* be sufficient to establish notice unless the offeree satisfactorily proves that the drafting of the terms was incomprehensible or difficult to understand (section four below deals with that discussion). The second line of the review relates to the requirement that a term must be onerous or unusual before it becomes a candidate for specific or emphatic notice to the offeree. As shall become apparent, this line is a fallback to the first (ie that of determining transactional expertise – where the offeree does not qualify as a transactional expert). This is because it relies on an inquiry based on the *informational complexity* parameter to ascertain whether relevant terms have been adequately communicated to the offeree. This discussion is pursued in section five below under the heading 'The requirement that terms must be onerous or unusual'.

THE ASSUMPTION THAT BUSINESSPERSONS ARE GENERALLY SOPHISTICATED

As noted, central to the signature rule's formalism is the view that contracting businesspersons can mostly be considered sophisticated. This judicial assumption of sophistication is untenable. Whether a businessperson is sophisticated should be assessed based on context, with regard had to the quality of transactional experience and knowledge attributable to the offeree concerning the bargain entered. As can be deciphered from relevant case law, courts often tend to get things right regarding sophistication in cases where relational proximity can be established. In such cases, if the offeree knows the offeror's market dynamics or pertinent peculiarities (or they ought to be known to the offeree), their sophistication can be taken as established. However, where there is no such evidence of relational proximity, then assumptions of sophistication cannot hold.

This section addresses how an appropriate level of sophistication or transactional expertise may convincingly be established and used to cement sufficient notice. Cases dealing with the ascertainment of sophistication can be divided into two: those concerning industry standards and those dealing with unilateral dictations. We shall deal with each in turn. The analysis draws on judicial decisions relating to both signed and unsigned contracts (or terms) to justify the postulations made in this section. This is because the selected cases help illustrate the informational dynamics pertinent to industrial standards and unilaterally dictated terms.

Industry standards and offeree sophistication

Given the widespread use of industrial standards in a specific industry or market, their adoption may sometimes extend beyond national application and encompass transnational application.[85] As Braithwaite describes it, 'standard form contracts may be understood as a set of binding norms that are generated privately'.[86] Their industry or market popularity reflects the need to expect their audiences to be experts in the relevant commercial field and its dynamics.[87] Therefore,

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85 See, Briggs J's statement concerning ISDA standard regime in *Lomas v JFB Firth Rixson* [2011] 2 BCLC 120, [53].

86 Joanne Braithwaite, 'Standard form contracts as transnational law: evidence from the derivatives markets' (2012) 75 Modern Law Review 779, 780.

87 See *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94, 96 per Lord Millett: 'A standard form is designed for use in a wide variety of different circumstances. It is not context-specific. Its value would be much diminished if it could not be relied upon as having the same meaning on all occasions. Accordingly the relevance of the factual background of a particular case to its interpretation is necessarily limited.'

they are assumed to possess knowledge of terms contained in specific sets of standard terms. For that reason, it is fair to think that when an offeror makes a reference that a designated or specified set of industry standards governs, the offeree who contracts with the offeror must be taken to have sufficient notice of all the provisions contained in the said set of terms. This is because it is fair to assume that persons agreeing to deal with industry standards are sophisticated, even if they are not necessarily so.

The main justification for the assumption of offeree sophistication in this regard is that the terms are not a product of the offeror's authorship. For this reason, offerors are not required to do anything further to present the terms beyond intimating to the offeree the standard's adoption. In turn, the offeree can be assumed to have had due notice of the terms and their contents by agreeing to them.

In *Photolibrary Group Ltd v Burda Senator Verlag GmbH*,[88] the claimant, suppliers of photographic transparencies, had agreed to deal with the defendants (the offerees) using industry standards recommended by the British Association of Picture Libraries and Agencies (BAPLA). One of the terms of the BAPLA standard catered to the compensation of the offeror for transparencies lost by offerees, and the claimant sought to be compensated based on that term. The offerees contested the term's validity, asserting that it had not been adequately brought to their notice and, as such, not incorporated. The offerees' argument of lack of notice was rejected because they understood the offeror dealt based on the BAPLA terms. Therefore, the offerees 'must be taken to have instructed the obtaining of the transparencies on those terms'.[89] The English Court of Appeal came to a similar position in *Circle Freight International Ltd v Medeast Gulf Exports Ltd*[90] by rejecting the offeree's argument that an exclusion clause contained in the relevant standard terms should not apply as specific notice of the said clause had not been provided. The court ruled that the offeree was bound by the clause given their awareness that the standard terms in issue governed in the relevant industry and because the offeror had referred to them as regulating the bargain between the parties.

Sometimes, an offeree may not be aware or conversant with specific terms in industry standards. This may arise because the offeree is a novice in the said industry. Concerning such a situation, the reasoning expressed by Mellish LJ in *Parker v South Eastern Rail Co*[91] is pertinent. In that case, the judge cited the analogy of a novice in the shipping industry who is presented with a bill of lading and ignorant of

88 [2008] 2 All ER (Comm) 881.
89 Ibid 896.
90 [1988] 2 Lloyd's Rep 427.
91 [1874–80] All ER Rep 166.

its purpose and terms. Concerning such a person, the Lord Justice said 'the shipbroker or the master delivering the bill of lading is entitled to assume that the person shipping goods has that knowledge'.[92] Further, that 'such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was'.[93]

Dictated terms and offeree sophistication

In unilateral contracts, an offeree's expertise may be established based on the strength of knowledge attributable to the offeree concerning the offeror's terms. A prime indicator of sophistication or expertise in such a case is the combination of the facts that the offeree has contractual terms identical to those of the offeror and that the offeree deals in the same market as the offeror. An excellent example of this is seen in *Allen Fabrications v ASD*.[94] In that case, the English Court of Appeal reasoned (among other things) that since the offeree had operated in the same market as the offeror and had exclusion clauses like that of the offeror, there was a sufficient basis for the offeree to be on notice of the offeror's exclusion clause.[95] We find similar outcomes in *Watford Electronics Ltd v Sanderson CFL*[96] and *Balmoral Group v Borealis*.[97]

Another possible indicator of offeree sophistication or expertise in a relevant market is that the offeree has had an established history of dealings with the offeror or other persons in the same market.[98] But an inconsistent or infrequent history of dealings is not representative of expertise. In *Carlsberg-Tetley Brewing Ltd v Gilbarco Ltd*,[99] the court refused the offeree's claim that they did not have notice of the offeror's exclusion clause. The court did so on the ground that the knowledge and expertise possessed by the offeree 'in engineering matters concerning underground pipes feeding fuel to fuel pumps was greater than that of the defendants'.[100] Also, the offerees 'had Chartered Engineers on their staff and had themselves originally designed the system of tanks and pipes'.

92 Ibid 169.
93 Ibid.
94 [2012] EWHC 2213 (TCC).
95 Ibid paras 64, 76.
96 [2001] EWCA CIV 317, para 48.
97 *Balmoral Group v Borealis* (n 82 above) para 147.
98 *SIAT v Tradax* [1978] 2 Lloyd's Rep 470.
99 [1999] 3 WLUK 593 (No 1998 TCC No 445).
100 Ibid para 25.

Similarly, in *British Crane Hire Corp v Ipswich Plant Hire*,[101] a case of an orally formed contract, Lord Denning took the factors of market expertise and a history of dealing with other parties in the market as sufficient in finding notice. Most pertinently, his Lordship said:

> But here the parties were both in the trade and were of equal bargaining power. Each was a firm of plant hirers who hired out plant. The defendants themselves knew that firms in the plant-hiring trade always imposed conditions in regard to the hiring of plant: and that their conditions were on much the same lines.[102]

We find a similar outcome in *HIH v New Hampshire*.[103] In that case, the subject matter in dispute was one of reinsurance. In their unilateral terms, the offeror included an exclusion clause customary in the London reinsurance market. As the court described it, the London market 'was more diverse, and included non-investment grade transactions, such as the instant insurances, where there was real risk and a higher rate of premium'.[104] For these reasons, players in the London market were more comfortable using exclusion clauses. However, the offeree was more conversant with practices in the US market, which, as the court described it, were 'concerned with investment grade security transactions, the relevant insurers were risk-averse, the premium rates were low, but the sums insured very high'.[105] In the US market, exclusion clauses were considered unusual. The offeree denied notice of the exclusion clause in issue as they had not specifically been informed concerning them. But the court rejected that argument, ruling that the term, while not standard or customary in the said market, was 'by no means unknown but something that the market would recognise'.[106] Given the offeree's general expertise in the reinsurance market, the court expected circumspection from the offeree.

On the other hand, where the offeree is not a market expert, it would be improper to attribute awareness of terms to the offeree. This is a situation, such as that which Sir Eric Sachs described as being one in which the offeror and the offeree are 'in wholly different walks of life'.[107] That is, 'where one, for instance, is an expert in a line of business and the other is not'.[108] In such a case, it is expected that notice of peculiar terms must be brought to the offeree. A commercially unsophisticated

101 [1974] 2 WLR 856.
102 Ibid 861.
103 [2001] EWCA Civ 735.
104 Ibid para 200.
105 Ibid.
106 Ibid para 214.
107 *British Crane Hire Corp v Ipswich Plant Hire* [1974] 2 WLR 856, 863.
108 Ibid.

offeree may not be deemed fixed with knowledge of peculiar terms, even if such terms are prevalent in the relevant market.[109] It is fair and reasonable for such an unacquainted party to assume or expect each offeror to have different terms. This allows such an offeree to compare the terms of various offerors before transacting. Therefore, an offeror may not argue that an offeree's history of dealing (with other offerors) in the relevant market is sufficient to fix that offeree with notice of otherwise peculiar (or essential) terms that the offeror adopts but which have not been effectively brought to the offeree's notice.[110]

To ensure adequate notice, the offeror must do all that is reasonably expected to be done in the context of bringing notice of the terms to the offeree. Similarly, an offeree who has dealt with a particular offeror numerous times but was never specifically informed of peculiar terms cannot reasonably be considered to be fixed with notice of such terms because of the history of dealings with that offeror. For notice of such peculiar terms to be effective, the offeror must ensure effective awareness of them, at least once, throughout their dealings with the offeree. This position finds corroboration in the views expressed by Lord Devlin in *McCutcheon v David Macbrayne*[111] and Lord Guest in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association*[112] that: 'Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them.'

In essence, while a set of unilateral terms previously used in an established course of dealing may be incorporated, peculiar salient clauses may not be considered incorporated and enforceable if they are not specifically made known to the offeree or if they are expressed using insufficiently clear wordings. From the preceding analysis, we may deduce two guiding principles. One is that offeree sophistication cannot be assumed when the offeree is not an expert in the market to which a bargain relates. The second is that, even if an offeree is an expert, the fact that the wordings of terms are elusive or tricky may destroy the value of relational proximity (ie expertise) in establishing notice.[113]

Submissions

The central plank of this section is that relational proximity can be taken as alleviating informational complexity. Also, counterparties' market expertise is a viable indicator of relational proximity. The

109 *Apps v Grouse Mountain Resorts Ltd* 2020 BCCA 78, para 70–84.

110 *Blu-Sky Solutions* (n 2 above) para 109(iii).

111 [1964] 1 WLR 125 (UK HL).

112 [1968] 3 WLR 110, 154.

113 *Thompson v London, Midland and Scottish Railway Co* [1930] 1 KB 41, 52.

question is: what is the yardstick by which we may identify a party as a market expert? For our purposes, one may describe an expert in a market (or industry) as either a buyer or seller of a subject matter (ie goods or specific service) that is integral to the operation of their trade and who engages with the said subject matter with reasonable scale and frequency.[114] The fact that an addressee of unilateral terms does not have equal bargaining powers with the term-giver should not negate a finding that the addressee is an expert.

Notwithstanding such possible gaps, all that is material is that the addressee is a commercial undertaking.[115] Also, for reasons already explained, a 'market novice' who enters a contract governed by industry standards will be considered an expert for that transaction. Where an addressee qualifies as an expert, it is fair to attribute to that party notice of terms that they ought reasonably to expect as customary in the said market. It is submitted that the burden of proving a lack of commercial expertise should be placed on an addressee to discharge.

This submission corresponds with the postulations of prominent scholars who deploy socio-economic analysis in contract law scholarship. Two relevant features are often identified by them – learning and network effects.[116] Learning effects relate to the frequency with which a species of terms is used in a market/industry. On the other hand, network effects relate to expectations borne by market/industry participants that that species of provisions would be used in prospective contracts or the general future. In other words, learning effects imbue or nurture network effects. The upshot is that where a class of terms is commonplace in a market, a counterparty would struggle to deny notice or anticipation of its usage. The only circumstance where such a counterparty may successfully deny notice is where the terms are unusual or inscrutably drafted. Such a situation would represent a departure from the terms' learning effects and, thus, lack network effects.

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114 *Lynch Roofing Systems Ltd v Bennett & Son Ltd* [1999] 2 IR 450; *Scheps v Fine Art Logistic Ltd* [2007] EWHC 541 (QB); C*apes (Hatherden) Ltd v Western Arable Services Ltd* [2009] EWHC 3065 (QB).

115 *McCrory Scaffolding Ltd v McInerney Construction Ltd* [2004] IEHC 346.

116 See Kahan and Gulati (n 66 above) 1127–1133; Michael Klausner, 'Corporations, corporate law, and networks of contracts' (1995) 81 Virginia Law Review 757.

THE REQUIREMENT THAT TERMS MUST BE ONEROUS OR UNUSUAL

We now shift to those situations where the relevant quality of transactional expertise or sophistication required of the offeree is not proven. For that reason, the inquiry would then depend on the parameter of *informational complexity* alone. Here, the pivotal inquiry would be: 'whether notice of relevant terms has been effectively communicated to the offeree'. This section also addresses cases where industry standard terms and dictated terms bear incomprehensible or elusive drafting that the average 'transactional expert' would have difficulty understanding.

Where a party qualifies as possessing transactional expertise (following the analysis and postulations of section four above), the need for bringing peculiar terms to the notice of that party is dispensed with. Some transactional contexts exemplify this view. A prime example would be investment arrangements. In such dealings, it is only fair to take it as the offeree's responsibility to ensure they understand what they are getting into. In other words, barring fraud or misrepresentation on the part of offerors (in such cases), offerees must ensure that they clearly understand the rules of such arrangements. A significant explanation for such a position is that such arrangements present offerees with opportunities for an economic windfall.[117] The zero-sum nature of such agreements was described in the Australian High Court in *Kakavas v Crown Melbourne Ltd*[118] as a kind where each party's unmistakable purpose is to 'inflict loss upon the other party to the transaction'.

Similarly, in the Canadian case of *Chen v TD Waterhouse*,[119] where the offeree had argued that certain aspects of an investment arrangement had not been brought to their notice, the court rejected the argument for specific notice. The court said, among other things, that the transaction involves 'substantial sums of money for risky and highly regulated stock market trading' and, as such, 'is not at all a "hurried, informal" affair analogous to renting a car at a pick-up counter'.[120] Therefore, it was incumbent upon the offeree to have spent time and effort understanding the documents connected with the arrangement.

117 Mark Gergen, 'A defense of judicial reconstruction of contracts' (1995) 71 Indiana Law Journal 45, 47.

118 [2013] HCA 25.

119 [2020] OJ No 1037.

120 Ibid para 29.

As can be gleaned from Rudanko's exposition on digitised contracts, particularly high-frequency trading, they are much analogous to gaming contracts.[121] As he explains:

> In the automated trading in securities markets, offers and acceptances are fed in the system that then matches the corresponding inputs into contracts, which are in the next stage settled in an automated netting system, distributing the net assets to the participants in trading.

He goes further to say: 'In the trading system, no traditional contract relations between identifiable parties can be detected, but there is no doubt about the existence of real sale of securities transactions.' For this reason, it appears convenient to refer to cases on gaming contracts where the notice of contested terms was in issue. A good example is the English gaming case of *O'Brien v MGN Ltd*[122] where the court reasoned that there was no need for the offeror (game operator) to bring the contested terms to the notice of the offeree (player). The player, the court reasoned, could (and should) have discovered the rules themselves, as all gaming arrangements operate based on specific rules.

But as reasoned in *Green v Petfre (Gibraltar) Ltd*,[123] a term-taker cannot reasonably be said to have notice of terms in a gaming agreement where such terms are patently 'obscure and unclear'. In some recently decided English cases, the courts ruled that the operator (or their agent) of an investment scheme owed no obligation to investors to advise them on the risks they are likely to encounter in participating in the scheme.[124] However, a duty known as a 'mezzanine duty to advise' only arises when the operator voluntarily assumes the responsibility of explaining the scheme's risks to the offeree.[125] Only in such a situation of the voluntary assumption must the operator be fully transparent in disclosing the relevant risks to the offeree.

There are other cases where heightened notice expectations are not placed on offerors. These are cases where any prudent and reasonable observer would be satisfied that the offeror had done everything that was objectively sufficient to bring all the terms, including

121 Matti Rudanko, 'Smart contracts and traditional contracts: views of contract law' in Marcelo Compagnucci, Mark Fenwick and Stefan Wrbka (eds), *Smart Contracts: Technological, Business and Legal Perspectives* (Hart 2021) 59, 67.

122 [2001] EWCA Civ 1279.

123 [2021] EWHC 842 (QB); see also, Joanne McCunn, 'Incorporation of terms: time for Blu-Sky thinking?' (2022) Lloyd's Maritime and Commercial Law Quarterly 189.

124 *Crestsign Ltd v National Westminster Bank & Royal Bank of Scotland* [2015] 2 All ER (Comm) 133; *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB).

125 *Property Alliance Group Ltd v Royal Bank of Scotland* [2016] EWHC 3342 (Ch).

salient ones, to the notice of the offeree. For example, where the terms are thematically arranged, highly readable and expressed in a few paragraphs.[126] Where there is no time pressure on the offeree, enabling them to carefully read the contract terms and ask questions about terms not understood before signing.[127] Also, sufficient notice would be deemed as served where salient terms were expressed in an 'almost apocalyptic' fashion.[128]

However, in cases where transactional expertise cannot fairly be attributed to the offeree, then it is incumbent upon the offeror to ensure sufficient notice of salient terms to the offeree. Notice is contestable in cases where salient terms that are vital in shaping the incentives of (non-expert) offerees to accept or refuse a contractual offer are not specifically brought to their attention. According to prevailing views, only onerous or unusual terms are required to be brought to the notice of the offeree in situations of contestable notice. It complicates matters that there is no discernible judicial consensus on what amounts to 'onerous' or 'unusual' terms.[129] Judges have defined those qualities differently. Notwithstanding the lack of uniformity in definition, it is observable that courts expect terms that qualify as such to be of a nature that is (totally) unexpected, commercially perverse, or something close to outlandish.[130] For this reason, remedial clauses, exclusion and exemption clauses, arbitration clauses, and commission-withholding clauses have been judged as not being onerous and, thus, not requiring specific notice.[131]

Judges are aware of the empirical reality that people do not pay rapt attention to contractual terms but instead focus on ones that appear salient, so the rules of notice should be reformed with this reality in mind. Thus, in those cases where offerees are non-experts or otherwise possess expertise (but the terms are presented using tricky or inscrutable wordings), specific notice must be required for

126 *Bedford Investments Ltd* (n 12 above) para 94; *Carlsberg-Tetley Brewing Ltd v Gilbarco Ltd* [1999] EWHC J0322-5; *Rogers Cable Communications Inc v York Condominium Corp* [2005] OJ No 4099.

127 *Canadian Linen and Uniforms v Taurus* [2020] AJ No 497; see also, *Burkshire Holdings Inc v Ngadi* [2021] OJ No 2781.

128 See *BA Kitchen Components Ltd v Jowat (UK) Ltd* [2021] NIQB 3, para 23; see also *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, para 53.

129 See *Streford v Football Association* [2007] EWCA Civ 238; *Trebor Bassett Holdings Ltd and Another v ADT Fire and Security plc* [2011] EWHC 1936 (TCC).

130 *O'Brien v MGN Ltd* [2001] EWCA Civ 1279; see also *Trebor Bassett Holdings* (n 129 above).

131 See *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49; *Streford v Football Association* (n 129 above); see also *Gregg & Co (Knottingley) Ltd v Emhart Glass Ltd* [2005] EWHC 804 (TCC).

salient terms. That is, terms that would have been vital to the offeree's exercise of choice between competing offerors, particularly those likely to impact the allocation of benefits and burdens between offerees and offerors.[132] These are terms likely to have material effects on the quality of contractual rights and obligations of an offeree. They include but are not limited to, all remedial clauses,[133] exclusion clauses,[134] termination clauses, arbitration clauses[135] and restrictive covenants.[136] This position is akin to Spencer's.[137]

As can be deduced from Eisenberg, contractual addressees are unlikely to treat clauses relating to consequences of non-performance or default as necessary to their decisions to enter a contract.[138] This is because people often discount the possibility of breach or default. For this reason, offerees will likely treat remedial clauses as non-salient because they consider a breach a low-probability event. Therefore, an offeror who intends to incorporate such a term must bring it to the notice of the offeree in a way that emphasises its salience. Thus, in *Bridge v Campbell Discount*,[139] Lord Denning categorically expressed an identical position. He reasoned that, although the offeror (seller) and the offeree (hirer) had effectively entered a contract, the offeree had not consented to the remedial clause inserted into the contract.[140] This is because, as Lord Denning rightly reasoned, the remedial clause was remote to the contractual considerations of the offeree when entering the contract. In effect, the offeree had only consented to or was mindful of the salient express terms, such as the price and dates at which payment was due. We also find a similar position expressed by Lord Denning in *United Dominions Trust (Commercial) Ltd v Ennis*.[141] For such terms to be salient in the calculations of the offeree, it should be expected that the offeror gives adequate notice of such terms.

132 Russell Korobkin, 'Bounded rationality, standard form contracts, and unconscionability' (2003) 70 University of Chicago Law Review 1203, 1206.

133 *Madison Homes Cornell Rouge Ltd v Chi-Hong Stanley Ng* [2021] OJ No 2369; *MacQuarie Equipment Finance (Canada) Ltd v 2326695 Ontario Ltd* [2020] OJ No 720.

134 *Luminary Holding Corp v Fyfe* 2021 BCSC 167; *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1446.

135 *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch).

136 *SI Systems Partnership v Geng* [2020] OJ No 5744.

137 J R Spencer, 'Signature, consent, and the rule in L'Estrange v Graucob' (1973) 32 Cambridge Law Journal 104.

138 Melvin Eisenberg, 'The limits of cognition and the limits of contract' (1995) 47 Stanford Law Journal 211, 243.

139 [1962] 2 WLR 439.

140 Ibid 446, 457.

141 [1967] 3 WLR 1, 7.

Submissions

The import of this section is that where an addressee proves to be a market 'novice' (not being an expert), then it would be incumbent on the term-giver to demonstrate that they had done everything reasonably possible to put a prudent person in the situation and circumstances of the addressee on notice of terms that are otherwise salient or material.[142] The argument is not that an offeror must ensure that the addressee reads the terms. Instead, the offeror has objectively done everything practically possible to ensure adequate notice to the addressee.

One major factor is vital here, and that factor is effective informational presentation. This factor is vital both in digital settings and paper-based ones.[143] In the face of informational complexity, how material terms are presented to addressees would impact how effectively they discern their material rights and obligations. This would then shape their ability to exercise their choice (or arrange their affairs) at the pre-contractual and post-formation stages. The assessment of what qualifies as a practical presentation of terms would depend on the facts of each case. In digital settings, the addressee may use a combination of features to improve the presentation of salient terms. The transactional interface may use colour codes or schemes to distinguish terms based on their materiality. They may use pings and images.[144] They may also use navigational aids and input controls (eg checkboxes requiring an offeree's confirmation of material terms before they can proceed to pay or complete contractual formation). In paper-based settings, the brevity of the statements, thematic arrangements of terms, the use of colour codes and distinct fonts and so on would matter for an effective informational presentation. Thus, the burden of proving that reasonable measures were taken to put a prudent person in the addressee's condition and circumstances on notice is to be shouldered by the term-giver.

Deductions from the forgoing analyses on the interactions between relational proximity and informational complexity or accessibility may be represented in the Figure 1.

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142 See the US cases of: *Scotti v Tough Mudder Inc* 63 Misc 3d 843 (2019); B*erkson v GOGO LLC*, 97 F Supp 3d 359 (2015).

143 Nancy Kim, 'Digital contracts' (2019) 75 The Business Lawyer 1683.

144 See Woodrow Hartzog, 'Website design as contract' (2011) 60 American University Law Review 1635, 1667.

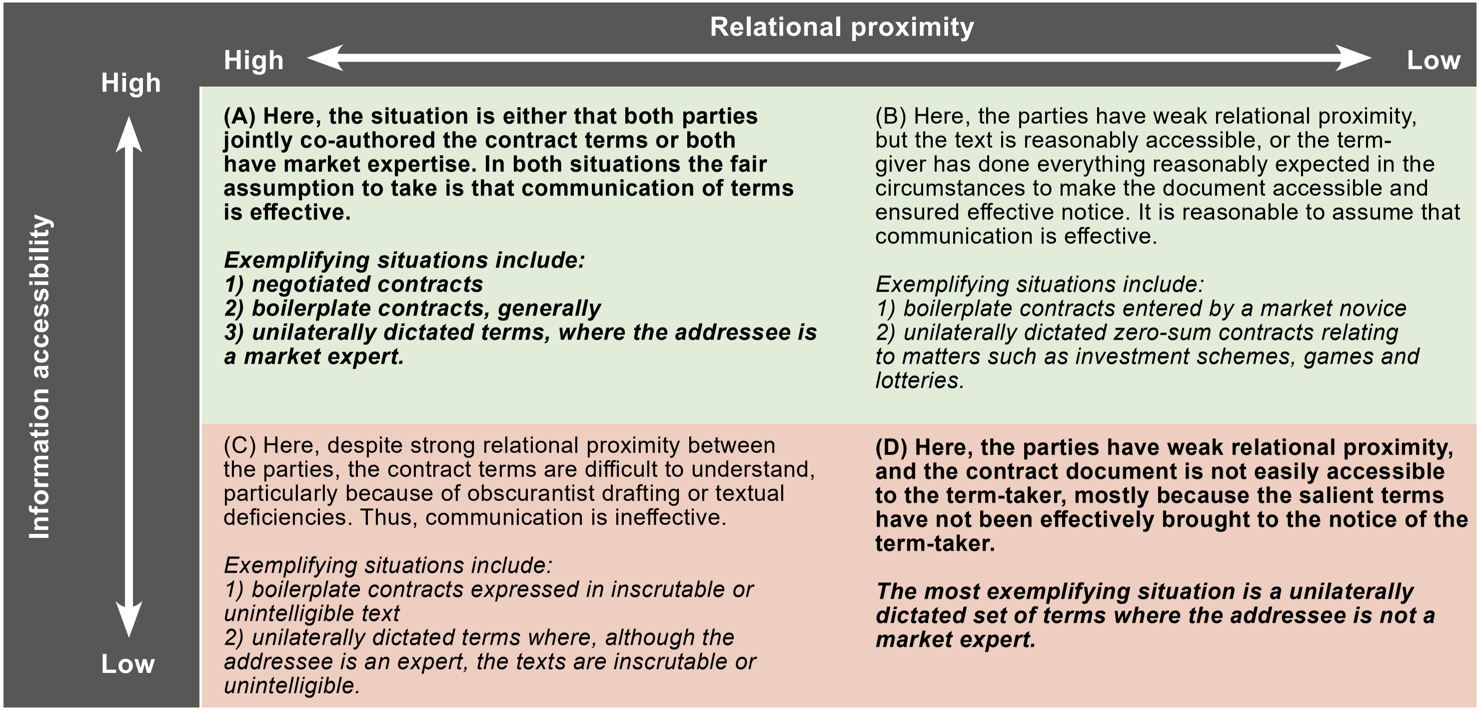

Figure 1: (A) and (D) capture standard cases. In most cases where relational proximity is strong, as in (A), informational accessibility follows. Where relational proximity is weak, as in (D), it often follows that informational accessibility is difficult. Relatively common exceptions are outlined in (B) and (C).

RECOMMENDATIONS AND CONCLUSION

From the foregoing analysis, it can be discerned that the signature rule takes an oversimplified view regarding the effective communication of contract terms. In that regard, the following are postulated:

1. That signature should generally be conclusive of consent in cases of negotiated and industry-standard terms. In other words, there should not be an inquiry into the sufficiency of notice in those cases.
2. In cases of industry standards, there may be the need to inquire into the sufficiency of notice where it can be proved that the wordings of the particular contract terms are so abstruse or complex as to defy the understanding of the average expert in the market or industry.
3. In cases of unilateral terms, offerees should be deemed sufficiently notified of all terms, including peculiar ones, in situations where it can demonstrably be shown that they are conversant with market dynamics and have had a series of dealings with the term-givers/offerors or alternative offerors with similar terms. It should also be probative of notice if offerees are market experts with their terms like the offeror's.
4. Regarding unilateral terms, where the offerees are not market experts, then terms that would otherwise have been salient to their consideration in entering the contract should be specifically brought to their awareness for notice to be adequate. In other words, the exacting qualities of 'onerous' and 'unusual' should not be the touchstone for determining the requirement of specific disclosure of terms to offerees.

With a context-specific test such as that proposed here, we can prevent using contract terms as economic traps for unwary offerees. Most importantly, in unilateral terms where offerees are not market experts and those of industry standards expressed in obscure ways, there should be heightened disclosure expectations for notice to be deemed sufficient. The rationale for this submission is that non-price terms are often equivalent or complementary to price terms. Thus, non-price terms contained in unilateral and industry-standard terms may facilitate the extraction of unearned economic rent from offerees to offerors, primarily when such terms are expressed as though there were unimportant terms. This endows such terms with potential ambush effects. The real possibility of offerees discounting the cost of such terms is apt to equip offerors with market power to increase market traction through their strategic presentation of contract terms in a commercially attractive fashion.