CONTRACT AS FORM

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I. HISTORY, FUNCTION AND JUSTIFICATION[1]

A. Contract as an historical fact

The function of contract, viewed as a sociological fact, is to regulate human conduct and to increase the possibility of predicting it in advance. In this respect, contract has the same function as custom and social and legal standards. In the course of the evolution from the primitive to the modern stage of society, contract has played a role of varying importance from this point of view. During the 19th century it was usual in English theory to express this thought by the formula "from status to contract".[2] In a primitive and static society with fixed social and economic positions there was, according to this theory, no great need for the notion of contract as an instrument for canalizing social conduct. The individual was not considered as such, but as a member of a group: family, class, guild. The group was the actual repository of rights and duties, and the individual's share of advantages and disadvantages was determined by tradition, according to his status in the group. Trade was essentially restricted to an immediate exchange of goods or performances, which created no lasting relations between the parties. Usually, all legally relevant consequences were exhausted by the act of exchange, which could consequently be conceived as justified and conditioned by "real actions", magic formulas, or ritual acts. As a general rule, the seller was not responsible for defects, since the buyer took over the thing as it was (*caveat emptor*).

As communities became more sophisticated, *contract,* consisting in a mere exchange of declarations between the parties, became the instrument used for the disintegration of the old forms and for the creation of new legal relations. The *claim*—the request for performance of each party, as isolated from the contractual relationship as a whole—was, in the framework of this theoretical

[1] Llewellyn, *Yale Law Journal* 1931, vol. 40, pp. 704 ff.; Cohen, *Harvard Law Review* 1933, vol. 46, pp. 553 ff.; Isaacs, *Yale Law Journal* 1917–18, vol. 27, pp. 34 ff.; Nial, *Minnesskrift utg. av Juridiska Fakulteten i Stockholm ...* 1957, pp. 190 ff.

[2] Maine, *Ancient Law,* 1861; cf. Llewellyn, *op. cit., supra.*

construction, the connecting link with the theories of the past. A system of trade thus elaborated made much larger demands on reliance and predictability than did the earlier forms, since an essential part of the fulfilment of a contract, including the examination of the qualities of the goods, was postponed till a later time.

The principle of the binding force of contract was in fact adopted all over Europe during the 16th and 17th centuries; in Scandinavian law it was definitely accepted in the codifications dating from the period around 1700.[3]

B. Practical justification

The practical justification of the institution of contract at this level of the evolution of social structure is evident enough. Contract is the instrument used to canalize trade at the moment of transition from a primitive and static economy to a well-developed and dynamic one. The old frames could no longer resist the pressure of expanding economies. Contract is revolutionary in its origin. It meets the need of man to be free to find new ways to open up fresh vistas of expansion, to create a fresh pattern on the ruins of the outworn one. Against this need for freedom and mobility, however, stands the need for security and predictability. Out of the newly created reality, new forms and new usages soon emerged. Especially on the Continent, various types of contract gradually crystallized, for instance contracts of sale, leases, etc., which were attended by specific legal consequences, defined by law or usage, unless the parties had made an agreement to the contrary ("yielding" legal rules). In English law, on the other hand, certain *standardized contracts,* i.e. usages for the formulation of contracts with certain standardized contents, were formed.[4]

The incompatible needs just referred to give rise to a number of important problems. In particular there is the problem of finding an answer to the demand for individualizing terms of contract, on the one hand, and for typified legal consequences of specific formulas, on the other. If the older rules of form are considered in this light—as guarantees in the latter respect—there

[3] Stig Jørgensen, *Fire obligationsretlige afhandlinger,* 1965, pp. 15 ff.

[4] Sundberg, "The Law of Contracts. Jurisprudential Writing in Search of Principles", *Scandinavian Studies in Law* 1963, pp. 123 ff.; cf. *Sv.J.T.* 1961, pp. 11 ff.

exists a close relationship between them and the fixed formulas of the present day, even though the modern formulas are usually described as non-compulsory.[5]

C. Theoretical justification

(*a*) *Individual and will*

As stated above, it is not difficult to explain the origin of contract as a social fact. It seems obvious, too, that if contract is to function there must be trust in the fulfilment of the promised performances. Man, however, has always felt a need for rationalizing and justifying his actions.

In the field of contract, individualism brought a decisive change in general outlook. The philosophy of natural law was creative in this sphere, inasmuch as it postulated that the reasonable will of man had the power of creating rights and duties.[6] However, the basis was dualistic. The original conception of the law of nature, including that of Grotius, emphasized that man is a social being and is part of a whole. It followed that man's free will and his power of creating rights were derived from the social framework; later authors, belonging to the law-of-nature school, started from the citizens' free acceptance of the legal order contained in the social contract, from which the sovereign right of the citizens to create duties and rights by their contracts was in its turn derived. It is obvious that in both cases an insoluble conflict would arise between the individual free will as a basis of rights and responsibility and this same will as derived from and conditioned by external circumstances and the interests of the community.

(*b*) *The liberal society*[7]

By means of this metaphysical conception of will, the disruption of the old status relations demanded by the expanding economy was now rationalized. The liberal theory and practice of economics needed full freedom for the individual to adopt formlessly any desirable term in any pattern as well as a readiness, on the part of society, to back up the claim for fulfilment with its authority. The same economic theory adopted the hypothesis that, in the

[5] Cohen, *op. cit.*, pp. 582 f.; Stig Jørgensen, *op. cit.*, p. 84.

[6] Stig Jørgensen, *op. cit.*, pp. 52 f.

[7] Kessler & Sharp, *Contracts, Cases and Materials*, 1953, Introduction: Contract as a Principle of Order, pp. 1 ff.

end, it would be to the community's benefit if individuals selfishly pursued their own aims by means of voluntary contracts.

On the other hand, like the preceding nominalistic and idealistic philosophies, liberal economic theory and the utilitarian philosophy connected therewith insisted upon the necessity of drawing limits to free will in the interest of the community.[8] Contract came into existence as a meeting of minds through the exchange of an offer and an acceptance, and the formation as well as the contents of a contract were considered to depend on the real or hypothetical will of the parties. Not only the interpretation of the contract but also its validity were considered to depend on the subjective circumstances of the parties. At the same time it was always recognized that in the last resort the creation of rights depends in one way or another on society, on the legal system, on legislation. It was admitted that sociological considerations set a limit to the effects of contracts so that the most extreme consequences of the doctrine of will could not be accepted. The legal effects ought to depend on the individual notions of the parties in each concrete case; Windscheid, among others, limited his "doctrine of implied assumptions" (German: *Lehre von den Voraussetzungen*) to cover only the cases where it is or ought to be realized by the addressee that the assumption implies a limitation upon the will of the other party as expressed in his declaration of intention.[9] The rules on invalidity on account of compulsion, fraud, etc., were also regarded as being justified by social considerations. Moreover, it was recognized that the effects of contract must to a certain extent be independent of the will of the parties; if there was a discrepancy between will and declaration, the declaring party was in principle not bound, and if there was dissent, the declarations of the parties having different meanings, no contract had come into existence.

It is evident that these far-reaching conclusions, all derived from the doctrine of will, have no connection with the practical needs which called forth contract as a tool in the service of trade.[1] These conclusions, however, are drawn from the after-rationalization and ideological superstructure given to the actual facts by jurisprudence, which had established the doctrines of sovereignty and will. It was quite obvious from the very beginning that practical busi-

[8] Cohen, *op. cit.*, p. 568; Stig Jørgensen, *op. cit.*, p. 88, and in *Juristen* 1963, p. 306.
[9] Stig Jørgensen, *op cit.*, p. 55.
[1] Cohen, *op. cit.*, pp. 568 ff.

ness life was in need of the security consisting in a foundation of outward and objective facts interpreted in accordance with their typical contents. In Anglo-American as well as in Scandinavian law the doctrine of will was never acknowledged in its extreme form. "If the parties have to all outward intents and purposes agreed in the same terms upon the same subject-matter, neither can deny that he intended to agree. For the law is concerned with conduct rather than with intention."[2]

In Scandinavian law, the so-called doctrine of expectation or reliance justified the binding power of contract by invoking the legitimate expectations of the parties, and attempted to solve the questions relating to the formation, interpretation and invalidity of contract by attaching great importance to the expectations of each contracting party as founded upon the outward behaviour of the other party.[3]

(c) *The productive society*[4]

In the period following upon the rise of liberalism, European economy has expanded vigorously since the transition to an industrialized society with mass production and mass trade. Many of the conditions indispensable for the adequate function of the individual free and formless contract have been lost in the process.

(a) The mere fact that modern industry makes heavy demands on capital and implies a division of labour has the effect that the finished uniform products have to be calculated exactly as regards terms of price and sale; standardized production demands standardized sale.

(b) The structure of trade is altered in such a way that the parties on both sides are no longer basically equal in strength and expert knowledge. The relations between them have undergone what may be called a fundamental change in their respective strategic positions. It is true that the producer must be able to standardize production and terms of sale, but in fact he possesses the power and the expert knowledge needed to impose his terms on the weaker and non-expert consumer.

(c) The freedom of competition will often fail, as the capital and the production capacity are apt to cumulate, either immedi-

[2] Chitty, *On Contracts*, 22nd ed. 1961, p. 54.
[3] Stig Jørgensen, *op. cit.*, pp. 87 ff.
[4] Kessler, *loc. cit.*, and *Columbia Law Review* 1943, vol. 43, pp. 629 ff.; Stig Jørgensen, *op. cit.*, pp. 111 ff.

ately or as the result of the creation of manufacturing or selling cartels.

(d) This development, which is to some extent the inevitable price of the welfare society, gives rise to an increased demand for security and predictability in the community. When one can no longer count on one's own qualified and expert estimate of the available offers of performance, one must be interested in optimum uniformity in quality and in terms of price and sale. As production and sale come more and more to be characterized by anonymity, the need for an objective interpretation of the mutual legal positions of the parties will grow.

(e) Public authorities interfere more and more in trade, both directly, by taking over the responsibility for certain branches of production and transport (distribution of power, railways, buses, ferries, roads and bridges, health services, etc.), and indirectly, through legal rules for the protection of certain groups and public interests. Moreover, rules have been introduced which annul such abusive contract terms as imply undue exploitation of the other party's weakness or are otherwise contrary to honesty, good business ethics, or similar standards. (Scandinavian Contracts Act, secs. 31 and 33, Instruments of Debt Act, sec. 8, Insurance Contracts Act, sec. 34, Danish Lease Act, sec. 30.) Moreover, many statutes contain provisions which cannot be set aside by contract or which cannot be set aside to the detriment of one party.

II. CONTRACT FORM AND FORM-CONTRACT[5]

It results from what has been said above that there is, in the development of the law of contract, an ambivalence between the need for individualizing party relations and the need for firm and clear relations, and that the trend in modern law is towards the latter. Thus the development is no longer moving from status to contract, but from contract towards status. Maine's hypothesis, advanced in the last century, turns out to be valid only in part: it was approximately true with regard to the evolution prior to the time when it was advanced. As mentioned above, the need for firmness and clarity can be supplied in two different ways:

[5] Sundberg, *op. cit., supra,* p. 100, note 4.

through the formation—either by law or by usage—of types of contract or through the application of standardized contract terms —standard contracts. In both cases the parties no longer have to consider the individual items of the contract and their mutual legal position if facts develop otherwise than expected; they may confine their decisions to a few principal points. As long as the contracting parties are equal economically and intellectually as well as professionally, the practical difference between the two kinds of solutions will also be unimportant. The parties themselves must be counted on to balance advantages and risks, and it must further be taken for granted that the principles introduced by "yielding" rules of law will correspond to the average interests of the parties. However, where there is no longer equality between the parties, as will often be the case in a modern society of producers and consumers, serious doubt arises with regard to standard contracts, which are often made by one party alone and consequently safeguard the interests of that party only. From this it cannot be concluded, however, that standard contracts deviating from "yielding" legal rules on important points are undesirable from the point of view of society.

(a) Especially if the legislation thus set aside is *out of date* as a result of changes in the social facts it is intended to regulate, the deviation will be justified. Thus, most standard terms in the trade in industrial goods deviate from some of the rules in the Scandinavian Sale of Goods Act dating from around 1907 and essentially originating from usage in the trade in heavy goods at the turn of the century.[6] For instance, in contracts of sale concerning machinery and technical plants, the buyer's remedies—which are, under the Act, a right to declare the contract avoided and to claim damages—have been replaced by a right to have defects in the goods remedied and to obtain extensive service; this right is unknown to the Sale of Goods Act. This conversion of remedies will often meet the needs of the buyer, who wants a well-functioning piece of machinery, but it quite often happens that he is left in the lurch if he suffers indirect loss before the machine is in working order or if it never proves completely satisfactory. At the turn of the century, industry had a need to be allowed to limit the liability for its products, partly because industrial production was new and attended by heavy risks, and partly because industry required all the capital it could accumu-

[6] Stig Jørgensen, *op. cit.*, pp. 147 ff.

late. At the present time industry could undoubtedly carry a heavier burden, and consumers' organizations in the Scandinavian countries have demanded compulsory legal provisions protecting buyers of durable consumers' goods against the risk of getting goods which do not function properly.[7]

(b) There exists, moreover, a need for further development of the acknowledged types of contract towards specialized and—as compared with the ordinary forms—*atypical* forms of contract. Since the legislative machinery works cumbrously and tends to be conservative, the evolution going on in the community and seeking its own way generates ambiguous contracts which fit in badly with the traditional types. Such new forms are for instance consignment on credit, lease and delivery contracts within petrol distribution, contracts between the motor-car dealer and his supplier: dealers' contracts, and other types of contract yet unchristened.[8]

(c) The need for an *international commercial law* also suggests the adoption of contract conditions different from those of the traditional customary law of the various countries. The endeavours of the Rome Institute and of the Hague Conferences to work out a uniform law on the international sale of goods are bound to influence national commercial law. The work performed by the E.C.E. in Geneva for the development of international standard contracts is likewise of great importance for national practice. The conditions worked out by the E.C.E. for the industrial sphere have been adopted in substance as a pattern for domestic trade in the Scandinavian countries.[9]

III. STANDARD CONDITIONS

A. Advantages and disadvantages[1]

The fact that one of the parties has worked out standardized conditions does not necessarily cause a disadvantage to the consumer even if in many cases sellers representing the same interests

[7] Stig Jørgensen, *op. cit.*, p. 163.
[8] Sundberg, *op. cit.*, p. 149.
[9] Schmitthoff, *F.J.F.T.* 1957, pp. 349 ff.; Sundberg, *op. cit.*, pp. 125 ff.; Stig Jørgensen, *op. cit*, pp. 147 f.
[1] Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law*, 1937; Raiser, *Das Recht der allgemeinen Geschäftsbedin-*

work out joint conditions. In well-developed social conditions, the members of a trade may consciously pursue the policy of considering the interests of both the potential parties to the contract. It has always been one of the most fundamental characteristics of civilization that individuals and groups are willing to give up a present advantage in expectation of a greater future advantage. This attitude largely explains the interest of modern business management in public relations, good will, and esteem. In certain branches of industry and commerce, businesses have grown so large that their leaders look upon themselves as representing the general public. This is especially true of insurance companies, which have claimed, on this ground, that there is a decreasing demand for supervision of general insurance conditions.[2] Within many other fields one finds a similar trend towards self-control and self-restraint. This attitude is visible, e.g., in the adoption by industry of the conditions worked out by the E.C.E. It must be admitted, however, that abuse of a strategic position is quite possible when the party who is potentially stronger and more expert works out standard conditions alone. There has been a marked tendency to disclaim or to limit liability and to insert arbitration clauses preventing judicial review of the extent of the conditions. For the producer, it is a considerable advantage to be able to standardize the terms of delivery as well as the quality of the goods; the customer, on the other hand, is frequently debarred from obtaining conditions other than the standardized ones, especially when the producer commands a virtual or a legal monopoly. In these cases one finds what have been called *contrats d'adhésion*[3] or "contracts of

gungen, 2nd printing 1964; *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957,* especially the report by Curt Olsson, "Verkan av avtalsklausuler i standardformulär". See also Cohen, *op. cit.,* pp. 588 ff.; Kessler, *op. cit.;* Ehrenzweig, *Columbia Law Review* 1953, vol. 53, p. 1072; Lukes, "Grundprobleme der allgemeinen Geschäftsbedingungen", *Juristische Schulung* 1961, pp. 301 ff., and *Neue Juristische Wochenschrift* 1963, pp. 1897 ff.; Fischer, *Der Betriebsberater* 1957, pp. 481 ff.; Meeske, *Der Betriebsberater* 1959, p. 857; H. Lund Christiansen, *Juridisk grundbog,* § 18; Kurt Grönfors, "Rättsvetenskapliga studier ägnade minnet av Phillips Hult", *Acta Universitatis Upsaliensis, Studia Juridica Upsaliensia* 2, Uppsala 1960, pp. 148 ff., and *Ekonomiskt forum* 1959, pp. 29 ff.

[2] Bertil Bengtsson, "Om tolkning av ansvarsförsäkringsvillkor", *Försäkringsjuridiska föreningens publikationer,* no. 16 1960; cf. Knut Selmer, "Forsikringsvilkårene, kontrakt eller salgsvare", *Norsk forsikringsjuridisk forenings publikasjoner,* no. 46 1962.

[3] Kessler, *Columbia Law Review* 1943, vol. 43, p. 629; Cohen, *op. cit.,* pp. 590 f.; Llewellyn, *op. cit.,* p. 706. The term is taken from R. Saleilles, De la déclaration de volonté, 1901; Demogue, *Notions fondamentales du droit privé,* 1911, and *Traité des obligations en général,* 1923; Fischer, *Der Betriebsberater* 1959, p. 859; Raiser, *op. cit.,* p. 148.

adhesion". The customer can "take it or leave it", but he cannot influence the terms of delivery. It should be added, moreover, that unlike the expert, the ordinary man seldom reads through standard conditions, not only because it is materially well-nigh impossible for him to do so, but also because such conditions are generally assumed to be normal and hence acceptable. Should there be a draftsman who wants to obscure unreasonable contract conditions, this can often be accomplished by employing a baffling typography and by inserting oppressive conditions in places where they are not expected to be found. The draftsman may often make use of the fact that the non-expert customer lacks the ability to assess the purport of standard conditions. These often refer to situations arising when the fulfilment of the contract miscarries, a contingency for which most customers are unprepared.

On the other hand, it would seem almost beyond doubt that the most efficient means of regulating frequently recurring terms of contract is the adoption of so-called "agreed documents", i.e. standard conditions created through negotiations between representatives from groups with opposing interests. This method presents some interest from the point of view of producers, not only on account of public relations, but also because it obviates the uncertainty created by the attitude of courts towards contract terms, and because where this procedure is adopted the principle whereby such terms should be construed against the author of the contract will not have the same consequences as otherwise.

B. Control[4]

In certain statutes, attempts have been made to remedy abuses in standard contracts. The greater part of the provisions of the Danish Lease Act are "yielding" rules. However, section 5 requires that where the contract is set out in a form which is printed or otherwise mechanically reproduced, it should be clearly indicated in what respects less extensive rights are granted to or more extensive duties are imposed on the lessee than are laid down in the Act.

A general requirement as to clearness of expression has been exacted by the law courts with regard to standardized contracts

[4] *Förhandlingarna å det tjugoförsta nordiska juristmötet;* Lund Christiansen, *op cit.*, pp. 438 ff.; Lando, "Standard Contracts. A Proposal and a Perspective", see *infra*, pp. 127 ff.

in general: as already mentioned, obscure contract terms are construed to the prejudice of the party who has drawn up the contract. Nor are the courts hostile to overruling inequitable stipulations found among a set of otherwise valid terms of a contract if the said stipulations are unexpected by and oppressive to the customer, provided he did not know of the stipulations at the time of contracting and that they were not emphasized in such a manner that he ought to have taken the trouble to read them.[5]

Several Scandinavian statutes contain so-called "general clauses" (German: *Generalklauseln*), which enable the courts to supervise the contents of contracts. This is true of the Insurance Contracts Act, section 34, the Lease Act, section 30, the Instruments of Debt Act, section 8, and the Conditional Sales Act, section 8, subsection 3. In their wording these rules are not identical, but it may be stated that in all the basic principle is that a provision may be set aside wholly or partially if the application of it would be undue or clearly contrary to good business custom.

IV. CONTRACT AND LEGAL NORM[6]

It is partly a question of terminology whether or not contracts create legal norms. The answer may, however, be of practical importance for the interpretation of contracts in the widest sense. Thus a Danish legal scholar, Professor Ross, has subsumed private contracts under the concept of law in the widest sense, i.e. the law formulated by the authorities.[7] If we conceive law as directives given to the citizens, then contracts create legal norms; if we conceive law as directives given to the courts, the relations created by contract are also legal norms, since they are to be made the basis of the decisions of the courts. If, on the other hand, it is stressed that legal norms should be applicable in an indefinite number of cases, the legal relationship entered into by two parties will fall outside the definition of law.[8] It should be remembered that the contents of a contract consist of various elements. There

[5] Ussing, *Aftaler,* 1945, pp. 427 ff.

[6] Cohen, *op. cit.,* pp. 585 ff.; Llewellyn, *op. cit.,* pp. 727 ff.; Lukes, *Juristische Schulung* 1961, pp. 301 ff.; Fischer, *Der Betriebsberater* 1959, pp. 859 ff.; Sundberg, *op. cit.,* pp. 123 ff.

[7] Ross, *Om Ret og Retfærdighed,* 1953, pp. 278 ff.

[8] Hart, *The Concept of Law,* 1961.

is, on the one hand, that which the parties have expressly provided for, on the other, that which the parties have not explicitly contracted for. If the contents of the contract are to be fixed in detail, that to which the parties have expressly committed themselves will be interpreted with regard to the expression employed and the circumstances of the case. The subsequent procedure, which consists of supplementing the contract of the parties with such legal effects as they have not taken into account, and have possibly not thought of, is usually described by saying that the contract of the parties is filled out with general "yielding" legal rules.[9] Now, if the legal system concerned does not know a *contract type* containing detailed legal effects fixed through usage or "yielding" rules of law, but the parties have signed a contract containing ordinary standard conditions, the question may arise whether the provisions of the standard form belong to the "yielding" rules or to the individual contract. The question touches partly on the problem how to decide whether the standard conditions are part of the contract or not, partly on the interpretation of those conditions.

A. The problem of submission

If the standard conditions belong to the "yielding" rules, they are part of the contract even if they are not expressly accepted. If they do not belong to these, they have to be separately submitted to in order to make them part of the contract.

(a) It is widely held in all countries that standard conditions do not become part of the contract of the parties without submission, unless the standard conditions are formalized pre-existing usages.[1] It is not necessary that they should be contained in a contract signed by the parties. It is sufficient that the standard conditions are contained in a previous offer to contract or that they are referred to in such offer. If, on the other hand, an acceptance refers to standard conditions, the acceptance will usually

[9] Sundberg, *Sv.J.T.* 1961, pp. 12 ff.; Vahlén, "Bidrag till avtalstolkningens systematik", *F.J.F.T.* 1963, pp. 380 ff., *Avtal och tolkning*, 1960; Folke Schmidt, "Model, Intention, Fault", *Scandinavian Studies in Law* 1960, pp. 179 ff.; Karlgren, *Kutym och rättsregel*, 1960; cf. the review in *U.f.R.* 1961 B, pp. 176 ff.; Ussing, *op. cit.*, § 39.

[1] Kessler, *op. cit.*; Fischer, *Der Betriebsberater* 1959, pp. 858 ff.; Lund Christiansen, *op. cit.*, pp. 432 f.; Grönfors, *Ekonomiskt forum, loc cit.*

be considered non-conforming to the offer. According to the Scandinavian Contracts Act, section 6, subsection 2, the acceptance constitutes a rejection in connection with a counter-offer, unless the offeree assumes that his acceptance agrees with the offer and the offeror should realize this. In this latter case, if the offeror does not notify the other party, the standard conditions will become part of the contract. It is more doubtful whether this rule will also apply if the offeree knows that there is a discrepancy. Even in these cases, there is a tendency in trade to impose on the offeror a duty to notify the offeree, and such duty of objection is in fact to a great extent enforced with regard to references to standard conditions contained in confirmative letters; a reference in the invoice, however, will not suffice. The fact is that, as a rule, the offeree will count on his conditions being accepted as a matter of course, provided the offeror has no conditions of his own, or has not informed the offeree of such conditions. Consequently, it is doubtful to what extent this may be called conditional acceptance. If the offeror, however, has stated his own conditions in the offer, the addition of the offeree's standard conditions in the acceptance will make it conditional; as a rule, the offeree cannot count on the offeror to be willing to accept his conditions.—In case of such a combat about the standard conditions the rule in the Uniform Commercial Code, section 2-207, will in all probability be preferable to the Scandinavian Contracts Act, section 6, subsection 2, cf. below.[2]

(b) Furthermore, it is generally recognized that standard conditions can become binding on the other party even if they are not referred to in the contract. This is the case if it is a matter of common knowledge or is well known to the party in question that such standard conditions exist.[3]

B. Interpretation

Whether the conditions are referred to or their existence must be supposed to be common knowledge, it is generally held that the conditions ought to be applied even if a party has been ignorant of the details of the standard conditions at the time of

[2] Ussing, *op. cit.*, p. 429; Olsson, *op. cit.*, pp. 19 f.; Lund Christiansen, *op. cit.*, p. 433; Ruud & Lando, *T.f.R.* 1965, p. 16.

[3] Ussing, *op. cit.*, p. 429; Lund Christiansen, *op cit.*, p. 433.

contracting.[4] Unusual provisions weakening the position of a party cannot, however, bind him unless they have been communicated to him or he was in fact cognizant of them.[5] If the documents are in the nature of agreed documents, the matter generally does not cause doubt, especially when both the contracting parties belong to the groups which have taken part in the adoption of the conditions. Even if they do not belong to these groups, the conditions are likely to be applied all the same. An analogous procedure is followed in respect of collective labour agreements, the so-called tariff agreements, and in many other cases where public or publicly concessioned institutions have worked out and published tariffs and regulations. Sometimes legislators apply the technique of confirming contracts between different groups of interests; sometimes they interfere by giving the force of law to contract proposals; this has now and then been the case in Denmark with the draft settlements of the official mediators in labour disputes. The interpretation of such conditions will normally follow the same objective principles as are employed for the purpose of construction of statutes.[6] Besides, the idea of the courts interpreting collective agreements differently according as they were agreed upon or given the force of law is unrealistic. Difficulties may arise, since it is often impossible to investigate the underlying considerations in the same way as can be done in respect of statutes, which are accompanied—particularly in Scandinavia—by extensive *travaux préparatoires*. Sometimes such investigation is possible, however; thus the standard conditions worked out by the E.C.E. have appurtenant comments which are usually made the basis of interpretation.

Thus standard conditions, particularly fixed trade conditions or agreed documents, will to a great extent function as and be treated like supplementary legal rules, subject to the exceptions mentioned above with regard to the problem of submission. This having been stated and the exceptions having been specified, it is of little importance to discuss whether standard conditions are objective or subjective law.[7]

[4] Lund Christiansen, *op. cit.*, p. 432; Ussing, *op. cit.*, p. 429.

[5] Ussing, *op. cit.*, p. 185.

[6] Sundberg, *Sv.J.T.* 1961, pp. 28 f.; Fischer, *Der Betriebsberater* 1959, pp. 860 ff.; Lund Christiansen, *op. cit.*, pp. 433 ff.

[7] Lukes, *Juristische Schulung* 1961, pp. 301 ff.; Clauss, *Monatsschrift für Deutsches Recht* 1959, pp. 165 ff.

V. CONTRACT AS FORM[8]

A. Introduction

It is often said that in earlier days contracts were bound to forms, while in modern times they are formless. If by contractual form we understand specific requirements for the validity of legal transactions, it is true that in most European countries no general demands have been made, since the 16th century, on the form of contracts, whether for the use of formulas or seals, exchange of tokens, taking the oath, or for other ritual acts. On the other hand, increased demands have been made on form in certain respects, especially the requirement of a written document. If by requirements as to form we understand the models generally applied in legal transactions under given social conditions, this statement is quite indisputable. Analytically, a distinction can be made between the external form—exchange of two conforming promises —and an internal form—the intention of each party. Thus the complete contract requires a consensus, a meeting of minds.

B. The function of form

The rules of form are supposed to serve various purposes. It is beyond doubt that the main purpose of these rules must be that of being instrumental in bringing about legal relations in conformity with the needs and potentialities existing at the time in question. Undoubtedly the contents of form rules are also connected with the procedure of courts as actually in force. In the days of primitive procedure with lay judges and external evidence, it was quite natural to require external manifestations of each legal transaction. As procedure tends to become a professional juristic activity which implies the recognition of "internal" evidence, including oral testimony, there will be the possibility of the approval of contractual forms which take into consideration individual and subjective factors.[9] Form rules, however, must be supposed not only to serve the purpose of securing evidence about the formation of legal relationships, but also to have a second

[8] Cohen, *op. cit.*, pp. 582 f.; Llewellyn, *op. cit.*, pp. 746 ff.
[9] Stig Jørgensen, *op. cit.*, pp. 84 ff.

function, connected with the first, viz. to ensure that the actual intentions of the parties are carried into effect. Finally, they may protect the parties against precipitate measures.[1]

(a) *The doctrine of "consensus"*

When the natural-law and pandect-law scholars applied the doctrine of consensus, their purpose was not only to safeguard respect of the intentions of the parties, but also to protect the parties from being legally bound by unilateral promises which were normally of no great practical social interest and against the risk of being bound by someting which was not a manifestation of a final decision. The doctrine of consensus has to be considered in the light of the Roman-law doctrine about the *causa* of promise, of which it may be called a continuation. The theoretical justification of the doctrine of consensus, being no necessary consequence of the doctrine of will, was a formal one, that you cannot force a right on anybody against his will.[2] In Anglo-American law the role of the doctrine of consensus as a requirement of form is still more pronounced. The Anglo-American rule that a promise is not binding until it has been accepted is to be seen in relation to the doctrine of consideration. In medieval English law—apart from certain particular cases—it was a prerequisite of the binding force of a contract that it should have been concluded under seal unless the performances were exchanged simultaneously: *quid pro quo*. When later, under the impact of economic development, the scope for a frictionless contract mechanism had to be widened, the principle of *quid pro quo* was nevertheless maintained, inasmuch as unilateral promises were not binding unless the promisee had either imposed a detriment upon himself or offered the promisor a benefit. Irrespective of the obvious historical connection with the concern of the patriarchal medieval society to give the parties value for money, the demand for consideration has not been administered in practice as a principle of equality intended to secure the parties a reasonable payment. Every detriment or benefit, be it ever so small, has been considered sufficient. When even a token payment of one penny has been considered as fulfilment of the claims, it goes without saying that the rule of consideration is a mere matter of form.[3]

[1] Llewellyn, *op. cit.*, pp. 710 ff.; Ussing, *op. cit.*, pp. 102 f.
[2] Stig Jørgensen, *op. cit.*, pp. 86 f.
[3] Cohen, *op. cit.*, pp. 580 ff.; Llewellyn, *op. cit.*, pp. 741 ff.; Stig Jørgensen, *op. cit.*, pp. 17 ff.

(b) *The doctrine of promise*

Conversely, the Scandinavian law of contract has been based, since the middle of last century, on the doctrine of promise, according to which a unilateral promise binds the promisor from the moment it has been brought to the notice of the promisee.

The practical difference between the doctrine of consensus and the doctrine of promise can be reduced to the question whether an offer can be revoked before it is accepted. For in the case of bilateral contracts, an offer is at any rate binding only up to the time fixed or implied for acceptance. The crucial point is whether it is deemed more expedient that the offeror should be preserved the liberty to enter into other commitments up to the time when the offeree is bound or that the offeree should be granted time for deliberation.

The tendency of Anglo-American law is towards the Scandinavian attitude, since the requirements of consideration are regarded as fulfilled in many of the cases which are most important in practice.[4] The Uniform Commercial Code, section 2-205, has abolished the requirement of consideration in mercantile sales when written promises expressly designating themselves as standing offers are employed.

The Uniform Law on the Formation of Contracts for the International Sale of Goods, art. 5, adopts the Anglo-American arrangement in that the offer is not binding in principle. The offer can only be validly revoked, however, if the revocation was made in good faith and in conformity with fair dealing; and the offer is irrevocable if a fixed time limit for acceptance is stated, or if it is to be considered a firm offer on account of either express provisions or general usage or owing to the practice prevailing between the parties or their negotiators.

C. The Scandinavian Contracts Act

Chapter 1 of the Scandinavian Contracts Acts contains provisions on the formation of contracts. This chapter mainly deals with the constitution of rights through the exchange of two declarations of intention, namely offer and acceptance. Even if the Scandinavian law of contract has rejected the doctrine of will as well as the doctrine of consensus, it can hardly be doubted that the

[4] Svane, *The Conclusion of Contracts,* Copenhagen 1961, pp. 38 ff.; Atiyah, *An Introduction to the Law of Contract,* 1961, pp. 57 ff.; Schmitthoff, *F.J.F.T.* 1957, pp. 362 f.

tradition and construction adopted have given rise to problems. Quite apart from the facts that the statute is not exhaustive and that rights can be created otherwise than through exchange of offer and acceptance, the notion of formation of contract that is adopted by the statute may cause difficulties. Recent Scandinavian doctrine has pointed out that the external and internal form rules of the Contracts Act may cause uncertainty in practice.

(a) *External form*

In practical life the usual means of making a contract is not the exchange of two declarations of will, namely an offer and a conforming reply. Even admitting that rules of law are and have to be abstractions, and as such reflect reality in outline only, it is not very easy to fit the most significant practical instances into the pattern.[5]

1. Usually the total number of declarations exchanged is far in excess of two, since contracting between persons at a distance takes place through an exchange of letters and other communications, constituting altogether the negotiations between the parties. The practical problem, in this situation, is to decide at which stage of the discussion one must pull up and define a declaration as a binding offer qualified for acceptance by a conforming answer. In practice, there exists a strong need for the principle that the negotiations between the parties should remain as long as possible free from the risk of being wrapped up in legal obligations, without there having to be an explicit statement about each declaration to the effect that it is non-binding (cf. the Contracts Act, section 9). Often an enforceable contract cannot be said to have come into being until a written contract document has been signed or a confirming letter has been received and not challenged. In such cases, it is not sufficient, when interpreting the relation between the parties, to take into consideration the last two declarations; on the contrary, it is necessary to include all the declarations exchanged in order to arrive at the contents of the contract.

2. When contracts are made between parties simultaneously present, it is still harder to fit the proceedings into the pattern. Only occasionally will the procedure be confined to the making of an offer and the acceptance of it.

3. Whether the parties are present simultaneously or not, whether they sign simultaneously or successively, neither of the

[5] Vahlén, *Avtal och tolkning*, 1960, pp. 122 ff., and *Teori och praxis, Skrifter tillägnade Hjalmar Karlgren*, 1964, pp. 372 ff.

signatures on a written contract for which the written form is agreed upon or implied can be regarded as an offer or an acceptance. The use of a written form is often tacitly agreed to by virtue of the circumstances where protracted negotiations have taken place as well as by virtue of the transfer of real property and consumer goods of large size.[6]

4. Where a contract form containing detailed standard terms is signed, the matter is more complicated still. Whether the parties sign simultaneously or successively, essential contractual conditions existed in advance. This situation harmonizes badly with the construction implied in the Contracts Act, according to which all of the contractual conditions are contained in the offer, which may consequently be seized by simply accepting.

5. Even more rudimentary are contractual proceedings in a great many everyday relationships. You drop a coin into a slot-machine and pull out the drawer, you choose an article at a self-service store, you board a train, or send goods by some public transport service. In all of the instances mentioned it is hard to detect any feature that might be characterized as offer and acceptance. But the formation of the contract is rather simplified in many other cases, too, e.g. employment contracts, the ordinary consumer's contract for gas or electricity supply, insurance contracts, etc.[7]

(b) *Internal form*

Especially in German contractual law, there still exists a pronounced tendency to choose as the point of departure the declaration of intention as a basis of the contractual construction. It is maintained that the declaring party is only bound provided that the declaration is a manifestation of intention and provided that the declaring party has an intention to perform a legal transaction, that is to say has the intention of obligating himself legally. On the other hand, it is maintained that the intention to perform a legal transaction must be communicated to the addressee. If there is a discrepancy between the contents of the declaration and the intention of the declaring party, the principle is that no obligation will come into existence; if he has acted negligently, however, he may perhaps have to pay the loss caused to the party

[6] See 1957 U.f.R. 1040 (Supreme Court of Denmark); cf. *T.f.R.* 1958, p. 329.
[7] Stig Jørgensen, *op. cit.*, pp. 101 ff.

that relied on the declaration.[8] For the purpose of interpreting the declaration, the intentions of the parties are made the point of departure. The actual or hypothetical intentions of the parties are also taken as points of departure for any attempt to define the extent of the obligations of the parties, though, to a certain extent, it is acknowledged that the contract of the parties may be supplemented by so-called *ergänzende Vertragsausfüllung* and *ergänzendes Gesetzrecht*.[9] If there is an "unconscious dissent", i.e. if the parties have exchanged declarations of intention which are outwardly identical, but mean different things, it is generally assumed that no contract has been formed.[1]

In Anglo-American law, the doctrine of will has been of no great importance. The promisor can only within certain limits plead against a *bona fide* promisee that it was not his intention to make a declaration or to obligate himself legally. Only in rather rare circumstances has the promisee the possibility of pleading a mistake or an inconsistency between intention and declaration. Also, the interpretation of the contract is made essentially on an objective foundation.[2] On the other hand, it has until very recently been usual to consider the extent of the obligations of the parties as a question to be answered on the basis of an interpretation of the parties' intentions, the existence of general "yielding" rules of law being recognized only within certain limits. In recent years, however, this fiction has been given up in favour of the more realistic view that the extent of the obligations of the parties in excess of the ones expressly agreed upon is a manifestation of objective rules concerning the distribution of risk rather than of the intention of the parties.[3]

[8] Enneccerus & Nipperdey, *Allgemeiner Teil*, vol. 2, 15th ed. 1958, pp. 896 ff., 1033 ff.; Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 2nd ed. 1957, p. 36, note 10.

[9] Larenz, *Lehrbuch des Schuldrechts*, vol. 1, 3rd ed. 1958, pp. 69 ff.; Stig Jørgensen, *op. cit.*, pp. 48 ff.

[1] The principal rule is found in B.G.B. § 139; if the court arrives, through an assessment of the hypothetical intentions of the parties, at the conclusion that the contract, even apart from the mistake, would have been made, the contract is regarded as concluded, and the item not agreed upon is left aside (§ 155).

[2] Chitty, *On Contracts*, 22nd ed. 1961, pp. 54 ff., pp. 191 ff.; Cheshire & Fifoot, *The Law of Contract*, 5th ed. 1960, pp. 21 f., 37, 176 ff., 194 ff.; Stig Jørgensen, *op. cit.*, pp. 41 ff., 89 ff.; Atiyah, *op. cit.*, pp. 41 ff., 127 ff.

[3] Lenhoff, *Michigan Law Review* 1946–47, vol. 45, pp. 39 ff.; Chitty, *op. cit.*, pp. 1171 ff.; Cheshire & Fifoot, *op. cit.*, pp. 462 ff.; Reynolds, *Law Quarterly Review* 1963, vol. 79, pp. 534 ff.; Llewellyn, *op. cit.*, pp. 716 ff., 722 ff.; Cohen, *op. cit.*, pp. 583 f.

For the last hundred years, the Scandinavian law of contract has chosen the same point of departure as English law;[4] this is probably due to the influence of English contractual law, but the emphasis has been put upon consideration of trade interests. In opposition to the German doctrine of will (*die Willenstheorie*) Scandinavian writers advanced a "doctrine of reliance", according to which the legal foundation of the creation of right was not the intention of the promisor, but the expectation, or reliance, of the promisee. Like the doctrine of will, the doctrine of reliance is subjective in so far as the legal effects are attached to the expectations of the parties: in the doctrine of will to those of the promisor, in the doctrine of reliance to those of the addressee. In the latter case, however, an objective standard is introduced by substituting the understanding of "the reasonable man of ordinary prudence" for the "actual expectations of the promisee". In order to overcome these difficulties, a doctrine of declaration has been worked out. This doctrine must be characterized as a step forward, since it stresses the importance of the declaration, the objective fact independent of the assumptions of the parties. On the other hand, the doctrine may lead to errors as to the matter of what shall be required in order to consider that a communication has taken place. There are the requirements that it shall express an intention and have an objective content of its own. In recent Scandinavian theory, we no longer speak of legal transactions and declarations of will but of "dispositive" statements.[5] The main stress is laid on the legal effects of the statements irrespective of whether they are written or oral manifestations, symbols, acts, or omissions, and irrespective of whether they are carried by a "dispositive" intention. A statement does not obligate because it is the expression of an intention or a decision of the promisor to obligate himself. Conversely, if the legal system endows certain statements with obligating force it can as a rule be taken for granted that anyone who makes use of such statements intends to obligate himself, just as it is normally assumed that, anyone who fires a revolver at another person intends to take that person's life. In so far as a statement of a certain type is conventionally obligating, it can usually be assumed that the making of it indicates a "dispositive" intention. Thus the task of the judge or of the legislator is, while paying due attention to

[4] On what follows, see Stig Jørgensen, *op. cit.*, pp. 81 ff.

[5] Arnholm, *Privatrett*, vol. 1, 1964, pp. 160 ff.; Ross, *Om Ret og Retfærdighed*, 1953, pp. 281 ff.

expediency and drawing support from conventional understanding, to fix the point when the statement becomes binding. The author submits the following general rule. When a form of behaviour usually connected with a certain complex of legal effects is observed, these typical legal effects do normally ensue. Choosing this point of departure it is not difficult, from a purely theoretical point of view, to settle when and to what extent legal effects result from the conduct of the promisor. This is a mere question of convention.

1. *Formation*[6]

A legal obligation is created when somebody displays a form of conduct which is a typical manifestation of an act of will and of his intention to obligate himself and consequently will as a rule be understood as such. Therefore, if somebody has signed or despatched a document or performed an act which would normally justify a conclusion to that effect, he will usually be bound by it even if he acted by mistake. So also will he bind himself if, for instance, he posts the wrong letter, acts in jest, or signs a document without making sure in what capacity. Likewise, he may be obligated if he performs deliberately specific acts in an environment where such acts are usually taken as a legal disposition, for example at a fish auction, etc. Another thing is that to a certain extent legal rules are furnished for the protection of the party concerned against abuses beyond his control, such as forgery, incapacity, etc. Often a duty is imposed on a party to a contract to give notice to the other party. In case of failure to do so, legal obligations are created without regard to whether the party concerned intended such effect or whether his failure was due to an oversight.

2. *Extent*

Nor is the extent of the effects of the obligation dependent on an inquiry into the factual or hypothetical intentions or the assumptions of the parties. It is the concern of the law courts to distribute the risks between the parties when the legislators have not provided for unforeseen events by yielding legal rules.[7]

[6] Stig Jørgensen, *op. cit.*, pp. 97 ff.

[7] Stig Jørgensen, *op. cit.*, pp. 52 ff.; Folke Schmidt, "Model, Intention, Fault", *Scandinavian Studies in Law* 1960, pp. 179 ff.; Sundberg, "The Law of Contracts. Jurisprudential Writing in Search of Principles", *Scandinavian Studies in Law* 1963, pp. 123 ff.

3. *Interpretation*

Our point of departure naturally leads to the consequence that the courts will start not from an inquiry into the will or intention of the parties, but from the natural understanding of the contract made by them. The interpreter must pay attention not only to the expressions actually used but to the context as a whole, including the application in the present situation, the manifested purposes and further circumstances.[8] If there is an "unconscious dissent", the parties' conception of the meaning differing on more or less essential items, the courts are inclined to conclude that there is a contract rather than to state that no contract exists (cf. Contracts Act, sec. 6). The court will find the reasonable and sensible content of the contract by balancing the average interests of the parties. This is the case especially when the parties performed their obligations wholly or partially. Against this background, it is easy to understand the attitude of the courts towards standard conditions. As mentioned before, these are made the basis of the relation between the parties, provided that they are referred to, or when the other party knows about their existence, or their existence is common knowledge. Whether the parties had any concrete idea of the particulars of the conditions is a matter of no concern.[9]

(c) *Special rules of the Contracts Act*

The background thus furnished seems to offer an occasion for a discussion of certain provisions in the Scandinavian Contracts Acts.

1. Pusuant to sec. 1 (cf. sec. 7), an offer becomes binding, i.e. cannot be revoked, when it has come to the offeree's actual *knowledge*. The rule, as far as it goes, is consistent with the basic approach of the Act: regard for the promisee's expectations.[1] But if this basic approach is not deemed decisive, there seems to be good reason for laying the stress, as in German law, on the time when the offer has *reached* the addressee's office, regardless of the time he actually reads it. This rule, which is simple from the point of view of judicial technique, has been proposed in the Uniform Law on the Formation of Contracts for the International

[8] Ross, *op. cit.*, p. 132; Folke Schmidt, *op. cit.*; Hellner, *Köprätt*, 1963, p. 116; Vahlén, *F.J.F.T.* 1963, pp. 380 ff.

[9] See Stig Jørgensen, *U.f.R.* 1961 B, p. 179; see 1909 U.f.R. 126; 1919 U.f.R. 445; 1928 U.f.R. 100; 1932 U.f.R. 684 and otherwise 1919 U.f.R. 548.

[1] *Udkast til Lov om Aftaler og andre Retshandler*, Copenhagen 1914.

Sale of Goods, section 5. The practical difference is not very considerable, and the amendment could be made without scruples.

2. Sections 4 and 6 of the Scandinavian Contracts Acts contain rules to the effect that both a late acceptance and an acceptance with modifications constitute a counteroffer pending for a period of acceptance; if not accepted, the counteroffer will lapse. If the offeror must realize that the offeree believed the acceptance to have been despatched in due time or to conform fully to the offer, he must give notice in order to avoid being obligated according to the acceptance. Instead of this rule, which is based on regard for the subjective circumstances of both the parties, the Uniform Law on the Formation of Contracts for the International Sale of Goods contains, in secs. 7 and 9, provisions resting on objective criteria. If the acceptance is *late,* it will be decisive for the offeror's duty to give notice whether the document containing the acceptance shows that it has been sent in such circumstances that, if its transmission had been normal, it would have been communicated in due time. The practical difference here is not very considerable, but the provisions of the Uniform Law on Formation are preferable on account of their objective character. If the acceptance contains modifications, a provision in section 7 corresponding to the Uniform Commercial Code, section 2-207, shall apply.[2] An acceptance which shows an immaterial difference from the offer does not constitute a rejection of the offer, but is made the basis of the relationship between the parties, unless the offeror gives notice without undue delay.

The increasing use of standardized contract forms, in particular, has made urgent the problem of the non-conforming acceptance and has necessitated the statutory rule. In a dispute about contract forms, each party tries to get his form accepted by the opposite party. The rule of the Uniform Law on Formation is less extensive than that of the Scandinavian Act in so far as the latter makes no distinction between material and immaterial inconsistencies. It is more extensive, however, in so far as it must apply even in case of conscious non-conformity of the acceptance. The question of the extent of the provision is dependent to some degree on the interpretation of the word "material". However, it does not seem advisable to replace the Scandinavian rule by the international equivalent. On the other hand, many reasons might be adduced for supplementing the Scandinavian rule by the international one,

[2] Ruud & Lando, *T.f.R.* 1963, pp. 14 ff.

which will no doubt solve many difficult practical problems and facilitate the above-mentioned endeavours of the courts to get something meaningful out of obscure contracts.

3. Finally, alterations ought to be contemplated as to the Scandinavian Contracts Acts, sec. 32, which contains the principal rule about mistake because of discrepancies between the intention and the declaration of a promisor. Such a mistake cannot be pleaded against the promisee unless the latter knew or ought to know about it. If, on the other hand, the promisee has acted negligently inasmuch as he ought to have discovered the mistake, the promisor is not bound by the content of his declaration. The provision is normally interpreted to mean that the promisor is not even bound according to what he intended. This is supposed to apply even when he himself has acted negligently—which is the usual case; the promisor will perhaps have to compensate the other party for his loss due to the fact that he relied on the declaration. In recent legal writing, this provision has been criticized because it gives the negligent promisor an unduly favourable position. Proposals have been made to leave it to the courts to distribute the loss between the parties according to the ordinary tort-law principles of contributory negligence on the part of the party suffering a loss, so that a reasonable adjustment of the interests of the parties is undertaken.[3] An amendment of that kind would harmonize with the above-mentioned general efforts on the part of the courts to attach a sensible and reasonable meaning to the contract of the parties, and it would eliminate many difficult problems of interpretation.

VI. CONCLUSION

Earlier in this paper, it was submitted that social evolution has caused a transition from status to contract and again from contract towards status-like relations.[4] Observations like these are, of course, inevitably vague and generalizing. The purpose was to investigate the development and function of the contractual construction viewed as a social fact, as well as the theoretical argu-

[3] Folke Schmidt, *op. cit.*, pp. 177 ff.

[4] Isaacs, "The Standardizing of Contracts", *Yale Law Journal* 1917–18, vol. 27, pp. 34 ff.

ment for acknowledging the contract as legally obligating. Our enquiry has demonstrated in contractual law an evolution from an objective stage, through a subjective one, towards a new objective stage, the development keeping pace with that of the law of torts and being connected with the same practical and theoretical motives as have influenced the evolution of that branch of private law. The results of the enquiry also support the contention that the deep rooting of the contract phenomenon in the doctrines of freedom and of will has influenced the solution of general and special legal problems; this influence is regarded as neither inevitable nor profitable. It is true that private autonomy is still acknowledged as the basis of our economic and social system, but the individual is not allowed to decide unrestrictedly whatever he likes. As regards the legal effects of a contract, no importance is attached to the hypothetical intentions of the parties beyond what they have expressly decided upon. Nowadays, it is held that contracts, being social phenomena, must be subordinated to the interests of society, and that the extent of the obligations of the parties must be determined by balancing advantages to be gained against risks incurred by the parties. In this connection, attention is drawn to the different means employed, partly the formation of acknowledged types of contract through usage or by compulsory or yielding statutory provisions, partly the application of standardized contractual terms. As regards the latter, stress is laid on their great importance in the present-day productive society, since such standard terms promote predictability as well as flexibility by facilitating and rendering informal the introduction of new types of contract and new contractual provisions; society, on the other hand, must strive to ensure that such balancing of the interests of the parties as is aimed at by legislators is achieved in one way or another. The author submits that today —instead of taking the contractual construction as a point of departure—we ought to set about charting the social reality and afterwards consider how far that construction corresponds with the map we have obtained. We shall undoubtedly find that to a great extent the construction still represents reality, especially since, where fundamental social conditions are involved, tradition has more bearing than has state regulation determined by rational considerations.[5] It is a fact that we can, to a great extent, rely on contract to secure our expectations regarding the conduct

[5] Cohen, *op. cit.*, pp. 590 ff.

of others, but this is so because society traditionally sees to it that these expectations are fulfilled.[6] The protection of our expectations by society is based on the traditional assumption as to what is a typical manifestation of the intention of the promisor to bind himself legally; it must not be forgotten that the expectation of performance is in fact created because the readiness of the promisor to effect such performance is always present in the typical cases. The continued recognition of private autonomy renders it natural to assume that the contractual construction will, in the future also, be the established method of creating rights and duties under private law. The construction, however, must be relieved of part of its metaphysical ballast and accordingly some alterations of the acknowledged types of contract-making must be contemplated. However, the situations actually occurring differ so widely from one another—on the one hand, the cases governed by the traditional form and, on the other, those which are in the nature of standard contracts—that it seems reasonable to raise the question whether unity of the law of contract ought to be aimed at or whether this field of law ought to be split into two separate parts.[7] It is not easy to have a definite opinion on which is preferable: unity at the risk of oversimplification and fiction, or plurality with greater precision as to details but with narrower perspective. But in view of the shift towards objectivity which has characterized the law of contract in recent years, there is hope for the ascendancy of unity.

[6] Llewellyn, *op. cit.*, pp. 750 f.

[7] Thus Kessler & Sharp, *Contracts, Cases and Materials*, 1953. German law makes a distinction between *Vertrag* and *Faktische Vertragsverhältnisse*. Grönfors, *Ekonomiskt forum* 1959, p. 34, refers to a conference in 1957 where this distinction was severely criticized.