STANDARD CONTRACTS

A PROPOSAL AND A PERSPECTIVE

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1. INTRODUCTION

This article deals with the so-called General Conditions (G.C.) used in adhesion contracts, agreed documents, and documents made by official bodies.

Contracts of adhesion are contracts made between a trader (supplier) and a customer in which the G.C. of the supplier, frequently referred to in the following as the stipulator, are made applicable. The words "supplier" and "customer" are not to be taken literally. The supplier is the party that makes the G.C. and imposes them. The customer, frequently referred to in what follows as the adhering party, must either accept the G.C. or abandon the contract. The stipulator is generally but not always the supplier of goods or services and the adhering party is a private person who buys these things for his personal needs. Generally the stipulator is powerful financially and in bargaining, and the adhering party is weak or uninterested. The stipulator makes many contracts of the same kind, the adhering party only one or relatively few.

Agreed documents are contracts containing G.C. made by representatives of both suppliers and customers. They resemble the documents made by official bodies in that the G.C. consider the interests of both groups, the only difference being that the "official documents" are made by or under the auspices of public institutions such as the Economic Commission for Europe (E.C.E.).

G.C. in contracts made by governments or by state monopolies which are parties to such contracts are in most cases adhesion contracts. It may be noted that the new Israeli statute on Standard Contracts which deals with G.C. in adhesion contracts also applies to such contracts.[1] In many cases supervision of these contracts is as necessary as supervision of contracts made by private enterprises. There is perhaps as much need for a judicial control of the government when it acts as a contracting party as when it exercises its purely governmental functions.

Standard form contracts and General Conditions are in principle to be welcomed. They facilitate the making of contracts. Mass

[1] Israeli Standard Contracts Law 1964, sec. 18, see Appendix.

bargaining is almost as important for the business world and for society in general as is mass production. In many situations the G.C. must necessarily deviate from the general contract law and from the law of the type of contract in question. For practical reasons the parties cannot use a law which does not meet their needs. Sometimes, even, no law is stated. Many G.C. are fair and reasonable, even when they deviate from the general law in favour of the supplier.

But onerous clauses which are unfair to the adhering party are nevertheless of frequent occurrence. I think the phenomenon is an international one. In sales contracts we find clauses that limit or exclude the liability of the seller, clauses that entitle the seller to cancel the contract, to vary its conditions, to postpone performance or to rescind the contract at will without giving the buyer the same rights. We find clauses that set up short time limits before which the buyer must give notice or sue in order to exercise any legal remedy against the seller, and we find onerous jurisdiction and arbitration clauses.

Some authors treating the G.C. only deal with contracts of adhesion and with the rules of interpretation and effects of contracts containing G.C. Their main object is to protect the adhering party.

In this article I shall deal with all general conditions, and I shall discuss the formation of standard contracts as well as their interpretation and validity. My theory is that certain rules of formation should be given for a majority of such contracts, and that, furthermore, rules should be given to govern their validity. Like Llewellyn, Kessler, Curt Olsson, Sales, and others, I shall assert that the law of contract cannot be upheld in the face of the increasing use of G.C.

2. G. C. AND THE SO-CALLED MEETING OF MINDS

It seems to be accepted in the case law of several countries that G.C. embodied in the contract, be it in the accepted offer or a contract signed by both parties, are binding upon a party even if he did not read them. This is also in accordance with the general contract law. We except in this connection small-print onerous clauses, unconscionable clauses, and ambiguous clauses.

However, it also seems to be the law of several countries, including Germany[2] and Scandinavia,[3] that if the customer has made the offer, and the acceptance by the supplier includes the G.C. of the latter, a valid contract has been made and the G.C. have become part of it, unless the customer has protested against the inclusion of the G.C. This rule is sometimes not applied when onerous, small-print, or ambiguous clauses appear, but when the G.C. are not unreasonable the Scandinavian and German courts will allow the G.C. to prevail even though the supplier knows that the G.C. state terms additional to those offered by the customer and that offer and acceptance are not identical in their terms. The American U.C.C. section 2-207 now opens a way to reach the same result in many cases, although the outcome will sometimes depend upon how much the offer is altered by the G.C.

This rule is, in my opinion, a sound one. The case law of some countries goes even further. It makes the G.C. binding on the adherent even when they are not embodied or referred to in the offer or the acceptance. According to the recording of English case law by H. B. Sales[4] the adhering party cannot plead ignorance of standard conditions in a "common form document", and as far as railway tickets are concerned the odds are even more heavily against the customer.

These rules, too, are mostly sound rules.

As far as quick-hand transactions are concerned, a careful reading of the contract and a subsequent discussion of its contents obviously cannot precede the formation of the contract. The law of any country must admit that the ticket handed over to the traveller may contain binding conditions even though he does not receive it until after he has boarded the ship. The same applies to contracts made with cloakrooms, laundries, etc. There is a tendency here even to accept G.C. which are displayed on a board in the premises of the enterprise.[5]

[2] Ludwig Raiser, *Das Recht der allgemeinen Geschäftsbedingungen,* 1935, pp. 147 ff., R.G. 25.1.1929, *Das Recht* 1929, 199 no. 795, B.G.H. 22.1.1964, *Der Betrieb* 1964, 258.

[3] Curt Olsson, "Verkan av avtalsklausuler i standardformulär", *Förhandlingarna å det 21. nordiska juristmötet* 1957, Appendix 6, pp. 17 ff., Inga Steen Jensen, *Danske domme vedrørende standardkontrakter,* 1965 (unpublished), pp. 1 ff.

[4] Sales, "Standard Form Contracts", *Modern Law Review* 1953, pp. 319 ff.

[5] Cheshire and Fifoot, *The Law of Contract,* 5th ed. 1960, p. 110, see also, as to French law, Planiol & Ripert, *Traité pratique de droit civil français,* vol. 6, 2nd ed. Paris 1952, p. 139 (no. 124).

The courts do not always give a clear statement of their readiness to accept G.C. to a larger extent than would follow from the rules on the formation of contract. If, for instance, a clause is onerous and unfair the court adhering to the common law of contract will decide that it has not been noticed by the adhering party and thus not made part of the contract. If, however, it is fair or at least not unreasonable the court will find that the adhering party ought to have taken notice of the G.C. This, in some countries, creates uncertainty as to when G.C. become binding upon the adhering party.[6]

Some authors[7] and some judges would give newcomers in a trade or in a trade relationship an advantage over the *habitués* in cases where the G.C. are to be found not in the offer or the acceptance but on a receipt, a ticket, an invoice, a notice on the wall of a hotel room, etc. The newcomer is not bound by the G.C. because he did not know and could not be expected to know of their existence before he made the contract, but the *habitué* is bound because he should have read the G.C. in earlier dealings. Danish case law seems to support the same view,[8] which is understandable as long as one relies on actual or presumed knowledge as a prerequisite for being bound by the terms.

In my view this reasoning is objectionable. In cases where the signing of a contract or the exchange of a written offer and acceptance do not precede the agreement, the G.C. of the stipulator should in some way be made accessible to the adhering party, but *habitués* and newcomers should not be treated differently. For big enterprises it is too great a burden to make investigations into the knowledge of each customer.

The German solution seems more appropriate. The G.C. of a big enterprise apply in dealings with its customers—even when the customers do not know the G.C.—if such G.C. must generally be taken to exist.[9] The rule is realistic, but leaves a doubt. When will one have to reckon on the existence of G.C.? When dealing with banks and insurance companies G.C. must be taken to exist, but in sales contracts the use of G.C. by the seller (or the buyer) is not always obvious.

Anyhow, the ordinary rules on formation of contracts should

[6] F. Kessler, "Contracts of Adhesion", 43 *Columbia Law Review* (1943), pp. 638 ff.

[7] e.g. Cheshire and Fifoot, *op. cit.*, p. 110.

[8] 1953 U.f.R. 1007, 1955 U.f.R. 1081, and 1948 U.f.R. 332.

[9] See Palandt, *Bürgerliches Gesetzbuch*, 23rd ed. 1963, note 5 to § 157.

not apply to contracts embodying G.C. The rules on the meeting of minds presuppose a complete agreement between the parties on every term. Such agreement is impossible in quick-hand transactions, and many contracts ranging from insurance to transport and sales are becoming quick-hand contracts to an increasing degree. Even in contracts which are not quick-hand dealings, an individual customer's knowledge of the G.C. cannot decide whether a contract has come into existence or whether the G.C. are binding.

If the general conditions were to be approved by a Controlling Board or some other authority there would be no unfairness in making them apply to all contracts made by a supplier irrespective of the customer's knowledge. A publication of the G.C. similar to the publication of statutes would sometimes suffice. The decision on whether such publication would be enough to bind the customer or whether further steps should be taken by the supplier in order to give the customers notice of its G.C. should be left for the Controlling Board to decide for each set of G.C. The rules on publication and notice set out by the Board should apply to G.C. alike in adhesion contracts, in agreed documents, and in documents made by or under the auspices of official bodies. Many stipulators would probably be interested in knowing exactly how much notice the public or the adhering party should be given in order for its G.C. to become binding upon the latter.

Such rules, however, can only be made regarding contracts between enterprises and customers contracting for their own needs or customers making contracts to perform other commercial contracts, as for instance a merchant who sends his goods on a ship owned by the enterprise. The rules cannot apply when both parties are enterprises doing their proper business and when both are using general conditions. Here the question is: Whose G.C. shall apply, when both parties have made reference to their own general conditions? The prevailing Scandinavian[1] and German[2] case law here rightly apply the G.C. of the offeree, if his general conditions do not materially alter the offer and if the offeror does not protest. If the offeror reacts to the acceptance and maintains his G.C., then these should prevail.[3] If the acceptance materially alters the offer, then no contract would exist.

[1] See 1949 N.J.A. 609 and 1938 N.Rt. 259, see also Ussing, *Aftaler*, 3rd ed. Copenhagen 1950, p. 68 note 111.

[2] B.G.H. 19.1.1951, *Der Betriebsberater* 1951, p. 456.

[3] See B.G.H. 14.3.1963, *Neue Juristische Wochenschrift* 1963, p. 1248.

3. INTERPRETATION

It is often said that G.C. in contracts of adhesion should be interpreted against the enterprise that produces and imposes them on the adhering party. *In dubio contra stipulatorem* or *contra proferentem*. A statutory provision to this effect is to be found in the Italian Civil Code, article 1370.

I cannot find any clear tendency in the Danish case law to interpret G.C. in contracts of adhesion against the stipulator, although the rule is often referred to when the result of a case is in favour of the adhering party. Many cases show that in doubtful situations the most expedient, reasonable or equitable result is reached, but this is not always the one most in favour of the adhering party. A Danish case illustrates this.[4] An insurance policy insured the holder against damage to his car. According to the G.C. in the policy, the company was not liable to pay compensation if the owner allowed somebody who was under the influence of alcohol to drive the car. This clause was also held applicable and compensation refused in a case where the owner himself had been driving the car under the influence of alcohol.

What the Danish cases show is a tendency to give the onerous or unreasonable clauses a narrow interpretation. Here, the courts allow the adhering party the benefit of any doubt that may exist. In this respect the common-law judges, too, have been conjurers with interpretation. They have interpreted onerous terms into a well-meaning meaninglessness.[5]

In the Continental case law there may sometimes be observed a tendency to interpret the G.C. in the same way as statutes.[6] It is not a very marked tendency, but it is a desirable one. It would be reasonable to expect general conditions embodied in agreed documents or made by big official bodies such as the General Conditions for the Supply of Plant and Machinery, set up under the auspices of the Economic Commission for Europe, to be interpreted as statutes. A clause in such a document should then not be inter-

[4] 1960 U.f.R. 571.

[5] Llewellyn, Review of O. Prausnitz, "The Standardization of Commercial Contracts in English Law", 52 *Harvard Law Review* (1939), p. 702.

[6] Raiser, *op. cit.*, pp. 251 ff., B.G.H. 8.3.1955, B.G.H.Z. 17, 1 (3). The objectivist tendency does not seem to be so strong in France, see Planiol & Ripert, *op. cit.*, p. 488 (no. 375).

preted as the individual customer or the individual enterprise understood it but as it was meant by its drafters to be understood. Failing information on the intention of the draftsmen, a pragmatic interpretation should prevail. The reasonable and equitable result should decide between the linguistic possibilities. This would give the customer adequate protection.

If, as in Israel, the courts or a Controlling Board have to supervise the G.C., the tendencies to interpret by the intention of the drafters or pragmatically would probably become even stronger. The approval of G.C. by lawyers and their publication in an official gazette may lend them a statute-like character. This also is in many respects to be welcomed.

I do not think that legislation concerning the interpretation of G.C. would be desirable. Statutes on interpretation generally do more harm than good. The protection of the weaker party should not be given in rules on interpretation but in the rules of the validity of onerous clauses in the G.C.

4. VALIDITY

What is needed is a rule to the effect that onerous clauses of G.C. may sometimes be declared void even if a corresponding clause in an individual contract would be valid by the ordinary law rules of contract. The scope of the *jus dispositivum* (i.e. the body of yielding laws) should in some respects be narrower when G.C. are being used than in individual contracts.

In many situations, however, such a rule is not necessary. The legislature has interfered, and declared onerous clauses void, be they G.C. in standard contracts or in contracts individually made. In transport contracts, leases, and insurance contracts, various onerous clauses of special kinds are prohibited in many countries and the same applies to such clauses in conditional sales (hire purchase) and employment contracts. The legislatures of the western hemisphere have in all these contracts taken steps to protect the weak party.

This legislation, however, is not sufficient. In many contracts no special rules exist for the protection of the weak party, or the existing rules are inadequate. Some equitable relief is needed.

It is a characteristic feature of German case law that the courts

have used the general clauses of the Civil Code (§§ 138, 242 and 315) to control the General Conditions.[7] Probably the authors of the Civil Code never contemplated this application of the Code. However, the General Clauses were later often used for purposes quite different from what they were meant for, and the voidance of unconscionable conditions was one of these purposes.

It has been stated in at least one recent German decision that a rule belonging to the *jus dispositivum* of German private law becomes a required part of the contract, *jus cogitum,* where it is a question of a contract of adhesion.[8] Parties may stipulate more freely in an individual contract than one party may "dictate" in a contract of adhesion.

German courts have in several other cases held that onerous clauses in G.C. are unconscionable and consequently void.

American case law shows examples of a clear setting aside of onerous clauses on the ground of their being unconscionable.[9] But in most cases dating from the days before the enactment of the Uniform Commercial Code the courts set aside the inequitable provisions through fictions and constructions. This has created much uncertainty.[1]

In English case law one can find a setting aside of unconscionable clauses through interpretation. Sometimes the rules on the formation of contract have also been used to show that the adhering party did not agree to the onerous G.C., and sometimes the doctrine of fundamental obligation has been used. But I have never seen an English decision openly declaring an unfair stipulation invalid because of its unfairness.[2]

Thus the law of many countries as to the validity of onerous clauses seems to be in a state of confusion and uncertainty. In the civil-law countries the courts are in difficulties because they feel that they cannot act rationally without the aid of the legislator. The common-law judges have not yet acted rationally, though perhaps they could do so. Often the trouble is the judge's lack of knowledge of the conditions of the trade. A clause may seem

[7] See Lukes in *Neue Juristische Wochenschrift* 1963, pp. 1857 ff., Raiser, *op. cit.*, pp. 277 ff.

[8] B.G.H. 4.11.1964, *Neue Juristische Wochenschrift* 1965, p. 6, B.G.H. 17.2. 1964, *Der Betriebsberater* 1964, p. 544 (545).

[9] e.g. *Henningsen* v. *Bloomfield Motors Inc. and Chrysler Corp.*, 32 N.J. 358, 161 A. 2d 69 (1959).

[1] Kessler, *op. cit.*, pp. 629 ff., Llewellyn in 52 *Harvard Law Review,* p. 703.

[2] See Wilson, "Freedom of Contracts and Adhesion Contracts", *The International and Comparative Law Quarterly* 1965, p. 172, Sales, *op. cit.*, p. 325 ff., and Cheshire and Fifoot, *op. cit.*, pp. 107 ff.

to a judge to be unconscionable and yet be found to be reasonable after a careful examination of the usages of the trade: and the opposite may be the case.[3] This also makes the courts reluctant to invalidate G.C.

In Scandinavian law a similar uncertainty seems to prevail, except in the case of G.C. in tenancy contracts and a few other contracts governed by special statutes. Danish cases have disregarded onerous clauses by using the rules on formation and through interpretation, but I have not found a single case where a Danish court has openly held that a clause was void because of its being unconscionable.

Usually Danish courts are satisfied if an onerous or unusual clause is printed in bold-face type or in some other way made clearly noticeable to the customer in the printed contract.[4] But this rule is not always followed by our courts; one Supreme Court decision,[5] for instance, upheld an onerous clause which was not put in bold-face type; it did so probably because the customer was an attorney-at-law who would be expected to read his contracts carefully.

I have no great belief in the effects of the "bold-face rule" of Danish case law. It seems to be ineffective. We customers are generally too weak or too careless to protest against the onerous bold-face terms. Often we do not even read them, because we know that we will sign the contract anyhow. We do not care very much, since there is a fair chance that the untoward events which the onerous clauses deal with will never happen.

Moreover, most people are unable to grasp the full meaning of the G.C. in their contracts even after reading them. To draft a contract so that it becomes at the same time intelligible to the adhering party and satisfactory as to its legal consequences for the stipulator is very difficult. It is no easier than to make intelligible and good statutes. Even the bold-face terms may be difficult to grasp.

This, in my opinion, calls for control by the government. The government is the only agency that is strong and careful enough to cope with powerful enterprises. This does not mean that the bold-face rule should be altogether abolished. But the mere fact

[3] Sales, *op. cit.*, p. 335, quoting Lord Bramwell in *Manchester, Sheffield and Lincolnshire Ry.* v. *Brown* (1883) 8 App. Cas. 703, 718.

[4] Lund Christiansen, "Standardvilkår", *Juridisk Grundbog*, 1962, p. 442, Ussing, *op. cit.*, pp. 183 f.

[5] 1953 U.f.R. 1007.

of their being in bold-face type should not make the clauses binding.

Some lawyers may not agree with me upon the need to protect the careless customer. Legislators, they will say, should not be nursemaids and should not be expected to protect customers from their own folly.

In quick-hand transactions, however, you have not time to be careful. When at a foreign railway station you take your suitcase to a cloakroom you cannot be expected to read all the conditions on the printed notice before you hand it in. You want to get rid of the suitcase for the moment, and the rules on what happens if the suitcase is lost or if you do not collect it within a certain time are of no great interest to you.

Even in contracts which are not quick-hand transactions a bold-face rule does not give the customer adequate protection. As mentioned above, we do not always give ourselves time to read our contracts carefully. This I think the legislators and the courts ought to realize and to accept.

For the same reasons the solution of the Italian Civil Code is not satisfactory. Article 1341 makes the validity of some specified onerous clauses conditional upon a specific approval in writing, so that two signatures upon the contract are often given by the adhering party. As has been pointed out by Gorla, this rule is impracticable in quick-hand transactions[6] and does not even give the adhering party in a non-quick-hand transaction adequate protection. In Italy many contracts are signed twice by the customers, but it is doubtful whether this has made the Italians more careful than customers in other countries.[7] Agents may give a half-illiterate adhering party odd explanations for the necessity of signing beneath the onerous clauses, and who can prove what the agent said?

The Israeli solution is based on the experience of many countries and seems to me to be the most attractive of the solutions tried out. Its outlines are as follows:[8]

The Standard Contracts Law of 1964 (S.C.L.) enumerates in section 15 the onerous clauses, *restrictive terms,* as they are called. This enumeration is based on the experience in Israel, and section

[6] Gino Gorla, "Standard Conditions and Form Contracts in Italian Law", *The American Journal of Comparative Law* 1962, pp. 1 ff.

[7] Guido Tedeschi & Ariel Hecht, "Les contrats d'adhésion en tant que problème de législation. Proposition d'une commission israélienne", *Revue internationale de droit comparé* 1960, pp. 574 ff.

[8] See Appendix.

15 seems to cover almost any possible inequitable stipulation. Contracts containing such clauses are not *ipso jure* invalid, but they may be refused approval by the Board appointed for the purposes of the Restrictive Practices Law, 1959, or they may be set aside by a court.

The stipulator (the Law calls him the "supplier") may apply to the Board for approval of his restrictive terms. The Board is composed of representatives of both supplier and customer interests and decides, after proceedings that are similar to court proceedings, upon the validity of the terms. In deciding the case the Board has to consider whether, having regard to the terms of the contract in its entirety and to other circumstances, the term is prejudicial to the customer or gives the supplier an unfair advantage likely to prejudice the customer. The Board's decision may be appealed to the Supreme Court. Otherwise, a restrictive term in a contract approved by the Board cannot be set aside as invalid by any court; a restrictive term which the Board has refused to approve is void. This, however, does not invalidate the other terms of the contract. When approval has been given by the Board the supplier must indicate the fact of approval on the face of every contract which he makes.

Restrictive terms which are not brought before the Board or which, though approved by the Board, appear in contracts on the face of which the approval has not been indicated may be set aside by a court in any legal proceedings between a supplier and a customer under the same conditions as will lead to a refusal by the Board to approve the restrictive term.

5. THE WORKING OF THE LAW IN ISRAEL

The Law has not been in force for more than a year and a half. It is too early to pass any final judgment on its effects. It is known[9] that by November 1965 very few standard contracts had been submitted to the Board and there were so far no court decisions under section 14 of the Law. The reluctance of commercial circles in Israel to make use of the Board has thrown some doubts on the usefulness of the system, and amendments of the Law are being

[9] I am indebted to Dr. Yadin, Faculty of Law, Hebrew University of Jerusalem, for this information concerning the working of the Law.

considered. There is, however, no available information as to whether the mere existence of the Law has had any effect on the drafting of G.C. in Israel. The fact that applications to the Board have been so few is, in my opinion, no proof that the Law has been ineffective.

6. AN OUTLINE OF A SOLUTION

The Israeli S.C.L. presents several advantages over other solutions hitherto attempted.[1]

It leaves the decision to a Board composed of persons probably representing the interests and the knowledge of both parties to a contract of adhesion, and so meets the objection of some common-law judges that they do not know the trade well enough to tell whether or not a clause is objectionable.

The Board dealing with these questions knows the problems of restrictive trade practices as well. There is a close affinity between the problems of the contracts of adhesion and those of restrictive trade practices. For instance, the existence of a monopoly will often aggravate the inequity of a restrictive term. This has been pointed out in German cases.[2]

The Israeli statute does not force the approval of the G.C. on the supplier but lets him decide for himself whether he will take the risk of having a term set aside by a court. At the present time this solution seems to be preferable to a system of forced supervision.

The Law gives the Board the opportunity to decide upon the restrictive terms in their context and not *per se*.

By enumerating all those terms which may be declared void by the Board or by a court the S.C.L. creates certainty. The general clauses of German law and of the American Uniform Commercial Code, broadly stating that unconscionable terms in a contract are void, do not provide the same predictability for the stipulator. As time passes, a sufficient number of precedents may be set up to ensure a fair degree of predictability. This has been strongly argued by Llewellyn when discussing the Uniform Commercial

[1] See Tedeschi & Hecht, *op cit.*

[2] See B.G.H. 13.3.1955, *Neue Juristische Wochenschrift* 1956, 304; B.G.H. 2.4.1962, *Neue Juristische Wochenschrift* 1962, 27 (28).

Code.[3] But case law moves slowly and in haphazard fashion, and cases may be distinguished.

The Finnish author Curt Olsson some years ago proposed a solution not very different from that adopted by Israel.[4] He proposed administrative supervision of G.C. and advocated Nordic cooperation on legislation.

I now venture to make a similar suggestion, taking the Israeli S.C.L. as a starting point.

A few changes and supplements to the Israeli S.C.L. are, however, suggested:

1. The S.C.L. only deals with G.C. imposed by a supplier upon the customer. It seems as if a big and powerful buyer of goods or services could freely impose his "restrictive terms" upon his individual suppliers. The unconscionable clauses imposed by the Campbell Soup Co. upon the growers of vegetables in the famous American case *Campbell Soup Co.* v. *Wentz* (172 F.2d 80 1948) could not be brought under the S.C.L. The term "supplier" should be replaced by "stipulator" and the term "customer" by "adhering party".[5]

2. The powers of the Board should be extended so as to leave it to the Board to decide under what conditions the G.C. should be made binding upon the adhering party. The requirements as to the notice to the adherent could not be the same in all cases. In some cases the publication of the G.C. in an official gazette might suffice in the same way as the publication of a statute. In quick-hand transactions one could not expect much contract reading to be done before making the contract. And some enterprises performing semi-public duties would only need to have their G.C. published in the Gazette. In other cases the G.C. should be printed on the contract, on the written acceptance, on the ticket, or displayed in the premises of the stipulator. Some clauses should be underlined or printed in bold-face type.

3. These rules on "formation" and on the approval of the restrictive terms should be open to all enterprises using G.C., be they big or small, and to all G.C., whether they are made by the stipulator, or a combine of stipulators, or are terms in an agreed document or in a document made by an official body. The effect

[3] Statement, 1 *State of New York Law Rev. Comm. Report of U.C.C.* 178 (1954).

[4] Curt Olsson, *op. cit.*, pp. 44 ff.

[5] According to Dr. Yadin the Law has now been amended so that the G.C. of "customers" are also covered. The wording of the amendment is not known to me.

of non-approval should be the same so that a court might also invalidate agreed documents if they had not been brought before the Board.

Through these rules the Board would protect both the stipulator and the adhering party.

The stipulator would be protected against uncertainty as to when and whether his G.C. become valid.

The adhering party would be protected against unfair G.C. and thus against his own weakness and carelessness in contract dealing.

There is some connection between the rules here proposed on the "formation" of standard contracts and on the validity of G.C. In former days, when the legislator believed in the bargaining power of all men "of full age and competent understanding", the law had only to see to it that these free men made a bargain *"in idem"*, and that they both knew what this *idem* was. But nowadays, when the legislators have ceased to believe in the bargaining power and competent understanding of men and women and have found it necessary to interfere, it becomes less important that those who made bargains should know all the conditions of their bargains. They should rely on the public authorities who safeguard their interests. The customer will not have to waste time on reading a set of conditions that are more or less unintelligible to him, nor will he, as we lawyers do, need to feel conscience-stricken about never reading the back of his passenger ticket, the cloakroom conditions, and all his insurance policies.

However, the Israeli solution does not take into account the case of a general condition which is not inequitable in most instances, but which in a special situation becomes unconscionable. Nor does it cope with the situation where because of changes in economic or technical conditions a contract clause approved by the Controlling Board becomes unconscionable. Therefore a Standard Contracts Act should be supplemented with a General Clause saying that any contract or any clause of a contract which is unconscionable will not be enforced by the courts and that the courts should be empowered to restrict the application of a clause or a contract as to avoid an unconscionable result. In order not to impair the foreseeability which the approval of a standard contract by the Controlling Board gives the stipulator, the General Clause should be applied with some caution.

The operation of such a General Clause should not be limited to standard contracts. German and American case law have shown the need for a General Clause of this kind, and there are indica-

tions in Scandinavian case law that we have the same need. These indications I find, among other things, in the attempt by the Swedish Supreme Court to give to a rule against unconscionable conditions embodied in the Scandinavian Instruments of Debt Act a general application[6] to all contracts, and in the corresponding efforts in Norway to give a similarly wide application to a broadly stated provision in the Act on Control of Prices, Dividends, and Business Arrangements that prohibits inequitable prices and terms of business.[7]

7. A PERSPECTIVE

If a statute similar to the Israeli S.C.L. is adopted in the Nordic countries and if the present tendency towards business amalgamation in Europe continues, we shall get fewer and bigger companies, all using G.C. Great importance will then be attached to these conditions and some day somebody will ask whether it is appropriate to give to a board composed of only a few members the enormous power to approve the G.C. of the Scandinavian Motor Company and the European Electric Corporation. The legislature may want to interfere.

The students will not only study the law of sales in general but also the law of general conditions, perhaps even the general conditions of some of the big enterprises.

Two trends will meet. One will be in the direction of diversity. The general conditions of the various big enterprises will become increasingly important. The other trend will be in the direction of unity. In the business world there will be some scores of G.C., one for each of the main sectors of commerce and industry, and not, as now, some thousands or millions of different contracts.

8. GENERAL CONDITIONS AND A UNIFORM SALES LAW?

The solution here proposed and the perspective for the future both lead me to the same conclusion regarding the need for provisions on Standard Contracts in a Uniform Sales Law.

[6] 1948 N.J.A. 138. See Vahlén, *Avtal och tolkning,* Stockholm 1960, pp. 235 ff.

[7] W. E. von Eyben and Carsten Smith, *Hovedpunkter i Formueretten,* Oslo 1962, p. 19.

Such rules could probably not be embodied in a Uniform Sales Law. It would scarcely be possible to agree upon the establishment of an international board to approve the restrictive terms in international sales contracts. Nor would it be possible to agree upon mutual recognition of approvals or disapprovals of restrictive terms in contracts used for international sales of goods.

International cooperation should, perhaps, not aim at making uniform rules on Standard Contracts but at making Standard Contracts. The collaboration within the Economic Commission for Europe (E.C.E.) may in the long run prove more fruitful than collaboration on a Uniform Sales Law. The Hague Convention of 1964 respecting a Uniform Law of Sales differs so widely from the American Uniform Commercial Code that I think it highly doubtful whether Americans and Europeans will agree on an International Sales Law in the near future. Collaboration in making uniform standard contracts for the sale of machinery, cereals, meat and coffee seems more likely to succeed. Such standard contracts would probably not be exposed to the risk of being disapproved by the Controlling Board of any country, and common rules governing their coming into effect might also be established through international cooperation.

But standard contracts cannot stand alone. Even the most explicit contract form can only be properly understood against a legal background. The international standard contract runs the risk of being interpreted differently by the courts of different countries since each judge shows a tendency to interpret it against the background of his own legal system. An international sales law will, therefore, still be desirable as a background for uniform interpretation. The existence of such a law will also enable the framers of the international standard contracts to draft them more briefly. So there are good reasons for continuing the efforts to create a World Sales Law.

APPENDIX: ISRAELI STANDARD CONTRACTS LAW, 1964[8]

1. *Definitions.* In this Law—

"standard contract" means a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by,

[8] I am indebted to Dr. U. Yadin of the Faculty of Law, Hebrew University of Jerusalem, for the English translation of the Law.

or on behalf of, the person supplying the commodity or service (hereinafter "the supplier") with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereinafter "the customers");

"commodity" includes land and rights over land, and rights of hire and lease;

"terms of a contract" includes terms referred to in the contract, and any condition, waiver or other matter forming part of the bargain without being expressly stated in the contract itself, but does not include a term especially agreed upon by a supplier and a customer for the purpose of a specific contract;

"restrictive term" means any of the terms specified in section 15;

"Court" includes a tribunal and an arbitrator.

2. *Application for approval of standard contract.* A supplier who enters, or intends to enter, into agreements with customers by a standard contract may apply to the Board appointed for the purposes of the Restrictive Trade Practices Law, 5719–1959[9] (hereinafter "the Board") for approval of the restrictive terms of the contract.

3. *Composition of the Board.* Applications for approval under this Law shall be dealt with by the Board, composed of three members, who shall be the Chairman of the Board or any other judge appointed for that purpose by the Minister of Justice and two members of the Board, one of whom at least shall not be a state employee.

4. *Restriction on application for approval.* The Board shall not entertain an application for approval made after an objection against a restrictive term of the contract has been raised in a suit between the supplier and one of his customers, nor shall it entertain an application for approval of a term which a court has, under section 14, decided to regard as void.

5. *Powers of the Board.* Where an application for approval has been made, the Board may, after hearing the applicant and the Attorney General or his representative and after giving every person designated under the regulations as a respondent an opportunity to state his arguments, approve any restrictive term of the contract or refuse to approve such term.

6. *Matters to be considered by the Board.* In deciding upon the validity of a restrictive term, the Board shall consider whether, having regard to the terms of the contract in their entirety and to all other circumstances, such term is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers.

[9] *Sefer Ha-Chukkim* no. 286 of 5719, p. 152; *Laws of the State of Israel*, vol. XIII, p. 159.

7. *Taking evidence; procedure.* For the purposes of summoning witnesses and taking evidence, the Board shall have all the powers which a District Court has in civil matters. The Board shall determine its procedure, in so far as this has not been prescribed by the Minister of Justice by regulations.

8. *Appeal.* The applicant, the Attorney General and any person designated under the regulations as a respondent may, within 60 days, appeal against the decision of the Board to the Supreme Court.

9. *Period of validity of approval.* An approval of the Board shall be valid for a period of five years from the day on which it was given or for such shorter period as may be fixed by the Board in its decision.

10. *Effect of approval.* A restrictive term of a standard contract approved by the Board shall be of full effect in every contract made in accordance with that standard contract before approval was given or during the period of its validity, and the provisions of section 14 shall not apply thereto.

11. *Effect of refusal.* A restrictive term of a standard contract which the Board has refused to approve shall be void; however, if before approval was refused that standard contract had been approved by the Board, the refusal shall not affect any contract made in accordance with that standard contract before such approval or during the period of its validity.

12. *Register of decisions; publication.* The Board shall keep a register of its decisions; the register shall be open for inspection by any person. The Board may publish its decisions in such form as it may deem fit in the public interest.

13. *Indication of approval.* Where the Board has approved the terms of a standard contract, the supplier shall indicate the fact of approval on the face of every contract which he makes with a customer after approval was given and during the period of its validity. Where no such indication was made on the face of a particular contract, a court may, notwithstanding the Board's approval and the provisions of section 10, act in respect of such contract as provided in section 14.

14. *Power of court.* Where, in any legal proceeding between a supplier and a customer, a court is satisfied that, having regard to the terms of the contract in their entirety and to all other circumstances, a restrictive term is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers, it may regard the term or any part of it as void and may order the return to the customer of anything given by him on the strength of such term.

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15. *What is a restrictive term?* A restrictive term is a term which—

(1) excludes or limits any liability of the supplier towards the customer, whether contractual or legal, as would have existed but for such term; or

(2) entitles the supplier, of his own accord, to cancel the contract, or vary its conditions or suspend its performance, or otherwise provides for the rescission of the contract, or the abrogation or limitation of any of the customer's rights thereunder, unless such cancellation, variation, suspension, rescission, abrogation or limitation is conditional upon a breach of the contract by the customer or upon other factors not dependent on the supplier; or

(3) makes the exercise of any right of the customer under the contract conditional upon the consent of the supplier or of some other person on his behalf; or

(4) requires the customer to resort to the supplier or to some other person in any matter not directly connected with the subject of the contract or makes any right of the customer under the contract conditional upon such resort or limits the freedom of the customer to enter into an agreement with a third party in any such matter; or

(5) constitutes a waiver by the customer in advance of any of his rights that would have existed under the contract but for such term; or

(6) authorizes the supplier or some other person on his behalf to act in the name of the customer or in his stead for the purpose of realizing a right of the supplier against the customer; or

(7) makes accounts or other documents prepared by or on behalf of the supplier binding on the customer, or otherwise imposes on the customer a burden of proof which would not have lain on him but for such term; or

(8) makes the right of the customer to any legal remedy dependent on the fulfilment of a condition or the observance of a time limit, or limits the customer with regard to arguments or to the legal proceedings available to him, unless such term be an arbitration clause; or

(9) refers a dispute between the parties to arbitration in such manner as to give the supplier more influence than the customer on the designation of the arbitrator or arbitrators or the place of the arbitration or entitles the supplier to choose, of his own accord, the court before which the dispute is to be brought.

16. *Effect on other terms of contract.* The fact that a term of a contract has been invalidated by the Board under section 11 or by the Court under section 14, shall not in itself affect the other terms of the contract.

17. *Power of Court of Appeal.* In an appeal against a decision of the Board or against a determination under section 14, the Court of Appeal may reconsider the matters mentioned in sections 6 and 14.

18. *Application to the State.* For the purposes of this Law, the state as a supplier shall have the same status as any other supplier.

19. *Terms conforming to enactment or international agreement.* The provisions of this Law shall not apply to a term which conforms with, or is more favourable to the customer than, a term prescribed or approved by or under an enactment in force immediately prior to the coming into force of this Law or provided in an international agreement to which Israel is a party or an agreement between an Israeli corporation approved by the Government for the purposes of this section and a foreign supplier.

20. *Saving of laws and pleas.* The provisions of this Law shall not derogate from any other law or affect any plea by virtue of which a contract or any term thereof, whether restrictive or otherwise, may be void or voidable.

21. *Implementation and regulations.* The Minister of Justice is charged with the implementation of this Law and may make regulations for such implementation, including rules of procedure of the Board and provisions as to—

(1) persons to be respondents before the Board in addition to the Attorney General or his representative;

(2) evidence which, notwithstanding the provisions of any Law, may be admitted or required in any proceedings before the Board;

(3) payment of costs, advocate's fees and witnesses' allowances;

(4) fees to be paid in proceedings before the Board;

(5) procedure in appeals under section 8;

(6) the form of the indication to be made on contracts under section 13.

22. *Transitional provision.* The provisions of sections 10, 11 and 14 shall not apply to a contract made before the expiration of six months from the coming into force of this Law or before a decision of the Board under section 5 in respect of such standard contract, whichever date is earlier.

23. *Commencement.* This Law shall come into force at the expiration of three months from the date of its passing by the Knesset.