CONSUMER PROTECTION AND STANDARD CONTRACTS

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1. SWEDISH LEGISLATIVE DEVELOPMENTS*

The demand for extended consumer protection is now making a strong impact in industrialized countries. Within Scandinavia, where a rapid development of consumer protection legislation is in progress, it is in Sweden that the legislative machinery has reacted most forcefully and swiftly; and, as matters stand at the moment, that country can claim to be regarded internationally as being in the lead in the field of consumer protection. From a legal point of view, Sweden has thus far concentrated primarily on two areas, namely on advertising and marketing directed to consumers and on standardized contracts used when consumers procure goods or services.

In the marketing area, Sweden took a very significant step in 1970 through the introduction of the *Marketing Practices Act.*[1] This act contains, as its most significant element, a provision in general terms (a *Generalklausel,* as the German term goes), under which it is possible to issue injunctions to any entrepreneur who undertakes an advertising measure or any other marketing action which, by being incompatible with good commercial standards or in some other way, adversely affects consumers or entrepreneurs. Similar "general clauses" exist in many other legal systems, but Sweden appears to be unique in that administrative machinery has been established for effective supervision and enforcement. This task falls primarily on the *Consumer Ombudsman,* a lawyer whose office was created at the same time as the Marketing Practices Act was adopted. Cases which the Ombudsman cannot settle through negotiations or which are of special importance are tried by the *Market Court.*[2] Before this special

* The article was finished in March, 1973.

[1] See, *inter alia, Proposition* (Government bill) 1970 no. 57 and Bernitz–Modig-Mallmén, *Otillbörlig marknadsföring,* Nyköping 1970. The text of the Act is published in English in *Guide to Legislation on Restrictive Business Practices,* vol. 5, OECD, Paris (also French edition).

[2] The Swedish Council on Business Practice ceased to exist in 1971, cf. Strömholm in 15 *Sc.St.L.*, pp. 239 f., 277 (1971).

court of first and last instance, where judges and laymen representing business and consumer interests sit together on the bench, the Consumer Ombudsman appears as the equivalent to a prosecuting attorney.[3] Similar legislation, to a large extent copied from the Swedish, was introduced in Norway in 1972 and corresponding measures are under serious consideration in Denmark and Finland.

Foreign lawyers will find it particularly interesting that the administrative control system established in Sweden by the Marketing Practices Act has also been adopted in the standard contract area. This occurred through the passing of the *Act Prohibiting Improper Contract Terms,* which came into effect on July 1, 1971.[4] The Act constitutes a genuine legislative innovation. From the point of view of comparative law, it may be seen as a significant legislative experiment.[5]

The Act, which will henceforth be referred to as the *Contract Terms Act,* is addressed directly against the use of improper terms by firms dealing with consumers. Thus, it represents a legal technique entirely different from the methods of control which are usually considered in this connection, principally recourse to the ordinary courts, judicial modifications of improper terms and mandatory private-law legislation.[6] However, additional legislation of a conventional character will probably be introduced, primarily in the form of a special *Consumer Sales Act* (see part 6, *infra*). Unlike such legislation, the Contract Terms Act is not enforced by the ordinary courts of law but by the same organs as

[3] The Market Court also serves as a court for anti-trust cases. Ever since 1954, there has been an Anti-Trust Ombudsman to enforce the Swedish Anti-Trust Act, see, *inter alia,* Bernitz, *Swedish Anti-Trust Law and Resale Price Maintenance,* Stockholm 1964. The new Swedish system, with its partial merging of anti-trust and marketing questions and administrative control in both areas, has partly been inspired by the American Federal Trade Commission Act.

[4] The text of the Act is printed as an appendix to this article. On the Act, see, *inter alia, Proposition* 1971 no. 15, Bernitz in *Sv.J.T.* 1973, Bernitz, *Svensk och internationell marknadsrätt,* 2nd ed. Stockholm 1973, ch. 8.

[5] Thus far no equivalent to the Act has been enacted in the other Scandinavian countries, but commission work to introduce similar legislation is in progress, especially in Norway.

[6] As discussed by the author in his treatise *Marknadsrätt* (Market Law. A Comparative Study of the Development and Principles of Market Legislation. With English Summary), Stockholm 1969, the Contract Terms Act forms a part of the market law framework. On the concept of market law in general, see Bernitz in *Revue Trimestrielle de Droit Commercial* 1971, pp. 1 ff. (also in International Conference on Monopolies, Mergers, and Restrictive Practices. Papers and Reports, Cambridge 1969, published in 1971 by the Department of Trade and Industry, United Kingdom, pp. 71 ff.).

enforce the Marketing Practices Act, i.e. the Consumer Ombudsman and the Market Court. The latter has been given the power to prohibit entrepreneurs by injunction from using improper contract terms. In practical application, however, an important role is played by negotiations between the Ombudsman on the one hand and trade associations and companies on the other.

2. PRIVATE LAW IN TRANSITION—CONSUMER LAW AND STANDARD CONTRACTS LAW

The vigorous expansion of consumer-protection legislation in Sweden implies changes in substantial parts of the basic law of contracts and sales. Formerly, in Swedish law as in that of other Scandinavian countries, consumer interests hardly constituted a separate judicial issue. On the contrary, legislation within the field of private law usually attempted to place merchants and ordinary consumers on equal terms, and in Sweden commercial law has never been recognized as a distinct legal discipline. Thus, it is characteristic of contract and sales law that hitherto little distinction has been made between individual consumers and commercial buyers. Illustrative is the Sale of Goods Act of 1905, which to a great extent contains rules applicable both to commercial and non-commercial sales.

Incidentally, non-commercial sales is a broader concept than consumer sales. According to the new consumer legislation, a *consumer* is generally defined as an individual person who procures goods or services from a commercial seller primarily for his own use and therefore not, for example, for resale or use in business. We are at present witnessing the emergence of consumer law, within the framework of general contract and sales law, as a special area with concepts and principles of its own.[7]

As compared with contract and sales law in general, consumer law has a much greater social orientation. Consumers, in the normal case, are regarded as weak contract parties who, without the special support of the legal system, would be incapable of adequately representing their own interests against the stronger and better organized sellers. Consumers and tradesmen, the latter

[7] Jan Hellner in *Uppsatser i civilrätt I*, published by Juridiska Föreningen i Uppsala, 4th ed. 1971, pp. 86 ff., cf. Lidbom in *Sv.J.T.* 1971, pp. 81 ff.

seeking unilaterally to exploit freedom of contract for their own advantage, are thus regarded as opposite parties. In accepting this premise, it becomes the task of legislation to shift the market balance between the parties to the consumers' advantage through rules which limit the freedom of contract.

We are also witnessing a break with the individualistic approach which earlier characterized contract and sales law. Thus, the *Contracts Acts* enacted jointly by the Scandinavian countries and still applicable (in Sweden from 1915) were drafted on the basis of the assumption that, in principle, contracts are individually formulated. On the whole, no rules were adopted at that time to deal with standardized mechanisms for making contracts or with the problem of construing standard contracts.[8] Even though standardized contract relations were already usual in certain areas at the beginning of the 20th century (for example, within insurance, credit and maritime law), Scandinavian legislators were at that time unfamiliar with legal problems caused by the use of standard contracts.

Unfortunately, it must be confessed that Scandinavian legal doctrine and practice have long been characterized by a lack of interest in standard contracts and the legal problems their use entail. Thus, the pioneering work *Das Recht der allgemeinen Geschäftsbedingungen* by the German law professor Ludwig Raiser, published in 1935,[9] had very little influence in the Nordic countries despite the traditionally close ties between Scandinavian and German legal science. An apparent turning point was the Twenty-first Meeting of Scandinavian Lawyers at Helsinki in 1957, when the topic "Effects of Contract Clauses in Standard Forms" was discussed on the basis of an article by the Finnish law professor Curt Olsson.[1] However, Olsson's recommendation of administrative control over standard contracts met at that time with little sympathy. The more detailed discussion of problems involved in construing standard contracts and in taking measures against undue standardized terms did not begin in earnest until the 1960s.[2] It should be emphasized that

[8] As distinguished from, e.g., the French *Code civil*, the Contracts Act lacks provisions on construction of contracts.

[9] Reprinted Bad Homburg 1961.

[1] *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957*, Vammala 1959, appendix VI, pp. 152 ff. Earlier, however, is the discussion on standard contract problems relating to insurance law in Folke Schmidt, *Faran och försäkringsfallet*, Lund 1943, pp. 161 ff.

[2] See, *inter alia*, Jørgensen in 10 *Sc.St.L.*, pp. 97 ff. (1966), Lando in 10

at all times lawyers have been unanimous in considering that agreements based on standard forms must be regarded as contracts. Saleilles' theory that adhesion contracts (*contrats d'adhésion*) should be considered outside contract law has found little if any support in Scandinavia.[3]

Against this background, the 1971 Swedish Contract Terms Act stands out as something genuinely new. The Act is unusual because it deals solely with standard contracts. It is true that it places standard contracts applied in relations with consumers under administrative control, but, at the same time, it implies a recognition of standard contracts as an important and practical necessity.

Basic contract and sales law rules, however, still constitute the foundation of any judgment in Sweden on legal questions connected with standard contracts. Recent developments indicate a break with the traditional concept according to which these rules have approximately the same meaning when applied to both standard contracts and individually drawn contracts. Swedish law is now developing a new body of rules with special principles to serve for dealing with standard contracts—in other words, a type of *standard contract law.*

In this connection, attention is primarily focused on the application of the Contract Terms Act and other proposed consumer-protection measures. However, fundamental questions of great importance from a legal point of view remain as to the forms for incorporating standardized terms in individual contracts, as to the construction of standard contracts, and as to the possibilities for ordinary courts to prevent the application of unduly far-reaching terms in standard contracts by "interpreting them out" or openly setting them aside. This article will also discuss these

Sc.St.L., pp. 127 ff. (1966), Strömholm in 15 *Sc.St.L.*, pp. 249 ff., 261 ff., 269 ff. (1971), Sundberg in 7 *Sc.St.L.*, pp. 133 ff. (1963), Vahlén, *Avtal och tolkning*, Stockholm 1960, *passim*, Schmidt *et al.* in *Förhandlingarna vid det tjugofjärde nordiska juristmötet 1966*, Stockholm 1967, pp. 182 ff. and appendix 7, pp. 13 f., 30 ff., Karlgren in *F.J.F.T.* 1967, pp. 415 ff., Ramberg, *Cancellation of Contracts of Affreightment on Account of War and Similar Circumstances*, Gothenburg 1969, pp. 413 ff., and most recently, Bernitz in *Sv.J.T.* 1972, pp. 401 ff. For general information on the use of standard contracts, see Grönfors in *Juridikens källmaterial*, 6th ed. Stockholm 1970, ch. 7, and the report *Konsumentköplag* (Consumer Sales Act), *S.O.U.* 1972 no. 28, Stockholm 1972, pp. 44 ff., 169 ff.

[3] Saleilles, *De la déclaration de volonté*, Paris 1901. On Saleilles's ideas and the following discussion in legal writing, see, *inter alia*, Karl H. Neumayer in *Richterliche Kontrolle von allgemeinen Geschäftsbedingungen, Arbeiten zur Rechtsvergleichung* no. 41, Frankfurt/M 1968, pp. 20 ff.

latter questions, which are still of great importance.[4] Thus, the new consumer-protection legislation should be seen against a background of experience and shortcomings in the ordinary court practices of construing and applying standard contracts.[5] This discussion provides the framework for the final part of this article, which deals with the scope and application of the Contract Terms Act and its relation to established contract principles.

3. THE INCORPORATION PROBLEM

The scope of application of standard contracts is limited in important respects by the principle that they are to be judged according to contract law. First, one should mention that Scandinavian law recognizes the principle of privity of contract, i.e. it is not possible through contract to bind an outsider who has not shown himself willing to become bound by the obligation. The principle sets limits on the possibilities of regulating contract conditions throughout a trade, for example with a standard contract drawn up by central organizations, and prevents the establishment of binding contract relations at a later sales level through contracts entered into at an earlier stage.[6]

The Importance of Trade Usage

Another fundamental limitation on the scope of standard contracts is that their terms must be made a part of each individual

[4] Readers are particularly referred to the reliable and richly documented article by Karl H. Neumayer, "Die allgemeinen Geschäftsbedingungen. Der Beitrag von Lehre und Gerichtspraxis der nordischen Staaten" in *Festschrift für Laufke*, Würzburg 1971, pp. 149 ff. See also Lando in *Richterliche Kontrolle von allgemeinen Geschäftsbedingungen, Arbeiten zur Rechtsvergleichung* no. 41, Frankfurt/M 1968, pp. 107 ff. *(Länderbericht Skandinavien).*

The contract of adhesion problem was discussed from a comparative-law viewpoint at the Eighth International Congress of Comparative Law at Pescara, 1970, for which a number of valuable national reports, now printed, were prepared, cf. Bolgár in *American Journal of Comparative Law,* vol. 20, pp. 53 ff. (1972).

[5] The following description primarily deals with unilaterally drafted standard contracts and standardized terms formulated by a seller or by an organization or financier for the seller and applied in relations with consumers. This limited scope cannot be maintained entirely since, as already mentioned, Swedish law has traditionally aimed at equalizing consumers and tradesmen as contract parties. However, agreed documents drawn up between organizations within trade and industry are, on the whole, kept outside the discussion.

[6] See, *inter alia,* Grönfors, *Ställningsfullmakt och bulvanskap,* Stockholm 1961, pp. 9 f., 20, 351, and Vahlén, *Avtal och tolkning,* pp. 228 f.

contract in order to become legally binding. However, the question arises whether commonly used standardized terms may be considered trade usage or custom and, in that way, found applicable even when they have not been incorporated in a particular contract. The answer to this question is complicated since, traditionally, Swedish contract and sales law attach considerable legal importance to trade usage.

Thus, as is stated in sec. 1 of the Sale of Goods Act of 1905, the provisions of the Act can be set aside not only by agreement between the parties but also by trade usage.[7] When the Act was passed, the section was intended to include, at least in the first place, such widespread and settled mercantile customs of a character as had developed relatively freely within a trade, often locally. As examples one might mention the development of size and weight tolerances and local port customs. However, in most areas, trade usage and custom in this sense now play a far smaller role than formerly. It is instructive that nowadays chambers of commerce produce substantially fewer pronouncements *(responsa)* on trade usage than was the case some decades ago.[8]

An essential part of the explanation for the decreasing importance of trade usage in the sense mentioned may be found in the changes in industrial structure. It seems obvious that the opportunity for developing and maintaining trade usage was greater when the industrial scene was dominated by numerous locally based, relatively small manufacturing and trading companies than it is today when a limited number of large, nationwide enterprises with more or less centralized decision-making play the leading role in most sectors. Another important reason, however, is the ever-increasing extension of the standard contract system.

[7] Sec. 1, subsec. 1, of the Sale of Goods Act reads as follows: "The provisions of the present Act concerning the rights and obligations of a seller and a buyer shall apply if nothing else has been expressly agreed upon or may otherwise be considered to be agreed or is consistent with customs of trade and other usages."

On the role of usages in Scandinavian commercial law, see in English Karlgren in 5 *Sc.St.L.*, pp. 41 ff. (1961), Jokela in 10 *Sc.St.L.*, pp. 83 ff. (1966), Tiberg, *The Law of Demurrage*, 2nd ed. Uppsala 1971, pp. 110 ff., and Ramberg, *Cancellation of Contracts of Affreightment*, pp. 418 ff.

[8] In Sweden, *responsa* from Chambers of Commerce constitute the usually adopted method of proving the existence and contents of usages. Since 1966, the activity is mainly entrusted to a special, nationwide Chambers of Commerce Responsa Committee, see Tiberg, *The Law of Demurrage*, 2nd ed., pp. 156 f., Grönfors in *Juridikens källmaterial*, ch. 6. In 1971, only three *responsa* were given, and in 1972 only one.

It should further be observed that commonly used standardized contract terms are of another nature than trade usage of the kind discussed here. As a rule, the formulation of terms hardly constitutes the result of freely developing commercial practice, but instead rather typically reflects the parties' pre-existing interests and the relative strength of their positions.

Swedish law does not deny in principle the possible development of trade usage and custom through a protracted and general use of standard contract clauses in commercial contract relations. However, in earlier legal writing and court rulings the difference between real customs and contract practices directly controlled by party interests did not receive adequate attention. Sharp and apparently justified criticism of this failure was made in 1960 by Mr Justice Karlgren in his book *Kutym och rättsregel.*[9] Modern legal writing justly emphasizes that the greatest caution in considering standardized terms as trade usage must be exercised with regard to the way party interests influence the development of the terms.[1] One should be especially cautious when a term which regulates the consequences of a breach of contract or deals with other division of risk questions is alleged to constitute trade usage. The possibility of trade usage and custom arising through general application of standardized terms may be more acceptable when it is a matter of actual procedures of manufacture or distribution, quality judgments, and quantity deviations.

In conclusion, disregarding possible exceptions, it is the rule in Swedish law that standardized terms must be incorporated in the individual contract in order to be held valid, even when the terms are very widely used. What is actually required for terms to be considered incorporated may be uncertain and difficult to judge. Considering their importance, these problems have received remarkably little attention in Scandinavian law.[2]

[9] A shorter version is Karlgren, "Usage and Statute Law", 5 *Sc.St.L.*, pp. 41 ff. (1961). See also Karlgren in *Sv.J.T.* 1967, pp. 51 ff.

[1] See, *inter alia,* Tiberg, *The Law of Demurrage,* 2nd ed., pp. 113 f., 162 f.

[2] See, in general, Lando in 10 *Sc.St.L.*, pp. 130 ff. (1966), Lando, *Udenrigshandelens kontrakter,* Copenhagen 1969, pp. 28 ff., Adlercreutz, *Avtalsrätt II,* Juridiska Föreningen i Lund, Lund 1967, pp. 25 ff., Curt Olsson in *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957,* Vammala 1959, appendix VI, pp. 18 ff., and Folke Schmidt *et al., Huvudlinjer i svensk frakträtt,* 2nd ed. Stockholm 1962, pp. 43 ff.

Requirements for Incorporation in Individual Contracts

A fundamental difficulty is that, as indicated in part 2, supra, the Contracts Act of 1915 is incomplete and that its drafters did not take into consideration contracts entered on standardized terms. In this area, patterns for concluding contracts have developed outside the scope of the Act.[3] An example is written form by agreement. In this case, the parties agree to become bound only after both have signed a written contract. One might also mention provisos by which the seller becomes bound only after dispatching an order acknowledgment. It is usual that a seller applying standardized terms intentionally places the purchaser in the position of offeror, in this way reserving to himself the decisive word as offeree. This normally occurs, for example, in conditional sales. Another common technique is to deliver the general contract terms to the other party only in connection with the acceptance. Of course, the procedure may, depending upon the contents of the terms, make the answer a counteroffer. However, if the recipient does not protest against the terms, which is usually what happens, the acceptor will often successfully maintain, with the support of sec. 6, subsec. 2, of the Contracts Act, that the contract has come about on the delivered terms by virtue of the recipient's inaction.[4]

In order for standardized terms to become a part of a contract, it is required in principle that they be brought to the attention of the other party, orally or in writing, before the contract is concluded. An express and distinct reference to the standardized terms ("reference clause") will, in this connection, often be sufficient, but only provided the terms are accessible in such a way that the other party can without difficulty become acquainted with them before entering into the contract.[5] As a rule, however, it is too much to demand that the other party shall actually obtain knowledge of what the terms contain.

Since methods for incorporating standardized terms in individual contracts are, on the whole, highly variable, more precise expressions on the legal situation require consideration of nuances

[3] On this development, see Vahlén in *Teori och praxis. Festskrift för Karlgren,* Stockholm 1964, pp. 356 ff.

[4] Karlgren, *Passivitet,* Stockholm 1965, pp. 39 ff., 52 ff., Schmidt in *A.J.C.L.* 1965, pp. 23 ff., and Vahlén, *Avtal och tolkning,* pp. 134 ff.

[5] See, e.g., Karl H. Neumayer in *Festschrift für Laufke,* pp. 157 ff. with further references.

arising from the type of contract and types of parties.[6] In a closer analysis, it would be appropriate to make a detailed assessment of how contracts are affected by the purposes and terms included in the documents and communications normally considered in connection with formation of contracts. Among other things, one may mention advertisements, catalogues and brochures, circulars, notices and displays, price lists, tickets, order forms and contract notes, order acknowledgments, receipts and proof of purchase certificates, invoices and other bills.[7] Other kinds of factors also influence the decision, such as the type of contract party, the existence of earlier business relations, the character and economic importance of the transaction, together with the question of whether the standardized term has a normal and expected tenor. Thus, in Swedish law significantly greater demands will be placed on businessmen as contract parties than on consumers in questions of attention and activity in connection with the formation of a contract.[8] If two businessmen have previously entertained business relations with each other, the courts are, to a certain extent, *in dubio* inclined to regard the formation of a new contract as being on the same terms as the previous one. With everyday mass transactions, however, consideration must be given to the practical possibilities. In mass transactions with consumers, too, it may be necessary to approve less stringent requirements for the conclusion of contracts on current general terms of sellers.

In legal writing, however, it is frequently maintained that, to a considerably greater extent than has now been suggested, normally maintained contract principles should be waived in order to facilitate the incorporation of standardized terms in an individual contract. Certain legal writers recommend as a legal principle that standardized terms, which may be considered "custo-

[6] As an example, one might mention the discussion within Scandinavian maritime law on how a general reference in a bill of lading to terms in the charter party affects the contract of the bill of lading holder, see Falkanger in *Six Lectures on the Hague Rules* (ed. Grönfors), Gothenburg 1967, pp. 59 ff., Tiberg, *The Law of Demurrage*, 2nd ed., pp. 588 ff.

[7] Scandinavian law, so far, does not recognize offers to the public as binding offers to the same extent as does Anglo-American law, cf. Schlesinger, *Formation of Contracts*, vol. I, London 1968, pp. 79 ff., 101 ff., 327 ff., 647 ff. However, there is a tendency, at least in Swedish law, to attach contract effects to more precise expressions in advertisements, see 1952 N.J.A. 184. A statutory provision to this effect is foreseen in the proposed Consumer Sales Act, cf. part 6, *infra*.

[8] Accordingly, in construing contracts, courts tend to place lower demands on consumers than on professional purchasers, cf. p. 37, *infra*.

mary" in the sense that they are commonly used within a trade or by a dominant, large enterprise, should be accorded an exceptional position. Contracts should normally be considered to include these terms, even in relations with consumers and when reference to the terms has not occurred, unless it is specifically stated in the contract that the terms shall not be applicable. This approach has been adopted by Professors Ussing, Curt Olsson, Lando and Adlercreutz, among others.[9] In connection with the discussion in German theory and practice, Curt Olsson presents three specific criteria for application of the aforementioned principle, namely that the company according to common experience usually concludes its contracts only on the standardized terms, that the company has a dominant position in the trade, and that purchasers have the possibility of acquainting themselves with the terms beforehand without undue difficulty.[1] The premise is, of course, that the purchasers in these cases have no reason to take into account anything other than the standardized terms.

However, important objections to this kind of reasoning may be put forward. The principle leads to the same result as that which is reached when standardized terms are seen as trade usage or equivalent custom, and meets with the same criticism as was mentioned above. In reality, the principle is even more far-reaching, since it is not limited by the wide acceptance and stability requirements maintained for trade usage. Thus, it is difficult to see why the law should place large enterprises or cartels in a special legal position with respect to contracts and, in effect, give them authority to draw up their terms completely autonomously with binding effect on the opposite party.[2] It seems particularly unacceptable to apply the principle to the onerous or unexpected clauses of standard contracts, as will be discussed in a moment. However, even those writers who advocate the application of this principle are inclined, as a rule, to exclude this type of situation.

[9] Ussing, *Aftaler paa formuerettens omraade,* 3rd ed. Copenhagen 1950, pp. 429 f., Curt Olsson in *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957,* appendix VI, pp. 23 f., Lando in *T.f.R.* 1966, pp. 348 f., also in 10 *Sc.St.L.*, pp. 130 ff. (1966) and Adlercreutz, *Avtalsrätt II,* pp. 27 f., also in *Sv.J.T.* 1968, pp. 751 f.

[1] Curt Olsson, *op. cit.,* p. 24; cf. L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen,* pp. 201 ff.

[2] Similar views are often expressed in contemporary German legal debate, cf., *inter alia,* Schmidt-Salzer, *Allgemeine Geschäftsbedingungen,* Munich 1971, pp. 28 f., and Weber in *Der Betrieb* 1970, p. 2424.

Onerous or Unexpected Clauses

What, in the individual case, should be considered an onerous clause may be open to doubt; in typical cases, however, this concept includes such terms in unilaterally drawn standard contracts as place the opposite party in a position that is substantially more unfavourable than that given by non-mandatory law. Primarily, it is here a question of exemption clauses, but maturity, arbitration and other types of clauses also come into the picture. The expression "unexpected clauses" in this context means standardized terms which by virtue of their unusual nature or for some other reason stand out as surprising in the particular contract situation or which one party seeks to "sneak in" by putting them in an unexpected place in the form or similar practices.

It is often maintained that special requirements should be made in order for onerous or unexpected standardized clauses to be considered incorporated in a contract. A principle which is closely related to the rule mentioned in part 4, *infra,* viz. that exemption clauses should be restrictively construed, is generally adopted in Anglo-American law.[3] In such cases, onerous clauses are sometimes required to be clearly distinguished, for example through special typographical marking in the standard form ("the boldface rule"). Very detailed statutory provisions to this effect exist in certain legal systems, particularly in the United States. Further, it may be mentioned that under sec. 1341 of the Italian civil code *(Codice civile)* of 1942 certain specifically enumerated types of onerous clauses in unilaterally drawn standard contracts ("clausole onerose") do not become enforceable until they have been approved by the purchaser in writing.[4]

In Sweden and the other Scandinavian countries there are practically no legal rules requiring such onerous clauses to be visually distinguished in the contract form or positioned in a particular way. However, the predominant opinion in Sweden now appears to be that, as a rule, a party to a contract should not be bound by a contract clause onerous to him, with which he was not acquainted or has had no reason to be acquainted or which

[3] See, from a comparative-law viewpoint, *inter alia,* G. Raiser, *Die gerichtliche Kontrolle von Formularbedingungen im amerikanischen und deutschen Recht,* Karlsruhe 1966, *passim.*

[4] On the Italian solution, see Gorla in *American Journal of Comparative Law,* vol. 10, pp. 1 ff. (1962).

cannot be considered to have been brought specifically to his attention. It is uncertain whether it is a further requirement for the application of this principle that the clause should be *unexpected* in the context.[5] Further, it has been held by legal writers that one may disregard terms in printed forms which are in such fine print that they cannot easily be read without special aid. There is also support in legal writing for disregarding terms which are communicated under misleading headings or otherwise appear misplaced or which have been given a particularly tricky formulation.[6]

Several decisions by the Swedish Supreme Court may be noted where it was held that exemption clauses had not become part of the contract.[7] However, in certain cases, it appears unclear whether the decision to disregard the clause was based on the assumption that the clause was not contracted or on the ground that it was unreasonable and so was set aside by "interpreting it out". In Sweden, there has been some tradition of adopting in the first hand the latter approach; from a strictly legal point of view, however, the primary question is, of course, whether or not the clause can be considered to have become a part of the contract.

When considering incorporation problems, courts should not only observe the differences between various kinds of terms and the forms for their introduction but also take into account the character of the transaction and the position of the parties. As already suggested, the duty of clarifying clauses which appear economically important for at least one of the parties should be maintained more strictly than with regard to conditions of the everyday mass-transaction type. There is, further, reason to demand a greater measure of attention and initiative from contract parties who are themselves businessmen or can for other reasons be supposed to be closely acquainted with market and contract conditions than from private consumers. At least in the latter case, considering the interests of the consumers, inadequate

[5] Of special importance for contemporary developments is Ussing, *Aftaler paa formuerettens omraade*, pp. 185, 430. Cf. Falkanger in *Six Lectures on the Hague Rules*, pp. 85 f. Two Swedish Supreme Court decisions, 1949 N.J.A. 609 and 1969 N.J.A. 285, indicate that an arbitration clause in a standardized form must be brought to the other party's attention before it can become part of a contract, unless the other party has knowledge of the clause.

[6] Bernitz in *Sv.J.T.* 1972, p. 426 with further references.

[7] 1923 N.J.A. 443, 1948 N.J.A. 701, 1965 N.J.A. 124, 1970 N.J.A. 478, cf. 1956 N.J.A. 229, 1966 N.J.A. 555.

clarification of an onerous term should not be acceptable merely because the term is common in the trade or is seldom relinquished.

In *conclusion,* the position of Swedish law on the incorporation problem seems quite acceptable from a consumer-protection point of view. However, the insistence on clarifying terms should not be pushed beyond what is necessary for maintaining reasonably good order in the conclusion of contracts. Control of clearly unreasonable contract clauses in consumer contracts should be effected in other ways. Detailed regulations on the manner of indicating onerous contract terms usually appear formalistic and, because of their concentration on form instead of contents, provide no real protection for the consumer.[8] Thus, the Italian rule mentioned above seems to be ineffective from a consumer-protection point of view. The adoption of similar rules has rarely been proposed in Swedish legal debate and is not a current issue.

4. CONSTRUCTION OF STANDARD CONTRACTS

Basic Principles in Scandinavian Law

Special problems arise concerning the construction of standard contracts. As a rule, there is no basis for finding a mutual intent of the parties behind a standardized term which seems unclear. Particularly in the application of unilaterally drawn standard contracts, it may be fictitious to speak of an underlying meeting of the minds.

It should be emphasized, however, that the situation is different if a matter regulated by standard contract has actually been the subject of bargaining in the specific case. Starting from the principle that the intent of the parties is decisive as to the tenor of a contract, the courts will, in such a case, normally assume that the negotiated terms best represent the parties' intent. It is a generally accepted principle of construction that, in doubtful cases, the independently bargained terms in standard contracts should be given preference over general contract terms. On the

[8] Cf. Ramberg, *Cancellation of Contracts of Affreightment,* pp. 417 ff.

whole, one should be inclined to construe the latter in the light of the former.[9]

This implies, among other things, that bargained terms which are filled in or written on or with reference to a standard form normally receive preference over conflicting, printed provisions in the form.[1] One assumes that such affixed or added terms normally receive greater attention from the parties and probably better represent the parties' intent. In case of conflict, Swedish courts are inclined to accept an assertion that a party has forgotten to delete a non-applicable standard clause.

Normally, general contract terms may also yield to special oral promises or commitments of the contracting parties or their proper representatives.[2] This coincides with the fundamental principle of construction that specific contract terms should be given preference over broadly phrased clauses. The latter principle should also be applied in relations between a more general and a more precise standard clause coexisting in the same form.

In practice, however, doubt as to the correct construction of a standardized clause is in most cases accompanied by the absence of any information of value relating to what has been discussed in the individual case. Under such circumstances, an analysis of the relation of the clause to other standardized terms in the contract and to the contract as a whole may be instructive. Often, however, one is forced into a text construction based on the wording of the clause itself. This procedure of construing the words of contract terms based on their typical meaning in similar situations rather than on background information regarding the contract involved is often called *the objective method* but is perhaps better described as a method striving after objectivity. In theory, it is generally accepted that the method plays a fundamental role in the construction of standard contracts, and legal usage points to the same conclusion, even though the grammatically-orientated discussion of construction which is sometimes found in Anglo-American law is, on the whole, unknown to Scan-

[9] See, in general, Ramberg, *Cancellation of Contracts of Affreightment*, pp. 421 ff., Vahlén, *Avtal och tolkning*, pp. 200, 260 ff., and *passim*, Adlercreutz, *Avtalsrätt II*, *passim*, Stig Jørgensen, *Kontraktsret I*, pp. 54 f., 187 ff., and Curt Olsson in *Förhandlingarna å det tjugoförsta nordiska juristmötet 1957*, appendix VI, pp. 41 ff.

[1] There is an express provision to the same effect in the Italian *Codice civile*, art. 1342.

[2] It should be observed that the parole evidence rule has no counterpart in Scandinavian contracts law.

dinavian law.[3] A similar method is also applied in the construction of articles of association and collective bargaining agreements.[4] Even here it concerns written documents meant to be applied similarly in a large number of individual cases.

The importance of the objective construction method has sometimes led to the conclusion that standard contracts should be construed in much the same manner as statutory texts. At first glance there appears to be a fundamental similarity since, in both cases, a certain given text constitutes the basis of the interpretation. In Scandinavian legal writing, however, this conception is commonly repudiated, at least as far as unilaterally drawn standard contracts are concerned. It is felt that fundamental differences exist between statutory construction and the construction of standard contracts. For example, standard contracts usually lack completely any record of preparatory work similar to legislative history, and to the extent that such a record exists its value as guidance is often doubtful. However, the dissimilarities go much deeper. The methods developed for statutory construction are founded on legislation considered as the result of qualified and balanced deliberations by society's highest responsible bodies. It is not reasonable to transfer such methods to documents which individual parties or organizations have drawn up in their own self-interest and which often are not particularly well formulated.[5]

Statutory construction and construction of standard contracts also differ substantially with respect to the importance and application given to the drafter's intent. Recourse to the drafter's intent for construing standard contracts obviously involve difficulties, exemption clauses providing a particularly clear example. In such cases, to have regard to the drafter's intent, namely to create a more advantageous legal position than he would have in

[3] Attention should be drawn to the comparison between English and Scandinavian, especially Norwegian, principles of construction of contracts made by Falkanger in 9 *A.f.S.*, pp. 537 ff. (1969), see also Ramberg, *Cancellation of Contracts of Affreightment*, pp. 421, 423.

[4] Schmidt, *The Law of Labour Relations in Sweden*, Cambridge, Mass., 1962.

[5] The situation may be different, however, when it is a matter of agreed documents of a more balanced and carefully prepared character, particularly when through their creation or broad-based support they have acquired a semi-official status. The sales contracts prepared by the ECE, the United Nations Economic Commission for Europe, with their published preparatory work are such an example. Cf. Sundberg, *Air Charter*, Stockholm 1961, p. 474, also Sundberg in 7 *Sc.St.L.*, p. 147 (1963).

the absence of the provision, would result in a construction to the advantage of the party who exempted himself. Such a construction is in general clearly repudiated by legal writers. The method is also inconsistent with case law, which, as will be shown later, is characterized by a restrictive attitude towards exemption clauses.

An example is 1957 N.J.A. 426, a Supreme Court case involving a standard contract for garage parking, by which the garage owner exonerated himself from any obligation to provide compensation for damage to cars. The case concerned the question whether such a clause could be upheld when a garage employee damaged a car when using it for towage without permission. The Supreme Court found that the clause was not applicable and, in that way, clearly repudiated a significant argument adopted in a minority opinion in the Court of Appeal, which concluded that the car owner would probably have entered into the contract even if the garage owner had included the specific type of damage within his contracted exoneration. Such a line of construction—based on a judgment of how the parties would have acted if, before entering into the contract, they had taken a position on the point which subsequently became controversial—seems inappropriate, since it leads, as a rule, to a construction built on the assumption that the stronger party would probably have enforced his point of view.

Constructions contra proferentem

The problems discussed should also be seen against the background of the construction principle *in dubio contra proferentem (stipulatorem),* often designated in Swedish legal writing as the "obscurity" rule. The principle means that written contract terms, in doubtful cases, should be construed to the disadvantage of the party who drew up the terms. This method of construing contracts is derived from Roman law and is codified in art. 1162 of the French *Code civil.* It thus constitutes a general principle of contract law, but it has been accorded particular importance in the construction of unilaterally drawn standard contracts. In that area, it may come to be used not only against a party who himself formulated a term but also against parties who use existing forms, or when an "obscurity" arises from shortcomings in the editing of a standard contract.

The *contra proferentem* principle constitutes an internationally

recognized method for interpreting unilaterally drawn standard contracts. It plays a significant role in Anglo-American legal practice, has been explicitly adopted by the West German Bundesgerichtshof, and is expressly codified in the Italian *Codice civile,* art. 1370.[6] It is generally agreed that the principle has also won acceptance and has come to be applied in Scandinavian law.[7] Yet, at least in Sweden, courts rarely undertake constructions with express reference to the principle.

However, there are a few examples of the principle in Swedish case law. In the case 1950 N.J.A. 86 the Supreme Court ruled unanimously that the consequences of obscurity in an order form used by a car dealer in sales to consumers should fall on the party drafting the text. The insurance law cases 1951 N.J.A 75 and 1963 N.J.A. 683 should also be noted. In the 1951 case, concerning liability insurance, the Supreme Court declared that the insurance company had not used the requisite clarity in stipulating for freedom from responsibility for damage of the type involved. In the 1963 case, where the insured himself had irresponsibly set fire to the insured property, the Supreme Court held it to be of "decisive importance. . . that the insurance terms were part of a standard form drawn up unilaterally by the insurance company" and found the company "to be more immediately responsible than the insured party to bear the consequences of the obscurity which. . . was incident to the terms".

One may ask whether Swedish law regards the *contra proferentem* principle only as a standard of construction for doubtful cases, or as a rule which may be applied more generally to unilaterally drawn standard contracts. It has been maintained that the principle is essentially a form of covert control motivated by legal policy. On this matter Professor Corbin has written that the principle "is chiefly a rule of public policy, generally favoring the underdog".[8] It seems hardly probable that Swedish law will be inclined to give a more general application to such a rule in the construction of contracts. However, the public-policy aspect does have a strong influence in the construction of exemption clauses, as will shortly be shown. Other reasons which may be invoked against the use of the *contra proferentem* construction as

[6] See, *inter alia, Corbin on Contracts,* vol. 3, St. Paul, Minn., 1960, § 559, Cheshire–Fifoot, *The Law of Contract,* 7th ed. London 1969, pp. 116, 122, and L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen,* pp. 264 ff.

[7] Bernitz in *Sv.J.T.* 1972, p. 432 with further references.

[8] *Corbin on Contracts,* vol. 3, § 559, at p. 270.

a general principle are the scarcity of legal cases where the method is clearly applied and the general reluctance of Swedish courts to "ride on words" in the construction of contracts.[9] With the exception of situations involving the construction of onerous or unexpected clauses, the *contra proferentem* principle can most correctly be regarded as merely a possible means of construction for clearly doubtful cases, often as an alternative to other possible construction procedures.

Reasonableness Tests

In reality, a reasonableness test seems to play a much larger role in Sweden as a method for the construction of standard contracts. Characteristically, in current Supreme Court case law, the judgment of doubtful cases begins with an examination of the wording of the standard clause in question. All relevant contract factors may be considered, particular attention being given to the possible one-sidedness of the clause and to the situation according to non-mandatory law, in an attempt to reach what would typically be regarded as a reasonable and appropriate construction.[1]

An examination of case law indicates a tendency to seek a construction which reflects non-mandatory law and accepted legal principles in general. Obviously, the courts regard non-mandatory law not merely as an available alternative for contract regulation but as the officially recommended normal solution.[2]

In some cases, the methods adopted by courts in their construction of standard contracts may lead to the development of new or modified legal principles (stop-gap rules). Illustrations may be found in two court decisions concerning brokerage commissions entered into in accordance with current forms. The first case, 1968 Sv.J.T. rf. 59, involved an exclusive-right clause given by a consumer to a real-estate broker in a written sales commission. The question was whether the clause prevented the property owner from himself selling the property before cancelling the

[9] Cf. Falkanger in 9 *A.f.S.*, pp. 565 f. (1969), Ramberg, *Cancellation of Contracts of Affreightment*, p. 423.

[1] A good example is furnished by the Supreme Court decision 1971 N.J.A. 36.

[2] Nial, *Om handelsbolag och enkla bolag*, Stockholm 1955, p. 115. See also Grönfors in *Festskrift till Håkan Nial*, Stockholm 1966, p. 222, Karlgren in *F.J.F.T.* 1967, pp. 421 ff., and Vahlén, *Avtal och tolkning*, pp. 195, 223, 260.

commission without paying the brokerage fee. The Stockholm City Court, making express reference to the *contra proferentem* principle, found that it did not, while the Court of Appeal reached the opposite conclusion after a discussion of the normal purposes behind that type of clause. In the later case, 1970 N.J.A. 122, the question was whether an exclusive brokerage commission of limited duration could be cancelled before the time had run out. The Supreme Court, considering the special nature of the contract and the law in analogous areas, found that cancellation would be allowed only as a consequence of the broker's breach of contract.

In these two cases the courts clearly preferred to base their decisions on a reasonableness test in the light of basic legal principles instead of on the *contra proferentem* theory. As a valuable result, the legal principles applicable to brokerage contracts have been clarified in some important respects. The cases also show the limited scope of application of the *contra proferentem* principle in Swedish law.

Restrictive Construction of Exemption Clauses

As has been emphasized above, however, the character of the clause concerned is very important in any construction. Thus, in Sweden and the other Scandinavian countries, a restrictive attitude is ordinarily taken towards exemption clauses and, as a rule, they are construed restrictively and against the drafter.[3] The same attitude normally prevails with regard to other types of onerous or unexpected clauses. The rule of construction follows, to a certain extent, an imprecise principle according to which exemption clauses that are extremely far-reaching cannot be given any legal support. Thus, it is recognized that one may not legally exonerate oneself from intentionally caused damage or, correspondingly, from gross negligence, although in the latter case the legal position is somewhat unclear.

The reasons supporting special principles of construction in this area are similar to those which are invoked when onerous or unexpected clauses become part of a contract. It is reasonable for courts to impose the burdens created by obscurities in such clauses upon the drafting party. This provides a further example

[3] On exemption clauses and their construction in Scandinavian law, see particularly Günther Petersen, *Ansvarsfraskrivelse*, Copenhagen 1957, and Hole, *Ansvarsfraskrivelse i massekontrakter*, Norsk Forsikringsjuridisk Forenings publikasjoner no. 40, Oslo 1959.

of the indirect contribution of non-mandatory law. When deciding what constitutes an exemption it is of course normal to begin with established legal principles; and, the restrictive constructions courts put on exemption clauses normally necessitate falling back on those principles. However, even for exemption clauses, there should be room for nuances of construction considering, among other things, the balance between the parties' undertakings as a whole and the distribution of insurance responsibility—aspects which may not always receive adequate attention.

In case law, several Swedish maritime-law decisions have a significant bearing on the matter under discussion, although they do not affect consumers and must be considered in the light of principles of admiralty law. In 1954 N.J.A. 573 (the ship *Mimona*), concerning among other things the scope of a charter-party clause granting freedom from responsibility for "time lost or detention" a unanimous Supreme Court stated, with clear reference to the *contra proferentem* principle, that the clause should, like exemption clauses in general, be construed narrowly, particularly since the evidence indicated that the charter-party form had been primarily drawn up by an organization representing charterer interests.[4]

In another case, 1951 N.J.A. 138 (the *Fidra*), certain statements in the Supreme Court's opinion focused attention on the possibility of openly disregarding particularly far-reaching exemption clauses, possibly considered to be incompatible with good business practice. But results in later cases, 1958 N.J.A. 373 (the *Amazonas*) and 1962 N.J.A. 159 (the *Gudur*), indicate that a change in the law along such lines has so far not occurred. In the *Gudur* case, where the shipper had reserved in the bill of lading a right to transfer goods and the goods were damaged in connection with a transfer, the exemption clause was upheld. However, the Supreme Court's majority stated that under particular circumstances the disadvantages could seem so objectionable that the shipper would be held responsible for damage to the goods without interference of the exemption clause.[5]

[4] The common-law principle of restrictive construction of exemption clauses may have inspired the Supreme Court. As was stated in the opinion of the court, English legal principles were taken into account in view of the charter-party's English origin.

[5] In his dissenting opinion, Mr Justice Karlgren found the exemption clause so indefinite and uncertain as to its consequences that it should not be

The already mentioned 1957 N.J.A. 426 is among the legal cases outside the maritime-law area where the principle of restrictive construction for exemption clauses has been adopted.[6] In the case in question, it was held that the garage owner's exemption from the obligation to pay for damage to a car parked in his garage did not include such damage as was caused by a garage watchman who in the course of his employment used the vehicle for a purpose inconsistent with the contract. Further, it is obvious that case law is inclined to give preference to contract factors interpreted as special undertakings or warranties over general, broadly drafted exemption clauses.[7] In this way, a markedly restrictive construction of the clause "in existing condition" has been developed in practice. A recent example is 1971 N.J.A. 51, where a used car was sold to a consumer under an oral misrepresentation that it was free from rust damage. Such conduct was felt to create a right to rescind the contract in spite of the fact that the car was sold in accordance with the general form term of the trade "in existing condition".[8]

In certain cases, one may find that a restrictive construction has been carried so far that a term is "*interpreted out*" of a contract. This occurs in situations where a court has attempted to avoid applying a particularly onerous or unexpected clause, but where the judgment would be considered questionable if a normal construction were used. As mentioned above, it is sometimes unclear whether a decision not to apply an onerous clause is based on a finding that the clause has not become part of the contract or on an interpretation of the clause which, in effect, ignores it completely. An example of the second type is 1941 N.J.A. 150, where the Supreme Court majority construed a printed clause in a savings bank promissory note, partially contrary to the wording, as implying only a solvency affidavit and not a surety on the note.[9]

However, the law has probably evolved beyond this decision. The method of reaching a materially satisfactory result with the help of a strained construction may be justified when courts, as has traditionally been the case in Anglo-American law, are unable

adjudged legally enforceable. On the *Gudur* case, see Ramberg, *Cancellation of Contracts of Affreightment*, pp. 227, 436.

[6] Cf. p. 29, *supra*.

[7] Examples are 1964 N.J.A. 517 and 1971 N.J.A. 36.

[8] On the contract clause "in existing condition", see particularly Jan Hellner, *Köprätt*, 3rd ed. Stockholm 1967, pp. 138 f., 146, 152.

[9] Cf. Vahlén, *Avtal och tolkning*, pp. 239 ff., 246 f.

directly to set aside improper terms; but it will be more appropriate openly to disregard improper terms instead of "interpreting them out" once it is clearly acknowledged that the Swedish courts have authority to do so. In this connection, it should be noted that a decision which merely "interprets out" a term gives very little guidance for change in the law.

5. CONTROL OF STANDARD CONTRACTS BY ORDINARY COURTS

Types of Control

An internationally well-known method for counteracting improper contract terms is to grant ordinary courts of law the authority to modify or set aside manifestly one-sided terms using general contract-law principles of invalidation, modification, and construction. Two main forms of such judicial control may be distinguished. *Covert control* exists when courts seek to limit the scope of one-sided terms or "interpret them out" by applying special construction principles, or so-called "covert techniques". *Express control,* on the other hand, exists when courts expressly set aside or modify manifestly one-sided standard contract terms as being improper or unjust.

It is also possible to distinguish two types of express control, namely *casuistic judgments* on whether the application of a certain contract term seems improper (unjust) in the particular case and *clause-orientated judgments* on whether the tenor of a certain type of contract term should be regarded as improper. It is not possible to draw a sharp dividing line between the two types but, on the whole, it is clear that only the latter leads to any real content control.

In this connection, the German legal development in particular should be borne in mind. Tied primarily to the legal principles set forth in the Bundesgerichtshof (earlier Reichsgericht) on the basis of the general clauses in the German civil code *(BGB),*[1] West German case law has developed an express, clause-orientated control of one-sided standard contract terms which are considered

[1] In particular, sec. 242 *BGB,* which reads: The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration.

to contain abuses of freedom of contract. It is a fundamental principle in this connection that a manufacturer or merchant who unilaterally forms general contract terms is thought to appropriate the entire freedom of contract as far as the content of the contract is concerned and therefore to assume an obligation, according to the principle of *"Treu und Glauben"* to take into reasonable consideration the interests of future parties even when the terms are being drawn up. If he asserts only his own interests, he is considered to have abused freedom of contract.[2] This is an argumentation technique which is evidently intended to provide legal support from the general clauses of the *BGB* for the principles that courts wish to apply. The fact is, however, that the Bundesgerichtshof has in this way reached a substantial content control in the standard contract area, particularly over onerous and unexpected clauses. To this are linked special principles on restrictive construction of exemption clauses, etc. In the inquiry as to what may be considered improper, non-mandatory law constitutes an important starting point and serves as a standard of value *(Wertmaßstab)*.[3]

American legal development may also be used for purposes of comparison. American courts have long practised a certain degree of control in the standard contract area through "covert techniques" but, in general, they have hesitated before the prospect of expressly setting aside contract terms as improper. To a certain extent, the situation has been altered through the creation of the Uniform Commercial Code (UCC), completed in the 1950s and now adopted in every state except Louisiana. According to UCC, sec. 2–302, courts have authority under certain conditions to set aside contract terms which are "unconscionable". The principle is regarded as an important innovation in American law, but its influence and practical importance have been disputed. Apparently, judicial control in American law is intended to express itself in casuistic judgments, particularly since the UCC requires that judgments shall consider whether a contract was "unconscionable at the time it was made".[4]

[2] Bundesgerichtshof in 1965 Neue Juristische Wochenschrift 246.

[3] For recent surveys, see, *inter alia*, Schmidt-Salzer, *Allgemeine Geschäftsbedingungen*, and Weber in *Der Betrieb* 1970, pp. 2355 ff., 2417 ff., 1971, pp. 129 ff., 177 ff.

[4] See, *inter alia*, Leff in *University of Pennsylvania Law Review*, vol. 115, pp. 485 ff. (1966), Davenport in *University of Miami Law Review*, vol. 22, pp. 121 ff. (1967), and Ellinghaus in *Yale Law Journal*, vol. 78, pp. 757 ff. (1969).

Covert Control in Swedish Case Law

What possibilities are the ordinary Scandinavian courts, and particularly those in Sweden, considered to have for the control of standard contracts? To obtain a correct perspective on the question, it should first be pointed out that courts are not often presented with controversies where it is necessary to take up a position on exercising this type of control. Particularly in Sweden, there has been a notable dearth of consumer cases in the ordinary courts. In the few cases of this type which have occurred, the plaintiff has nearly always been a businessman. Unfortunately, Swedish consumer organizations have not shown any great interest in initiating legal proceedings over improper contract terms.

Because of the dearth of reported decisions from the ordinary Swedish courts, and particularly from the Supreme Court, the cases have been too few and too diverse to serve as the foundation for a vigorous and richly differentiated legal development. The situation is hardly improved by the fact that the selection of cases which do reach the Supreme Court often appears rather haphazard and by the fact that the Court sometimes gives its opinions a formulation so casuistic that the approach as to principle seems unclear. However, subject to these reservations, *certain conclusions* may be drawn.

The approach of Swedish courts to covert control of unduly one-sided standard contract terms has been described in part 4, *supra*. As was mentioned there, the courts seek to limit the application of onerous clauses, particularly exemption clauses, through restrictive constructions. This tendency to covert control, particularly in combination with other, already discussed construction principles, indirectly gives non-mandatory law a certain influence in the standard contract area. Also, it is interesting that, in construing contracts, Swedish courts appear to place lower demands on consumers than on commercial purchasers. This applies, for example, when a representative of the seller lacks authority to collect payment or when a standard contract term has an onerous tenor. Also, courts are less inclined to find that a contract has come about through inaction when the purchaser is an ordinary consumer than when he is commercially experienced.[5]

The tendency toward covert control is of practical importance in two ways. It may not only affect the conclusion of contracts in individual cases, but may also, because of the insecurity over the

[5] Examples are 1950 N.J.A. 86 and 1964 N.J.A. 152.

scope and validity of onerous clauses caused by judicial scrutiny, promote a certain degree of caution among serious firms in the formulation and application of such terms. Broadly speaking, however, covert control as a construction method seems to be of limited legal importance as an instrument for counteracting one-sided terms in standard contracts.

This is due to the facts that, among other things, the applied principles are so vague and that, essentially, the method has significance only in doubtful cases. More often than not, the meaning of a term is obvious in the context and one gets nowhere by using construction techniques. The advantage which specific and explicit clauses have in this respect is illustrated by the consumer case 1964 N.J.A. 239 concerning the sale of a used car in accordance with the trade's current standard form. While the broadly formulated clause stating that the car was sold "in existing condition" was held to have little independent significance, the specific clause that the seller was not responsible if the vehicle had been driven farther than indicated on the speedometer played an important role in giving the lawsuit a favourable outcome for the seller. Generally, it may be said that if the task of counteracting improper contract terms is entrusted to the ordinary courts, it must be handled essentially through express content control.

Express Control in Swedish Case Law

In Swedish law, it has long been accepted that a "grey zone" exists between, on the one hand, outlawed procedures in connection with the creation and application of a contract and, on the other hand, proper utilization of business experience and economic strength or advantage. Within this grey zone, courts may intervene in individual contract relations with invalidity or modification sanctions supported by certain statutory provisions and uncodified legal principles. The question is whether and to what extent Swedish case law has developed a judicial control in the standard contract area.

In case law, the principle of *pacta sunt servanda* is felt to require moderation in the use of contract-law invalidity rules and associated principles. At the outset, it may be noted that the principle of invalidity of contracts contrary to good practice or morals *(contra bonos mores)* has not achieved any real importance in Swedish law, in contrast particularly to its status in

German legal development.[6] With the exception of some Labour Court cases concerning termination of employment,[7] the *contra bonos mores* principle has rarely found expression in Swedish case law and, when it has, the situations have usually concerned gambling and betting. A remark in the preparatory work to the Contracts Act of 1915 that a general invalidity rule directed against contracts contrary to good practice (morals) could not be laid down seems to have been governing[8] and there is no sign of any change in case law.[9] The moralizing element, which can hardly be avoided in a judicial judgment founded on such reasoning, does not seem compatible with Swedish legal tradition. Former Supreme Court Justice Karlgren has expressed himself in favour of developing a good-practice principle as an instrument for judicial control over abuse in the standard contract area,[1] but this seems an unnecessarily roundabout procedure. It would be more appropriate to develop the means for directly modifying or setting aside standard terms judged to be improper.

In current Swedish law on contracts, as a general rule, ordinary courts of law have authority to modify or set aside manifestly improper contract terms. The principle has been developed on the basis of special statutes introduced for different types of contract, the best example being sec. 8 of the Promissory Notes Act, 1936. Thus, it is possible for courts to take the actual situation in application of a contract term as the starting point for their judgment as to whether the term is improper. However, the principle is greatly limited in practice by a requirement that the impropriety (unreasonableness) shall be manifest and by the strikingly cautious standards of evaluation which are applied. The reported decisions in which courts have modified or set aside contract terms as manifestly improper have been so few, so diverse and so casuistic that they have hardly led to the development of any definitions of typically improper terms.

The present case law has frequently and, in my opinion, with justice been criticized as being far too cautious, even though reported cases do indicate that courts are, as a rule, able to find means of avoiding clearly unjust results. However, the principle

[6] Sec. 138, subsec. 1, *BGB;* cf. art. 1133 *Code civil.*

[7] 1932 A.D. no. 100, 1936 A.D. no. 121, 1946 A.D. no. 67.

[8] *Förslag till lag om avtal,* etc., Stockholm 1914, p. 120.

[9] See, particularly, Agell in 11 *Sc.St.L.*, pp. 18 ff. (1967), and Hjerner, *Främmande valutalag och internationell privaträtt,* Stockholm 1956, pp. 604 ff.

[1] Karlgren in *F.J.F.T.* 1967, pp. 431 f.

referred to is probably of greater importance in actual legal practice than the few court decisions indicate. It probably works "below the surface" as a negotiation argument in settlements out of court and as an objective for dealings of serious enterprises. These indirect effects would probably be greater, however, if there were a larger number of judicial decisions to create a framework of standards. It must be noted that, up to now, hardly any content control of one-sided terms in standard contracts has been developed in Swedish court practice. The situation is much the same in the other Scandinavian countries.[2]

The *conclusion* now drawn implies that Swedish law has been unaccustomed to the use of the clause-orientated principles developed in German law. The main trend in court practice still is to apply, as far as possible, traditional principles of the law of contract both to individually drawn contracts and to such contract relations of a collective character as have grown up through the standard contract system.

Thus far, forms of control over unilaterally drawn standard contracts have appeared inadequate and ineffective. The ordinary Swedish courts have not been able to prevent abuses by developing any content control denying legal effect to certain *types* of clauses as improper. When consumer protection some years ago developed into a major issue, this legal situation met with increasing dissatisfaction, and eventually the feeling that new legal instruments were called for led to the introduction of the administrative control system embodied in the Contract Terms Act.[3]

On the basis of the general picture of the Contract Terms Act and the emerging Swedish consumer law that has been given in parts 1 and 2, *supra,* we will now discuss the structure and applicability of the Act and its relation to previously applied legal principles in the standard contract area.

[2] The statement in the text is based on the author's survey in *Sv.J.T.* 1972, pp. 440 ff., 451 ff., cf. Ramberg, *Cancellation of Contracts of Affreighment,* pp. 432 ff., Rodhe in 3 *Sc.St.L.*, pp. 170 f. (1959). On the Scandinavian doctrine of "presupposed (implied) conditions" see particularly Ramberg, *op. cit.*, pp. 141 ff. On possibilities for the courts to modify or set aside manifestly improper terms in copyright contracts, see Strömholm, *Le droit moral de l'auteur,* vol. II: 1, Stockholm 1966, pp. 208 ff.

[3] The ordinary courts' reluctance to set aside improper contract terms was stressed in the *travaux préparatoires* of the Contract Terms Act, see *Prop.* 1971 no. 15, pp. 20 f., 82.

6. THE CONTRACT TERMS ACT AND ITS APPLICATION

The Structure and Scope of the Act

The only substantive provision of the Contract Terms Act is a "general clause" (sec. 1 of the Act) which makes it possible to issue injunctions to firms which apply improper standard terms when dealing with consumers.[4] The main part of the provision reads:

> If an entrepreneur, when offering a commodity or a service to a consumer for personal use, applies a term which, in regard to the payment and other circumstances, is to be considered as improper towards the consumer, the Market Court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a substantially identical term in similar cases in the future. The injunction shall be issued under penalty of a fine unless, for special reasons, this is deemed unnecessary.

As already mentioned in part 1, *supra,* the Contract Terms Act is designed technically in close accordance with the Marketing Practices Act and is applied by the same organs (the Consumer Ombudsman and the Market Court). It is intended to provide preventive means for eliminating the use of improper contract terms by entrepreneurs in their dealings with consumers. Thus, the Act has a legal design entirely different from the control methods used by ordinary courts of law. Although the text is not clear on this point, the Act is directed towards standard contracts and standardized terms. However, the Act does not deal directly with individual market transactions (purchases, performance of services, etc.) and consequently, individual consumers may not initiate claims based on its provisions. That is to say, the Contract Terms Act, similarly to the Marketing Practices Act, is designed to provide *collective protection of consumers.*

According to the Act, injunctions may be issued only by the Market Court, but in cases which are not of great importance the Consumer Ombudsman may submit cease and desist orders to offending parties for their consent. However, on the rare occasions when it will be necessary to impose fines on businessmen for non-compliance with injunctions, proceedings must be instituted in the ordinary courts of law. So far there have been no cases of

[4] For general references, see footnote 4, p. 14, *supra.*

this kind. For further details as to the contents of the Act, reference should be made to the text reproduced in an *appendix* to this article.

As appears clearly from the text, the Act deals only with contract relations between entrepreneurs and individual consumers and is directed against improper terms used in the offers of such entrepreneurs to consumers. The concept of entrepreneur is used in a broad sense and includes state enterprises. Responsibility for the propriety of terms is placed on the entrepreneur (retailer, service establishment, etc.) who uses them in relations with consumers. In certain cases, this may involve a problem since, to a considerable degree, it is actually the manufacturers and importers who dictate terms, e.g. through so-called warranties for various consumer capital goods. Indirectly, however, even the terms applied by manufacturers can be regulated by drawing them into the injunction actions.[5]

It appears from the general clause that the Act adopts no formal definition of standard contracts; but it is very clear that it is intended to apply to general contract terms, such as those concerning sanctions for delays and defects which are applied similarly when goods or services are offered to consumers in general or as a group. As a rule, it only becomes meaningful to issue an injunction against the continued use of terms or their equivalent when similar terms are used frequently. Naturally, from the point of view of the Act, the most interesting terms are those found in forms in general use within a certain line of business, but even the standardized terms of an independent seller fall within the Contract Terms Act. It should also be emphasized that the statute is applicable not only to such compilations of terms as are usually found in conditional sales contracts, on the reverse of order forms, in warranty certificates, and on other standardized forms but also to separate terms adopted in documents such as receipts and delivery slips, etc., for example limiting complaint periods or exempting bailees from responsibility. However, trivial cases and those which from a consumer-protection standpoint are irrelevant or too remote are excluded from the field of application of the Act by a special proviso in the general clause that injunctions may be issued only if *the public interest so requires.*

The Contract Terms Act does apply to offers of goods and services to consumers (major examples being sales and repairs of

[5] *Proposition* 1971 no. 15, pp. 83 ff.

capital goods such as cars and household appliances) and to offers for hire of movable property for the consumer's personal use (e.g. hire of cars, TV sets, and various sports and medical equipment).[6] Examples of goods and services which fall outside the field of application of the Act are conveyances and the right to use real property, together with banking and insurance transactions.[7] The exclusion of the latter constitutes a rather far-reaching limitation on the scope of the Act since, for the individual consumer, the terms attached to his rented flat or house purchase, his insurance, and his bank loans are often of special importance. The reason why banking and insurance are excluded from the Contract Terms Act is primarily that they are supervised by special organs, the Bank Inspection Board and the National Private Insurance Supervisory Service. Thus far, however, those authorities have not devoted themselves to any great extent to reviewing general contract terms.[8]

The Contract Terms Act provides businessmen with no legal protection whatever. During the public discussion of the draft proposal, it was noted that small entrepreneurs such as a farmer who purchases a tractor or a craftsman who purchases a tool stand in a position to the seller's standard forms that is little better than that of ordinary consumers. However, the suggestion by organizations representing small businesses that the protection be extended to small entrepreneurs met with little sympathy from the legislators.[9] Thus, under present conditions, an entrepreneur who is prohibited by injunction from using certain improper terms in sales to consumers is free to continue using the same terms in sales to other businessmen. This may be of some importance where goods are sold to both categories of purchaser.

The Application of the Act— Guiding Principles

In the practical application of the Act, the Consumer Ombudsman's own initiatives play a decisive role, complaints to the Ombudsman from consumers and businessmen being comparatively few in number in this field. The Consumer Ombudsman's

[6] On the latter, see sec. 1, subsec. 2, of the Act.

[7] Sec. 2 of the Act, on the position of real property, *Proposition* 1971 no. 15, p. 69.

[8] On supervision of insurance contracts, see Jan Hellner, *Försäkringsrätt*, 2nd ed. Stockholm 1965, pp. 42 f., cf. Jan Hellner in *Grundprobleme des Versicherungsrechts. Festgabe für Hans Möller*, Karlsruhe 1972, pp. 283 ff.

[9] *Proposition* 1971 no. 15, pp. 40, 68, 86.

activity is carried on with the companies and organizations in question largely through negotiations intended to eliminate improper terms.[1] This concentration on broad trade deliberations coincides with recommendations in the *travaux préparatoires* and has often led to negotiated settlements. Normally, the business community has taken a favourable attitude towards the Ombudsman's proposals and has been willing to work out constructive solutions. A good example is the 1972 agreement reached by the Ombudsman with travel organizations on general terms for charter and group trips. The settlement involved substantial changes in the contract relations between trip organizers and travellers and brought great improvements for the consumer.[2] The Ombudsman's activities also include measures for eliminating improper terms used in the wide variety of forms applied by individual, often unorganized businessmen.

Essentially, the task of the Market Court is to use its precedent-creating power to guide the development of the application of the Act.[3] While its practice in the contract terms area is still insignificant, a fairly rapid increase in the number of cases before the Court may be expected to occur.[4]

The influence and importance of the Contract Terms Act depend above all on the principles applied in the evaluation of the propriety of a contract term. On this point, there is considerable uncertainty. However, the text of the Act quite deliberately excludes any requirement that impropriety shall be manifest. The legislators have indicated that the restrictive practice followed in the ordinary courts, discussed in part 5, *supra,* should not be governing for the Contract Terms Act but that the judgment as to propriety should be less restrictive so as to provide a standard of protection more favourable to consumers.[5] The

[1] The Consumer Ombudsman reports his practice in a special periodical, *KO Konsumentombudsmannen*, Stockholm 1971–.

[2] *KO Konsumentombudsmannen* 1972 no. 3, pp. 33 f. For a general survey of experience gained so far, see *KO Konsumentombudsmannen* 1973 no. 1, pp. 26 ff.

[3] There is no appeal from the decisions of the Market Court, see sec. 2 of the Market Court Act (1970). When the Contract Terms Act was deliberated in Parliament, there was substantial disagreement only on this point, see *Näringsutskottets betänkande* 1971 no. 7 (The report of the parliamentary committee).

[4] The decisions by the Market Court are published in full in the periodical *Pris- och kartellfrågor*. They are also published, generally in abbreviated form, in *KO Konsumentombudsmannen*.

[5] *Proposition* 1971 no. 15, p. 82.

Contract Terms Act also stands apart from the judgment of controversies by ordinary courts by aiming not at particular cases but at clause-orientated judgments. Therefore, the tenor and the typical consequences for consumers of a term are crucial in an analysis intended to determine whether a clause is to be considered improper according to the Contract Terms Act. In other words, the Act aims at content control.

To determine whether a standard contract clause is improper from a consumer viewpoint, a standard of evaluation is required which may serve as a foundation for comparisons and guidance. In the *travaux préparatoires* of the Contract Terms Act, non-mandatory law and also above all the Sale of Goods Act were mentioned as a basic standard. The standard of evaluation was defined in the following way in the bill submitted by the Government to Parliament:

> A contract term may be considered improper to consumers if, in deviating from non-mandatory law, it gives entrepreneurs an advantage or deprives consumers of a right and thereby causes such one-sided relations in the parties' rights and obligations under the contract that a reasonable balance between the parties no longer exists.[6]

Thus a clause does not have to be considered improper even if it clearly diverges from non-mandatory law. It must also be judged against the background of the balance in the contract as a whole, founded on "an evaluation of the total effect of the contract for the contract parties".[7] In this connection, even the price of goods or services is considered ; however, the Act does not authorize price control. The idea is that a term which in isolation seems unfavourable to a consumer may be acceptable in view of the benefits he otherwise receives in the contract. A typical example is standard contracts for the sale of consumer durable goods by which a so-called warranty actually limits the purchaser's cancellation right as existing under the Sale of Goods Act while at the same time giving him a right to demand the repair of defects in goods, a right he would otherwise lack according to the Sale of Goods Act.

However, certain types of clauses are considered improper *per se* under the Contract Terms Act. These include clauses which vio-

[6] *Proposition* 1971 no. 15, p. 71.
[7] *Ibid.*

late mandatory rules in consumer-protection legislation such as the *Conditional Sales Act* and the special *Home Sales Act* of 1971.[8] Through the latter, Swedish consumers are, among other things, given a week to reconsider home purchases, i.e. a right to cancel an at-the-door purchase and also certain similar types of purchases within seven days of entering into the contract and of being informed by the seller of their rights under the Act.

It has not been entirely unusual for standard terms to include clauses violating such mandatory legislation, e.g. maturity clauses in conditional sales contracts, even though such clauses lack any legal effect. To the extent that this does not occur merely as a result of unreflecting business routine, it may be assumed that the intent of businessmen has been to mislead consumers as to their legal standing and in that way partially to evade the consequences of mandatory rules. Through the Contract Terms Act, Swedish authorities have been given the opportunity effectively to eliminate clauses of this type.

Certain other types of clauses considered improper *per se* are mentioned in the *travaux préparatoires* of the Act.[9] Basically, they are extremely far-reaching clauses which to a great extent will not be given legal effect in the ordinary courts, e.g. clauses which sell new goods "in existing condition",[1] *force majeure* clauses without time limitations, and warranties (repair promises) which exclude entirely the purchaser's cancellation right.

Additional Legislation

One may assume that the principles of evaluation applied according to the Contract Terms Act will be clarified further in the future, partly through case law developed by the Market Court and partly through extensions of mandatory legislation of a private-law nature excluding entirely certain types of clauses.

There are two main reasons why such mandatory legislation is considered to be needed in addition to the Contract Terms Act. First, it is felt that the establishment of specific legal rules on important points stating the consumer's position will lead to greater efficacy and predictability. In this way a minimum level

[8] Decision by the Market Court in the case *Consumer Ombudsman* v. *Richards Company of Sweden* (1972 no. 24), *Pris- och kartellfrågor* 1972 no. 10, p. 87.

[9] *Proposition* 1971 no. 15, p. 72.

[1] Cf. footnote 8, p. 34, *supra*, and p. 38, *supra*.

of consumer protection will be established, which will also serve as a platform, supported by the Consumer Ombudsman's application of the Contract Terms Act, for further efforts in particular areas to provide consumers with more comprehensive protection.

The second reason is that the Contract Terms Act may not be used as a basis for decisions by ordinary courts of law on specific controversies. As already stated, the Act concentrates directly on the control of terms applied by entrepreneurs and does not create rights or obligations for individual parties. Consequently, there is a need to provide individual consumers with statutory provisions which they can invoke before ordinary courts of law.

In Sweden, there is intense legislative activity in this area. The most notable example of this is the recently drafted *Consumer Sales Bill* which will probably be passed by Parliament in 1973.[2] This statute will apply to consumer sales of goods and is intended to provide consumers as purchasers with certain basic rights of which they cannot be deprived by terms of contract. The proposed measure is intended as a complement to the basic *Sale of Goods Act* of 1905 and states the minimum protection to which a consumer is entitled as a buyer. The provisions are directed primarily against certain terms which have been usual in standard forms.

Also, a recently appointed Swedish legislative commission, of which the present author is the chairman, has been given the task of preparing a parallel *Consumer Services Act,* concerning services which businessmen furnish to consumers. The terms of reference of the commission are comprehensive and, in principle, embrace all services except those arising from contracts of employment and those which are wholly public in nature, such as public medical treatment and education. However, both insurance law, which is regulated by special legislation of a partially mandatory nature, and, to a great extent, transport law also fall outside its compass. The work of the commission is directed primarily towards services of the repair, maintenance, and supervision types. These appear to form a fairly well-defined group of services, which should be made the subject of a special Consumer Services Act enforced, like other statutes already mentioned, by the ordinary courts of law. The commission is also charged with considering special legislation for organized holiday tours. There

[2] A committee report, *Konsumentköplag,* with summary in English, has been published as *S.O.U.* 1972 no. 28, Stockholm 1972.

are reasons for hoping that Nordic legislative cooperation will come about in the consumer services area.[3]

The Consumer Sales Act and the Consumer Services Act will deal with relations between sellers and purchasers in individual cases, involving the purchaser's rights to rescind contracts, to receive damages, and to have defective goods repaired and unacceptable services remedied. Legislation is also being prepared which will probably enable ordinary courts of law to set aside improper contract terms in the special case, even when the terms are not manifestly improper.[4] In that way, the ordinary courts may in their practice partially accept the guiding principles evolved in the application of the Contract Terms Act. However, it is probable that the ordinary courts' competence will also be extended to cases involving disputes between entrepreneurs, thus giving small retailers, craftsmen, and farmers, etc., a better protection from heavily one-sided contract terms.

However, it is not enough that legislation should give consumers certain rights without also giving them effective possibilities of enforcing those rights. To this end Sweden has initiated a comprehensive expansion of the publicly financed legal aid programme. A special, simplified procedure will probably be instituted in the ordinary courts for consumer cases of a minor nature. However, it is beyond the limits of this paper to discuss these questions of procedure.

Thus, one-sided standard contract terms used when consumers acquire goods or services are now being attacked in Sweden upon several fronts. In all probability, such terms will cease to be a major consumer-protection problem within a few years. Experience shows that already today standard contracts are drafted with much more care and understanding of consumer interests than was the case only a few years ago. The Swedish method of combining administrative control with detailed private-law legislation applied by the ordinary courts should be very effective. Sweden may reach a situation where most major standard forms and standardized terms used when offering consumers goods or services will reflect agreements reached after negotiations with the Consumer Ombudsman on the basis of the principles and

[3] Another legislative commission, also working with similar commissions in the other Scandinavian countries, is entrusted with the task of modernizing and extending the present Conditional Sales Act.

[4] For the principles applied at present, see part 5, *supra*.

special provisions of the new consumer-protection legislation. These agreements will produce quite a new type of agreed documents, *agreed consumer documents.*

APPENDIX

The Contract Terms Act

The Act of April 30, 1971 (1971:112) Prohibiting Improper Terms of Contract[1]

Section 1

If an entrepreneur, when offering a commodity or a service to a consumer for personal use, applies a term which, in regard to the payment and other circumstances, is to be considered as improper towards the consumer, the Market Court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a substantially identical term in similar cases in the future. The injunction shall be issued under penalty of a fine unless, for special reasons, this is deemed unnecessary.

The provisions of the first paragraph shall apply correspondingly if an entrepreneur offers a consumer the right to use movable property against payment.

An injunction may also be issued to any employee of an entrepreneur and to any person who is acting on behalf of such entrepreneur.

Section 2

This Act shall not apply to activities which are under the supervision of the Bank Inspection Board or the National Private Insurance Supervisory Service.

Section 3

Questions concerning the issuing of an injunction under Section 1 shall be considered upon application. Such application shall be made by the Consumer Ombudsman. If, in a certain case, the Ombudsman decides not to make an application, an application may be made by any association of entrepreneurs, consumers or employees.

[1] The Act entered into force on July 1, 1971.

Section 4

Decisions concerning the issuing of an injunction under this Act shall constitute no obstacle to reconsideration of the matter in question where altered circumstances or other special reasons give cause for so doing.

Section 5

If special reasons exist for so doing, an injunction may be issued in respect of the period before a final decision is reached (interim injunction).

Section 6

Questions concerning the issuing of an injunction may, in cases which are not of great importance, be dealt with by the Consumer Ombudsman by submitting to the entrepreneur a cease and desist order for acceptance.

If such an order has been accepted it shall have the effect of an injunction issued by the Market Court. An acceptance which takes place after the time set out in the submission of the order has expired is, however, without effect.

Further provisions on the submission of cease and desist orders for acceptance shall be issued by the King in Council.

Section 7

Proceedings for the imposition of a fine shall be instituted in an ordinary court of law by the Prosecutor. Such a proceeding may be instituted only after notification by the Consumer Ombudsman or other person who has applied to the Market Court for the prohibition.