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## STANDARDIZATION OF STANDARD-FORM CONTRACTS: COMPETITION AND CONTRACT IMPLICATIONS

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### ABSTRACT

*Standard-form contracts are a common feature of commercial relationships because they offer the advantage of lower transaction costs. This advantage of standard contracts is increased when there is a second layer of standardization under which multiple firms agree on a standard contract. Trade associations and similar entities often effect standardization of this kind through collective agreement on a standard contract, sometimes under the aegis of state actors. Multifirm contract standardization can provide not only the usual transaction-cost advantages of standard-form contracts, but also increased competition among firms, because a standard contract makes comparison among firms' offerings easier. But standardization among firms also eliminates competition on the standardized*

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*terms, adding market power to bargaining power and making it less likely that the needs of all parties will be served.*

*The collective formation of standard-form contracts has recently begun to receive academic attention. This attention, however, has for the most part focused on contract interpretation, emphasizing the fact of standardization and the nature of the standardizing entity. Less attention has been paid to issues of contractual fairness. Moreover, the competitive effects of contract standardization, which implicate primarily antitrust law, are distinct from those addressed by contract law. When sellers agree on contract terms, they eliminate competition among themselves on those terms. This sort of agreement can be undesirable even if the agreed-upon terms of the contract are fair and reasonable in themselves, because the standard contract can eliminate competition among reasonable terms.*

*Fundamentally, the standardization of contracts is a standardization of the package offered to customers, in much the same way as is standardization of a product, and antitrust law has often been skeptical of such standardization. But contract standardization can also be viewed as altering not the product itself, but the legal background governing the purchase. Under that view, the contract simply standardizes the legal backdrop for what otherwise continues to be a competitive and vigorously bargained transaction. Which of these perspectives more accurately describes contract standardization likely differs from case to case, yet the courts generally have considered neither whether competition law should apply differently to standardization of contracts than to standardization of other "products" nor whether and how contract law should alter the competition analysis.*

*This Article addresses the issue of contract standardization by exploring the interaction of antitrust and contract law in three basic respects. The first is substantive, focusing on product terms and considering standardization of terms both to reduce costs (interoperability standards) and to improve the contract (quality standards). This focus on terms is consistent with the antitrust approach of the Department of Justice, which has asked whether standardization involves "competitively significant" terms, but as the Article describes this standard is not well defined. The Article then moves to procedure, considering different contexts in which contract*

*standardization occurs and discussing the implications of different means of negotiation. Third, the Article considers the possibilities both of voluntary adoption of contracts and of adoption incentives created by private organizations and by the state. The Article then draws on these discussions to suggest some analytical approaches to contract standardization.*

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## INTRODUCTION

Standard-form contracts are a common feature of commercial relationships,<sup>1</sup> where they offer both advantages and disadvantages. The primary advantage is a reduction of transaction costs, because the parties need not negotiate a new contract for each transaction.<sup>2</sup> Standard contracts can also provide greater certainty regarding the meaning of contractual terms<sup>3</sup> and a reduction in agency costs.<sup>4</sup> Despite these benefits, courts and especially commentators also express concerns regarding standard contracts.<sup>5</sup> Many of these

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1. John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) (“[I]n an advanced economy the standard form contract accounts for more than 99% of all contracts used in commercial and consumer transactions for the transfer of goods, services and software.”); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 864 (2006) (“Virtually every firm that sells goods or services or extends some form of credit to consumers has certain standard-form contractual terms governing such things as when and how payment is due, when and if a good can be returned, whether charges are made for services beyond those originally contracted for, and other related matters.”).

2. Burke, *supra* note 1, at 289 (“Efficiency requires firms engaged in the mass production and distribution of products to develop identical legal contracts regulating their rights and obligations.”); Steven R. Salbu, *Evolving Contract as a Device for Flexible Coordination and Control*, 34 AM. BUS. L.J. 329, 376 (1997) (“Standardized language and culture can generate transaction cost efficiencies by facilitating the trading of contractual rights. The transactional cost savings that result from standardization of terms are akin to the economies of scale that are realized in manufacturing when an investment in fixed assets is spread across a large number of outputs. Like customized production processes, individually tailored contracting incurs high variable costs that must be renewed with each unit of production. These variable costs are comprised of the time and resources that must be invested in developing new contract terms for otherwise familiar transactions, and analyzing these customized terms whenever a contract is consulted.”) (internal citations omitted).

3. Salbu, *supra* note 2, at 373 (explaining that a “common, familiar language increases both one’s acuity of understanding and one’s faith in the quality of that understanding,” which makes judicial interpretations of standardized contract language more reliable than those of idiosyncratic language).

4. *Id.* at 378 (“[S]tandardization of contractual provisions can reduce agency costs by limiting opportunities for agents to exercise discretion in their own interests.”).

5. See, e.g., *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 565 (Ct. App. 1993); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 124-25 (Ct. App. 1982); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960); 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 18:13 (Richard A. Lord ed., 4th ed. 1993 & Supp. 2009) (“But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms,

concerns arise from the use of standard-form contracts in the consumer context, where they often are contracts of adhesion that consumers neither read nor have the power to negotiate.<sup>6</sup> Whether the parties are consumers or businesses, though, a single, standard contract may not be appropriate for every transaction, so some parties will not be well-served by contract standardization.<sup>7</sup>

Both the advantages and the disadvantages of standard contracts are increased when there is a second layer of standardization. This additional standardization—the subject of this Article—is present when a standard contract is not only used by a single seller in multiple transactions, but also by multiple sellers. Trade associa-

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either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.” (quoting *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971)); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1175 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23 (1984); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (“An unfair form will not deter sales because the seller can easily arrange his sales so that few if any buyers will read his forms, whatever their terms, and he risks nothing because the law will treat his forms as contracts anyway.”). For some more sanguine views on standard-form contracts, see Symposium, *“Boilerplate”: Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).

6. See, e.g., *Brown v. Soh*, 909 A.2d 43, 49 (Conn. 2006) (“The most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts, and they tend to involve ‘standard form contract[s] prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms.’” (quoting *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 745 (Conn. 2005))) (internal quotation marks omitted); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 248 (2007); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 629 (2002) (“If contracts are enforceable promises to do or refrain from doing something, then one must have *actually* promised to do or refrain from doing something. True, such promises are to be judged objectively, but if the promisee knows or has reason to know that a particular promise went unread then it is unreasonable for the promisee to conclude that the promisor even objectively manifested assent by signing a form contract or clicking ‘I agree.’”); Rakoff, *supra* note 5, at 1177. Florencia Marotta-Wurgler recently conducted an extensive empirical study of standard contracts used for software licenses, finding that such contracts are indeed biased in favor of the contract drafters-licensors at least as compared to contract-law default rules, which more often tend to favor licensees. See Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 713 (2007).

7. See Johnston, *supra* note 1, at 864-73 (listing several examples, such as hospital bills, credit-card debt, and mortgage loans, in which consumers benefit significantly from bargaining around standard-form terms rather than following them).

tions and similar entities often effect standardization of this kind through collective agreement on a standard contract, sometimes under the aegis of state agencies. Multifirm contract standardization can provide not only the advantages noted above, but also increased competition among firms, because a standard contract makes comparison among firms' offerings easier.<sup>8</sup> But standardization among firms also eliminates competition on the standardized terms, adding market power to bargaining power and making it even less likely that the needs of all parties will be served.

The collective formation of standard-form contracts has recently begun to receive academic attention.<sup>9</sup> The attention, however, has for the most part focused on contract law, emphasizing the implications for contract interpretation of the fact of standardization and the nature of the standardizing entity.<sup>10</sup> The implications of

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8. That is, it is easier to assess the significance of price and quality, for example, if other terms of a transaction, like contractual payment terms and remedies, are the same.

9. Lisa Bernstein has been writing on related, but distinct, topics for some time. Her work has focused on private codes created by trade associations. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1725 (2001); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 713 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769 (1996) [hereinafter Bernstein, *Merchant Law*]. These codes, while not themselves contracts, do sometimes specify default contractual provisions. See, e.g., NAT'L GRAIN & FEED ASS'N, GRAIN TRADE RULES OF THE NATIONAL GRAIN AND FEED ASSOCIATION (2010), available at [http://www.ngfa.org/files/misc/web2010\\_Grain\\_Trade\\_Rules.pdf](http://www.ngfa.org/files/misc/web2010_Grain_Trade_Rules.pdf); Bernstein, *Merchant Law*, *supra*, at 1772 (describing the National Grain and Feed Association's adoption of rules that "cover the basics of contract formation, performance, repudiation, breach, damages, and excuse").

To the extent that these codes specify contractual provisions, even as defaults, they can present the same issues as are discussed here. But the codes could also be viewed as codifications of already-existing trade rules. See Bernstein, *Merchant Law*, *supra*, at 1772 n.19 ("When the trade rules were originally adopted, custom was the starting point for the codifiers."). The actual contracts used by members of the trade associations can still differ, see *id.* at 1774 nn.30-31 (noting "battle of the forms" issues arising from differing forms), so it is not clear how much standardization results.

10. See Bernstein, *Merchant Law*, *supra* note 9, at 1766 ("This Article draws on a case study of merchant law in a merchant court to reexamine, and, ultimately, to challenge, the fundamental premise of the Uniform Commercial Code's adjudicative philosophy, the idea that courts should seek to discover 'immanent business norms' and use them to decide cases."); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1145 (2006); Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1077 (2006); Joseph M. Perillo, *Neutral Standardizing of Contracts*, 28 PACE L. REV. 179, 181 (2008).

collective formation of standard contracts, however, go beyond contract law. Most importantly, any agreement on terms of a transaction raises antitrust issues.<sup>11</sup> When sellers agree on contract terms, they eliminate competition among themselves on those terms. Whether this elimination of competition leaves contracting parties worse off depends at least in part upon whether the standardized terms are important ones and upon whether sellers continue to compete on other, arguably more important terms like price.

It is important to recognize that these competition issues are distinct from issues of fairness under contract law. To the extent that contract law regulates form contracts, it does so primarily through a focus on oppressive terms.<sup>12</sup> The antitrust issue is a different one: that the terms of the standard-form contract are the product of an agreement, and therefore eliminate competition. This concern exists even if the agreed-upon terms of the contract are fair and reasonable in themselves, because the standard contract can still eliminate competition in the range of reasonableness, that is, among reasonable terms. As a result of the elimination of alternative terms, the needs of different customers may not be met.

Another layer of complication is introduced when standardization of form contracts is used to perform what might be thought of as a regulatory function. For example, sellers might agree not to use particular terms considered to be oppressive. Or the standardization might mandate desirable terms or disclosures. The goals here are not to reduce transaction costs, or even to promote efficiency more generally, but to channel contracts and contracting practices in a particular direction. But standardization for these

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11. This aspect of contract standardization has not received much attention in the United States, but it has been the subject of scholarship in Europe. See Fabrizio Cafaggi, *Self-Regulation in European Contract Law*, in *STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW* 93, 109 (Hugh Collins ed., 2008); Thomas Wilhelmsson, *Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts*, 17 *EUR. BUS. L. REV.* 49, 49 (2006). But see Hugh Collins, *The Freedom To Circulate Documents: Regulating Contracts in Europe*, 10 *EUR. L.J.* 787, 800 (2004) (dismissing antitrust concerns).

12. Contract-law limitations would apply to the extent that the standard contract introduces terms that are unfair, to use the European terminology, or that violate one of the analogous, though narrower, U.S. doctrines, such as unconscionability or reasonable expectations.



purposes might also violate antitrust law.<sup>13</sup> In general, antitrust law views self-regulation by groups of competitors skeptically, largely because of a concern that a self-regulating group may be tempted to adopt rules that exclude their competitors.<sup>14</sup>

Thus, contract law and competition law may view standardization of standard contracts differently. This Article compares the approaches to standardization of the various contract doctrines focusing on unfairness and the antitrust emphasis on competitive effects. The Article also addresses these issues comparatively by considering both the United States and Europe. The law in Europe provides a helpful complement and contrast to that of the United States because European law focuses on several issues that are relevant to standardization. Most importantly, the European Union's push toward integration of the European economy has led to the goal of harmonizing European contract law, and standard contracts have been advanced as one means of achieving such harmonization.<sup>15</sup> The European Union also has a more active and formal approach to addressing contractual fairness,<sup>16</sup> and is engaged in a larger debate concerning the potential convergence of the objectives of antitrust law and consumer protection.<sup>17</sup>

Part I of the Article begins by describing a recent case that presents an instance of contract standardization and illustrates the alternative legal approaches to the issue. Part II then outlines several types of contract standardization, comparing them to the more familiar product standardization, and describes several significant examples of contract standardization. Part III describes the relevant competition and contract-law issues from three perspec-

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13. See *infra* Part III.A.3.

14. ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING 8 (2004) [hereinafter ABA STANDARDS HANDBOOK] ("Because failure to meet quality standards may limit market acceptance or even result in exclusion from the market altogether, such standards may represent barriers to market entry, which in turn could potentially limit consumer options in an anticompetitive manner.").

15. See Commission of the European Communities, Communication, *European Contract Law and the Revision of the Acquis: The Way Forward*, at 6-8, COM (2004) 651 final (Oct. 11, 2004), available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com2004\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_en.pdf) [hereinafter *European Contract Law*] (discussing standardization of terms and conditions); see also *supra* note 11.

16. Council Directive 93/13, 1990 O.J. (L 095) 29, 31 (EEC).

17. See Giorgio Monti, *The Revision of the Consumer Acquis from a Competition Law Perspective*, 3 EUR. REV. CONT. L. 295, 295-96 (2007).

tives: the nature of standard contract terms, the standardization process, and the freedom or pressure that contracting parties have in adopting standard contracts. Part IV then proposes some regulatory approaches to standardized contracts. A Conclusion offers some final observations.

### I. COMPETITION LAW AND CONTRACT LAW

Although a number of cases, both in the United States and in Europe, have considered standardized standard-form contracts, there has been surprisingly little analysis focused on the particular issues raised by such standardization. Moreover, the analysis that has been presented has been inconclusive, with the courts developing no clear approach to the relationship between competition law and contract law. The need for greater clarity can be illustrated by a recent U.S. case.

Litigation against Visa, MasterCard, and their card-issuing banks in both the United States and Europe has challenged a variety of their practices as antitrust violations.<sup>18</sup> Much of the litigation has involved bank interchange fees, and in these cases the allegation is effectively one of price-fixing.<sup>19</sup> But in the United States, consumers have also challenged mandatory arbitration clauses in their cardholder agreements, alleging that banks illegally agreed among themselves to include these provisions.<sup>20</sup> The consumers challenged these clauses in two suits, one based on contract law and the other on antitrust law.

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18. Actually, such litigation has been even more widespread. See Elizabeth Warren, Antitrust Issues in Credit Card Merchant Restraint Rules, Tobin Project Discussion Paper, (May 6, 2007), [http://www.tobinproject.org/downloads/RP\\_Merchant\\_Restraint\\_Rules.pdf](http://www.tobinproject.org/downloads/RP_Merchant_Restraint_Rules.pdf) (noting litigation in Australia, Argentina, Israel, and Mexico, and investigations in many other countries).

19. See, e.g., *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1045 (9th Cir. 2008); *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006); *Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 594 (11th Cir. 1986); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003); Commission Decision 2001/782, 2001 O.J. (L 293) 24, 25 (EC).

20. See *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2d Cir. 2008); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 243 (S.D.N.Y. 2005).

The first suit claimed that the standardized contracts were unenforceable under contract law.<sup>21</sup> The plaintiffs argued that “(1) collusion by defendants renders their agreements unenforceable, and (2) defendants’ collusive behavior was procedurally unconscionable, which, combined with a waiver of class action remedies, renders the contracts unenforceable.”<sup>22</sup> It is not clear whether the first argument was that the contracts were unenforceable because they violated federal antitrust law, which would then preempt state contract law, or that as a matter of contract law itself the enforcement of contracts obtained through an antitrust violation is impermissible.

In any event, the district court refused to hold that the contracts were unenforceable. With respect to the first argument, the court cited a line of cases in which courts enforced contracts that were “intelligible economic transactions” separable (in some ill-defined way) from the alleged antitrust violations.<sup>23</sup> The impetus for these cases seems to be a concern that the plaintiff may be seeking to take the benefits of the contract and then use antitrust law to avoid paying its costs. In that case, the plaintiff could conceivably reap a windfall beyond any antitrust damages it might suffer. The district court therefore took the view that the contract could be enforced and that the plaintiffs must bring a separate antitrust claim.<sup>24</sup>

The second argument was that the alleged antitrust violation had implications purely within contract law. The court rejected the plaintiffs’ argument, but not on the ground that collusion did not constitute procedural unconscionability. Instead, the court took the common view that both procedural *and* substantive unconscionability are required,<sup>25</sup> and concluded that a waiver of class action litigation remedies was not substantively unconscionable.<sup>26</sup> In essence, the anticompetitive effect of the act of agreement was not

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21. *Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 237.

22. *Id.* at 258-59.

23. *Id.* at 259.

24. *Id.*

25. This issue might be resolved differently in a state that had a more flexible approach to unconscionability, as some do. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9.40 (4th ed. 1998) (describing the variety of approaches taken by courts to unconscionability).

26. *Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 259.

sufficient to invalidate it under contract law; contract law also required an inquiry into the substantive terms that resulted from the agreement.

Following this decision, the plaintiff consumers filed a separate antitrust action alleging that the same collusion was an antitrust violation.<sup>27</sup> The district court rejected this suit on the grounds that it was not ripe for adjudication because the plaintiffs had not yet had a claim that was subject to the arbitration clause. But the Second Circuit Court of Appeals disagreed, distinguishing antitrust harm from contractual harm:

The harms claimed by the cardholders, which lie at the heart of their Complaint, are injuries to the market from the banks' alleged collusion to impose a mandatory term in cardholder agreements, not injuries to any individual cardholder from the possible invocation of an arbitration clause. The antitrust harms set forth in the Complaint—for example, the reduction in choice for consumers, many of whom might well prefer a credit card that allowed for more methods of dispute resolution—constitute present market effects that stem directly from the alleged collusion and are distinct from the issue of whether any cardholder's mandatory arbitration clause is ever invoked. The reduction in choice and diminished quality of credit services to which the cardholders claim they have been subjected are present anti-competitive effects that constitute Article III injury in fact.<sup>28</sup>

In other words, the plaintiffs' harm was the agreed-upon unavailability of contracts without arbitration clauses, not the requirement of arbitration itself.

That the agreement *may* constitute an antitrust violation does not, however, define the evaluative criteria that should be applied. The court's reference to the "diminished quality in credit services"<sup>29</sup> points in one direction, indicating that it is not simply an agreement on terms that would result in an antitrust violation; a less desirable contract would also be required. One wonders, though, whether the

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27. *In re Currency Conversion Fee Antitrust Litig.*, No. 05 Civ. 7116 (WHP), 2006 WL 2685082, at \*1 (S.D.N.Y. Sept. 20, 2006).

28. *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 223-24 (2d Cir. 2008).

29. *Id.* at 223.

assessment of the quality of credit services would be made on average—including both those who do not care whether they are limited to arbitration and those who do—or if a diminished quality for any customer would be sufficient to constitute a violation. After all, the court focused also on the reduction of choice, which seems to acknowledge the importance of individuals, not just collective interests.

One also wonders if in light of the court's focus on the reduction in choice it would be willing, as the district court was, to see the arbitration clause as an "intelligible economic transaction"<sup>30</sup> independent of the antitrust violation. If not, the court might conclude that the clause is unenforceable under contract law as well. That is, if the consumer's choice of contract is determined by the antitrust violation, in what sense can or should the contract be viewed as independent of that violation?

These issues are taken up more specifically in Part III-IV, where the primary focus is on the proper relationship between contract law and competition law in this context. First, though, Part II presents a more systematic description of collective agreements on standard-form contracts, and compares this sort of standardization of contracts to the standardization of products, which has been more commonly addressed by antitrust law.

## II. TYPES OF STANDARD-FORM CONTRACTS

The agreements at issue in this Article are in effect standardizations of standards. That is, there is one layer of standardization in which a firm chooses to use a single form contract in multiple transactions, and then there is a second layer in which multiple firms agree among themselves to use the same form contract. In this Article, the term "standardized contract," as distinguished from "standard contract," will be used to indicate a contract that is the product of this second layer of standardization.

Two types of variation on the basic scenario are also possible. First, the counterparties to the firms agreeing on the form contract may be either individual consumers or other firms. The legal treatment of standard contracts may differ depending on whether the

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30. See *supra* text accompanying note 23.

contract at issue is between a business and consumers or is between businesses. The significance of this difference is generally greater in contract law than it is in competition law, because contract law is more concerned with differences in bargaining power between the contracting parties.<sup>31</sup> Moreover, within contract law, the involvement of a consumer as one of the contracting parties has more significance in Europe than it does in the United States.<sup>32</sup>

Second, the agreement on contract standardization may be made with some degree of organizational or state direction or supervision. Although an agreement on the standard can be ad hoc—that is, the product of a group effort directed solely at that agreement—standardization efforts are more commonly the products of preexisting or continuing organizations, often trade associations. The involvement of an organization can have several effects under antitrust law. On the one hand, an organization is perhaps more likely to have in place procedural protections that ensure an objective standard-setting process. On the other hand, if membership in an organization is important, and if membership requires adherence to the standard, the standard may be viewed as more coercive, and thus possibly more anticompetitive.<sup>33</sup>

Even more significantly, a standardization effort can take place under the supervision or mandate of the state. States may have an interest in contract standardization to police industry behavior or to ensure certain policies. The European Commission, as noted above, has proposed the use of standard contract forms as an

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31. Rakoff, *supra* note 5, at 1264-65.

32. For example, the Directive on Unfair Contract Terms applies only to consumer contracts. See Council Directive 93/13, 1990 O.J. (L 095) 29, 31 (EEC); see also M. Neil Browne & Jennifer Coon, *The Impact of Market Ideology on Transnational Contract Law*, 30 LOY. L.A. INT'L & COMP. L. REV. 91, 114 (2008) (explaining how German contract law “seeks to construct roadblocks for stipulators who try to place undue burden[s] on the consumer in standard form consumer contracts”); Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 BUS. LAW. 209, 210 (2006). There is nothing, however, that would prevent a court from applying similar approaches to business-to-business contracts. Indeed, in Germany, whose contract law has its own list of unfair terms for consumer contracts similar to that of the Council Directive (and in fact a model for the Directive), Collins, *supra* note 11, at 797, courts have often set aside such terms in business contracts. See Annick De Boeck & Mark Van Hoecke, *The Interpretation of Standard Clauses in European Contract Law*, in STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW 201, 225-26 (Hugh Collins ed., 2008).

33. See *infra* Part III.C.1-2.

instrument of policymaking.<sup>34</sup> State supervision is particularly important for certain standard contracts, such as those in the insurance industry, and review by the state can help ensure fair and procompetitive contracts. But that assumes that a State actively reviews the contracts at issue. In past instances of joint private action, state review has at times been cursory or even nonexistent.<sup>35</sup> This sort of pro forma state involvement can have significant negative effects, because it can lessen or eliminate antitrust scrutiny of the private action under the state action doctrine in the United States and analogous European doctrines.<sup>36</sup>

Fundamentally, the standardization of contracts is a standardization of the package offered to customers, in much the same way as is standardization of a product. Yet the courts generally have considered neither whether competition law should apply differently to standardization of contracts than to standardization of other “products” nor whether and how contract law should alter the competition analysis. The remainder of Part II first describes several types of standards and then gives examples of standardized contracts.

### *A. Product Standards and Contract Standards*

Standardization of contracts has both important similarities to and important differences from standardization of other products. The literature on product standards typically divides such standards into two general classes: uniformity standards and quality standards.<sup>37</sup> Uniformity standards “assure that two related pro-

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34. See *supra* text accompanying note 15. In addition to the EU harmonization issue noted above, see the recent European Commission communication concerning prices and power in the supply food chain for another example of the use of standard contract forms to further policy making. Commission of the European Communities, Communication, *A Better Functioning Food Supply Chain in Europe*, at 5-7, COM (2009) 591 (Oct. 28, 2009), available at [http://ec.europa.eu/economy\\_finance/publications/publication16061\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf) (committing explicitly to a participatory procedure concerning standard contract forms).

35. See *FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 631 (1992).

36. See *infra* Part III.C.3.

37. ABA STANDARDS HANDBOOK, *supra* note 14, at 6-7. This reference actually lists five categories of standards: quality standards, informational standards, uniformity standards, interoperability standards, and professional conduct and certification standards. These are variations on the two basic categories, however. Informational standards and interoperability standards are types of uniformity standards, and professional conduct and certification

ducts or processes will fit and/or operate with one another.”<sup>38</sup> When consumers want products to interact, uniformity standards enhance product value, because conformity with such a standard assures consumers that the desired interaction will be successful.<sup>39</sup> Quality standards, in contrast, are designed to assure a certain level of performance. That is, they seek to assure that products perform at a certain level, without regard to interaction with other products.<sup>40</sup> These two types of standards are discussed in more detail below, with particular reference to contract standards.

### *1. Uniformity Standards: Transaction Cost Reduction*

The most obvious reason for agreement on a standard-form contract is to lessen the transaction costs associated with contractual negotiation. A uniform standard contract makes it easier for parties to compare contracts and to switch from one provider to another, because the parties need not familiarize themselves with a variety of alternative contracts.<sup>41</sup> For example, the agreeing parties might adopt common language for commonly used terms.<sup>42</sup> Or they might enter into substantive agreements on minor terms.<sup>43</sup>

Agreements of this kind can be analogized to product standardization efforts that are directed to interoperability. The purpose of product standards directed at interoperability is to define aspects of product design, like interfaces, that allow products from multiple manufacturers to work together.<sup>44</sup> Such standards are very common in the electronics and computer industry. Contracts, of course, do not have to “work together” in the same sense, but the lawyers or businesspeople negotiating them must work together, and contracts

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standards are types of quality standards.

38. *Id.* at 10 (quoting Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 940 (1986)).

39. Daniel J. Gifford, *Developing Models for a Coherent Treatment of Standard-Setting Issues Under the Patent, Copyright, and Antitrust Laws*, 43 IDEA 331, 338 (2003).

40. ABA STANDARDS HANDBOOK, *supra* note 14, at 7.

41. David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 987 (2006).

42. Wilhelmsson, *supra* note 11, at 56.

43. *Id.* at 56-57.

44. See ABA STANDARDS HANDBOOK, *supra* note 14, at 10.



with standard terms provide a common “interface” to ease that negotiation process and reduce transaction costs.<sup>45</sup>

In the context of the standardization of products, the benefit of interoperability is generally viewed as a network effect. A network effect is present when the value of a good is greater if more people use it, as is the case for many “network” goods, such as telephones and the Internet.<sup>46</sup> The standardization of a product interface produces such an effect because it allows individual products to work with a wide variety of other products. The lowering of contractual negotiation costs discussed above might not, strictly speaking, be thought of as a network effect, because it does not give the contract a greater value but instead lowers the cost of using it. That is, it lowers the effective price of the contract, rather than increasing the demand for it. Nevertheless, the effect is similar in that consumer surplus is greater in each case.

Moreover, contract standardization can also increase the inherent value of the contract in a more direct way: a contract that is more commonly used is more commonly interpreted by courts, and therefore is a contract whose meaning and interpretation is more certain.<sup>47</sup> To the extent that a user values this certainty, as most do, the contract is therefore more valuable even for users who are not familiar with its terms.<sup>48</sup> This effect has been recognized in some cases involving standard contracts, such as bond indentures:

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45. See *id.* at 9 (discussing “uniformity standards”).

46. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 483 (1998); Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 987 (2003) (“The benefits created by network effects can be direct or indirect. A direct benefit is the value added to the network when additional users join, directly benefiting all network participants.”).

47. *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982); *Broad v. Rockwell Int’l Corp.*, 642 F.2d 929, 943 (5th Cir. 1981); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1112 (2006) (“Positive network effects can flow from common or boilerplate clauses in any contract. Widespread, shared contract language is more likely to have taken on a lay meaning, and to have been previously interpreted, perhaps definitively, by courts. If courts have fleshed out the application of language, a drafter can be confident about its future application. The value of contract language can therefore increase as the number of others adopting the language increases.”).

48. Of course, if courts interpret a standard term in an unexpected way, it may be that the contract’s value is lessened for a particular party. But the gain in certainty may still exist.

[U]niformity in interpretation [of bond indenture provisions] is important to the efficiency of capital markets.... Whereas participants in the capital market can adjust their affairs according to a uniform interpretation, whether it be correct or not as an initial proposition, the creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets. Such uncertainties would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice. Just such uncertainties would be created if interpretation of boilerplate provisions were submitted to juries sitting in every judicial district in the nation.<sup>49</sup>

It is important to remember, though, that the same uniformity that reduces transaction costs in either products or contracts also limits consumer choice.<sup>50</sup> Uniformity is exactly that: a limitation on choice. The benefits of contractual uniformity are more likely to outweigh its harms when contracting parties are uniform as well. Significant differences among consumers would likely mean differences in contractual preferences, which would make it difficult to achieve uniformity without denying some consumers their preferences. Of course, standardized contracts can offer menus of choices rather than single terms, but that lessens the value of the standardization.

Similar points apply to network effects. Network effects provide increased value, but when they are present, they can also constitute significant barriers to entry.<sup>51</sup> It is difficult for even improved products, like new contractual forms, to establish the informational benefits that widely adopted and long-used contracts will have. In that respect, firms and consumers may prefer the known quantity of an established contract term to a new and apparently better term whose interpretation is uncertain.

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49. *Sharon Steel*, 691 F.2d at 1048.

50. This effect depends upon the completeness of the standardization. If standard contracts contain options or menus, they reduce, but do not eliminate, choices and may have beneficial effects when contracting parties have bounded rationality.

51. Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 917 (2000) ("Application effects and network effects are similar in that they both create barriers to entry for competitors and pressure for standardization.").

Although it is possible that in the standardization process only undesirable contract terms will be eliminated, or that the benefits of uniformity will exceed its costs, it is also possible for standardization to be used by sellers as a practice that constitutes or facilitates collusion. Indeed, the fact that firms have agreed on a form contract means not only that they are likely to propose using the contract, but also that they are less likely to be willing to deviate from it or even to discuss its weaknesses.<sup>52</sup> Moreover, because discussion of, and competition among, contracts can serve to elicit information about the underlying transaction to which the contract applies, an agreement on a contract may make such information more difficult to obtain. In this respect, the informational aspect of contracts may cause them to differ from other, more typical products.<sup>53</sup>

## 2. *Quality Standards: Legal Self-Regulation*

Firms may also seek to regulate their conduct in more fundamental ways that are not aimed specifically at uniformity and transaction costs. For example, they might choose to forbid certain terms that are arguably unfair from inclusion in the contract. This sort of agreement would pose questions similar to those that are presented for product standards when industry groups make efforts to impose, for example, safety standards. The focus is not on transaction costs but on what are perceived as socially desirable goals. The problem, from an antitrust perspective, is that the firms entering into the agreement and their customers might not have a uniformly accepted view of what goals are socially desirable.

The argument for the use of quality standards is stronger when consumers may have difficulty evaluating the alternative products available. In that case, because the market will not discipline sellers providing less desirable goods, an agreement on a minimum quality level may be desirable. For that reason, such standards are often

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52. See Mark R. Patterson, *Law-Fixing: Should Lawyers Agree How To Interpret Statutes?*, 11, 16 (Fordham Univ. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 50, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=555706](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=555706) (making similar point regarding an agreement among lawyers on how to interpret a statute).

53. Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 135 (1989); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 721 (1997).

seen in the professions, in which the quality of services can be difficult for laypeople to evaluate. In the business-to-consumer context, a similar argument could be made that consumers may not adequately assess contract terms. The problem in this context is not so much expertise as it is the cost of taking the time to evaluate the contract, but the principle is the same: protection of consumers may be desirable.

A particular problem with quality standards is that there is often no reason why a single firm could not adopt the term individually. That is, because the goal is not uniformity, but the availability of a desirable product or contract characteristic, there would generally be no obstacle to a single firm adopting it unilaterally. Indeed, to the extent that consumers favor that characteristic, one would expect sellers to adopt it unilaterally and advertise it. But just as consumers may not have time to evaluate contracts, they may not have time to evaluate advertising, especially if the product characteristic at issue is not an important one. Moreover, if the goal is to have *both* desirable terms and uniformity, a collective effort may be necessary.

It is significant that because a contract is not only a business document but also a legal one, the parties can define their own law in a way that differs from standardization of the characteristics of products.<sup>54</sup> They might, for example, agree on a deviation from a default contract-law rule, or on the choice of a particular legal regime. Actually, any quality standard for contracts could be seen as altering the law in this way, given that contracts define the legal terms for the transaction. But it is worth distinguishing standardization that achieves uniformity of the legal elements of the contract from other standardization, which more typically focuses on the business elements of a transaction.

The benefits of conforming legal rules differ significantly in Europe and the United States.<sup>55</sup> In the European Union, where

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54. This is made explicit in the French Civil Code: "Agreements lawfully entered into take the place of the law for those who have made them." CODE CIVIL art. 1134 (Fr.), *translated at* [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm#Section%20I%20-%20General%20Prov](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#Section%20I%20-%20General%20Prov). Of course, the same provision might be interpreted differently in different jurisdictions. Still, standardization is likely to narrow the range of such interpretations.

55. See Collins, *supra* note 11, at 788-89 ("In comparison to the United States, the greater diversity of laws in Europe may continue to reduce access to markets, if only by creating

there remains considerable variation in the contract law of the member states, standard-form contracts can serve to conform contractual relationships in the different states, at least to the extent permitted by contract law.<sup>56</sup> This conformity of contractual relationships can in turn serve the goal of market integration of the European economy.<sup>57</sup> Indeed, this benefit of standard contracts has been a focus of recent communications by the European Commission.<sup>58</sup>

The United States is different in this respect. Although contract law is state law, so that formally there are fifty different bodies of contract law, the law is largely uniform among the states.<sup>59</sup> As a result, standard-form contracts are not generally viewed as a means of integrating contract law—effecting legal integration, if you will<sup>60</sup>—but as an efficient means of reducing transaction

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psychological barriers in the form of persistent worries ... arising from unexpected legal complications occurring in cross-border trade.”).

56. See *European Contract Law*, *supra* note 15, at 6 § 2.2.1 (“The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU-wide use rather than just in a single legal order. Currently parties often think they have to use different sets of STC, due to the existence of differing mandatory requirements in Member states’ laws, either in contract laws or in other areas of the law.”); *cf.* Browne & Coon, *supra* note 32, at 115 (“One potentially significant effect of consumer protection laws stems from their demonstrative effect—jurisdictions observe a consumer protection law in another jurisdiction, promoting the movement of local laws in a similar direction. For example, on April 5, 1993, the terms of the AGBG were embraced by the European Union (EU) in the European Community (EC) Directive on Unfair Terms in Consumer Contracts (Directive), although with some slight modification.”).

57. This assumes, though, that remedying shortcomings in the legal system is a valid goal. In fact, it is not at all clear, even if it were agreed to be clearly desirable to integrate European contract law, or to increase U.S. consumer protection law, as discussed below, that private self-regulation would be the proper approach. Generally speaking, antitrust law, at least in the United States, takes the approach that private agreement on the terms of doing business is inappropriate even if those terms would be desirable if they were adopted by individual firms.

58. See *European Contract Law*, *supra* note 15.

59. This uniformity has been achieved by statute in the sale of goods, through widespread adoption of the Uniform Commercial Code, but even in other contexts the common derivation of U.S. contract law from English sources has resulted in great similarity among the laws of the different states. *But see* Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts* (N.Y. Univ. Law & Econ. Working Papers, Paper No. 72, 2007), available at [http://lsr.nellco.org/nyu\\_lewp/72/](http://lsr.nellco.org/nyu_lewp/72/).

60. Indeed, a recent U.S. example suggests that parties will not always choose this legal uniformity. A form contract promulgated by the American Trucking Associations (ATA) actually results in less uniformity. Uniform law for certain aspects of trucking in the United States is provided by federal provisions that preempt state law. These provisions are not

costs—effecting economic integration. In fact, even the transaction-cost-reduction justifications are less compelling in the United States. Language uniformity and large firms that operate throughout the United States and beyond contribute both to greater commonality among contracts, even without interfirm standardization, and to lower costs in moving from one contract to another.<sup>61</sup>

An analogy can be drawn between this sort of “legal standardization” and the use of “code” as an alternative to law in the product context. As described by Joel Reidenberg and by Lawrence Lessig, the choice of particular software code for computer-related products can define and alter the way law is applied:

This code sets the rules of this space; it regulates behavior in this space; it determines what’s possible here, and what’s not possible. And as we look to this code maturing, Reidenberg rightly saw that this code would become its own type of law. That we could define life in cyberspace as we wanted—with privacy, or without; with anonymity or without; with universal access, or without; with the freedom to speak and publish, or without—and then write what we wanted into the code.<sup>62</sup>

A standard contract can define contractual options in a similar way. Of course, the concept is not so novel for contracts, which are legal documents to begin with, but standardization on legal options can limit the realm of legal choice for parties in much the same way as code can limit legal options in cyberspace.

The implications for contract law can be considered in light of the distinction between mandatory and default contract rules. If we

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mandatory, though, and the ATA form contract waives them, thus making state law applicable. To be sure, the form contract provides its own alternatives, which might themselves result in a uniform contract, though one different from the uniform federal version. But the contract also leaves a blank for the parties to specify which state’s laws apply, which could affect the interpretation of the contract’s provisions. Uniformity appears not to have been a significant goal in creation of the ATA form. *See infra* Part II.B.1.

61. *See* Perillo, *supra* note 10, at 182 (“The drafting of standard forms by national enterprises has properly been described as ‘unilateral private ordering of terms imposed by the dominant party’” (quoting Irma S. Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 *LOY. L.A. L. REV.* 137, 138 (2006))).

62. Lawrence Lessig, Keynote Address at Fordham Law School Media Convergence Conference: Code and the Commons 5 (Feb. 9, 1999), available at <http://cyber.law.harvard.edu/works/lessig/Fordham.pdf>.

assume that the choice between mandatory and default rules in contract law is a considered one, standardized contracts can distort that choice. By making uniform a particular term, that term effectively becomes a mandatory one, at least to the extent that users of the contract decline to renegotiate it.<sup>63</sup> This seems especially problematic for terms that go to essentially legal, rather than business, questions, such as the alteration of the date at which the statute of limitations begins to run, an instance discussed below.<sup>64</sup> In this sense, the legal self-regulation of standardized contracts can usurp the roles of the legislature and courts.

Simon Whittaker has made this point, suggesting that such modifications of the law could be viewed in Europe as unfair contract terms:

Now, it could be said that any European standard terms could simply not worry too much about these differences but could instead set a standard position in the contract, reflecting or not reflecting the default positions in national laws. But how would this work? Where the applicable law does not itself take a default position on the issue in question, then, in principle, the term would be given effect, but where the applicable law *does* take a default position, then the term's effect would immediately run into difficulty. Unless its substance were identical to the default rule, it would look like a contractual exclusion or modification of the law and, therefore, be potentially vulnerable under national laws governing unfair contract terms or other mandatory rules.<sup>65</sup>

Whether such alterations in default contract rules would be viewed in the United States as unfair, or unconscionable, is not clear, but alteration of mandatory rules certainly seems problematic, particularly when contracting parties may not be aware of the rules.<sup>66</sup>

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63. Even if the parties do choose to negotiate a change to a standard contract, the standard's agreed-upon choice of the default rule can be important. *See infra* text accompanying note 260.

64. *See infra* text accompanying notes 166-72.

65. Simon Whittaker, *On the Development of European Standard Contract Terms*, in *STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW* 150 (Hugh Collins ed., 2008).

66. *Cf. infra* text accompanying notes 186-91.

### *B. Examples of Standardized Contracts*

The following paragraphs briefly describe several examples of standardized contracts. The purpose here is not to discuss these contracts in detail, but merely to introduce them. The implications of the contracts and their standardization are discussed later in the Article.

#### *1. American Trucking Associations*

The American Trucking Associations (ATA) is a trade association of trucking companies. The ATA recently promulgated a model carrier-broker contract—actually, two contracts, a short one and a long one—to govern the relationship between motor carriers, or trucking companies, and the brokers that make the arrangements under which those carriers transport goods for shippers.<sup>67</sup> The ATA presented the model contracts as alternatives to another model contract proposed by the Transportation Intermediaries Association (TIA),<sup>68</sup> an organization whose members include the brokers who are the parties on the other side of the carrier-broker transaction from the members of the ATA:

The ATA model contracts follow the release earlier this summer of a TIA-developed model motor carrier/broker agreement. ATA has previously cautioned its members that it believes that the TIA model, which has not undergone DOJ antitrust review, favors in many instances the interests of brokers and shippers over that of motor carriers.<sup>69</sup>

The main point of contention between the ATA and the TIA, judging from the ATA press release, appeared to be that “the TIA model asks motor carriers to agree that the broker ‘is the sole party responsible for payment of carrier’s charges’ and contains an

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67. Am. Trucking Ass’n, *ATA Unveils Model Motor Carrier/Broker Agreements* (Aug. 15, 2006), <http://www.truckline.com/Advissues/Litigation/Pages/Carrier%20Broker%20Agreements.aspx>.

68. Transp. Intermediaries Ass’n, *Transportation Intermediaries Association Introduces Model Broker-Carrier Contract*, BUSINESS WIRE, June 5, 2006.

69. Am. Trucking Ass’n, *ATA Unveils Model Motor Carrier/Broker Agreements*, *supra* note 67.



absolute prohibition against motor carriers seeking payment of freight charges from a shipper that has paid a broker.”<sup>70</sup> One industry commentator pointed out the risk that this approach poses for brokers.<sup>71</sup> Moreover, he asserted that this may have disparate effects on large and small brokers:

This possibility of a major customer default is the reason numerous sophisticated brokers will not guarantee payment of freight charges incurred for the account of Rust Belt shippers with junk bond status. Smaller brokers should recognize the credit risk involved in guaranteeing payments notwithstanding shipper insolvency and the possibility of offset.<sup>72</sup>

From this perspective, it appears possible that the TIA model puts small brokers at a distinct disadvantage, because they are assuming the credit risk of the shippers. Larger brokers are presumably better able to assume that risk than are smaller brokers. Interestingly, though, it is not clear what position the ATA agreement adopts on this issue. The ATA agreement states that “it shall be Broker’s responsibility to remit freight charges owed to Carrier ..., regardless of any late payment or nonpayment to Broker by Shippers.”<sup>73</sup> This provision does not prevent the carrier from seeking payment from the shipper, but, like the TIA agreement, it makes the broker responsible for payment regardless of whether the shipper has paid.<sup>74</sup> In that respect, the ATA model continues to leave the brokers at risk, but it also provides that shippers continue to be liable, or at least does not clearly provide otherwise.

More importantly, perhaps, the ATA agreement does not provide contracting parties with various options on this term, or highlight the issues that are the subject of disagreement, but instead merely applies the provision quoted above.<sup>75</sup> That approach seems intended

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70. *Id.*

71. Henry E. Seaton, Who Pays the Freight? (Jan. 2007), <http://www.transportationlaw.net/articles/jan07article.html>.

72. *Id.*

73. Am. Trucking Ass’n, Model Motor Carrier/Broker Agreement § 3.2(c), <http://www.truckline.com/AdvIssues/Litigation/Pages/Carrier%20Broker%20Agreements.aspx> (follow “Model Motor Carrier-Broker Agreement” hyperlink) (last visited Oct. 16, 2010) [hereinafter ATA Model Motor Carrier/Broker Agreement].

74. *Id.* § 3.2.

75. *Id.*

more to ensure that carriers are protected than to ensure that the parties carefully consider their positions on what seems clearly to be a competitively significant term. The failure to provide or explain options is especially significant because a previous ATA model agreement for agreements between carriers and shippers provided commentary for its various sections outlining alternative provisions.<sup>76</sup>

## 2. American Institute of Architects

One of the more prominent instances of collectively created standard-form contracts in the United States is that of the American Institute of Architects (AIA). The AIA is the “dominant” provider of building design and construction documents, and supplies a wide range of documents that are commonly used in the construction industry.<sup>77</sup> It provides both form contracts that primarily involve provision of architectural services and contracts that primarily involve other relationships, such as contracts for use by building contractors and property owners.<sup>78</sup>

Although the AIA promotes its contracts as balanced,<sup>79</sup> Justin Sweet notes several ways in which the AIA’s documents are designed to protect the financial interests of architects.<sup>80</sup> AIA contracts also pose some other interesting contractual issues:

What many owners, contractors, and other users of AIA forms do not realize, however, is that the form contract they sign also binds them to approximately 50 additional pages of “general conditions” incorporated by reference into the contract. AIA Document A201, which contains these general conditions, is rarely attached to the contract that is signed—and, in fact, must be purchased separately from the AIA. Unfortunately, many parties discover the existence of the A201, and the additional

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76. See Am. Trucking Ass’n, Model Truckload Motor Carrier/Shipper Agreement with Commentaries, <http://www.truckline.com/AdvIssues/Litigation/Carrier%20Shipper%20Agreements/Model%20Agreement.pdf> (last visited Oct. 16, 2010).

77. Justin Sweet, Essay, *The American Institute of Architects: Dominant Actor in the Construction Documents Market*, 1991 WIS. L. REV. 317.

78. See Am. Inst. of Architects, Document Synopses by Family, <http://www.aia.org/contractdocs/aia076693> (last visited Oct. 16, 2010).

79. See *infra* text accompanying note 217.

80. Sweet, *supra* note 77, at 320, 330-31.

terms therein, only when there is a dispute. At that point, the parties learn that they agreed to very specific procedures related to change orders, insurance, dispute resolution, and payment—procedures they may not have previously contemplated much less agreed to had they been aware that such terms existed.<sup>81</sup>

The AIA has made some changes to the contracts in recent years, but among the AIA contracts' problematic provisions have been requirements of mandatory arbitration,<sup>82</sup> alteration of the statute of limitations,<sup>83</sup> and waivers of consequential damages.<sup>84</sup> Although these provisions may not always be inappropriate, to the extent that they favor architects, they may raise questions about the AIA's standardization.

Other AIA contracts are also sometimes subject to criticism. For example, a “prominent” lawyer-architect recently objected to several AIA contracts, which he said have flaws regarding “issues of indemnity, mutual waivers of claims, and insurance.”<sup>85</sup> The lawyer also “[took] issue with the makeup of the [contractually-created entity’s] governance board because it not only guarantees the owner majority control ... but it also may violate licensing laws in some states.”<sup>86</sup> In response, the AIA indicated its view that the contracts were satisfactory, but said also that “the AIA knew the documents would be ‘thought-provoking.’”<sup>87</sup>

### 3. Insurance Services Office

In the United States, much of the work of generating insurance policy forms is done by the Insurance Services Office, Inc. (ISO), an

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81. C. Daniel Lins, AIA General Conditions: What You Don't Know Might Hurt You, <http://www.mglaw.net/2008/08/aia-general-conditions-what-you-don't-know-might-hurt-you/> (last visited Oct. 16, 2010).

82. *Id.*

83. *See infra* text accompanying notes 166-72.

84. *Id.*; *see also* AIA Contract Documents: Of Antelopes and Alligators—The AIA A201 Waiver of Consequential Damages from the Owner's Perspective and Other Troubling Tales, [http://www.acrel.org/Documents/Seminars/a002113\(1\).pdf](http://www.acrel.org/Documents/Seminars/a002113(1).pdf) (last visited Oct. 16, 2010).

85. Nadine M. Post, *IPD Contracts Draw Criticism from Lawyer*, ARCHITECTURAL REC., June 15, 2009, <http://archrecord.construction.com/news/daily/archives/090615ipd.asp>.

86. *Id.*

87. *Id.*

association of insurers.<sup>88</sup> The ISO is an organization somewhat similar to the AIA and performs a variety of functions for the insurance industry, among them the preparation of model insurance policies.<sup>89</sup> With each policy, ISO provides actuarial and rating data,<sup>90</sup> all of which make it very efficient for insurers to use ISO forms. Indeed, the Supreme Court has said that “[m]ost ISO members cannot afford to continue to use a form if ISO withdraws these support services.”<sup>91</sup>

ISO is owned in large part by insurers, so that its operation could be viewed as an agreement among those insurers. Its contract-development process, however, can have input from other industry participants:

The ISO drafting process is reminiscent of the legislative process, with input from interest groups and regulators, and collaborative drafting, comment receipt, and revision. The revision of standard form policies is akin to amendment of legislation. The issuance of a new endorsement to meet a new problem (*e.g.*, the total exclusion of asbestos or pollution coverage) has elements of amendment, the promulgation of a new regulation, or an agency opinion.<sup>92</sup>

Of course, it is not like legislation if the insurers, rather than legislators, control the process. In fact, an antitrust suit in the late 1980s alleged that the involvement of insurers in the ISO’s preparation of form contracts was an antitrust violation. The suit was settled by the insurers with the State of Texas with an agreement that insurers would no longer have decision-making power regarding policy language, though ISO could still “consult” with them.<sup>93</sup>

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88. There are other similar but smaller organizations, such as the American Association of Insurance Services. 1 JEFFREY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS* § 4.05[A] (3d ed. 2006 & Supp. 2010).

89. *Id.*

90. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993).

91. *Id.*

92. 1 STEMPEL, *supra* note 88, § 4.05[A].

93. Eric N. Berg, *Four Big Insurers Settle Texas Antitrust Case*, N.Y. TIMES, Mar. 28, 1991, at D2 (“The Insurance Services Office will change its policy forms decision-making process nationwide as a result of an antitrust suit settlement reached with Texas state officials. ISO agrees that decision-making authority in ISO with respect to all Policy Forms that are filed or to be filed in Texas shall be exercised by ISO staff, rather than by participating ISO

Indeed, insurers have sought to retain influence over the ISO. In *Hartford Fire Insurance Co. v. California*, a 1993 case, the Supreme Court considered efforts to force the use of insurance policy forms with particular terms.<sup>94</sup> The ISO had proposed to offer two alternative forms, one for what was at the time the traditional “occurrence” policy and another for a “claims-made” policy.<sup>95</sup> Several insurers objected and organized a boycott of the ISO forms, enlisting reinsurance companies in the boycott as well.<sup>96</sup> As a result, the ISO responded to some of the insurers’ demands.<sup>97</sup>

The Court had no trouble concluding that the boycotters’ conduct was anticompetitive. The conduct, however, was arguably exempt from antitrust scrutiny under the McCarran-Ferguson Act, which provides that the antitrust laws apply to “the business of insurance” only “to the extent that such business is not regulated by State Law.”<sup>98</sup> Because insurance generally *is* regulated by state law, the McCarran-Ferguson Act largely exempts insurance from antitrust scrutiny.<sup>99</sup> There is an exception to the Act, however, that makes antitrust law applicable “to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.”<sup>100</sup> The Court concluded that the allegations were sufficient to make out a claim

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insurers, according to the settlement agreement.”).

94. *Hartford*, 509 U.S. at 770-71.

95. *Id.* at 773.

96. *Id.* at 775.

97. *Id.* at 775-76.

98. 15 U.S.C. § 1012(b) (2006). The Court considered whether the conduct alleged might have been a “boycott,” which is an exemption to the antitrust immunity conferred by the McCarran-Ferguson Act. *Hartford*, 509 U.S. at 780-81; *see also* UNR Indus., Inc. v. Cont’l Ins. Co., 607 F. Supp. 855, 862-63 (N.D. Ill. 1984) (“Therefore, the conspiracy to refuse to issue occurrence policies, while it might violate the antitrust laws as a concerted refusal to deal, is exempt from antitrust scrutiny under the McCarran-Ferguson Act.”); *Pierucci v. Cont’l Cas. Co.*, 418 F. Supp. 704, 707 (W.D. Pa. 1976) (dismissing complaint alleging that insurers “fix[ed] the terms of [insurance] policies” because state law provided for approval of policies, and therefore complaints about policy terms should have been made to state regulators).

99. As discussed subsequently in the text, *infra* notes 103-07 and accompanying text, many argue that insurance should receive more antitrust scrutiny. *See also* ABA SECTION OF ANTITRUST LAW, INSURANCE ANTITRUST HANDBOOK 2 (Michael Blankshain ed., 2d ed. 2006) [hereinafter ABA INSURANCE ANTITRUST HANDBOOK] (“Legislators at both the national and state levels have made efforts to significantly increase the insurance industry’s exposure to the antitrust laws.”).

100. 15 U.S.C. § 1013(b).

of a boycott that would subject the insurers' conduct to the antitrust laws.<sup>101</sup>

As a result of the procedural posture of the case, though, the Court was not called upon to provide a full antitrust analysis of the effect of the standardization. It did not, for example, need to decide whether the standardization would have been anticompetitive had the ISO not been coerced to make the changes. In other words, it might have been the coercion that was the anticompetitive act, so that it would have been anticompetitive regardless of the competitive effect of the standardization itself. In any event, in the absence of the coercive boycott, the standardization would have been exempt from antitrust scrutiny under the McCarran-Ferguson Act.<sup>102</sup>

In fact, though, many view the ISO contracts as both unfavorable to policyholders and difficult to understand. This was especially apparent in the aftermath of Hurricane Katrina in New Orleans in 2005. One of the primary legal issues that arose following Katrina was whether the exclusion in the ISO policies for damage from "flood" included damage from the breached levees in New Orleans. Although a district court concluded that damage from the breached levees was covered,<sup>103</sup> the court of appeals disagreed, concluding that flood damage was excluded "unambiguously."<sup>104</sup> Neither court addressed any significance of the drafting of the policies by the ISO.<sup>105</sup>

Katrina increased the calls for repeal of the McCarran-Ferguson Act, and those calling for the repeal sometimes point to the ISO as a source of anticompetitive effects. For example, in Senate testimony, J. Robert Hunter, Director of Insurance for the Consumer Federation of America, pointed to what he called "collusive activities" by "[c]artel-like organizations, such as the Insurance Services Office."<sup>106</sup> Those who call for repeal generally do not believe that

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101. *Hartford*, 509 U.S. at 780.

102. 15 U.S.C. § 1013(b).

103. *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 765 (E.D. La. 2006), *aff'd in part, vacated in part, and remanded*, 495 F.3d 191 (5th Cir. 2007).

104. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 196 (5th Cir. 2007).

105. Nor did other courts considering Katrina-related insurance issues. *See, e.g.*, *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007). *But see* Jay S. Goldbaum, Comment, *Katrina and Beyond: Judicial Treatment of Boilerplate Language in Standardized Insurance Contracts*, 2007 MICH. ST. L. REV. 453, 460-72.

106. *The McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust*

state regulation is adequate. In the testimony referred to above, Hunter called the Act “a truly astounding piece of legislation,” not only because it largely exempts insurers from antitrust laws, but also because it does not establish any other forms of oversight by the federal government on state regulation.<sup>107</sup>

### III. COMPETITION AND CONTRACT ANALYSIS

Competition law and contract law have both commonalities and differences. Both, for example, reflect fundamental concerns about efficiency. A focus on efficiency is more evident in antitrust law, in which economic efficiency is the touchstone.<sup>108</sup> Contract-law decisions do not emphasize efficiency so explicitly, but much contract scholarship is directed at evaluating the efficiency *vel non* of contract rules.<sup>109</sup> On the other hand, contract law’s emphasis on consent and self-determination by contracting parties is not a focus of antitrust law, which instead places limits on parties’ freedom of action.

The two bodies of law might view the same conduct differently. For example, an agreement to eliminate unfair contract terms would likely be viewed favorably under contract law, but it could be seen as anticompetitive under antitrust law,<sup>110</sup> which focuses more

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*Exemption: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of J. Robert Hunter, Director of Insurance, Consumer Federation of America), available at [http://www.consumersunion.org/pub/Antitrust%20Senate%20McCarran%20Repeal%20Testimony%202007%20\(2\).pdf](http://www.consumersunion.org/pub/Antitrust%20Senate%20McCarran%20Repeal%20Testimony%202007%20(2).pdf).

107. *Id.* at 1.

108. *See, e.g.*, *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (“[T]he emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency.”); Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037, 1040 (2010) (observing that “[a]ntitrust law,” has a “primary emphasis on economic efficiency”).

109. Contract law also arguably has concerns that go beyond efficiency, at least in Europe. *See* Study Group on Social Justice in European Private Law, *Social Justice In European Contract Law: A Manifesto*, 10 EUR. L.J. 653, 664-67 (2004) (contending that “fairness,” or distributive justice, is part of EU law).

110. If such an agreement were entered into by businesses in a way that benefited consumers, it might be viewed as procompetitive, especially if the terms could be viewed as the product of a market failure. But if the agreement were entered into by the consumers who would benefit from the change, it might be viewed as anticompetitive, and antitrust law would take a less favorable view.

on the competitive process than on the fairness of results.<sup>111</sup> Conversely, an agreement that produced more competitive benefits than harms would generally pass antitrust scrutiny, but to the extent that it resulted in a contract of adhesion, it might be viewed unfavorably by contract law, as for example under the unconscionability doctrine in the United States or unfairness regulation in Europe.

There are also several ways that the two bodies of law could interact in evaluating standardized contracts. For example, it might be that one body of law would provide rules that altered the legality of conduct under the other. Suppose a group of sellers agreed on a contract that eliminated a particular term that was unfavorable to buyers. From an antitrust view, it is possible that this could be viewed as procompetitive, assuming the benefits to buyers outweighed any competitive harms.<sup>112</sup> But then suppose that the eliminated term would have been unenforceable under contract law. In that case, it is less clear that there would be any real benefits to be obtained by the agreement.

To take another example, a few cases have indicated that contracts or contractual terms that have been standardized in an industry should be interpreted uniformly.<sup>113</sup> To the extent that this rule were applied to an arguably unfair contract, it could make enforcement of that contract more likely. On the other hand, uniformity does not imply enforceability: perhaps such a contract should be interpreted uniformly by striking it down in every instance. In fact, though, some courts have found the widespread use of a term a factor that points away from unconscionability. If contract law will apply a lower level of scrutiny to a standardized contract, that makes the role of antitrust law even more important.

Beyond the few cases that have advocated uniform interpretations, though, the courts have not devoted significant attention to

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111. See, e.g., *United States v. W. Elec. Co.*, 578 F. Supp. 668, 672 (D.D.C. 1983) (“[Antitrust] laws are intended to protect the competitive process, not to assure positive results for competitors.”).

112. That is the usual antitrust standard, but it is possible that the creation of a “new” contract would be treated even more deferentially. See Jonathan B. Baker, *Beyond Schumpeter v. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 597 n.62 (2007) (observing that “[a]ntitrust courts have arguably adopted a rebuttable presumption that new products or processes do not harm competition so long as they confer some benefits to buyers”).

113. See *supra* text accompanying notes 47-49.



interpretation of even widely used standardized contracts. With respect to the American Institute of Architects (AIA) contracts, for example, which are perhaps the most widely used standardized contracts, Professor Sweet says that “relatively few reported appellate decisions can be said to provide guides as to how AIA selected language will be interpreted.”<sup>114</sup> It is therefore somewhat difficult to predict how contract law will interact with antitrust law in this area.

It is also true that there are few decisions considering the anti-trust aspects of standardizing contracts. In the cases addressing product standards, the alleged injuries have generally been to competitors excluded from the market.<sup>115</sup> Although such injuries could be an issue for standardized contracts as well, there may also be harm to the counterparties to a contract when the parties on one side standardize the contract. As a result, it is not clear to what extent the approaches taken in challenges to product standards can be extrapolated to standard contracts.

The following material seeks to address the issue of contract standardization specifically by exploring the interaction of antitrust and contract law in this area. Part III.A focuses on product terms, considering standardization of terms both to reduce costs (interoperability standards) and to improve the contract (quality standards). Part III.B then focuses on the process of standardizing a contract and discusses the implication of different means of negotiation. Part III.C then addresses the question of adoption of standard contracts, and considers the possibilities both of voluntary adoption of contracts and of adoption incentives created by private organizations and by the state.

#### *A. Substance: Price-Fixing v. Standardization*

Generally speaking, antitrust law does not favor horizontal agreements on sales terms. Although the Supreme Court has not considered a case focusing on agreement on a contract in many

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114. Sweet, *supra* note 77, at 324.

115. Although standardization could cause harm to consumers (and presumably would, even in a case brought by an injured competitor), there have been relatively few cases brought by consumers.

years,<sup>116</sup> its decision in *Catalano, Inc. v. Target Sales, Inc.*, was somewhat similar.<sup>117</sup> In *Catalano*, the plaintiffs, beer retailers, alleged that a group of beer wholesalers had agreed to eliminate short-term trade credit on their purchases.<sup>118</sup> The Ninth Circuit had refused to apply a per se rule and instead required a showing of anticompetitive effect:

An agreement to fix credit, a “nonprice” condition of sale, may actually enhance competition. Proper analysis reveals “that an agreement fixing nonprice trade items may either help or hurt competition, depending upon industry structure.” ... [C]ompetition could be fostered by the increased visibility of price made possible by the agreement to eliminate credit. For example, an agreement to eliminate credit might foster competition by increasing the visibility of the price term, and hence, promote open price competition in an industry in which imperfect information shielded various sellers from vigorous competition.<sup>119</sup>

The Supreme Court disagreed, however, reasoning that “[a]n agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing.”<sup>120</sup>

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116. The most recent case specifically challenging standardization of a contract was *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930), *aff'g* 34 F.2d 984 (S.D.N.Y. 1929). In that case, the U.S. government challenged an agreement among movie distributors under which they agreed to do business with exhibitors only under a “Standard Exhibition Contract.” *Id.* at 37. Among other provisions in the contract was an arbitration provision that was the primary focus of the antitrust challenge. *United States v. Paramount Famous Lasky Corp.*, 34 F.2d 984, 985-88 (S.D.N.Y. 1929). The Supreme Court concluded that agreement on the provision was an antitrust violation, stating that “[t]he Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action.” *Paramount Famous Lasky*, 282 U.S. at 43. In determining that the provision injured competition, the Court appeared to rely on the fact that it was, in the Court’s word, “unusual.” *See id.* (stating that the arrangement “cannot be classed among ‘those normal and usual agreements in aid of trade and commerce’ spoken of in *Eastern States Lumber Ass’n v. United States*, 234 U.S. 600, 612 (1914)”).

117. 446 U.S. 643 (1980) (per curiam).

118. *Id.* at 643.

119. *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097, 1099 (9th Cir. 1979) (quoting L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 99, at 277 (1977)).

120. *Catalano*, 446 U.S. at 648.

The Court explicitly rejected the argument that the restraint would lead to greater price transparency:

Nor can the informing function of the agreement, the increased price visibility, justify its restraint on the individual wholesaler's freedom to select his own prices and terms of sale. For, again, it is obvious that any industrywide agreement on prices will result in a more accurate understanding of the terms offered by all parties to the agreement.... [T]here is a plain distinction between the lawful right to publish prices and terms of sale, on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other.<sup>121</sup>

The implications of *Catalano* for contract standardization are not clear. It seems likely that the credit restriction agreed upon in *Catalano* is not a term that would be favored either by contract law as fair or by antitrust law as procompetitive. Perhaps if the agreed-upon term had been more favorable, the Court would have viewed the case differently. On the other hand, the Court seemed to cast a broad net of condemnation: "It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers."<sup>122</sup> If eliminating any element of competition among sellers is a per se antitrust violation, then it would seem that any standardization of contract would be illegal, even when it reduces transaction costs and improves the quality of bargaining. In fact, though, the courts and agencies have generally been much more receptive to contract standardization.<sup>123</sup>

There are alternative ways to view standard contracts. Those who would view contracts as commodities provide support for the Supreme Court's approach in *Catalano*.<sup>124</sup> In that view, a contract is simply part of the product that is sold to the buyer.<sup>125</sup> Competition among sellers on contractual provisions, then, is just one aspect of product competition, and agreement on a contract would be

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121. *Id.* at 649-50.

122. *Id.* at 649.

123. See *infra* Part III.C.

124. See, e.g., Burke, *supra* note 1; Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133 (1989); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

125. See Burke, *supra* note 1, at 287.

equivalent to agreement on the definition of a product. In contrast, Stephen Choi and Mitu Gulati have recently argued that standard contracts should be interpreted as if they were statutes.<sup>126</sup>

These two views—standard contracts as part of the purchased product and standard contracts as part of the legal background governing the purchase—are presented in the literature as alternative conceptions, but the distinction might better be viewed as a question of fact. Some standardized contracts might indeed reflect efforts to standardize the terms of the transaction, which could be anticompetitive. Others, though, might simply be aimed at standardizing the legal backdrop for what would otherwise continue to be a vigorously bargained transaction.

### *1. Agreement on Price and Related Terms*

Many of the cases that have addressed standardized contracts fall clearly into the price-fixing category.<sup>127</sup> In fact, a significant proportion of the decided cases challenging agreements on contracts have not involved true standardization efforts.<sup>128</sup> Instead, these cases have involved simple agreements on sales terms, such as price, where the agreement was then memorialized or effected through a standard contract.<sup>129</sup> In these cases, there was not a colorable argument for the efficiency of standardization.<sup>130</sup> Therefore, the cases have correctly treated the agreements as per se illegal price-fixing agreements.

A prominent example involved the Dramatists Guild's long-term effort to encourage use of a standard contract.<sup>131</sup> The Guild promotes

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126. See Choi & Gulati, *supra* note 10.

127. See, e.g., *Estate of Garrison v. Warner Bros., Inc.*, Civ. No. CV 95-8328 RMT, 1996 WL 407849, at \*2 (C.D. Cal. June 1996) (involving a claim in which plaintiffs alleged the defendants had violated the Sherman Act by price-fixing and refusing to deal with talent who had entered into "standard net profits contracts").

128. See, e.g., *id.*

129. See *infra* text accompanying notes 132-33.

130. In one sense, price-fixing is always efficient, because it saves the cost of negotiating on price, but the efficiency does not outweigh the anticompetitive effect of price-fixing.

131. The most recent case addressing this effort is *Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555 (S.D.N.Y. 1983) (discussing whether the Dramatists Guild's internal agreement not to license a play except upon the terms of a form contract violates antitrust laws). See also *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945) (reversing the trial court's dismissal of an action for treble damages under the Sherman Act because requiring producers to sign the Guild's

a “Minimum Basic Production Contract” (MBPC) and has been subject to allegations that the Guild and individual playwrights “have conspired to fix the minimum prices and other terms on which they will deal with producers and have agreed among themselves that they will not license a play to producers except upon the minimum terms incorporated in a standard form contract [the MBPC].”<sup>132</sup> The effort to improve terms for playwrights even resulted in the unsuccessful introduction of the Playwrights Licensing Antitrust Initiative Act of 2004, which if passed would have provided that “the antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement for the express purpose of, and limited to, the development of a standard form contract containing minimum terms of artistic protection and levels of compensation for playwrights.”<sup>133</sup>

Some similar cases have considered contract standardization efforts that were conducted in association with agreements on price.<sup>134</sup> In such cases, the courts have sometimes treated the agreement on other contract terms as intended to prevent the agreeing firms from cheating on their price agreement.<sup>135</sup> As such, the anticompetitive effect of the standardization of the form contracts is clear, and it seems unlikely that any procompetitive effects could be sufficiently great to outweigh the anticompetitive ones. There appears to be no reported case in which it has been argued that an agreement on a form contract was sufficiently procompetitive to compensate for the effects of price-fixing.<sup>136</sup> Nor is

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form contract is prima facie evidence of restraint of trade).

132. *Barr*, 573 F. Supp. at 557.

133. S. 2349, 108th Cong. § 2(a) (2004). The Act would have exempted not just the development of a standard contract, but also “reaching a collective agreement among playwrights adopting a standard form contract developed pursuant to subsection (a) as the participating playwrights sole and exclusive means by which participating playwrights shall license their plays to producers.” *Id.* § 2(b).

134. *See, e.g.*, *Commodity Futures Trading Comm’n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 580-81 (9th Cir. 1982) (finding defendant engaged in standardized futures contracts and also set prices for its products according to the then-prevailing market rates).

135. *See, e.g.*, *Hyland v. Homeservices of Am., Inc.*, No. 3:05-CV-612-R, 2008 WL 4858202, at \*1 (W.D. Ky. Nov. 7, 2008) (noting, while granting class certification to plaintiffs, that plaintiffs had argued that defendants provided similar, “virtually standardized services” and exerted influence over a state real estate commission to maintain an antirebate rule to help prevent defendants from cheating on their price-fixing agreement).

136. In theory, the benefits of standardization of nonprice terms could outweigh the costs of price-fixing even when there is an actual price-fixing agreement. That could be true, for

it obvious how such standardization would be ancillary to the price-fixing; it seems unlikely that an agreement on price is necessary to the achievement of the cost savings from standardization of other terms. Here, too, *per se* treatment is appropriate.

But not all contract standardization efforts are associated with efforts to fix price. As Choi and Gulati's approach suggests, one can view standard contracts as part of the legal background against which price and nonprice competition takes place.<sup>137</sup> The agreement on this legal background by market participants, rather than its adoption by a legislature, is a source of concern, though, and is cause for antitrust scrutiny. As the Supreme Court said in its most recent standard-setting case, "[t]here is no doubt that the members of [standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."<sup>138</sup>

## 2. *Uniformity: Agreement on Minor Terms*

Agreement upon a uniformity standard is unlikely to be viewed as procompetitive unless the agreed-upon terms are minor. Although it is possible that the elimination of competition on significant terms could be procompetitive, that seems somewhat implausible. It would probably require that the cost of comparing those terms outweigh the benefits obtained from the availability of alternatives. This situation seems unlikely, especially because buyers need not compare alternatives in which they are not interested; they presumably would only incur the costs of comparison when they anticipated value from the effort.<sup>139</sup>

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example, if prices were within a very narrow range prior to the standardization, yet consumers spent considerable time analyzing insignificant nonprice differences among contracts. In that case, the elimination of price competition might cost the buyer little, but the elimination of the cost of comparing nonprice terms could provide significant savings. (Think about trying to determine which of thirty brands of toothpaste to buy.) But such a prospect seems sufficiently unlikely to argue for a deviation from *per se* treatment.

137. Choi & Gulati, *supra* note 10, at 1131-33.

138. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).

139. In theory, buyers could be mistaken about the value of comparison shopping, thinking it valuable when it is not. But again that seems implausible, and in any case it is not clear that antitrust law would accept an argument that sellers were protecting buyers from misguided comparison shopping. On this, see *infra* text accompanying notes 175-80, discussing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

The most likely argument for antitrust legality of an agreement on contract terms would be that any anticompetitive effect of the elimination of competition on those terms is outweighed by more effective bargaining on the remaining, more significant terms. It is true that this argument is much the same as one made by the defendants in *Catalano* and rejected by the Supreme Court.<sup>140</sup> Nevertheless, it is the basic competitive justification for uniformity standards, and is likely to succeed for at least some standardized contracts, particularly if the agreed-upon terms are less significant than the credit restriction in *Catalano*.

In a recent business review letter, the Antitrust Division of the Department of Justice (DOJ) took an approach that focused on the asserted minor nature of the agreed-upon terms.<sup>141</sup> The letter reviewed the model carrier-broker contracts<sup>142</sup> that were promulgated by the American Trucking Associations (ATA). The DOJ stated that it had no intention of challenging the proposed model contracts, observing that “[t]he model agreements do not contain any provisions specifying rates to be charged or other competitively significant terms.”<sup>143</sup>

As suggested above, however, it is not clear that all of the standardized terms are minor.<sup>144</sup> The ATA model contracts were presented as an alternative to the competing model contract proposed by the TIA, whose members are on the other side of the contract from those of the ATA.<sup>145</sup> The ATA agreement takes a different position from the TIA’s on the central point of disagreement suggesting that the contracting parties, who presumably are best informed regarding their contracts, believe that the issue is important.<sup>146</sup> Moreover, as discussed above, a possible effect of the

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140. See *supra* text accompanying notes 117-21.

141. Letter from Thomas O. Barnett, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Kenneth P. Ewing, Steptoe & Johnson LLP 2 (Aug. 10, 2006), available at <http://www.justice.gov/atr/public/busreview/217742.pdf> [hereinafter Barnett Letter] (regarding ATA’s proposed model contract).

142. See *supra* Part II.B.1.

143. Barnett Letter, *supra* note 141, at 2. The agency also noted that “use of the agreements or any of their provisions will be left to the determination of each company acting independently.” *Id.* This issue of the voluntary nature of adoption of the standard contract will be taken up below. See *infra* Part III.C.1.

144. See *supra* notes 70-73 and accompanying text.

145. See *supra* notes 67-69 and accompanying text.

146. See *supra* note 70 and accompanying text (noting that unlike the TIA Model Contract,

TIA version would be to put small brokers at a competitive disadvantage, which indicates that the issue is one of antitrust significance.<sup>147</sup>

The DOJ's business review letter does not address any of these issues. The letter simply relies on the statement quoted above regarding the absence of "competitively significant terms."<sup>148</sup> The DOJ's approach puts its phrase "competitively significant" at the center of the analysis, and the meaning of that phrase is not clear. It might mean that a term is one with respect to which firms are in fact not competing significantly. That is, it might mean that the firms' terms are already identical. If so, it is not clear that there would be a need for, or a benefit from, standardization.<sup>149</sup> And even if there would be value in standardization, it also raises the question of what the DOJ's basis is for its determination of competitive significance.<sup>150</sup>

The letter does not suggest that the DOJ conducted an independent assessment of the competitive significance of the standardized terms, or even that it relied on one submitted by the ATA. Presumably what the DOJ meant was that the agreed-upon terms did not include price, payment terms, limitations on remedies, or other key terms of the contract.<sup>151</sup> The European Commission has suggested a similar approach.<sup>152</sup> As the difference in opinion

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the ATA versions leave the issue of broker indemnification to the negotiations of the parties).

147. See *supra* text accompanying notes 71-72.

148. Barnett Letter, *supra* note 141, at 2.

149. If only a small number of firms deviated from what was otherwise a widely used term, there might be some reason for standardization, because counterparties might assume that all firms used the more common term, and it might be difficult to determine the true terms.

150. In other respects, too, the Barnett letter does not seem to capture the potential issues posed by the ATA agreement. For example, the letter states that it is issued on the understanding that the term regarding dispute resolution "would be left blank for each carrier to negotiate individually with brokers." Barnett Letter, *supra* note 141, at 2. In the published agreement, this is true only in a strained sense. The ATA Model Contract states "the terms and procedures set forth in Attachment 3 hereto shall be controlling if a dispute arises with regard to its application or interpretation." ATA Model Motor Carrier/Broker Agreement, *supra* note 73, § 10. This leaves the parties free to negotiate their own "Attachment 3," but the agreement as it appears on the ATA website includes an Attachment 3 that outlines detailed provisions for dispute resolution, including "final and binding arbitration under the Commercial Rules of the American Arbitration Association." *Id.* at Attachment 3, para. 2.

151. See Barnett Letter, *supra* note 141, at 2 ("The model agreements do not contain any provisions specifying rates to be charged or other competitively significant terms.").

152. See Commission Notice, Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) § 6, para. 164, available at



between the ATA and the TIA shows, though, it may be difficult for an outsider to the transaction to determine what is competitively significant.<sup>153</sup> As Hugh Collins has written, “[c]ourts do not have access to reliable information about the operation of particular markets in practice, so that in concentrating on the balance of the formal terms they may not understand the idiosyncratic conditions under which the market sector has to operate.”<sup>154</sup>

Moreover, if there are many agreed-upon terms, as in the ATA’s proposed contract and in many other standardized contracts, the cumulative harm in allowing one side to the contract to choose could be significant even if individual terms are not important.<sup>155</sup> If it is true that any harm that would otherwise be caused by allowing one party to define many minor terms would be prevented by an adjustment to the price, there might not be a problem.<sup>156</sup> But if the DOJ’s point is that the parties do not focus on these terms, then there is little to suggest that the standardization would result in a renegotiation of the price of the contract. Perhaps the standardization itself would make it cost-effective for the parties to focus on these terms, but it is far from clear whether that is so, or whether the DOJ focused on that issue.

To be sure, price could compensate for unfair or undesirable terms even if consumers were not focused on those terms. So long as

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF> (“No appreciable restriction is found ... in agreements ... that standardize aspects such as minor product characteristics, forms, and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.”). Like the DOJ, the EC does not offer any substantive justification for this position.

153. Although the effects of contract standardization would seem easy for lawyers to assess, because contracts are legal documents, an understanding of those effects may in fact require a fairly detailed understanding of the business context in which those contracts will be used. In fact, a trucking lawyer who has followed the history of the ATA and TIA agreements has said that the DOJ probably knew nothing of that history. Interview with Henry E. Seaton, Seaton & Husk, LP, in Vienna, Va. (Jan. 2008).

154. Collins, *supra* note 11, at 793.

155. This is especially so if the perceived insignificance of the terms is due in part to the infrequency with which they will occur. In that case, when there are many such terms, the likelihood of at least one term becoming relevant may be significant. Moreover, it is likely to be very difficult for the parties to evaluate the significance of these sorts of low-probability events, and the parties may have different views about the likelihood of their occurrence.

156. In the context of vertical restraints, and more particularly vertical *price* restraints, the usual justification for allowing manufacturers to impose minimum prices on their dealers assumes that such prices will force the dealers to provide more in the way of services.

there is vigorous price competition, sellers may be forced to charge a competitive price that reflects the other terms of the contract.<sup>157</sup> Moreover, this sort of price competition will increase when contracts are standardized. With unstandardized contracts, price might not respond fully to the inclusion of an unfair term. But this sort of competition requires that the market be a competitive one, and more particularly that it be one in which price competition is vigorous.

Just as importantly, perhaps, it requires uniformity among buyers. Although it is possible that sellers could divide themselves into several groups, each of which would serve a different group of buyers, that situation seems unlikely. If standardization results in uniformity on nonprice terms, it is likely that competition will drive sellers to uniform prices as well. In that case, some consumers will be disadvantaged by the agreement on nonprice terms, and others will be advantaged. This scenario is a fundamental problem with standardization, and it is a problem that price competition cannot solve.

It may be useful here to turn to contract law. Some courts have indicated that the standardization, or even uniformity, of contract terms across an industry will contribute to a finding of procedural unconscionability.<sup>158</sup> Courts take this approach because

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157. This is a critical, though unstated, aspect of Hugh Collins's description:

At first sight, such a regulatory strategy appears to pose a potential threat to competition in the market. It would require or induce all businesses in a particular trade sector to use the same standard form contract, thereby removing the possibility of competition between contract terms. But it seems unlikely in fact that there would be any significant anticompetitive effects caused by the use of standardised terms. The model standard form would not determine the price and the nature of the main subject matter of the contract, but would merely supply all the other standard terms of the transaction. For these ancillary terms, there is unlikely to be a competitive market, since consumers and small businesses normally concentrate their attention on the principal features of the transaction rather than the small print of the standard form contract.

Collins, *supra* note 11, at 800. In order that standardization of minor terms not have anticompetitive effects, it is not sufficient that, as Collins says, consumers are inattentive to them. *See id.* It must also be that there is sufficient competition on other terms, and that the competition on those other terms responds to the standardization.

158. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1148-49 (9th Cir. 2003) (upholding a conclusion of procedural unconscionability and noting that when customers complained about the arbitration clause at issue, "AT&T responded with a letter informing them that 'all other major long distance carriers have included an arbitration provision in their services

an element—in California, a sufficient element—in a determination of procedural unconscionability is that the contract at issue is one of adhesion, that is, a contract that a party can only accept or reject, but not negotiate.<sup>159</sup> Some contend that the availability of alternatives in the market will affect the adhesion analysis,<sup>160</sup> but if a contract is standardized across the industry, there will be no such alternatives.

Most states require both procedural and substantive unconscionability, however, and if the standardized terms are minor ones, perhaps substantive unconscionability would not be found. On the other hand, it is possible that even some minor terms might be viewed as sufficient to justify a finding of unconscionability—such a finding could be especially likely if the agreement on terms was viewed as establishing a high level of procedural unconscionability, because in many states less substantive unconscionability is needed if the level of procedural unconscionability is great.<sup>161</sup>

Here, reference to the European approach to unfair contract terms is helpful. The Council of the European Union's Unfair Contract Terms Directive seeks to establish community-wide elimination of unfair terms in business-to-consumer contracts.<sup>162</sup> It states that “[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>163</sup> More relevant to present purposes, it sets out a nonexclusive list of terms that “may be regarded as unfair.”<sup>164</sup> One could take the position that agreement by sellers on any of these

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agreement”).

159. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (reviewing principles of unconscionability).

160. See, e.g., Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1411 (1996) (“[A] free market ceases to exist ... unless the customer or the employee has some meaningful alternatives.”).

161. See *Armendariz*, 6 P.3d at 690 (“Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.” (quoting 15 WILLISTON ON CONTRACTS § 1763A (3d ed. 1972))).

162. Council Directive 93/13, *supra* note 16, art. 1, § 1.

163. *Id.* art. 3, § 1.

164. *Id.* art. 3, § 3; see also *id.* annex (listing potentially unfair contract terms).

terms would constitute both unconscionability (with the procedural element being provided by the agreement) and an antitrust violation, or perhaps a sufficient antitrust concern to require the sellers to demonstrate procompetitive effects, as in the “quick look” rule of reason.<sup>165</sup>

But the few contract decisions that consider standardization express little concern. The Fourth Circuit’s decision in *Harbor Court Associates v. Leo A. Daly Co.*, for example, considered a provision in the standard American Institute of Architects (AIA) construction contract that altered the default rule for the statute of limitations.<sup>166</sup> Under the usual rule in the two states at issue, the limitations period began to run at the time of discovery of the wrong, but under the AIA contract, the limitations period began to run at the time construction was complete.<sup>167</sup> Although one cannot be sure whether the DOJ would have considered this a “competitively significant” term, it seems unlikely, given the lack of scrutiny it applied to the ATA contract.<sup>168</sup>

In any event, the Fourth Circuit relied on freedom-of-contract principles to enforce the contractual alteration.<sup>169</sup> Indeed, the court made the point that price competition could serve to redress any imbalance produced by the provision:

For even if such a contractual limitation redounds only to [the architect’s] benefit—in the form of an increase in repose and a decrease in liability—[the developer] was free in return to reduce the compensation it was willing to offer for [the architect’s] services, or indeed to hire another architect for the project.<sup>170</sup>

Given that the contract was the AIA’s standard one, it is not clear, of course, that another architect would have used another provision.

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165. See, e.g., *Cal. Dental Ass’n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997) (explaining “quick look” rule of reason analysis).

166. 179 F.3d 147 (4th Cir. 1999).

167. *Id.* at 149.

168. See *supra* note 150.

169. See, e.g., *Harbor Court Assocs.*, 179 F.3d at 153 (“[I]t is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy.” (quoting *S. Neb. Rural Pub. Power v. Neb. Elec. Generation & Transmission Coop, Inc.*, 546 N.W. 2d 315, 319 (Neb. 1996))).

170. *Id.* at 151.

There is also no indication that the parties engaged in any negotiations regarding this provision. But they presumably could have, and the court noted that there had been no allegation “that this contract was induced by fraud or duress, or that the bargaining power of the parties was anything but equal.”<sup>171</sup> The court did, however, note that “the parties to the agreement are sophisticated business actors who sought, by contract, to allocate business risks in advance,” suggesting perhaps that the result might have been different in other circumstances.<sup>172</sup>

The DOJ letter and *Harbor Court* opinion support the view that neither under antitrust nor under contract law would standardization of minor terms receive searching scrutiny. Interestingly, though, the reasons given seem to some extent contradictory. In the business review letter, the DOJ relied on the fact that the terms at issue were not “competitively significant.”<sup>173</sup> But in the similar context of the AIA contract in *Harbor Court*, the court relied on the disadvantaged party’s ability to negotiate compensation for the restriction,<sup>174</sup> which seems to imply competitive significance. Of course, it is possible that the limitation date, in contrast to the terms at issue in the DOJ letter, *is* significant. But that is hardly clear, and it is not even clear how such a determination should be made.

### 3. *Quality: Agreement on Fair Terms*

Quality or regulatory standards pose a different problem. Here the goal of the sellers is to enter into an agreement that is “better” in some sense. Such an agreement should either benefit all buyers or provide enough benefits to some buyers to outweigh harms to others. It might also benefit sellers, or at least some sellers, by eliminating or lessening competition from those that would otherwise use less desirable alternatives. So, for example, in the product context, sellers of children’s toys might agree not to use lead paint, which, assuming all buyers would prefer toys without lead paint, would benefit both buyers and those sellers who would not

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171. *Id.*

172. *Id.*

173. See *supra* notes 141-43 and accompanying text.

174. *Harbor Court Assocs.*, 179 F.3d at 151.

use it in any case. In the contract context, sellers might agree, for example, not to disclaim warranties or not to require arbitration.

Even agreements that claim to be quality standards, however, may violate antitrust law. In *National Society of Professional Engineers v. United States*, the Court considered a provision of the society's code of ethics that effectively prohibited competitive bidding,<sup>175</sup> a prohibition that the society justified by arguing that competitive bidding would produce inferior engineering work.<sup>176</sup> The Court condemned the agreement, which it viewed as a "frontal assault" on competition.<sup>177</sup> Of course, the Court might reasonably have had some doubt as to the society's disinterestedness regarding the benefits of the agreement. In a case in which the claimed benefits were not so obviously likely to raise prices, a regulatory restraint might be permissible.

Unfortunately, it is not easy to find examples of clearly beneficial regulatory standardization, either of products or of contracts. In many cases, sellers offering beneficial terms to buyers would no doubt prefer to offer them unilaterally and advertise them to seek an advantage over their competitors. Perhaps only when the terms are minor and not likely to provide a competitive advantage would standardization be an appropriate strategy. In that case, a seller might want to adopt the favorable term, perhaps because it believes it will provide long-term competitive benefits, but might prefer not to put itself at a short-term disadvantage vis-à-vis its competitors. Of course, this is exactly the sort of elimination of competition with which *Professional Engineers* was concerned,<sup>178</sup> so the question is whether sellers could justify this sort of agreement.

Here we might again return to a focus on specific terms that have been determined to be unfair. At least in the consumer context, it seems that an agreement to eliminate such terms could be pro-competitive. Such an agreement seems different from the one in *Professional Engineers* for two reasons. First, competitive bidding

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175. See 435 U.S. 679, 682-83 (1978). The provision did not affect contracts formed between engineers and their clients, except in that it forbade submission of a fee proposal before a client had chosen an engineer and begun negotiations on a contract. *Id.*

176. *Id.* at 693-94.

177. *Id.* at 695.

178. *Id.* at 691-93 (noting that the ban on competitive bidding in the Society's agreement "restrain[ed] trade within the meaning of § 1 of the Sherman Act").

is not unfair, or at least the society in *Professional Engineers* could not rely on any previous determination to that effect.<sup>179</sup> Second, in the business-to-business context of *Professional Engineers*, the parties to the agreement are presumably able to defend themselves from unfair terms. It is in the consumer context that unfair terms might escape the attention of consumers, which creates a market failure that agreement on a standard contract could remedy.

So there might be some specific terms—perhaps those that have been found unconscionable—whose elimination would be both contractually fair and procompetitive. Of course, there is probably no consensus among the states on what terms are unconscionable. Still, it seems that an agreement to eliminate any term that has been held unconscionable in any jurisdiction would be a reasonable one, at least from a contract point of view. Most contract standardization does not, however, take the form of *prohibition* of undesired provisions. Instead, standardization usually consists of the *adoption* of particular terms.<sup>180</sup> Perhaps the adoption of a particular term when there is an alternative that has been determined to be unconscionable should be viewed as a quality standard, but this approach seems to attribute quality goals where none may exist.

In Europe, there has been consideration of a more systematic approach. Standardization has been seen as a means to harmonize European contract law. The focus is largely on uniformity, with the goal of integrating the European economy, but there is also concern about contract quality, as the European Commission has described:

As a first step in promoting the development of EU-wide standard terms and conditions, it is important to establish a list of existing initiatives both at a European level and within the Member States. Once such a list is made available, parties interested in developing standard terms and conditions could obtain information on similar initiatives in other sectors or in the same sectors in other Member States. Thus they could learn

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179. *Id.* at 692-93 (stating that “the ban [on competitive bidding] ‘impedes the ordinary give and take of the market place’ and substantially deprives the customer of ‘the ability to utilize and compare prices in selecting engineering services’” (quoting *United States v. Nat’l Soc’y Prof’l Eng’rs*, 404 F. Supp. 457, 460 (D.D.C. 1976))).

180. Sometimes, standard contracts offer alternative terms, but more often the standard provides only one option. *See, e.g., supra* text accompanying notes 75-76.

from the mistakes of others and benefit from their successes (“best practices”).<sup>181</sup>

It is not entirely clear whether the “best practices” referred to here are intended to promote uniformity or contract quality in the sense of fairness, but in the same communication the Commission made reference to quality issues. Specifically, it stated that it “intend[ed] to publish guidelines, the purpose of which [would be] to remind interested companies, persons and organisations that certain legal and other limits apply,”<sup>182</sup> and it referred specifically to the Unfair Contract Terms Directive and to the involvement in the process of “representatives from all relevant groups.”<sup>183</sup> The European Commission has also been engaged in an ongoing effort to reform European contract law, and much of that effort has been focused on ensuring contractual fairness.<sup>184</sup>

Despite the potential benefits of this sort of legal self-regulation, though, it may create conflicts with statutes or common law. Generally speaking, similar issues do not arise with uniformity or quality standards because there are few mandatory business terms. Even in the contract area, most legal rules are only default rules, not mandatory ones. But there are some legal rules that parties are not permitted to alter, or are permitted to alter only in certain ways, and attempts to self-regulate with respect to these rules are problematic.<sup>185</sup> Even where rules are only defaults, differences from jurisdiction to jurisdiction may suggest that standardization is undesirable.

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181. Commission of the European Communities, Communication, *A More Coherent European Contract Law: An Action Plan*, at 22 para. 86, COM (2003) 68 final (Dec. 2, 2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0068:FIN:EN:PDF> [hereinafter *Action Plan*].

182. *Id.* at 22 para. 88. The Commission later stated that it no longer planned to publish such guidelines. *European Contract Law*, *supra* note 15, at 7 (“The Commission does not intend at this stage to publish separate guidelines relating to the development and use of [standard terms and conditions].”).

183. *Action Plan*, *supra* note 181, at 22-23 para. 88.

184. See, e.g., Commission of the European Communities, *Second Progress Report on the Common Frame of Reference*, COM (2007) 447 final (July 25, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0447:FIN:EN:PDF> (stating that principles of “fair dealing” provide the essential background for formulating new EU contract-law provisions).

185. See *supra* text accompanying notes 161-63.



An example of these sorts of difficulties can be found in the 1989 (and still current) revision of the Joint Operating Agreement (JOA) for oil and gas exploration promulgated by the American Association of Professional Landmen (AAPL).<sup>186</sup> In a controversial amendment in the 1989 JOA, the AAPL sought to define the legal relationship among joint venturers, eliminating duties they might otherwise have:

It is not the intention of the parties to create, nor shall this agreement be construed as creating a mining or other partnership, joint venture, agency relationship or association, or to render the parties liable as partners, co-venturers, or principals. In their relations with each other under this agreement, the parties shall not be considered fiduciaries or to have established a confidential relationship but rather shall be free to act on an arms-length basis in accordance with their own respective self-interest, subject, however, to the obligation of the parties to act in good faith in their dealings with each other with respect to activities hereunder.<sup>187</sup>

The problem with this provision is that the law generally makes its own determination of partnership status and the existence *vel non* of fiduciary duties.<sup>188</sup> In a review of this issue, John Burritt

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186. See Am. Ass'n of Prof'l Landmen, About AAPL, [http://www.landman.org/WCM/AAPL/ABOUT\\_AAPL/AAPL/About\\_AAPL/About\\_AAPL.aspx?hkey=04c0535f-d6bd-4e38-a29f-39f11a4764c8](http://www.landman.org/WCM/AAPL/ABOUT_AAPL/AAPL/About_AAPL/About_AAPL.aspx?hkey=04c0535f-d6bd-4e38-a29f-39f11a4764c8) (last visited Oct. 16, 2010) ("Landmen constitute the business side of the oil and gas and mineral exploration and production team.").

187. Onecle, Sample Business Contracts, <http://contracts.onecle.com/ivanhoe/discovery.jv.2001.03.05.shtml> (last visited Oct. 16, 2010) (providing the full text of the JOA). This provision is discussed in John Burritt McArthur, *Judging Made Too Easy: The Judicial Exaggeration of Exculpatory and Liability-Limiting Clauses in the Oilfield's Operator Fiduciary Cases*, 56 SMU L. REV. 925, 954-59 (2003).

188. *Cf. Amoco Prod. Co. v. Charles B. Wilson, Jr., Inc.*, 976 P.2d 941, 955 (Kan. 1999) (refusing to enforce JOA's exculpatory provision because "parties in a joint venture stand in a close relationship of trust and confidence"). Professor David Pierce described the *Amoco Production* case as applying a "basic syllogism": "a joint operating agreement creates a joint venture, a joint venture creates fiduciary duties, therefore a joint operating agreement creates fiduciary duties." Richard James, Comment, *Kansas Oil and Gas Law: Defining the Duty Between Participants in a Joint Operating Agreement*, 39 WASHBURN L.J. 128, 138 (1999) (quoting David E. Pierce, *Kansas Supreme Court Applies Joint Venture Analysis to Operating Agreement*, OIL-GAS & MINERAL LAW SECTION (Kan. Bar Ass'n, Topeka, Kan.), June 1999, at 4).

McArthur notes that the enforceability of these provisions is not clear:

[A]nother review that covers all major oilfield jurisdictions concludes that exculpatory clauses, at least under certain conditions including that the exculpation be clearly expressed, are likely to be enforced in four states that lack anti-indemnity statutes (Colorado, Montana, Oklahoma, and Utah) and two states that exclude operating agreements from such statutes (Texas and Louisiana), but that New Mexico and Wyoming, two other major oilfield jurisdictions, would not enforce them.<sup>189</sup>

McArthur also discusses the antitrust implications of this provision of the JOA, though he notes that “[a]ntitrust litigation has been conspicuously absent from the exploration and production sector of the industry.”<sup>190</sup> He argues that the JOA is the product of the larger oil companies.<sup>191</sup> Perhaps the exculpatory clause would create an advantage for those companies.<sup>192</sup> McArthur argues that despite the efficiency benefits of a standard agreement, “[t]he oil and gas industry thrived in decades of vigorous exploration without giving operators an absolute shield against fiduciary liability” and “[i]t is hardly plausible that the recently expanded protection is needed to bring the JOA into existence or to secure its benefits.”<sup>193</sup>

Although there are obstacles to antitrust liability in this case,<sup>194</sup> a contract with standardized terms that are unenforceable is problematic, even if the terms are unenforceable only in some jurisdictions. Such terms could appropriately be labeled anticompetitive, especially given that all parties might not know about the unenforceability of the terms, which would distort competition among the

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189. McArthur, *supra* note 187, at 966-67 (citing Robert C. Bledsoe, *The Operating Agreement: Matters Not Covered or Inadequately Covered*, 47 ROCKY MTN. MIN. L. INST. 15-1, 15-4 to -18 (2001)); *see also Amoco Prod. Co.*, 976 P.2d at 954 (refusing to enforce JOA's exculpatory provision).

190. McArthur, *supra* note 187, at 967. He also notes that “[o]ne sign of the absence of antitrust litigation is the lack of significant law-review writing on oil and gas antitrust issues.” *Id.* at 967 n.146.

191. *Id.* at 966 n.142.

192. *Cf. supra* text accompanying note 72 (making analogous point about TIA agreement).

193. McArthur, *supra* note 187, at 971.

194. McArthur points out the difficulty of establishing an agreement on the JOA. *Id.* at 969-70.

parties. Even if all parties did know about the invalidity of the terms, it seems that competition is distorted when it takes place with only partly enforceable contracts.

Even in the absence of an antitrust violation, the contract could be unconscionable. As suggested above, the contract standardization could be sufficient to constitute procedural unconscionability,<sup>195</sup> and the unenforceable terms could satisfy the requirement of substantive unconscionability. On the other hand, one could take the position that an unenforceable term, because it is unenforceable, will not impose any contractual burden, and therefore should not be viewed as unconscionable. But this position assumes that the disadvantaged party knows enough to ignore, or seek a declaration of unenforceability of, the invalid term. If some do not, it seems that agreeing to put such a term in the contract is unconscionable.

Furthermore, as suggested above, it is questionable whether an agreement should standardize legal responsibilities when different jurisdictions have different rules regarding those responsibilities. Just as different parties may have different views regarding certain contractual issues, one can view different legal rules in different jurisdictions as taking different views on those issues. At the very least, then, one would expect a standardized contract to offer explicitly the alternative options for rules such as these.<sup>196</sup> To standardize a particular position seems to preempt not only competition among contracting parties, but also competition among legal jurisdictions.

### *B. Process: Transaction Costs and Bargaining*

Competition law and contract law have different views of the bargaining process. Competition law serves to ensure, at least generally, that bargaining is one-to-one. Although collective bargaining is permissible in some circumstances, such bargaining generally involves an agreement among competitors, so antitrust law requires that it be procompetitive.<sup>197</sup> But beyond this scrutiny

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195. See *supra* text accompanying note 158.

196. Cf. *supra* text accompanying note 76 (making an analogous assertion about the ATA agreement).

197. In the labor context, however, where much collective bargaining takes place, there is a specific antitrust exemption. See generally *Connell Constr. Co. v. Plumbers & Steamfitters*

of agreements, antitrust law does not focus particularly on the quality of bargaining. Contract law, on the other hand, is more substantive, emphasizing consent with doctrines that focus on duress and, in the procedural component of unconscionability, relative bargaining power and knowledge.

The importance of process to antitrust law is apparent in cases considering standards, because in such cases the courts have usually used a procedural test rather than a substantive one. In the United States, the Supreme Court set out the basic standard in *Allied Tube*: “When ... private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... those private standards can have significant procompetitive advantages.”<sup>198</sup> Despite that direction, however, there has been little emphasis on exactly what procedures are necessary, or which would be sufficient.

The European Commission’s approach to standardization appears to have elements similar to those relied upon by *Allied Tube*. In *Stichting Certificatie Kraanverhuurbedrijf (SCK)*, the Commission and subsequently the Court of First Instance considered actions by a certification body (SCK) for mobile-crane operators.<sup>199</sup> One element for determining whether the certification system restricted competition, the Commission said, was whether it was “completely open, independent and transparent.”<sup>200</sup> This presumably imposes requirements similar to *Allied Tube*’s requirement that a standard-setting system be “based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased.”<sup>201</sup>

It is not clear that this is the proper approach for a case involving standard-form contracts. The focus of the analysis is on whether fair and objective procedures have been applied, an approach that the

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Local Union No. 100, 421 U.S. 616, 621-22 (1975) (discussing organized labor’s exemption from federal antitrust law).

198. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

199. Joined Cases T-213/95 & T-18/96, *Stichting Certificatie Kraanverhuurbedrijf v. Comm’n*, 1997 E.C.R. II-1739.

200. *Id.* para. 125.

201. *Allied Tube*, 486 U.S. at 501.

courts perhaps adopt for product standards because they lack technical expertise in most areas of standardization.<sup>202</sup> But courts presumably understand contracts. Consequently, a closer, more substantive scrutiny might be appropriate for contractual standardization.<sup>203</sup> Whether this would take the form of a contract-law-like focus on fairness or would be based on some other criterion is not entirely clear.

Little attention has been paid by the courts, however, to specific criteria for reviewing the standard-setting process, with the statements from the cases discussed above constituting the key points. And even less attention has been paid to this issue in the few contract-standardization cases. Although the importance of involvement from both sides of the contract is sometimes mentioned, specific criteria or implications are not. Moreover, in cases where there have been shortcomings in the bargaining process, those shortcomings have not generally resulted in comment, let alone condemnation of the standardized contract.

Some specific criteria can be derived from statute. The process issues are addressed, if only briefly, in U.S. antitrust provisions set out in the Standards Development Organization Advancement Act of 2004.<sup>204</sup> This Act requires application of the rule of reason, rather than the *per se* rule, to “standards development activity”<sup>205</sup> and limits antitrust liability to single damages.<sup>206</sup> But these provisions apply only to “voluntary consensus standards,” which are “standards developed or adopted by voluntary consensus standards bodies”.<sup>207</sup>

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202. See Heike Schweitzer, *European Standard-Setting Policy and the Role of Competition Law*, in CURRENT DEVELOPMENTS IN EUROPEAN AND INTERNATIONAL COMPETITION LAW: 15TH ST. GALLEN INTERNATIONAL COMPETITION LAW FORUM ICF 2008, at 42 (Carl Baudenbacher ed., 2009) (“In principle, this assessment [of the competitive effect of a standard] would need to be based on an inquiry into the merits of the relevant standard—an analysis which competition authorities or courts are not well placed to perform.”).

203. On the other hand, it is possible that the effects of contractual standardization require a greater understanding of the market at issue than does the standardization of other products. See *supra* note 153 and accompanying text.

204. 15 U.S.C. § 4301 (2006).

205. *Id.* § 4302.

206. *Id.* § 4303(a).

207. *Id.* § 4301(a)(8) (citing OMB Circular No. A-119, 63 Fed. Reg. 8546, 8554 (Feb. 19, 1998)) (“The term ‘standards development organization’ means a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards

A voluntary consensus standards body is defined by the following attributes:

- (i) Openness.
- (ii) Balance of interest.
- (iii) Due process.
- (iv) An appeals process.
- (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.<sup>208</sup>

Although this definition does not condemn standard-setting processes that fail to meet the criteria set out, it does provide some concrete tests. Moreover, putting aside the due process and appeals requirements, the openness and balance criteria could be viewed as reflecting similar concerns in contract law. In unconscionability analysis, both the availability of information and bargaining power play roles, and those factors seem similar to the openness and balance-of-interest criteria. Furthermore, openness and balance appear to be formal and substantive sides of the same coin, with openness requiring access to the standard-formation process and balance requiring an ability to influence the outcome of that process.

The openness and balance of contract standardization are likely to be affected by the organizational model through which the standardization takes place. Approaching the issue from the contract-law side, Joseph Perillo has recently argued that particular bargaining contexts can produce “neutral” standard-form contracts.<sup>209</sup> He discusses several such contexts. One is what he calls the “collaborative” model, in which “[t]he drafting of boilerplate terms by ... a diverse group helps ensure that the concerns of most stakeholders will be

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using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119, as revised February 19, 1998.”).

208. OMB Circular No. A-119, 63 Fed. Reg. at 8554.

209. Perillo, *supra* note 10, at 179.

taken into account.”<sup>210</sup> Another he calls the “collective bargain,” where “[s]tandard forms are ... negotiated between potentially adversary organizations.”<sup>211</sup> To these multilateral—or multilateral and bilateral—models, one can add the unilateral model, in which a contract is standardized by a group of firms on one side of the contract.<sup>212</sup>

Contract standardization can also differ along another organizational axis. Many standard contracts are created by a preexisting organization that also provides other services to its members. Other instances of standardization, however, appear to be effected by ad hoc groups that had no further role. The efforts of such groups, in fact, appear to have been among the more problematic of standardization efforts.<sup>213</sup> That may not be surprising, because ad hoc groups probably have less to lose from an antitrust violation and are perhaps less focused on legal advice and constraints. In any event, this leaves us with this table of organizational alternatives:<sup>214</sup>

#### Organizational Alternatives

	<b>Unilateral (single stakeholder)</b>	<b>Bilateral (two stakeholders/ “adversarial”)</b>	<b>Multilateral (multiple stakeholders/ “collaborative”)</b>
<b>Ad hoc agreement</b>	<i>Catalano;</i> <i>Hartford Fire Insurance</i>	no examples found in cases	no examples found in cases; unlikely?
<b>Pre-existing organization</b>	<i>Professional Engineers;</i> ATA and TIA contracts; AAPL JOA; AIA, ISO?	failed ATA-TIA effort	ISDA; AIA, ISO?

210. *Id.* at 184.

211. *Id.* at 186.

212. *Id.* at 182.

213. Several Supreme Court cases—*Paramount Famous Lasky*, *Catalano*, and *Hartford Fire Insurance*—did involve what appear to be ad hoc groups that created form contracts. See *supra* notes 94-102, 116-21 and accompanying text.

214. A similar typology is presented in Cafaggi, *supra* note 11, at 107 tbl.6.1, 116 tbl.6.3.

As the table shows, several of the standardization examples discussed earlier can be classified by these organizational alternatives, as can the International Swaps and Derivatives Association, Inc. (ISDA), which is discussed immediately below.<sup>215</sup> The category in which the AIA and ISO efforts belong is not clear. On the one hand, they claim to welcome input from various stakeholders. On the other hand, the extent to which they are truly “open” and exhibit a “balance of interests” in their processes is not clear, as is discussed in the following paragraphs.

### *1. Open Access to the Standardization Process*

Many standard-setting organizations do provide at least formal access to their standard-setting processes. The organizations might exercise ultimate control over the results, but input is possible from interested parties. The DOJ has indicated the importance of this openness in a business review letter addressing standardization (though not contract standardization):

You have assured us that the processes under which the reliability standards are to be established and enforced are open to all interested parties, provide for representation for all segments of the industry, are not designed to competitively disadvantage any particular party or segment of the industry, and that Commission or court review will be available to review disputes.<sup>216</sup>

Multilateral standardization efforts seem designed to provide this sort of openness. The AIA, for example, describes its drafting process as multilateral:

The process is based on the cooperative input of a Documents Committee of practicing architects who have been appointed based on their experience, regional diversity, and variety of practices. Beyond the input of these committee members, the

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215. See *infra* text accompanying notes 221-23.

216. Letter from Joel I. Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Joseph C. Bell, Esq. & Mary Ann Mason, Esq., Hogan & Hartson, LLP (June 17, 1999), available at <http://www.justice.gov/atr/public/busreview/214456.htm> [hereinafter Klein Letter].



AIA also solicits feedback from owners, general contractors, engineers, subcontractors, sureties, lawyers, insurers, and others. By considering the opinions of a broad range of disciplines, the AIA strives to publish documents that account for the best interests of all parties affected by them.<sup>217</sup>

It is not clear, however, to what extent the aspiration of multilateralism is met. Professor Sweet has provided a description of the AIA drafting process gained in part from his experience observing that process. He observes that the AIA solicits the views of the Associated General Contractors (AGC), the primary organization for builders, and even receives the AGC's endorsement for some of its documents.<sup>218</sup> But he says that "the AIA document creation process is notable for the conspicuous absence of owners or groups with the owner's interests in mind."<sup>219</sup> Sweet points out that there are also issues with the ultimate control over the process;<sup>220</sup> these issues are taken up below.

This suggests that there may be problems even with a multilateral, "collaborative" process. The primary example that Perillo offers for the success of his "collaborative" model is the ISDA,<sup>221</sup> which has a very broad range of participants:

ISDA ... has over 830 member institutions from 57 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.<sup>222</sup>

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217. Am. Inst. of Architects, History of AIA Contract Documents, <http://www.aia.org/contractdocs/AIAS076671?dvid=&reccspec=AIAS076671> (last visited Oct. 16, 2010).

218. See Sweet, *supra* note 77, at 319-22. The AIA does not seek the endorsement of any other organization for its documents dealing with architectural services. See *id.* at 322.

219. *Id.* at 322.

220. *Id.*

221. Perillo, *supra* note 10, at 184 ("[The ISDA's Master Agreement] helps ensure that the concerns of most stakeholders will be taken into account. The model by which it is created is a participatory, collaborative effort by its stakeholders rather than an adversarial clash.").

222. Int'l Swaps & Derivatives Ass'n, About ISDA, <http://isda.org> (follow "About ISDA" hyperlink) (last visited Oct. 16, 2010).

But a key difference between the ISDA and many other contract-standardization organizations is the nature of the contracts at issue. As with some other standardized contracts, the swap and derivative agreements are in a sense symmetric, in that particular parties could find themselves on either side of one of the contracts.<sup>223</sup> As a result, there is an inherent incentive for each party to make the contract a balanced one. In that respect, the parties are acting from what is inherently a bilateral perspective.

An “openness” problem could still be present even in a “symmetric” context like that of the ISDA, though. For example, suppose that the contract at issue was one that established terms for intermediaries like brokers or agents. Suppose also that such a contract established expensive and inefficient dispute-resolution procedures, but left the brokers free to establish individually the fees for their services. If all brokers, or a large proportion of them, used this standard contract, they would presumably incorporate the excess costs of the dispute-resolution procedure into their fees. Widespread use of the contract would likely make such passing-on possible, because the users of the brokers’ services would have nowhere else to turn.

In this scenario, the contract standardization can be viewed as anticompetitive in the sense that it raises prices to users.<sup>224</sup> The contracting parties would not, however, necessarily reap greater profits, because they would also incur greater costs as a result of the inefficient terms of the contract. The contract standardization would be a means of creating anticompetitive waste, not anticompetitive profits.<sup>225</sup>

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223. See, e.g., William N. Eskridge, *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1180-81 (1984) (noting that certain “preformulated” contracts “reflect the needs of the marketplace and consumer protection”); Samuel Krislov & Paul Kramer, *20/20 Vision: The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1957 (1993) (describing the formation of standard contracts, which are developed with equal bargaining power allocated between the parties).

224. But see Sean M. Flanagan, Student Article, *The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association*, 6 HARV. NEGOT. L. REV. 211, 232 (2001) (explaining how the ISDA Master Agreement has certain measures that reduce transaction costs, including “close-out activity” which yields lower “transaction costs, lower legal fees, less legal risk, and reduced default risk”).

225. However, in the example given, there could be profits gained through the dispute resolution process, as perhaps by an inefficient arbitration organization.

Ultimately, then, the participation in bargaining by parties on both sides of the contract would not suffice to prevent anticompetitive contracting. Participation by those who ultimately bear the costs of the terms at issue would also be necessary, because only they would have the incentive to ensure that the contracting terms are efficient. Moreover, participation would need to be informed, and that is a condition that might not easily be met. It seems possible that principals working through brokers would not have good information about the costs and benefits of contractual choices made by the brokers. Without such information, the principals could not effectively influence the standardization process.

On the other hand, contract law generally requires consent only of parties to a contract, not of third parties affected by it.<sup>226</sup> That is, although contract law requires consent, not just involvement in the process, it requires only bilateral, not multilateral, consent.<sup>227</sup> Therefore, contract law would not seem to call for more than bilateral bargaining, at least for two-party contracts. In one sense, then, contract law requires more, and in another, antitrust law requires more. Antitrust law's concern for the overall competitive effect of a standard is broader than contract law's focus on the agreement itself, so antitrust law sees benefits in broader participation, but contract law has a more stringent consent requirement.

## *2. Balance in the Standardization Process*

As suggested above, even contract negotiation processes that are open to all interested parties may be subject to the control of one party. For example, returning to the AIA, both scholars<sup>228</sup> and industry participants<sup>229</sup> suggest that the AIA's documents favor architects and to a lesser extent contractors at the expense of owners. This illustrates the difficulty of incorporating meaningful input from other industry players when the process is controlled by an organization like the AIA, whose members are on one side of the contract to be standardized. Professor Sweet is skeptical:

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226. See RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. g (1981).

227. See *id.* §§ 1-2.

228. Sweet, *supra* note 77, at 319-22.

229. *Id.* at 336-37.

The more difficult question will be whether the AIA will really share its power. Although perhaps willing to seek the input of more owner-oriented groups regarding AIA drafts, the AIA would strenuously resist giving up any real power. This resistance is reflected in the recent Futures Task Force Report concerning AIA Policy on Documents Preparation and Review where the AIA notes that participation must be “responsible.” More importantly, the report notes that the AIA must exercise *control* to insure full and fair consideration of all interests, document-making must be expeditious and orderly and AIA policy or the public interest must not be compromised. In short, the AIA must have “full and final authority.”<sup>230</sup>

These concerns have been borne out in public forums. In the 1960s, for example, contractors objected to an indemnity clause in an AIA contract, and the contractor groups persuaded state legislatures to limit those clauses.<sup>231</sup> The National Association of Attorneys General has also had concerns about AIA contracts, and at one time it even considered publishing its own model contracts.<sup>232</sup>

It seems likely that similar problems would exist for many formally multilateral processes. To make the process manageable, it may be necessary to have it controlled by one industry group. In some respects, it seems that the straightforward bilateral bargain would be more promising. It seems likely that in the bilateral context it both would be both easier to determine whether the parties agree and easier to manage the process while still accepting input by both parties. Perillo’s “collective bargain” contemplates “negotiat[ion] between potentially adversary organizations.”<sup>233</sup> Collective bargaining agreements in the organized-labor context also often involve associations of employers, but in that context the antitrust issues are subject to a specific antitrust exemption.<sup>234</sup>

An example of a bilateral relationship in the contract-standardization context was initially present in the ATA-TIA carrier-broker

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230. *Id.* at 341-42 (footnotes omitted).

231. *Id.* at 339.

232. *Id.* at 342.

233. Perillo, *supra* note 10, at 186.

234. Collective bargaining agreements are both statutorily and judicially exempt from antitrust regulations. See 15 U.S.C. § 17 (2006) (statutory); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235 (1995) (judicial).

agreement discussed above,<sup>235</sup> but that bilateral arrangement broke down. The two organizations, the ATA and the TIA, sought to negotiate a joint agreement, but they could not agree on terms, so each created its own agreement.<sup>236</sup> It seems clear that a breakdown in bargaining like this is evidence that there could be a problem with a standardized contract adopted by one side, at least if the contract takes a position on the subject that caused the breakdown. As previously discussed, that was indeed the case in the carrier-broker negotiation.<sup>237</sup>

Another arguably bilateral negotiation on a standardized contract was that in *Hartford Fire Insurance*.<sup>238</sup> The defendants in that case, the group of insurers, sought to persuade the ISO to change a standardized contract, and when the ISO declined to do so, the insurers organized a boycott.<sup>239</sup> The relationship here was bilateral in the sense that there were two different preferences regarding the contract at issue, but in fact the parties involved were really all insurers, and thus were on one side of the contract.<sup>240</sup> Even then, their interests diverged enough to prevent agreement on the contract.

It is telling that in these bilateral contexts, the negotiations broke down. In fact, the cases do not present any example of successful bilateral contract standardization. That at least raises the possibility that the “open” processes of multilateral organizations like the AIA and ISO would not be so successful if they relied upon agreement, rather than input, among all the parties involved. This is presumably why the Standards Development Organization Advancement Act imposes the additional requirement of a balance of interests in the process.

These issues of control and balance are relevant both for antitrust and contract law. Antitrust law sometimes relies on balance as an indicator that the standardization provides procompetitive benefits overall, not just for one group.<sup>241</sup> And contract law is based on the

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235. See *supra* Part II.B.1 and text accompanying notes 143-52.

236. See *supra* notes 144-47 and accompanying text.

237. See *supra* notes 144-47 and accompanying text.

238. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); see *supra* notes 90-97 and accompanying text.

239. *Hartford Fire Ins.*, 509 U.S. at 773-75.

240. *Id.*

241. For example, in the area of vertical restraints, antitrust law takes a permissive view

concept of mutual assent, so balance is an even more fundamental requirement there. It is important to note, though, that neither body of law is likely to find either bilateral bargaining or multilateral bargaining sufficient in every case. Each ensures only vertical balance, which is to say that each ensures only that actors at two or more levels favor the standardization.

Neither bilateral nor multilateral bargaining ensures horizontal consent, which would require that all firms or consumers at each level agree to the standardized terms. The concern here is that particular terms will have different impacts on different parties at the same level. It is exactly this sort of horizontal consent that was the focus of the Court in *Allied Tube* and in the credit-card cases previously discussed.<sup>242</sup> In that respect, the consensus decision-making referred to by the Standards Development Organization Advancement Act should involve not only parties from different levels relative to the contract, but also parties differently positioned, by size or other characteristics, at the same level. Only then can it be ensured that the agreed-upon terms are truly beneficial.

### 3. *The Business-to-Consumer Context*

Consumer contracts present somewhat different problems than do business-to-business contracts. Although consumers are both the ultimate intended beneficiaries of antitrust law and the group most in need of protection from oppressive contracts, it may be difficult for them to play a role in negotiation of standard contracts. As Perillo notes, the drafting mechanisms for standardization of contracts do not often involve consumers, at least in the United States.<sup>243</sup>

That is not to say that the need for consumer involvement is not recognized. Some commentary focused on insurance contracts

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of manufacturer-imposed restraints, in part because of an expectation that the manufacturer's interests are aligned with those of consumers. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 896-99 (2007).

242. See *supra* notes 18-20 and accompanying text.

243. Perillo, *supra* note 10, at 187 ("Consumers are notably absent from most of the standard-form drafting organizations."). In Europe, consumer associations play a more active role. See Cafaggi, *supra* note 11, at 101, 106 n.37, 111 n.47.

suggests that if consumers are involved in the process, the legal treatment of a standardized contract may be more generous:

Antitrust analysis also considers the extent to which consumers have a voice in the standard setting process. Exclusion of consumers may be evidence of anticompetitive intent. Allowing policyholders to express their views on proposed coverages would tend to dispel any inference of anticompetitive motive on the part of an insurance rating organization's members.<sup>244</sup>

But the cases cited in support of this passage really support only the “considers,” “may be,” and “would tend to” claims. In other words, the role played by consumer input is not at all clear.

The involvement of parties from both sides of the transaction may be of even greater significance in Europe, where there is a broader range of institutional mechanisms for addressing form contracts. Consumer associations play a greater role in Europe, both in the creation of standard-form contracts and in their monitoring and challenge.<sup>245</sup> On the other hand, one European commentator sees potential problems in relying on consumer associations, comparing the situation unfavorably to collective bargaining in the labor context:

[A]t first sight, this [collective bargaining] model does appear to fit well with consumer contracts as both the employment and consumer contexts have in common a relationship of considerable inequality of bargaining power at an individual level. However, where collective bargaining in employment works, it does so owing to the existence of significant and well-organized representative organizations for the weaker party (trade unions or professional associations), whose representative credentials are genuine and which have the time and resources to participate in the negotiation necessary to conclude collective agreements. For such a model to work in the consumer context, similar sorts of associations would need to exist not merely at the national level but also at the European level. While there are

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244. ABA INSURANCE ANTITRUST HANDBOOK, *supra* note 99, at 70 (citing *Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 703 (7th Cir. 1987)); *see also* *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294-95 (5th Cir. 1988); Klein Letter, *supra* note 216, at 1-3.

245. Cafaggi, *supra* note 11, at 101, 106 n.37, 111 n.47.

indeed national consumers associations in the Member States, their nature, aims, and ability to undertake such a task differ very considerably.... [G]iven the other important roles which these various consumers' organizations need to play, it is not at all clear to me that either the national or European associations would possess the time, resources, or, indeed, specialist expertise to properly negotiate sets of effective and fair contract terms.<sup>246</sup>

These points, of course, apply more broadly than just to Europe. Just as courts and antitrust agencies need expertise and information about the business context of specific proposed standard contracts in order to evaluate their effects, so too do consumer groups. The same commentator draws an analogy to the role that consumer groups play in the enactment of legislation, where they may be better positioned than they are in contract negotiation.<sup>247</sup> Thus, although the antitrust approach to standardization may focus on procedure rather than substance, perhaps because of a lack of substantive expertise, the evaluation of whether consumer interests are adequately represented in negotiations may itself require considerable expertise.

### *C. Adoption of Standardized Contracts*

Neither of the two approaches to review of standardized contracts discussed above—focusing on either contractual terms or the bargaining process—provides particularly conclusive criteria. The shortcomings of these approaches suggest that some attention to the context in which the contracts are adopted could be valuable. More specifically, this portion of the Article will focus on the constraints to which those considering adoption of standardized contracts may be subject. Both antitrust law and contract law are likely to consider such constraints relevant, with antitrust law using context to evaluate the likelihood of market power, and contract law using

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246. Whittaker, *supra* note 65, at 158-59.

247. *Id.* (discussing the Bureau Européen des Unions de Consommateurs, "which is an association of national consumer agencies and associations, whose role is the representation of consumers' interests in the setting of EU policymaking").



contract to assess consent. The constraints can come from two different sources: the market and the State.

There are at least two ways in which market effects can constrain the creation or adoption of a standardized contract. First, such effects could be present in the market in which firms adopting contracts operate. If competition among firms is sufficient in that market, they may decline to adopt an oppressive or anticompetitive contract. But it is also possible that other constraints, such as the recognition of a standardized contract, may limit the ability of firms to use an alternative.<sup>248</sup>

Second, there might be market pressures in the “standardization market.” If competition works well in that market, a standardizing organization might be forced to respond to customer demand for satisfactory contract terms. It is not clear, though, that this standardization market will function well unless there are multiple organizations competing to provide standard contracts.

In a variety of areas, the market is apparently thought to be insufficient to ensure procompetitive contract standardization. In these areas—insurance is a notable example—the State reviews, or at least has the power to review, standardized contracts. However, the involvement of the State not only provides the potential for substantive review, but also lessens the level of scrutiny that competition law applies. Each of these topics is discussed below.

### 1. “Voluntary” Standards

For most standardized contracts, the adoption by individual firms of the contract is, formally at least, voluntary. To be sure, there are some instances in which there exists a legal requirement that a particular form be used. In the United States, for example, state regulators mandate certain standard contracts, such as those for fire insurance.<sup>249</sup> And a few states have certain restrictions on

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248. See Kahan & Klausner, *supra* note 53, at 729-36 (discussing the potential for the “suboptimality” of terms in contracts based on the effects of “network externalities” during the early adoption period of a new standardized contract in an existing industry). See generally Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995) for a discussion of network externalities and their impact on contracts.

249. 1 STEMPEL, *supra* note 88, § 2.05(D). When discussing standard contract policies established by statute, Stempel notes that “[s]tate regulation imposing mandatory contract terms is, thankfully, normally direct and easy to discern. For example, most state statutes

the use of real estate contracts. Such cases are the exception, though: for most standardized contracts, there is neither a state requirement that the contract be used nor an explicit private agreement to do so.

Because Section 1 of the Sherman Act<sup>250</sup> and Article 101 of the Treaty on the Functionality of the European Union<sup>251</sup> condemn only anticompetitive agreements, one could take the view that voluntary adoption of a standard contract is a unilateral act and therefore not subject to condemnation regardless of its competitive effect. Some courts have in fact taken this approach in cases involving standardization, though not contract standardization. For example, in *Schachar v. American Academy of Ophthalmology, Inc.*, Judge Easterbrook said that “when a trade association provides information ... but does not constrain others to follow its recommendations, it does not violate the antitrust laws.”<sup>252</sup>

*Schachar* and the cases it cited, however, involved *quality* statements or certifications by standard-setting organizations regarding products. In that context, buyers are free to accept or ignore the organization’s views. More to the point, consumers have every incentive to act independently, because an uncertified product may in fact meet their needs. And in the certification cases the uncertified seller is generally one that is already committed to its (uncertified) product. One result of that commitment is that it is not free to conform to the standard, except at considerable cost, but another is that the uncertified product continues to be available to consumers that choose it.

The contract standardization context is different. A standardized contract serves as a uniformity standard, not merely as quality information. As such, the availability of a standardized contract, and others’ use of it, alters the competitive landscape, instead of merely informing consumers about it. More specifically, once there has been widespread adoption of a standardized contract, that

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require insurers to use a standard fire insurance policy.” *Id.*

250. 15 U.S.C. § 1 (2006).

251. Treaty on the Functionality of the European Union, May 9, 2008, 2008 O.J. (C 115) 47, 88.

252. 870 F.2d 397, 399 (7th Cir. 1989) (citing *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486-89 (1st Cir. 1988)). It is worth noting here that the holding of *Consolidated Metal Products* was not as categorical as *Schachar* would have had it.

contract can provide advantages that are greater than the advantages to be obtained from using an alternative contract. Parties might have preferred a different standardized contract, or standardization on different terms, but once the standardization process is complete and the contract is adopted, their choices will no longer be as free.<sup>253</sup> “[T]he potential advantages of avoiding doubts about the legal validity of terms might be sufficient to induce businesses to adopt the model contract without any coercion.”<sup>254</sup>

The AIA’s standard contracts present a typical example. The use of the contracts is voluntary, but as is the case with other standardized contracts, use of an alternative contract is more expensive. As Professor Sweet says, “[c]ustomized contracts are much more expensive than standardized contracts, such as those of the AIA.”<sup>255</sup> Moreover, the AIA contracts themselves are difficult to customize,<sup>256</sup> which makes it difficult to use only part of an AIA contract.<sup>257</sup> Thus, although use of the AIA contract is formally voluntary, it may be necessary as a practical matter.

The same is true of the ISO’s insurance contracts. The cost to an insurance company of creating an alternative policy contract and getting that policy approved by all the states in which it operates is likely to be prohibitive. And to use another contract would be to sacrifice the actuarial data that the ISO provides for its contracts.<sup>258</sup> As noted above, the Supreme Court has said that “[m]ost ISO members cannot afford to continue to use a form if ISO withdraws [or, in this case, does not provide] these support services.”<sup>259</sup>

Furthermore, even if users do not adopt the standard contract but instead choose to deviate from it, the adoption of the standard could

253. See Kahan & Klausner, *supra* note 53, at 729-36.

254. Collins, *supra* note 11, at 799; see also Choi & Gulati, *supra* note 10, at 1137-38 (“The lawyers explained that it was impossible for standard-form clauses that were present in every single sovereign debt instrument across the globe to change every time there was an aberrant court decision. The issue was coordination. As a practical matter, the individual lawyer proposing that his client alter a term in response to some interpretive shock faces the possibility that no one else will change their terms. And the market is unlikely to accept a non-standard term.”).

255. Sweet, *supra* note 77, at 325.

256. *Id.* at 335.

257. Moreover, the AIA contracts, like those of the ISO and other contract-standardization organizations, are copyrighted, so modification would require permission of the organization.

258. See *supra* text accompanying note 90.

259. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993).

have significant competitive effects. There is a significant body of contract scholarship, much of it following the work of Ian Ayres and Robert Gertner on “penalty” default rules,<sup>260</sup> that addresses the significance of default rules. The basic insight in this work is that penalty default rules can be used to induce contracting parties to reveal private information.<sup>261</sup> In the present context, the importance of this insight is simply that default rules established by standardized contracts can have significant strategic implications, even if the contract that is ultimately agreed upon deviates from those defaults. As a result, the standardized contract need not be adopted to have competitive effects; it need only create a default rule that causes the revelation of competitively significant information.

The question, then, is whether agreement on a standardized contract, without any formal agreement to adopt that contract, should be viewed as an agreement in restraint of trade if that contract is widely adopted, or even recognized as a default. In the case of contracts that are already widely adopted, and where continued adoption is assured, as with those of the AIA and ISO,<sup>262</sup> it seems fair to treat an agreement on creation of the contract as an agreement on adoption of it. More generally, the expectation of uniform use of a contract seems a prerequisite for the collective work of standardization. Indeed, it would make little sense for the parties to engage in a standardization effort were their uniform use of the contract not an assumption underlying that effort.

This assumption in fact corresponds to the standard approach to inferring an agreement under the antitrust laws. Under that approach, a party alleging agreement must show not only that the parties behaved in the same way—in this case, by uniformly adopting the contract—but also that their behavior made sense only on the assumption that others would do the same.<sup>263</sup> The effort

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260. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992). Later work includes Barry Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999); Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*].

261. Ayres & Gertner, *Filling Gaps*, *supra* note 260, at 127-28.

262. See *supra* text accompanying notes 255-59.

263. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1009-10 (6th Cir. 1999).

required to standardize a contract is considerable. There would be no reason for a firm to engage in that effort except on the assumption that there would be compensating benefits. Those benefits of standardization arise from the widespread use of the standardized contract.<sup>264</sup> Therefore, the effort makes sense if the contracts are to be adopted—as final contracts or as defaults from which negotiation begins—uniformly, but does not make sense in the absence of an understanding that they will all adopt the contract.<sup>265</sup> From that, it is reasonable to infer an agreement to adopt the contract. As the Supreme Court said in *Allied Tube*, “[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.”<sup>266</sup>

That inference would not apply, however, to those who were not engaged in the standardization process, but merely adopted the contract after the standardization. The adoption of the contract, once it is standardized and adopted by others, would make sense even individually, so no inference of agreement could be drawn from the adoption. But the parties that were directly involved in the standardization process could still be charged with the results of it. If a standard is created that has sufficient power in the market so that it must be adopted even by others, it seems reasonable to charge its creators with causing those adoptions. This, then, leads to the question of the incentives for users to adopt standardized contracts, a topic which is taken up next.

## 2. Organizational Constraints

The manner in which a standard contract is created can have two contrary implications with respect to parties’ incentives to use an

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264. It is true that collaborative work to create a contract probably also produces a better contract, but that would not likely be enough to justify the effort of standardization. In a collaborative process like standardization, each party presumably has to be content with a resulting contract that is not ideal from its individual point of view but is instead a balance of collective interests. The compensation for the compromise, though, is exactly the understanding that the contract will be used by all, which constitutes the agreement.

265. Engaging in standard-setting may also make relatively more sense for larger firms than for smaller ones. See Schweitzer, *supra* note 202, at 32 (“The associated costs [of standard-setting] may ... be more easily borne by larger players than by smaller ones.”). This provides one possible explanation of why the results of some standardization efforts seem to favor larger parties.

266. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).

unpreferred contract. On the one hand, creation by an ad hoc group, rather than an established organization, is likely to produce a more favorable contract for the group.<sup>267</sup> Indeed, an ad hoc group may create a contract exactly because its members are not satisfied with the contracts available from standard-setting organizations.<sup>268</sup> That in turn is likely to increase the incentive to use the contract, even for nonmembers of the group. On the other hand, creation of a contract by an organization is likely to entail its own incentives to the extent that there are organizational or market sanctions for nonuse. The issue here is not the nature of the bargaining process, as above, but whether there are characteristics of the standard-setting arrangements that might make users not entirely free to deviate from the standard contracts.

There appear to be relatively few public examples, at least in the United States, of creation of a standardized contract by an ad hoc group, or, in other words, of creation of such contracts outside a preexisting organizational structure. Interestingly, though, several Supreme Court cases—*Paramount Famous Lasky*,<sup>269</sup> *Catalano*,<sup>270</sup> and *Hartford Fire Insurance*<sup>271</sup>—did involve what appear to be ad hoc groups that created form contracts or at least agreed on particular terms.<sup>272</sup> It may be that such cases, when they become public, are more likely to be litigated than perhaps more competitively ambiguous organizational standard-setting.

As described in Part III.C.1, parties that enter into an ad hoc arrangement to standardize a contract are likely to use that contract.<sup>273</sup> After all, they are unlikely to join the effort to create the contract if they do not intend to use it, at least if there are not any other benefits to joining the group engaged in drafting the contract in which case the effort might better be viewed as organizational.

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267. There still will be compromises within the group, of course. *See supra* note 264. This difference between ad hoc groups and established standard-setting organizations (SSOs) is echoed in differences between SSOs. Professor Schweitzer notes that “[i]n SSOs with closed membership or restrictive membership rules, insiders may have incentives to collude against outsiders,” but that “[i]n recognized SSOs with open and broad membership, collusive strategies will be more difficult to organize.” Schweitzer, *supra* note 202, at 32.

268. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

269. 282 U.S. 30 (1930); *see supra* note 116.

270. 446 U.S. 643 (1980); *see supra* notes 117-22 and accompanying text.

271. 509 U.S. 764 (1993); *see supra* notes 94-101 and accompanying text.

272. *See supra* note 213 and accompanying text.

273. *See supra* Part III.C.1.

Moreover, they are likely to act on the understanding that the other parties to the arrangement will also use the standardized contract. It seems fair, then, to characterize the agreement to standardize the contract as also constituting an agreement to use it. Even straightforward price-fixing cartels usually have no formal enforcement mechanism to ensure compliance with the agreement.<sup>274</sup>

More often, standard contracts are created by preexisting organizations. In that case, there are other incentives at work. The organization may have rules that require members to conform to its contracts or sacrifice any benefits of membership.<sup>275</sup> If not, users' decisions to adopt the standardized contract could be characterized as voluntary. Even in the absence of such rules, the organization's imprimatur may in itself carry some force in the market. The extent to which these factors impose pressure on members then depends on how those advantages of conforming compare to the benefits of using an alternative contract.

It is also possible for standard contracts to be created by organizations independent of the market participants. In that case, there is unlikely to be an antitrust issue, because if the organization is truly independent, there would be no agreement on the contract among competitors. In that case, the only additional incentive for parties to use the form contract—beyond the value of the contract itself—is the market power of the approval or imprimatur of the organization that creates the contract. Moreover, there is less incentive for a group that is not itself active in the market to create a contract skewed in favor of one party. Creation of standard contracts by truly independent entities appears to be quite rare, however.

Thus we have three possible sources of form contracts, each of which creates different incentives for use of the form contract. The primary incentives for compliance are presumably either the benefits of the contract itself, in the form of its reduction of transaction costs or other procompetitive benefits, or in the form of the advantages of collusion. The table below presents the other incentives offered by form contracts:

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274. See Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 812 (2009) ("Most aspects of agreements among price-fixing firms are not enforceable in court ... [but] the mere presence of these kinds of agreements has served to stabilize many a cartel in the past.").

275. See *supra* Part II.B.3.

### Incentives for Using Form Contracts

	<b>Formal compliance mechanisms</b>	<b>Market compliance incentives (in addition to benefits of contract)</b>
<b>Ad hoc arrangement</b>	breach-of-contract action?	none
<b>Organization of contracting firms</b>	membership sanctions	market significance of organizational approval
<b>Independent organization</b>	none	market significance of organizational approval

Of course, the pressure to use a particular standardized contract would be lessened or eliminated if there were multiple such contracts available. That would likely require competition among multiple standard-setting organizations, which appears to be uncommon. Although competing standards are sometimes available, as in the trucking example discussed earlier,<sup>276</sup> that is the exception. As suggested above, one reason for this may be the network effect created by standardization.<sup>277</sup> In addition to this demand-side effect, there are presumably supply-side economies of scale in the creation of standards.

The problem can be illustrated by a European Commission case that sought to ensure the possibility of standards competition.<sup>278</sup> In *SCK*, which was discussed briefly above,<sup>279</sup> the Commission required not only that the certification process be “completely open, independent and transparent”<sup>280</sup> but also that in order not to restrict competition, the system must “provide[] for the acceptance of

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276. See *supra* Part II.B.1.

277. See *supra* notes 46-47 and accompanying text.

278. Interestingly, one commentator states that “the EU Commission has disfavoured competition for standards in the marketplace, both in the form of a unilateral development of standards and in the form of private standard-setting consortia.” Schweitzer, *supra* note 202, at 30.

279. See *supra* notes 199-200 and accompanying text.

280. Joined Cases T-213/95 & T-18/96, *Stichting Certificatie Kraanverhuurbedrijf v. Comm’n*, 1997 ECR II-1739 para. 125.



equivalent guarantees from other systems.”<sup>281</sup> That is, apparently the standard-setting organization was required not only to make determinations of whether its standards were met, but also to accept the “equivalent” certifications of competing certifiers. The Court of First Instance confirmed that this criterion was “pertinent,” observing that the limitation of approval to SCK’s own evaluations “cannot be objectively justified by an interest in maintaining the quality of the products and services ensured by the certification system.”<sup>282</sup>

Although *SCK* involved a certification scheme, not the creation of a standardized product or contract, there are important parallels that pose problems for the European approach. The cost of developing standards must be recouped by a standard-setting organization, and if others could free-ride on that standard-development effort, the incentive to create standards would be lessened. It is not clear how one would develop an “equivalent” certification system without relying on the original system. Or, to put it another way, how could SCK certify that its standards were met by another “equivalent” system unless the other system’s criteria were at least as strict? Therefore, it seems it would be possible simply to wait until the original certifying organization developed market acceptance for its system and then create an equivalent system. Perhaps the Commission, and the Court of First Instance, would have allowed SCK to charge for granting its certification to those presenting equivalent certifications, but that is not clear.<sup>283</sup>

The creator of a standard contract, like the creator of certification criteria, makes an investment that it will not want to share. Indeed, the European Commission has stated that it “doubts that parties that invest vast amounts to develop and update STCs [standard terms and conditions] will be eager to share the final result at no

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281. *Id.* para. 141.

282. *Id.* para. 137.

283. It is possible that the concern of the Commission and the court was not so much about access of competing certifiers but about SCK’s requirement that, to remain certified, firms were required only to deal with other certified firms. That is, the concern might have been not so much about competition in the certification market as with competition in the market for services that were (sometimes) certified. The Court of First Instance also said that “the failure to accept equivalent guarantees offered by other systems protects certified firms from competition from uncertified firms.” *Id.*

cost with competitors.”<sup>284</sup> For that reason, creators of standard contracts often protect them with copyright.<sup>285</sup> There is therefore no way for a competing organization to create “equivalent” contracts. A competing organization could create a different standardized contract, but then the benefits of uniformity would be lost to users of the original and competing contracts. Moreover, it is likely that network effects would soon cause the contract with the larger installed base to eliminate the other.

In the United States, there has been little focus on this issue, or even on the possibility of competing standard-setters more generally.<sup>286</sup> The issue is addressed, though, in the European Commission’s guidelines for horizontal cooperation agreements.<sup>287</sup> The Commission observes that one of the relevant markets for agreements on standards is “the service market for standard setting, if different standard setting bodies or agreements exist.”<sup>288</sup> The guidelines state that “[t]he existence of a restriction on competition in standardization agreements depends upon the extent to which the parties remain free to develop alternative standards.”<sup>289</sup> Furthermore, “[a]greements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.”<sup>290</sup>

The first freedom, the right to produce a competing standard, is uncontroversial, but the second, the right to produce products that conform to preexisting standards, is more doubtful, as suggested above.<sup>291</sup> Particularly for a copyrighted standard contract, it is not clear that allowing competing versions, which presumably would have to use the same language, is feasible. In this regard, a

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284. Commission of the European Communities, *First Annual Progress Report on European Contract Law and the Acquis Review*, at 10-11, COM (2005) 456 final (Sept. 23, 2005), available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/progress05\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/progress05_en.pdf).

285. *See supra* note 257.

286. For example, this is not a topic discussed in the ABA STANDARDS HANDBOOK, referenced *supra* note 14.

287. Commission Notice, *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements*, 2001 O.J. (C 3), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF>.

288. *Id.* para. 161.

289. *Id.* para. 167.

290. *Id.*

291. *See supra* Part II.B.

copyrighted contract is similar to a patent-protected product standard. On the other hand, copyright's merger doctrine, which is intended to allow copying when an idea can be expressed only in one way, and its *scènes à faire* doctrine, which can allow use of others' material when choices are externally constrained, could come into play here.<sup>292</sup> At least after a standard contract becomes accepted, the only way to express its provisions and preserve the benefits of uniformity is likely to be to use the same language.

An illustrative copyright case is *Mitel, Inc. v. Iqtel, Inc.*<sup>293</sup> Mitel, the copyright owner, had created a series of codes to control its telephone call controller, and these codes were the subject of its copyright claim.<sup>294</sup> Iqtel introduced a competing controller but “[b]ecause Mitel controlled a large share of the call controller market, Iqtel concluded that it could compete with Mitel only if its [Iqtel] controller were compatible with Mitel's controller.”<sup>295</sup> Iqtel therefore copied Mitel's codes. Nevertheless, the district court and court of appeals rejected Mitel's request for a preliminary injunction for several reasons, among them the *scènes à faire* doctrine:

We have extended this traditional copyright [*scènes à faire*] doctrine to exclude from protection against infringement those elements of a work that necessarily result from external factors inherent in the subject matter of the work. For computer-related applications, these external factors include hardware standards and mechanical specifications, software standards and compatibility requirements, computer manufacturer design standards, industry programming practices, and practices and demands of the industry being serviced.<sup>296</sup>

These statements appear equally applicable to standard contracts. The *Mitel* court said that “the scenes a faire doctrine identifies and excludes from protection against infringement any expression whose creation ‘flow[ed] naturally from considerations

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292. See Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 215-21 (2007).

293. 124 F.3d 1366 (10th Cir. 1997).

294. *Id.* at 1369-70.

295. *Id.* at 1369.

296. *Id.* at 1375.

external to the author's creativity."<sup>297</sup> Contract language, which is constrained by legal requirements, would seem to fit within this class of expression. Moreover, another factor that has been considered in finding material uncopyrightable is "compatibility requirements of other programs with which a program is designed to operate in conjunction."<sup>298</sup> This, too, would presumably be relevant to standard contractual language, which necessarily uses earlier verbal formulations.<sup>299</sup>

### 3. *The State and Contract Standardization*

The State can play a significant role in the standardization of contracts. When the State takes part, in some fashion, in the process, there are two contrary implications. On the one hand, state approval or review of the resulting contract, if it involves meaningful evaluation,<sup>300</sup> can help ensure a fair and procompetitive contract. On the other hand, though, state involvement typically lessens the degree of antitrust scrutiny of any private standardization activity, at least if the State actively supervises any private standard-setting activity,<sup>301</sup> and in Europe can also affect the contract analysis.<sup>302</sup>

In the United States, the most significant state involvement with contracts standardization is in the insurance industry. Most insur-

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297. *Id.* (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[F] (1997)).

298. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992).

299. These copyright doctrines are echoed by antitrust law limits on the control of interfaces, which are the analog here to standardized contracts. See Herbert Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C. L. REV. 87 (2007).

300. For example, a clear relation between the use of expertise and coregulation between private parties and the state "combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement." *Commission White Paper on European Governance*, at 21, COM (2001) 428 final (July 25, 2001), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf).

301. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). In Europe, the standard is lower, requiring only that "the State has not waived its power to make decisions of last resort or to review the implementation of a decision." Schweitzer, *supra* note 202, at 44.

302. If the standardized contracts are produced by a trade association on the basis of a formal delegation by a public authority, the anticompetitive nature of those contracts can be scrutinized only by reference to the state delegation, which involves a type of scrutiny different from that which would apply to an independent initiative by the associations or a group of market players.

ance policies must be approved by state insurance regulators. As noted above, much of the work of generating the insurance policy forms is done by the ISO.<sup>303</sup> The policies are subject to review and approval by state regulators, but the quality of this review is questionable. A recent study indicated that the regulators are often underfunded: “Over half of the states are more than 40% below the minimum needed to fully protect consumers.”<sup>304</sup> Moreover the McCarran-Ferguson Act,<sup>305</sup> which exempts the business of insurance from federal antitrust law, does not establish any other forms of oversight by the federal government of state regulation.<sup>306</sup>

Perhaps this concern would be lessened if the ISO’s deliberation and selection process were open, but it is not:

For obvious reasons, ISO and insurers resist turning over this so-called drafting and regulatory history. Even if a policyholder is able to obtain the information, ISO typically succeeds in obtaining a protective order precluding dissemination of the materials to third parties. Accordingly, much of this story remains hidden to the public, known only to those policyholders and their law firms that have prevailed in the requisite discovery battles.<sup>307</sup>

The justifications for state regulation of insurance contracts and for the drafting efforts that the states largely leave to the ISO focus primarily on contract and consumer-protection concerns particular to insurance transactions.<sup>308</sup> But U.S. contract law has itself developed a variety of doctrines, many of them specific to insurance law, that greatly lessen the problems at which self-regulation is

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303. See *supra* Part II.B.3.

304. Press Release, Consumer Fed’n of Am., State Insurance Department Resources Have Risen Over Last 10 Years But Are Still Inadequate To Fully Protect Consumers (Oct. 22, 2009), <http://www.consumerfed.org/pdfs/stateinsurance.pdf> (quoting J. Robert Hunter, Dir. of Ins., Consumer Fed’n of Am.).

305. 15 U.S.C. §§ 1011-15 (2006).

306. See Press Release, *supra* note 304.

307. 1 STEMPER, *supra* note 88, § 4.05[A] (3d ed. 2006) (quoting KALIS ET AL., POLICYHOLDER’S GUIDE § 1.02).

308. For example, in the mid-to-late 1970s, states imposed readability requirements for insurance contracts on the grounds that they were necessary to protect consumers. See John Aloysius Cogan, Jr., *Readability, Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 119 (2010).

purportedly addressed. Moreover, some states require by law that certain provisions are part of the insurance contract, even if those provisions are not in the written agreement.<sup>309</sup>

As a result, it is possible that there is little gained in preventing bad terms through regulation by state agencies. If so, then by promoting standardization when bad terms would be unenforceable in any event, the state regulatory agency may serve to eliminate good terms. This is especially so because innovative, consumer-favorable terms are likely to come from small, innovative insurers, which are exactly the ones that would find it difficult to afford the requirements for state review of new contracts.

The European Commission has a somewhat similar approach to the insurance industry. Specifically, the Commission has a block exemption from antitrust law for form insurance contracts.<sup>310</sup> The block exemption, like the McCarran-Ferguson Act in the United States, does not really address whether agreement on contracts is likely to make them more or less consumer-friendly. Although the block exemption, among other things, prohibits insurers from agreeing on policies that combine coverage for multiple risks if those risks do not always appear together,<sup>311</sup> for the most part it does not in itself attempt to define what terms might be undesirable.

The block exemption, however, does have one dramatic difference from the McCarran-Ferguson Act.<sup>312</sup> It provides that the Commission can withdraw the exemption “at the request of a Member State or of a natural or legal person claiming a legitimate interest” if standard terms “contain clauses which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract.”<sup>313</sup> It is interesting that, although the block exemption is addressed to competition law, the language of this provision is one of contract law.<sup>314</sup>

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309. 1 STEMPEL, *supra* note 88, § 9.01.

310. Commission Regulation (EC) No. 358/2003 of 27 February 2003, On the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions, and Concerted Practices in the Insurance Sector, art. 1, 2003 O.J. (L 53) 8-16.

311. *Id.* art. 6, § 1(c).

312. The EC block exemption also requires that the agreements must be public and freely available. *Id.* art. 5, § 1(c). In the United States, in contrast, the ISO's policies are not generally available, at least free of charge. *See supra* Part II.B.3.

313. *See* Commission Regulation, *supra* note 310, art. 10, § b.

314. *See generally* Cafaggi, *supra* note 11.

In this respect, another DOJ business review letter is suggestive. In 1993, the ISO requested review by the DOJ of the ISO's marketing of a product that would provide premium-comparison reports for different insurance companies.<sup>315</sup> This is the sort of information that can facilitate price-fixing, and indeed the DOJ stated that "[t]he Department would be concerned about the anticompetitive impact on insurance rates of the creation by competitors of a database that permits the detailed comparison of premiums currently being charged."<sup>316</sup> The DOJ, however, said that because it appeared that the proposal was part of the "business of insurance" and because it was regulated by state law, it was exempt from antitrust scrutiny.<sup>317</sup> Although this is not the sort of conduct that would be covered by the European Commission block exemption in any case, it does illustrate that even if an antitrust exemption may often be appropriate in the insurance context, the desirability of applying antitrust law should at times overcome the exemption.

#### IV. ANALYTICAL APPROACHES TO STANDARDIZED CONTRACTS

The preceding discussion does not provide firm recommendations for reviewing standardized contracts. Firm recommendations are likely to be difficult given both the mix of costs and benefits that can be created by standardization of contracts, and the fact-specific nature of the relevant antitrust and contract doctrines. The difficulty is exacerbated by the scarcity of cases, which limits the information available on some relevant issues, such as standardization procedures. In any event, the purpose of this Article is more to call for greater attention to standardized contracts than to propose specific legal standards. For that reason, the paragraphs below focus more on possible costs of standardization than on benefits, which are generally more obvious.

Although both contract law and antitrust law are relevant, antitrust law seems the more appropriate means for scrutinizing

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315. Letter from Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Joel M. Cohen, Esq. (Jan. 25, 1994), *available at* <http://www.usdoj.gov/atr/public/busreview/211724.pdf>.

316. *Id.*

317. *Id.*; *cf.* *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (providing a different definition of the "business of insurance").

standardized contracts. It is the *standardization* of such contracts—that is, the horizontal agreement on them—that is the primary concern, and such horizontal agreements among competitors are the focus of antitrust. Contract law's focus is more vertical, on the agreement between the contracting parties, which usually are not competitors.<sup>318</sup> Therefore, contract law typically will not address the fact of standardization directly, though it may be relevant to contract doctrine.<sup>319</sup>

### A. *Incentives and Effects*

From an antitrust perspective, the same approach discussed above for inferring an agreement among those involved in standard-setting can also be used as a basic indicator of competitive effect. That is, the incentives of the parties are evidence not only of whether they agreed to adopt the standardized contract, but also of what effect they anticipated from the contract. The standardization effort is costly,<sup>320</sup> so participation in it indicates that some sort of return on investment is expected. A consideration of the likely source of that return is therefore desirable. One possibility—the anticompetitive one—is that the standardization will constitute or facilitate collusion. To avoid an inference of that possibility, it seems that the standard-setters should be able to offer an alternative explanation of how their costs will be recovered.<sup>321</sup>

A key point is that the usual procompetitive justification for standardization efforts—the creation of cost savings—is not obviously valid. Assuming that the parties continued to compete on price, it is not clear why they would not compete away any savings. Moreover, because the investment in standardization would be a fixed cost, pricing based on marginal costs would not necessarily allow recovery of that investment. To the extent, however, that the standardization facilitates collusion on price, return on the stan-

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318. See *supra* notes 226-27 and accompanying text.

319. See *infra* text accompanying note 336.

320. See *supra* Part III.B.

321. This shifting of the burden to the standard-setters would not be uncontroversial, but in its standard-setting cases the Supreme Court has appeared willing to require some showing from the standard-setting entity. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505-06 (1988) (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-43 (1961)).



dardization investment would not pose a problem. Hence, there needs to be some explanation for how the parties expect to profit, or at least break even, on the standardization effort.

One might think that the same point would apply to product standardization, but the circumstances are different there. At least for interoperability standards, product standardization enlarges the market for each seller by making interoperability with more other products possible.<sup>322</sup> Moreover, the products may be those of vertically related parties, as when standardization enables a computer to work with more peripherals. Therefore, the standardization is likely to improve the competitive position of at least some sellers.<sup>323</sup> Although the same sort of market expansion is possible for standardized contracts, it seems unlikely that contract negotiation costs pose the same sort of obstacle to additional transactions that can be posed by incompatible hardware.

Moreover, in the product standardization context, it is likely that sellers seek to be involved in the standardization effort to ensure that they are not disadvantaged by adoption of a standard to which they are not well-positioned to conform. Again, though, it is not clear that this same incentive exists for contract standardization, at least to the same extent. It seems unlikely that users of a particular contract differ dramatically in their abilities to conform to a particular standardized version of the contract. And that is particularly so because adoption of the new contract would not require a new drafting effort—analogueous to a redesign effort for product standardization—on the part of the individual firms, but could be accomplished by adoption of the standardized contract.

But there might be some circumstances in which the expense of standardizing a contract could make sense, even for individual firms. For example, suppose that there were several large firms in the market, each of which used its own contract. And suppose that customers were comfortable using those contracts, but that small

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322. Drew Andison, Dir., Standards and Conformance Policy Section, Dep't of Indus. Sci. & Tourism, Presentation to the Australian APEC Study Centre: Product Standards and Their Impact on International Trade (Dec. 5-6, 1996), *available at* <http://www.apec.org.au/docs/citer10.htm>.

323. Some sellers, that is, are likely to believe that they could do better than their competitors at selling to the new customers made available by the standardization. And even if they had no such expectation, they might well believe that a larger market, even if competitive, is better than a smaller one.

firms seeking to enter the market encountered resistance from customers who did not want to familiarize themselves with the entrants' contracts. In that case, one could imagine that a standardization effort would make sense, at least for the new entrants. By standardizing, they could make customers more likely to switch to them. But the same reasoning would make the incumbent firms reluctant to engage in standardization, so it is not clear that this could be a source of many standardization efforts.

In any event, this picture of individual firms deciding whether to participate in an effort at standardization is somewhat misleading. Most efforts at standardization, at least of contracts, are undertaken by trade associations.<sup>324</sup> Trade associations can in theory solve the collective-action problem that otherwise would create incentives not to participate and instead to free-ride on the efforts of others. At least if the association does the work of standardization, or if it pays for the participation of its members, there is no need for the association members to recoup the costs of standardization, because those costs are paid by the association. On the other hand, if the standardization effort is still a product of volunteer efforts by members, the same recoupment problems exist.

### *B. Terms and Severability*

Part IV.A suggests that a simple "interoperability" cost-reduction justification for contract standardization may not always be applicable. If not, then the specific standard terms adopted become more significant. It might be, that is, that the parties to the standardization recoup the costs of the standardization effort through more favorable terms, rather than through lower costs of contract drafting. More specifically, if the interoperability benefits of standardization are likely to be competed away, and therefore do not necessarily provide an explanation for the standardization, then the terms themselves may provide that explanation.

However, the antitrust assessments of standardized contracts sometimes seem to focus on the efficiency of standardization of the contract as a whole rather than on particular terms.<sup>325</sup> Antitrust

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324. *See supra* Part II.B.

325. This seems to have been the case in the DOJ review of the ATA contract, in which the

doctrine has means for reviewing particular restraints in the context of broader activities,<sup>326</sup> and the Supreme Court has on several occasions condemned individual restraints that were part of large packages.<sup>327</sup> Indeed, the Court did so with regard to a standardized contract in *Paramount Famous Lasky*,<sup>328</sup> and courts should continue to examine the individual terms of standardized contracts.

In antitrust analysis, this issue could be presented in the context of ancillary-restraint doctrine, which is a commonly used approach to joint ventures like standard-setting.<sup>329</sup> Under that doctrine, it is not sufficient for a restraint—in this case, the standardization—to accomplish a lawful purpose; the restrictions imposed must also be ancillary to that purpose. In the contract-standardization context, the implication of this doctrine is that even a standardized contract that reduces costs or improves quality overall should not include provisions that do not serve those purposes, or that impose restrictions that are not necessary to serve those purposes.

In this respect, standardized contracts are again different from standardized products. For standardized products, it will often be difficult to pick and choose among the product characteristics specified by the standard; more often, the standardized characteristics will work together, so to eliminate one may be to eliminate the benefits of the standardization. The individual provisions of a standardized contract, however, will generally be severable. Indeed, the contract itself is likely to provide that if any provision is invalidated, the remainder of the contract will survive. Hence, there is no reason not to examine each contractual provision carefully.

Substantive scrutiny poses its own problems, however. Most importantly, if sellers agreed on a term that disadvantaged buyers, is it likely that the sellers would compete away any harm in lower prices? If so, even burdensome terms might not result in an anticompetitive effect overall. One answer, given by the Supreme

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agency seems not to have focused either on the disagreement regarding broker liability or on the remedial provisions. *See supra* note 150 and accompanying text and note 153.

326. *See infra* text accompanying note 329.

327. *See Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *see also* *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (holding NCAA's plan for televising college football games restrained competition in the relevant market).

328. *Paramount Famous Lasky*, 282 U.S. at 41-44. *See supra* note 116.

329. A similar approach is recognized by courts that ask whether a restraint is the least restrictive alternative available to accomplish its procompetitive goals.

Court in *Catalano*, is that the absence of negative effects overall does not matter, because elimination of competition on any term is an antitrust violation.<sup>330</sup> Other courts might be more flexible, but for price competition to eliminate any harm from agreement on other terms, two conditions must be met. First, of course, there must be vigorous price competition. Although such competition may often exist, the fact of standardization may suggest some degree of collusion, and in fact will make collusion easier. Second, buyers, or other parties harmed by the agreed-upon term, must be uniform; otherwise, competition along the single price axis cannot eliminate harm to all of them.<sup>331</sup>

Although these antitrust concerns regarding horizontal competition are not the primary focus of contract law, they are also relevant there. As described above,<sup>332</sup> the contract tests for unconscionability and unfairness of terms in standardized contracts can take into account the market within which standardization takes place. In that way, contract law's focus on vertical interparty consent and bargaining power is related to antitrust market power. In principle, competition should be a force that pushes firms toward contractual terms that advance fairness and consumer welfare. Although there are seldom competing standard-setting organizations, contract law could consider some of the same factors that antitrust law looks at in determining whether adoption of standards is voluntary: network effects, the composition of the standard-setting body, and the meaningfulness of any state review of the contract.

Conversely, contract law's emphasis in unconscionability on burdensome terms and bargaining power can inform the antitrust analysis of whether there has been an agreement. The imposition of unfair or burdensome terms by multiple sellers suggests that any of those sellers could attract buyers by *not* imposing those terms,<sup>333</sup>

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330. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (per curiam). See *supra* text accompanying note 121.

331. In theory, the sellers perhaps could serve different buyer groups at different prices, but it is not clear that this would be practical in many cases, because of difficulties both in identifying the different buyer groups and in limiting transactions to particular groups.

332. See *supra* text accompanying note 158.

333. That is so, at least, if the seller is not compensated for its lost or forgone sales by benefits produced by the terms that burden buyers. If that were the case, though, there would presumably be some evidence that sellers would impose similar terms unilaterally, without standardization.

which in turn is the sort of “plus factor” from which one could infer an agreement among the sellers.<sup>334</sup> It is generally considered reasonable to infer an agreement where firms behave in a way that makes sense only if they all behave similarly.<sup>335</sup>

It is also possible that terms could be sufficiently desirable that it would be reasonable to trust their standardization to private agreement, and here again reference to contract law could be useful. Although contract law generally will have no occasion to review desirable terms, a contract might be standardized in order to eliminate undesirable terms. As described above,<sup>336</sup> antitrust law is typically skeptical of agreement on terms, even where the parties defend those terms as beneficial. But if terms have been recognized as unfair under contract law, self-regulatory standardization that eliminates such terms might be permissible.

### *C. Trade Associations as Standard-Setters*

The severability of contracts also suggests that the procedural approach to review of standardization suggested by the Supreme Court in *Allied Tube* may not be appropriate for contract standardization.<sup>337</sup> The procedural approach necessarily takes the contract as a whole, but it might be that the desirability of individual provisions is not guaranteed by procedures that are satisfactory as a whole. Given the complexity of many standardized contracts, a procedural approach may not reveal all of the competitive implications of the contract, particularly when not all interested parties are able to make their views heard.<sup>338</sup> And despite the misgivings expressed above, courts may be better equipped to review the costs and benefits of standardized contracts than they are to make the corresponding inquiry regarding more-typical product standards.

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334. See 1 JONATHAN M. JACOBSON ET AL., ANTITRUST LAW DEVELOPMENTS 11 (6th ed. 2007) (“The plaintiff typically must prove other facts and circumstances (often referred to as ‘plus factors’) in combination with conscious parallelism to support an inference of concerted action.”).

335. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939); *Re/Max Int’l v. Realty One*, 173 F.3d 995, 1009-10 (6th Cir. 1999).

336. See *supra* text accompanying notes 175-77.

337. See generally *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

338. See *supra* text accompanying note 222 (discussing possible harm to third parties to standardized contracts).

Even from a general procedural perspective, though, contract standardization differs from much product standardization. Many, if not most, product standards are established by organizations that are devoted primarily to standard-setting. Such organizations may be accredited by the American National Standards Institute (ANSI).<sup>339</sup> The requirements for accreditation applied by ANSI are the same ones—“openness, balance, consensus and due process”<sup>340</sup>—that define a “voluntary consensus standards body” under the Standard Development Organization Advancement Act of 2004.<sup>341</sup> As a result, there is at least some reason to expect that these organizations will provide unbiased fora for standard-setting.

It is all the more significant, then, that standardized contracts are more often adopted not by standard-setting entities, but by trade associations, where it is not clear that these criteria are met. Indeed, none of the primary standardizing entities discussed in this article—the ISO, AIA, or ATA—is on the ANSI list of “accredited standards developers.”<sup>342</sup> As described above, there are significant concerns about “openness, balance, consensus, and due process” in these organizations,<sup>343</sup> so more attention to these criteria, especially given their adoption specifically for antitrust law in the Standard Development Organization Advancement Act of 2004, would be appropriate.

#### *D. Modification of Standardized Contracts*

A focus on individual contract terms rather than on standardized contracts as a whole also suggests that the question of whether adoption of a standardized contract is voluntary may be too broad. Instead of asking only whether users are under pressure to adopt the contract, as was discussed above,<sup>344</sup> the inquiry should also ask

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339. Am. Nat'l Standards Inst., Domestic Programs (American National Standards) Overview, [http://www.ansi.org/standards\\_activities/domestic\\_programs/overview.aspx?menuid=3](http://www.ansi.org/standards_activities/domestic_programs/overview.aspx?menuid=3) (last visited Oct. 16, 2010).

340. *Id.*

341. 15 U.S.C. § 4301(a)(8) (2006).

342. See Am. Nat'l Standards Inst., ANSI Accredited Standards Developers, [http://www.ansi.org/Standards\\_activities/domestic\\_programs/accreditation\\_as\\_developer/asd.aspx?menuid=3](http://www.ansi.org/Standards_activities/domestic_programs/accreditation_as_developer/asd.aspx?menuid=3) (follow “Standards Developers” hyperlink) (last visited Oct. 16, 2010).

343. See *supra* Part III.B.

344. See *supra* Part III.C.1.

whether users are able to change individual undesired terms. If such alterations of individual terms are possible, users may be able to gain the advantages of standardization while preserving the flexibility to compete.

This sort of flexibility is especially important where potential users of the contract are differently positioned in some way. For example, as discussed above,<sup>345</sup> a contract term may affect small and large firms in different ways. If the term can be altered in ways that suit both types of firms, though, there need not be any anticompetitive effect. The question, then, is whether such alteration is feasible. If alteration of a particular standardized contract is common, it should be taken as evidence that any anticompetitive effect from the standardization is unlikely,<sup>346</sup> at least with respect to the terms that are altered. Even if alteration is not common, it might be that other evidence, such as testimony from parties to the contract, would suffice to infer that terms are used because they are desirable, not because they must be.

It is also worth noting, though, that if alteration of particular standardized terms is frequent, it is reasonable to ask why those terms are standardized at all. It might even be reasonable to ask whether, if little attention was paid in the standardization effort to whether uniformity would be desirable for particular terms, there are other terms that parties would prefer to alter but do not. That would particularly be so if the use or nonuse of the standardized terms were correlated with user characteristics like size. In that case, it might be that it would be too burdensome to renegotiate all the unfavored terms.

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In sum, there are two ways in which contract standardization differs from product standardization, and each suggests that greater scrutiny of standardized contracts could be appropriate. First, it is not clear that the incentives for standardizing contracts are as likely to derive from procompetitive effects as are those for standardizing products. Second, standardized contracts can be scrutinized, and if necessary invalidated, term-by-term in a way that standardized

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345. See *supra* note 72 and accompanying text.

346. That is so, at least, in the absence of any countervailing evidence, such as that alteration is expensive, either in attorneys' fees or in customer resistance.

products cannot. Each of these considerations suggests that, as compared to product standardization, contract standardization could reasonably be subject to greater, not less, antitrust attention.

#### CONCLUSION

There is surprisingly little scrutiny of standardized contracts, either under antitrust law or contract law. Antitrust defers to efficiency justifications for standardization with little effort to determine whether individual terms are desirable. And contract law appears not to have attributed any significance to standardization, even though it exacerbates at least the procedural concerns that are part of unconscionability analysis. It is even possible, though there is no particular evidence of this, that each body of law gives less scrutiny to standardized contracts because they are subject to control by the other.

Of course, it is also possible that very few standardized contracts present problems, either of fairness or competitiveness. But questions about the contracts discussed in this Article suggest that there are more such problems than have been recognized. Many standardized contracts are created under circumstances that put control of the process in the hands of parties on one side of the contract. Although that need not result in an unbalanced contract, a significant amount of commentary points to imbalance in these contracts and suggests that there is reason for greater scrutiny.

How that scrutiny should balance competition and contract concerns is not entirely clear, but this Article has provided some suggestions. Each body of law should retain its traditional focus, which in antitrust law is primarily horizontal competition and in contract law is vertical consent and agreement between the parties. But contract law could look to antitrust law approaches and market conditions to help determine whether true consent to a standardized contract is present. And antitrust law could look to contract law's assessment of the fairness of terms to help draw conclusions regarding both the manner in which standardization occurred and possible anticompetitive agreements. In these ways, the relevance of both bodies of law can aid, rather than hinder, the review of standardized contracts.