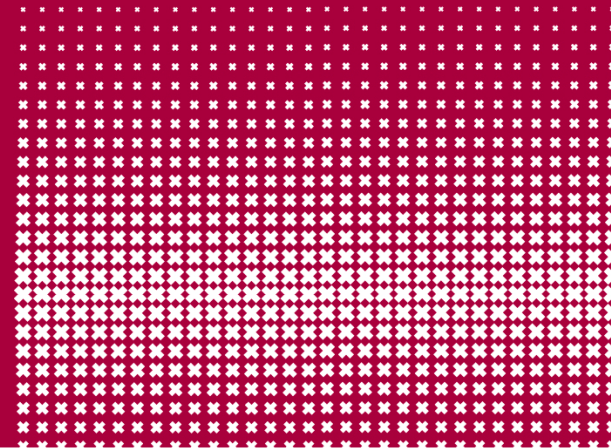




**Prof. dr. M.B.M. Loos**



**Incorporation and making available of standard contract terms: a comparison between Articles 70-71 CESL, German and Dutch law**

**Content and effects of contracts, Groningen 31/5-1/6/2013**

# Incorporation of standard terms: better of with CESL than with national law?

- Depends on perspective
  - Consumer vs. business (B using terms)
  - Buyer vs. seller (B or S using terms)
- Reason for protection differs
  - B2C: structural imbalance → on basis of status
  - B2B: individual imbalance → against abuse
- Through unfairness test
  - Substantive fairness
    - Restoration of freedom of contract as to content agreement
- Through incorporation rules
  - Procedural fairness
    - Access to contract terms
    - Ability to read terms before contract is concluded



# Approach

- CESL
- German law
- Dutch law
- Comparison and concluding remarks

# Incorporation of standard terms under CESL

- Additional payments
- Acceptance
- Precontractual obligations to inform
- Terms to be provided before contract is concluded



## Incorporation of standard terms under German law

- B2C: § 305 and 305c BGB
  - Reference to terms
  - Reasonable opportunity to read
  - Acceptance
  - Surprising terms
- B2B: § 310(1) BGB/case law and 305c BGB

## **Incorporation of standard terms under Dutch law**

- Incorporation
- Surprising terms
- Reasonable opportunity to read
- International commercial contracts
- Large counterparts
- Comparison and concluding remarks



## Comparison and concluding remarks

- German and Dutch law have much in common
- At detailed level: many discrepancies
  
- More attention to incorporation needed in CESL
  - But uncertainty is unavoidable consequence of any legislation