THE LAW OF CONTRACT AND THE POOLS

BY

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1. INTRODUCTION

1.1. *Preliminary remarks on the development and function of the (general) law of contract in Denmark*

Legal writing in Denmark covers—as in several other countries—works on the "general part" ("Almindelig Del") of certain legal disciplines, particularly of contract law (the law of obligations, *droit d'obligation, Schuldrecht*), of penal law and of administrative law. Under Danish legal science the law of contract has, since the middle of the 19th century, been presented as being divided up into a general and a special part.[1]

Danish scholars have unquestionably been strongly inspired by and supported from abroad, especially from Germany and there particularly by *F. C. von Savigny* (1779–1861) and *Bernhard Windscheid* (1817–92). While the knowledge of the 19th-century Danish legal authors of German literature was wide, its final influence was, however, limited. There were, and are, important differences between German and Danish law and legal writing. The systematization in the works on private law, which was founded in Germany by v. Savigny in his *System des Heutigen Römischen Rechts* and in *Das Obligationsrecht* and further developed by the "Pandectists"—especially by Windscheid in his extensive *Lehrbuch des Pandektenrechts*—contains two levels of abstraction over and above the rules on the individual legal position: at the top, the general part of private law, and as an intermediate level, the general part of the law of obligations. Danish jurists have not developed a system of general rules common to the whole of private law such as is found in *System des Heutigen Römischen Rechts,* with the pandectists, and now, in *BGB*s First Book ("Allgemeiner Teil") which, *inter alia,* contains a (third) subtitle, *Rechtsgeschäfte* (secs. 104–185).[2] In Denmark the abstraction—"die Ausklammerung"—stops at the level of a general part of property law or contract law. The Danish authors have been influenced by German legal writing, where they have found concepts and arrangements which have seemed clear to them, or rules which have appeared desirable when judged as solutions to the factually arising conflicts. On the

[1] The first Danish author to do this was F. T. J. Gram (1816–71). The heading of the introductory chapter of his work *Den Danske Formueret* (The Danish Law of Contracts and Property), Second Part, First Book (1860), reads: "On the necessity of first presenting a General Part in a Description of the Contractual legal relationship". This necessity is due to the "infinite richness and variety" in the legal relationships which, to a greater extent than the legal relationships regarding property, invokes "general basic rules".

See, on this, Gomard, *Introduktion til Obligationsretten* (Introduction to Contract Law), Copenhagen 1979, pp. 83 ff.

[2] See, on this, Gustav Böhmer, *Einführung in das Bürgerliche Recht,* 2nd ed., pp. 70ff., particularly p. 75.

other hand, it has always been foreign to Danish law and to Danish authors to ascribe to a solution any independent authoritative validity by virtue solely of its background in *corpus juris* or in later developments in Roman or Romanistic law.[3] No official or semiofficial reception has forced or argued for acceptance of this foreign legal material as being a priori valid or guiding. Danish authors have always been agreed only to draw on the Roman law and its adaptations, as well as on other foreign sources, where these have had a persuasive solution to offer. As a possible model Roman law does not have a superior position to other foreign law.

The *BGB* of 1896 has also had influence on judicial thinking in Denmark, particularly on *Julius Lassen* (1847–1923). On the other hand, the preparation and acceptance of a modern, systematic codification has never been seriously considered here. In Denmark, as in the other Nordic countries, laws have only been made in a particular way in so far as they either refer to individual questions in contract as well as other matters concerning claims arising out of contracts (*inter alia* concerning contract formation, limitation and interest) or individual types of contract (*inter alia,* sale, insurance contracts and leases). The general rules of contract law are predominantly the production of theory.

The systemization of the rules of obligation law in Julius Lassen's two main works, *Håndbog i Obligationsretten* (The Law of Contract), *Almindelig Del* (General Part), first edition 1892, third edition 1917–20, and *Specielle Del* (Special Part), 1897, is influenced by Windscheid's work and *BGB,* and Lassen recognizes, in numerous note references, the inspiration and support which he has found in German sources. Julius Lassen writes about *BGB* that this codification is "a powerful testimony to the high level of German legal science, but, according to Nordic opinion, is too detailed with insufficient scope for the freedom of judges' opinions".[4] There can also be found in the two books many references to the well-known Anglo-American authors of the time, such as Pollock, Anson, Wharton, etc., and in his valedictory lecture,[5] Lassen emphasized how important Anglo-American law and "the works of the great English jurists" had been to him. Lassen's emphasis here on English legal writing ahead of German may seem surprising. Lassen's real opinion, in different statements on his methods and sources, is probably that, while he has often found inspiration and direction in German sources as far as apparatus of concepts and

[3] See, on this, Thøger Nielsen, *Studier over ældre dansk formueretspraksis* (Studies of Old Danish Property Law Practice), (dissertation), Copenhagen 1951, pp. 10f., 13ff., and Stig Juul, *Forelæsninger over hovedlinierne i europæisk retsudvikling* (Lectures on the Main Lines of European Legal Development), Copenhagen 1970, pp. 160ff.

[4] *Almindelig Del,* 3rd ed., p. 23.

[5] Published in *UfR* 1918 B, pp. 17ff.

systematization is concerned, in the foreign sources he has found particular support in English works for his adoption of the content of particular rules and for the free scope of common sense, which he found desirable.

Lassen's works, with the weight they put on finding desirable rules for the situations which are met by the application of the law, break away from the conceptual jurisprudence which his predecessor *Andreas Aagesen* (1826–79) had presented in Denmark. In this, Lassen went back to *A. S. Ørstedt*'s (1778–1860) practical view of the law, but he was perhaps also influenced by Jhering's fight against conceptual jurisprudence in Germany.

Lassen and his contemporary *Carl Torp* (1855–1929) made room, *inter alia,* for pragmatic evaluations of individual situations by giving general concepts a certain change in interpretation. The content in meaning of a legal concept was regarded as being not necessarily the same in all contexts, but as varying according to the legal areas and the individual relations, where the concept was used. In the law of property Torp broke the law of the transfer of ownership up into a number of relations, and this development was furthered by *Frederik Vinding Kruse* (1880–1963) and by *Alf Ross* (1899–1979). Thus modern Danish law deals with conflicts of priority of different kinds individually as being separate sets of rules. The change in interpretation of the concepts from being absolute to being relative and the limitation of the use of general concepts form part of a general trend which has reduced the importance of the rules of the general part to their being merely guiding maxims, legal lines or principles which, before use in the legal context can, if necessary, be adapted to the character of the present situation. The change in interpretation of the concepts in the general rules did not encounter any insuperable hindrances in the legislation, Danish legislation not having laid down any particular conceptual apparatus[6] or particular systematization of legal material.

The juridical methodology moved a step further in the direction of discretion with Lassen's successor *Henry Ussing* (1886–1954): it now took on the character of an *interest jurisprudence.* Solutions in cases undecided by law are found, not by conceptual considerations, but on the basis of an analysis and weighing up of the overlapping and conflicting concrete considerations or reasons. Although an excellent systematist, Ussing saw the systems only as a technique of presentation, as an aid to legal analysis and the search for information by practitioners. Ussing also presented the Law of Obligations in a General and a Special Part.

[6] Among the exceptions are the concepts *retshandel* (legal act) in the Contracts Act and *tinglig ret* (property interest) in sec. 54 of the Insurance Contracts Act.

In the post-war period, the development has continued in Denmark in the direction of isolated examination of individual questions with emphasis on the value of concrete, pragmatic evaluations and considerable scepticism of the value of conceptualization and systematics. It is also an attractive, or at any rate a very widespread idea that every legal question can and should be solved on the basis of the real conflicting interests and evaluations in the particular case. The numerous rules in the legislation of recent years which have built up legal regulations by referring to general clauses of reasonableness, offer many examples of this trend—and the consequential difficulties. The criticism which has come forward in Germany of the general part of Private Law and the Law of Obligations in *BGB* is also to some extent based on the same idea.[7]

However, the question ought to be raised whether in Danish—and possibly also in other Scandinavian—law legislation, or at least legal writing and judge-made law, is about to reconsider the atomization of the legal system into individual rules and individual decisions based on pragmatic reasoning and perception of reasonableness. The pendulum might soon swing back towards a more fixed legal system and, perhaps, the beginning of a moderate renaissance of a constructive but, we hope, still flexible jurisprudence. There is, at any rate, reason to consider whether or not the general law of contract that has been handed down contains values which, indeed, like everything else, are subject to a law of development but which ought not to be totally discarded. Neither of the two extremes—a complete atomization or an elaborate system of stiff, general rules with the force of law—is the best solution for Danish law. The concrete evaluation of the particular dispute and the questions this raises have their value; but there is also a value in the finding of rules or principles in the law of contract which are *general* in so far as they are applicable unless special rules or important reasons prescribe, or argue for, a diverging result. Rules of this character have, *inter alia,* considerable value because—as illustrated in this paper by the judgment of the Danish Supreme Court in 1964 UfR [H] discussed in section 3.3—concrete evaluations of reasonableness are substantially more uncertain than has been recognized in discussions in recent years. The judge, in making his decision, has no effective way of defeating the uncertainty in the choice of assumptions of evaluation and differences in individual taste. The unexpressed assumption which is particularly clear in Henry Ussing's authorship—that one particular solution always or generally emerges as the best or the most correct—by no means always holds good. Often, several different solutions may in themselves be just as good,

[7] See, on this, Wieacker, *Privatrechtsgeschichte der Neuzeit,* 2nd ed., 1967, pp. 486 ff.

while there exists a substantial interest to one particular rule or principle being chosen and adhered to. The uncertainty about the legal position and about the result of the dispute which is a consequence of a strongly individualizing method can be unfortunate. Predictability makes ordinary planning easier in business life and increases the possibility of disputes being solved quickly and correctly. In the area of the law of contract, the commercial company is still characterized by freedom of contract, and correction of the results which follow from general rules can therefore occur through agreements and special arrangements.

We do not, of course, mean that a weighing of pros and cons can be dispensed with. We merely find that the time has come to emphasize anew the importance of ordinary fixed guiding principles or rules. General rules promote predictability and clarity. A guidance which gives these advantages and at the same time points to solutions which experience has shown itself to be usable in many situations can, in the domain of the law, only be obtained through general rules.

1.2. *The application of the general rules to a special case: doing the pools*

Using the question whether a disappointed pools punter can claim compensation from a pools agent or the pools company as an example, this paper will illustrate the use of general rules. We see this paper as an instance of the principle that the general rules of obligations are, to a great extent, useful both as a *counterbalance* to the results to which the individual judge's sense of justice would prompt him, and as providing actual *guidance* for the application of the law in areas which are not regulated by legislation or precedent. Despite the still deeper regulation of details and the growing standardization of contract situations through the influence of public authorities and institutions and the practice of private companies and institutions, there still arise conflicts which have to be solved on the basis of the traditional and thoroughly worked out system of general rules. A Danish judgment concerning the pools,[8] which found a pools agent not liable to compensate a punter for winnings where the coupon got lost, is unsatisfactory because the judgment departs from the general rules of the law of contract without giving a satisfactory reason for doing so.

There is an interaction between working with individual types of contract, with their special problems, and the striving of legal dogmatics for the elaboration of general rules. The description in this paper of the legal

[8] 1964 UfR 803 (Supreme Court).

problems connected with the pools contract throws a sidelight on some important general tendencies in the development of the law of contract, including the introduction of a *general rule of mitigation* in the law of damages, the difficulties in using the *traditional vicarious liability of master* in present-day business life, particularly in relation to persons who are intermediaries in contracts, and the stronger emphasis on the *status* of the parties—the pools company as a commercial betting organizer and the punter as a private person or consumer—rather than the individual contract between them.

2. THE POOLS IN THE SCANDINAVIAN COUNTRIES: SOME FACTS

"The pools" is a gamble or a bet which consists in participators guessing the results of football matches. The participators make a payment, and a part of the pool goes as winnings to those whose predictions prove to be correct.[9]

In each of the Nordic countries pools are conducted by, and may only be carried out by, one single particular company in accordance with a public concession. In Denmark, Norway and Finland, special acts have been passed on the pools.[10] In Sweden, the pools are operated on the basis of a licence which has been given in an ordinary Lottery Ordinance.[11]

In Denmark the pools are operated by a limited company with the state as its chief shareholder. The concession is issued by the Minister of Duties and Taxes, and the company is subject to the continuous control by the state. Apart from this special state control, the pools company is organized just as other Danish concessionary companies, such as the Danish telephone companies.

The pools are organized in all the Nordic countries in such a way that the receipts far exceed the winnings. This large surplus which is left over after the administrative costs have been covered is used in Denmark, Norway and Finland, as far as the greatest part is concerned, for the benefit of purposes of public utility, such as sport. In Sweden, the excess is not earmarked for any particular purpose, but goes to the Treasury. By Scandinavian standards, the amounts are large. In Denmark, in the finan-

[9] Doing the pools and other forms of gambling are described as far as Sweden is concerned in *SOU* 1979: 29, *Lotterier och spel* (Lotteries and Gambling), and for England in the Royal Commission on Gambling, *Final Report* (1978). Further information on the organization of gambling is given below in 5.3.1.1.

[10] In Denmark, the Lov om Tipning (the Pools Act), Statutory Instrument no. 66 of february 25, 1977, sec. 2(1); in Finland, the Förordningen om vadhållning i samband med idrottstävlingar of December 17, 1955 (656/65); and in Norway, the Lov om tipping i samband med idrettstevlinger of June 21, 1946, no. 2.

[11] Of May 19, 1939, as later amended (SFS 1974 no. 221).

cial year 1977/78, over 142 mill. DKK (Danish Kroner) was left over for beneficial purposes. In the same period the total payments in prizes amounted to about 237 mill. DKK. The figures in Norway and Sweden were even bigger.

In all the Nordic countries, contact between the pools company and the punters is effected through special pools agents who are approved by the pools company usually from among independent tradesmen, especially owners of newspaper and magazine stands, tobacconists and grocers. The pools agents see to the receipt and forwarding of coupons and the amounts paid in, in return for a consideration in the form of a commission. There are about 3 200 pools agents in Denmark. In the financial year 1977/78, their income from this particular activity was on average about 17 000 DKK. In Finland, Norway and Sweden there are about 8 000, 4 500 and 9 300 pools agents respectively. In Norway and Sweden people can do the pools by direct application to the pools company, but this method is hardly used at all.

3. GENERAL LEGAL QUALIFICATIONS

3.1. *Standard contracts*

The legal relationship between the punter and the pools company has the character of a contract. To a great extent, the content of the pools contract is standardized. The duties of the punter and the pools company are fully regulated in the rules of the pools company. The punter himself decides to what extent he wants to participate in the pools, but the rules of the pools company leave no place for the working out of special agreements or provisions concerning the legal relationship between punter and pools company. In this way, the pools contract resembles other contracts which are arranged by means of the public's (the contracting party's) consensus to a general arrangement, such as by the purchase of "tickets" of various kinds, approval of the supply of water or gas, telephone subscriptions, the entering into agreements on leases or insurances on the basis of the fixed conditions of the other contracting party.

The general opinion is that an extensive curtailment of "freedom of contract", so that it covers only freedom to decide whether or not to enter into the agreement, without the possibility of influencing the contents of the contract, does not exclude the legal relationship between the parties being a contract or the applicability of contract rules.[12] However, such a standard contract is significantly different from the individual agreement

[12] In France, in the case of "contrats d'adhésion", special characteristics are emphasized, but it is at the same time stressed that by and large these contracts follow the same rules as other agreements; see, *inter alia,* Marty/Raynaud, *Droit civil. Les obligations,* Paris 1962, p. 101.

which is the historical prototype for general contract law. Standardization has the effect that important presumptions concerning the factual background to the principles of agreement, interpretation and legal effects of contracts do not hold good, at least not totally. Standardization of contractual relationships, which only leaves the customer the choice either of entering into the contract on the basis of the fixed terms or of not making a contract at all, increases the need for control of the reasonableness of the contract's provisions. Such a "reasonableness censorship" of standard contracts is now authorized in the new provision contained in sec. 36 of the Danish and Swedish Contracts Acts.[13] To a certain extent, sec. 8 of the Instruments of Debt Act or the equivalents of this provision—in Norway, in addition, sec. 18 of the Prices Act—had already formed the basis of such a practice. Thus, in a judgment pronounced in 1974 the Finnish Supreme Court used the principle in sec. 8 of the Instruments of Debt Act as authority for setting aside an unreasonable condition in a lottery which would have resulted in the winner of the first prize losing his prize.[14]

3.2. *Monopoly*

The pools company has a monopoly over the running of the pools. The combination of the standard contract and the monopoly increases the distance from the original picture envisaged by ordinary contract law of the common will of the parties. A monopoly company is to some extent subject to special principles of public law, not just because some of these companies, such as the electricity and gas suppliers, are set up under public auspices, but also because the background to the idea in private law of the parties' autonomy in free negotiations and free competition does not exist. Censorship of unfair contractual terms is of particular importance to the customer where the offerer of the fixed standardized service has a monopoly position, so that the customers cannot get the same or similar performance (substitute) from others. The legislation on monopolies in the Nordic countries contains, in different forms, a prohibition against the

[13] Introduced into the Contracts Act in Denmark by Act no. 250 of June 12, 1975.

[14] 1974 Nord. Domss. 184. The Finnish case is discussed by Pirkko-Liisa Aro in *FJFT* 1974, pp. 171 f. On the subject of judicial control of the reasonableness of fixed business terms in Sweden, see *SOU* 1974: 83, pp. 73 and 134, and also Bernitz, *Standardavtalsrätt,* 3rd ed., Stockholm 1978, pp. 20 f. As far as Norway is concerned, see *NOU* 1977: 61, pp. 10 and 86, Ole Lund Jr. in *Lov og Rett* 1964, pp. 66–81, and Fridtjof Frank Gundersen and Ulf Bernitz, *Norsk og internasjonal markedsrett,* Oslo 1977, pp. 326 ff. On the relationship between sec. 18 of the Norwegian Prices Act and sec. 8 of the Instruments of Debt Act, see L. Villars Dahl, *Gjeldsbrevloven og deponeringsloven,* 4th ed., Oslo 1974, pp. 39 f.

monopoly companies using unreasonable business terms or charging unreasonable prices: see secs. 11 and 12 of the Danish Monopolies Act and sec. 18 of the Norwegian Prices Act. The pools companies are not wholly subject to the provisions of the Monopolies Act. Thus sec. 2(2) of the Danish Act exempts from the scope of the Act "price relationships and the exercise of business which, in accordance with a special authority, are run or recognized by the public sector".[15] The companies' monopoly position must, on the other hand, be accepted as being a factor in the evaluation of the reasonableness of the rules of play, which punters can demand be undertaken under sec. 36 of the Contracts Act.

3.3. *Gambling and betting*

In the theory of the Nordic countries, and particularly in older theory, emphasis is put on "chance contracts" (*lykke- eller hasardkontrakter*) described as a special type of contract. What is common to, and characteristic of, chance contracts is that, according to the content of the contract, it depends on totally uncertain and fortuitous facts whether one party is to have any advantage at the expense of the other.[16]

Chance contracts which do not fulfil specific commercial or clear social needs, as opposed to, for example, insurance or acts to be performed in the future in accordance with price changes or interest rates, have, ever since the days of Roman law, been subject to specially restrictive or repressive rules, and in particular rules concerning penalties, invalidity, confiscation and *condictio indebiti.*

According to the provision in D.L.5-14-55 of 1683, no one is obliged to pay what he loses in a game of chance. The invalidity of gambling in Norway is the result of the Act of Implementation of the Norwegian Penal Code of May 22, 1902, no. 11, sec. 12: see Arnholm, *Privatret* (Private Law) II, Oslo 1964, p. 256, 35, and in Finland the same follows from the Finnish Penal Code, 43 : 3: see Hakulinen, *Obligationsrätt* (The Law of Obligations) I, Helsinki 1962, p. 34. Gambling contracts were, in fact, earlier completely forbidden in Denmark: see the Statutory Instrument of October 6, 1773, relating to the prohibition of gambling. This Instrument was repealed by law no. 408 of December 3, 1952, but the Danish Penal Code still provides for punishment in secs. 202–4 of any person who commercially organizes gambling or betting in various ways, which are defined in detail. The Danish

[15] See, on this, *Monopoler og Priser* (Monopolies and Prices), Copenhagen 1980, book 1 by v. Eyben, pp. 98 ff.

[16] See Jul. Lassen, *Obligationsretten, Speciel Del,* Copenhagen 1897, p. 575. See, too, Gram and Vogt, *Den Nordiske Obligationsret* (Nordic Law of Obligations), Copenhagen 1888, pp. 201 f.

and Norwegian Marketing Acts contain (in secs. 8 and 5 respectively) provisions prohibiting businessmen from arranging lotteries, prize competitions, etc. Such gambling is covered by the prohibition in the Swedish Lotteries Act and—to a lesser extent—sec. 8 of the Finnish Competition Act.[17] Similar rules are found in the *Code civil* arts. 1965–7, the *BGB* secs. 762–3 and, for England, the Gaming Act of 1968.

Jul. Lassen, among others, emphasizes[18] that the background to this tradition of special rules is the "uselessness" and "danger" of such contracts. Half a century later, along the same lines, Ussing says in his book *Aftaler* (On Contracts):[19]

"It is long-standing experience that the hope of winning induces many people to engage irresponsibly in gaming, speculation or other contracts which give rise to a similar possibility of winning without any corresponding sacrifice of work or capital. As this irresponsibility often results in serious consequences for the person in question, his family and creditors, it is only natural to consider whether the legal system ought not to refuse to recognize such contracts."

Ussing made the proposition that unauthorized betting or the like is invalid under applicable law. This invalidity is to affect only duties of future performance: what has already been paid cannot be recovered.[20]

In earlier Nordic practice, *betting* was regarded as valid, perhaps because the principle of freedom of contract was regarded as a generally valid rule which could be departed from only by a special provision.[21] A decision can be cited from Danish court practice[22] in which the loser of a bet over how many votes a parliamentary candidate had obtained at an earlier election was ordered to fulfil his part of the bargain by paying the agreed sum of 1 000 DKK. One judge dissented in favour of non-liability, referring to the character of the case involving "something as worthless to society's general economy as a bet". Later Danish practice has changed its position, consistently with the change in theory, so that 1944 UfR 936 found to be invalid a bet entered into in 1941 as to whether the war would be over by November 1, 1943.[23] This is also the position as far as bets are concerned in Swedish (1921 SvJT rf. 3) and Norwegian (1934 NRt 421) court practice.

Authorized gambling such as lotteries and the totalizator ("the tote") are lawful. Contracts concerning participation in such gambling are entered

[17] See Pirkko-Liisa Aro in *NIR* 1976, p. 243.
[18] *Loc. cit.*
[19] Ussing, *Aftaler,* 3rd ed., Copenhagen 1950, at p. 209.
[20] See Ussing, *Aftaler,* p. 211.
[21] See Gram and Vogt, *Den Nordiske Obligationsret,* p. 202.
[22] 1914 UfR 902 LOHS.
[23] This judgment is discussed in Ussing, *Aftaler,* p. 216, note 29.

into and have effect according to the ordinary rules of the law on contracts. However, the special nature of the contractual relationship is not totally without relevance as far as the legal consequences of the contract are concerned. Ussing, among others, has asserted[24] that legal gambling contracts—regardless of their validity—are at any rate subject to special rules, e.g. (1) the special "weak" reasons of invalidity in the Contracts Act are of importance despite the good faith of the offeree; (2) promises are interpreted more restrictively than in other contracts; and (3) less strict rules apply as to liability for breach of contract. This opinion, which also applies to gambling that is authorized by special legislation, such as doing the pools, the "lawfulness" of which is therefore beyond doubt, has some support in Danish court practice. Thus an older judgment reported in 1907 UfR 404 LOHS found a party with an interest in a lottery ticket not liable to compensate the person with the other interest for his loss corresponding to the winnings which the parties forfeited because the ticket had not been renewed. In the same way, on the basis of the "special nature of lottery", the High Court (Eastern Division) dismissed, in 1942 UfR 513, a claim for compensation from a former fellow punter. On the other hand, Swedish court practice seems to apply the normal contract rules to disputes between persons who gamble together or cooperate in some lawful gambling; see 1964 NJA 80, in which the court imposed on a private person who had failed to gamble on the tote in accordance with his promise for which he had received a sum of money full liability to damages. The judgment is discussed, without being dissociated from, by Tiberg,[25] but is criticized by Agell[26] on the basis of the same critical attitude to gambling which is taken in Denmark by Lassen and Ussing.

A critical attitude to any general transfer of the rules of contract law to gambling and betting may be appropriate with respect to a relationship between private persons, but in general it does not seem natural to depart from the rules of contract and damages which apply to the contracts of other commercial enterprises where gambling carried out by *professional gambling organizations* is concerned. Here, the general rules of contract which comprise the starting point of any legal treatment of the pools contract ought to be adhered to.

It is also accepted in Swedish court practice that pools agents incur liability to pay damages.[27] In the same way, the Norwegian Supreme Court,

[24] Ussing, *op. cit.*, at pp. 126 and 158.
[25] Tiberg, *Mellanmansrätt* (The Rights of Intermediaries), Uppsala 1970, p. 26.
[26] Agell, in *Festskrift till Nial* (Volume in Homage to Nial), Stockholm 1966, p. 6.
[27] See 1940 NJA 442, 1947 NJA 13 and an unreported decision of the Court of Appeal in Scania and Blekinge of December 2, 1976.

by emphasizing that pools agents assist in the making of pools contracts in return for payment, used the ordinary rules of contract and damages in a case brought by a pools punter against his agent, claiming compensation for winnings which he lost because of a forwarding error.[28] Similarly, the Danish Supreme Court in 1942 UfR 269, contrary to the teaching of Lassen/Ussing,[29] but in accordance with sec. 32 of the Contracts Act, protected the good faith of a gambler on a horse race who was given a ticket with a particularly lucky content because of a mistake by the assistant at the tote. In 1956 UfR 480, the Supreme Court awarded compensation in a case where an assistant at the tote gave wrong information and thus prevented a person from backing a winner. The case, reported in 1956 UfR 245 (Supreme Court), which allowed a carrier-pigeon gambler to correct the first wrong notice of the result of the bet after the expiration of half an hour, probably follows ordinary contract rules, as the decision is based on the fact that the first notice, which the gambler only heard at second hand, had not, on his part, "awakened such a certain expectation of the correctness and finality of the result announced that he can use this to support his claim to be regarded as winner"; see a similar case in 1966 UfR 588 (Supreme Court).[30]

While all the cited cases apply the general rules of contract concerning the validity of the contract and liability for breach of contract, the Danish Supreme Court changed course in 1964 UfR 803: here they found not liable (by a majority) a pools agent who, for reasons not stated, had mislaid a correctly filled-in pools coupon, and they thus departed from the general rule of contract damages that the burden is on a debtor to prove that his failure to fulfil a contract is not his fault. The judges who constituted the majority in this case justified this departure from the general rule by saying that "the pools agent has, for a small fee, merely acted as a minor link in the connection between the gambler and the pools company" and referred, moreover, to "the nature of the contract at large".

One of the majority judges, Trolle, emphasizes in his comments, *inter alia* "... the peculiar character of the loss—not so much the fact that it is a question of the gamble not being appreciated by the legal system, but more a question of a legal relationship outside trade, where the chances of winning are uncertain, but can be large. From this it can be urged that, despite everything, it is always less painful to miss an earning you have had

[28] See 1955 NRt 1132. Swedish court practice is discussed by Tiberg in *Mellanmansrätt*, p. 32, and Norwegian practice by Kristen Andersen, *Skadeforvoldelse og erstatning* (Injury and Compensation), Oslo 1970, pp. 65 f. and p. 141.

[29] See, however, Ussing, *Aftaler*, p. 158, with notes 27 and 28.

[30] Illum expresses doubts about the usability of the Contracts Act in such a case, in *UfR* 1971 B, p. 221.

a chance of, but not obtained, than to lose or forfeit a corresponding sum you have."[31]

It appears clearly from the commentary to the judgment that the judges, on the basis of their direct impression of the case, harboured a strong wish to reach the conclusion that the pools agent should be found not liable. There was no direct impediment to this in any contrary rule, e.g. on sale or commission or in a precedent dealing with an earlier, similar case. The *Danish* judgments referred to above all concerned *company* responsibility. The only impediment to the desired result was the general rules of contract. These rules covered the present case and, according to their content, they clearly led to liability. The finding of non-liability, if the general law of contract were not to be repudiated, thus had to be harmonized with the general law of contract by its being established that the case of pools contracts is so atypical that this could justify deviation from general legal principles. This justification of the result can be found in the judgment and the commentary by a combination of several circumstances which are collected here in three points:

(a) The agent was only a minor link in the arrangement of the contract between the punter and the pools company, and his commission for this was small,
(b) It was a legal relationship "outside trade",
(c) At the time the contractual relationship was entered into, the loss was the punter's uncertain winnings.

A confrontation of these premises with ordinary contract law shows that, if the lines of the judgment are followed in the future, this may lead to the making of substantial modifications to principles which are otherwise fixed and well established. This confrontation can, *inter alia,* contribute to substantiating the argument that the judgment ought not to be followed.

(a) This consideration must perhaps be understood as a reference to the principle that the employees of a party to a contract who assist in the performance of the contract are not themselves liable to the other contracting party under the *rules of contract.*[32] Trolle's statement in his commentary that the responsibility, in view of the pools agent's position in relation to the company, ought to be placed on the company, points in this direction. Other independent businessmen, however, acting as intermediaries or

[31] *UfR* 1965 B, p. 148.
[32] See Ussing, *Almindelig Del,* p. 115, and Tiberg, *Mellanmansrätt,* pp. 30–2.

"intermediary" sellers, e.g. estate agents,[33] car dealers, keepers of a laundry-delivery service, could also be presented as "minor links", but their liability in relation to the customers is, so far, beyond discussion. The free pardon of the pools agent along this line of reasoning reminds one of the Norwegian case, "Poståpner" (Post opener).[34] A negligent officer in the postal service was held not liable in relation to a customer, the court thus departing from the established rule of personal liability for negligence in public services. In those days the government itself could not be sued. It should be noted, however, that the pools agent is liable under Norwegian law.[35]

Another possible interpretation of the emphasis on the agent's inferior position and small payment is that these factors are of importance for whether the loss suffered is "adækvat" (has reasonable foreseeability). The Danish concept *adækvans* (is reasonably foreseeable) has occasionally appeared as a safety valve for the system and has now a more fixed basis in proposed general rules on modification of liability to pay damages.[36] On the other hand, the fact that a pools punter now and again gets a fair amount of winnings can hardly be unforeseeable for a pools agent! In addition, a third possible interpretation deserves to be mentioned: the fact that the commision paid is small is sometimes put forward as an argument for conceding that the acceptor has undertaken only minor duties.[37] Such a restrictive interpretation assumes, however, that the extent of the acceptor's duties is not quite definitely determined. Any person who, as a third party or a pools agent, commercially binds himself to perform certain tasks must himself see that the consideration is sufficient in relation to the expenses thereby incurred, and to these anticipated expenses belong the economic consequences of mistakes and negligence which might be committed in the activity. A baker's profit on crusted buns alone is also small in relation to the product liability that he can incur through a single unfortunate piece of bakery.

(b) The argument that the legal relationship is "outside trade" must probably be understood in accordance with, *inter alia,* Lassen's and Ussing's allusion to the "uselessness" of gambling. It is also given expression in the Report of the Royal Commission on Gambling: "Gambling does not create

[33] See, on this, *inter alia* Frost, *Ejendomsmæglerens og Ejendomshandlerens Retlige Stilling* (The Legal Position of the Estate Agent), Copenhagen 1964, pp. 62 f.
[34] The Norwegian case is reported in 1878 NRt 407.
[35] Cf. the case cited above and, further, below at 4.1.1.
[36] See, in the case of Denmark, Report no. 829 of 1978.
[37] On the importance of the amount of consideration, Gomard, *Erstatningsregler i og udenfor kontraktsforhold* (Rules of Damages inside and outside the Contractual Relationship) (dissertation), Copenhagen 1958, p. 361.

wealth."[38] Nor do gifts, and the general rules of contract are departed from to a certain extent in the case of gifts. It is accepted in legal writing that the rules on claims to gifts and liability for breach of promise of gifts are more lenient than the corresponding rules on contracts in return for consideration.[39] The giver has merely to deliver the gift as it is, and, in general, does not have imposed on him liability for defects. The receiver of the gift has given nothing and must be satisfied with what he has in fact got. A gambler's winnings may remind one of a gift in so far as it is to a great extent the result of the gambler's luck rather than his skill or the stake in the gamble. However, the situation as far as a gambling organization such as a pools company is concerned is quite different from that of the bestower of gifts. The pools company is run professionally with a trained administrative staff and modern office machinery. The business is very substantial and the profits are much greater than those of ordinary commercial companies. The sums which do not go to cover the costs—which include, in Denmark, 19% of the trade going in state taxes[39a]— are applied as winnings and for beneficial purposes.

(c) The character of a loss or an uncertain chance of winnings does not, under the general rules, lead without more ado to the loss being non-recoverable as damages. The starting point is that the person who is guilty of negligence must pay full damages for the loss which has resulted from the breach of contract. It is true that there is a certain boundary to the traditional criteria of foreseeability, but, as said under (a), it is clear to everyone that large winnings can arise from every coupon, including a coupon that has got lost. The winnings in the case were, incidentally, only 6 000 DKK (approx. £500).

3.4. *The usability of the general rules of contract in the case of the pools*

The reasons which are given in legal writing and in 1964 UfR 803 against basing the legal treatment of the pools on the ordinary rules of contract are not convincing, and there are other good reasons for keeping to the use of these rules. The maintenance of organized gambling depends on many people wanting to gamble, and a precondition for this is that the gambling

[38] See the heading of ch. 1 at p. 6.

[39] See further Gomard, *op. cit.*, pp. 231 ff., and, on the position of promises of gifts in relation to third parties, Munch in *UfR* 1978 B, pp. 295 f.

[39a] On the other hand, the Danish pools company pays neither corporation tax (see sec. 8 of the Danish Pools Act) nor VAT (see sec. 2 of the Danish Value Added Tax Act).

rules give participators a measure of "fair play". "Fair play" includes the legal rules on the binding force of contracts and responsibility for their performance being observed. The notion that gambling, as opposed to contracts on the production and distribution of necessary goods, is "useless" and therefore ought not to enjoy the protection of the legal system, cannot survive any detailed examination. A dividing-up of contracts into useful and useless ones is impossible in a pluralistic, free society enjoying a high standard of living. Contracts on the production and sale of luxury items, pleasure journeys or theatre performances ought in general to be treated according to the same rules as contracts concerning indispensable necessities.

The circumstances to which the Danish Supreme Court judgment alludes in 1964 UfR 803 can, at most, be the cause of pools agents considering whether or not to limit—as certain other businessmen have done—their liability if they find that the full burden of liability, where the winnings lost constitute a very large sum, can be crushing for a pools agent. Also, in the courts, despite the agent's not having stipulated such a limited liability himself, those circumstances may warrant a certain *mitigation* of damages. In the modern Nordic law of damages, relief in certain cases from a disproportionate burden of liability for persons responsible for loss by reducing the size of the damages from full compensation to some lesser amount is regarded as a reasonable and proper legal position; see further below in section 4.3. However, apart from this, there is hardly any cogent reason for modifying the general rules of contract in connection with doing the pools and similar forms of organized, authorized gambling.[40]

4. THE LEGAL RELATIONSHIP BETWEEN POOLS AGENTS AND CUSTOMERS

4.1. *Fault liability. Mistakes in forwarding and the duty of guidance*

4.1.1. *Forwarding mistakes*

Pools agents, just like travel agents, insurance brokers, estate agents, etc., are *intermediaries* of the contract between the two main parties to the legal relationship, i.e. the pools company and the punter. Even though this

[40] There is no reason to relieve the burden of responsibility of a pools company merely because its profits, as is the case for most pools companies, are used for public utilities. Neither are companies which are owned by foundations set up for generally beneficial purposes subject to specially mild liability rules. However, a presumption in the opposite direction is perhaps made by the Norwegian High Court (*Lagmansretten*, Court of Appeal) in the case reported in 1978 NRt 1019 and discussed below in 5.2.

relationship is called, in Danish, "tipsforhandling" (pools "dealer"), the pools agent is not a "dealer" in the usual meaning of the word, and he is not liable for the correct carrying out of the gamble, in contrast to e.g. a car dealer's liability for defective products. The pools agent's position as middleman is obvious to the punter.[41] The agent's duties in relation to the punter consist solely in correctly forwarding the coupon received and in exercising a certain very limited degree of guidance for the punter.

In Nordic practice, there is agreement that the pools agent is responsible for forwarding errors. The three reported *Swedish* cases cited in section 3.3 at note 27 have all been based on the presumption that pools agents, according to the compensation rule under ordinary contract law, are responsible for losses which are due to their mistakes or negligence. The *Norwegian* Supreme Court must be regarded as having reached the same result in 1955 NRt 1132. The court put "the decisive weight on the fact that the mistake was made by a person (the pools agent) who makes a living out of forwarding pools coupons and assisting the public's contact with the pools company ...". The premises of the *Danish* pools judgment in 1964 UfR 803 also recognize in principle a fault liability for pools agents. The question which divided the Supreme Court into a majority and a minority (7 judges to 4) was whether the punter has the burden of proof of fault (mistake or negligence) or whether it rests on the pools agent to produce at least some exculpatory evidence.[42]

Positive, incorrect information concerning the development of the gamble is treated as a mistake in forwarding incurring liability; see 1956 UfR 480 (Supreme Court), discussed in section 3.3 above.

4.1.2. *Duty of guidance*

No completely clear distinction can be drawn between forwarding faults and failure to give the punter some guidance, which is obligatory. Some mistakes can be described both as faults in forwarding and as cases of failure to give guidance. In the Norwegian case, the pools agent had accepted a pools coupon after the time when delivery of coupons to the agent in question was no longer allowed for a certain playing-week, where-

[41] A company which acts both as intermediary and in its own name ought, according to the circumstances, to make it quite clear when it is acting purely as intermediary; thus, see the case which involved a travel agent who had not made it sufficiently clear that, in the case in question, he had only meant to act as agent: 1973 UfR 901 (Supreme Court). This judgment is discussed by Michael Bogdan in *Tidskrift för Sveriges Advokatsamfund* (Journal of the Swedish Bar Association) 1978, p. 346, note 5.

[42] Fault liability is also recognized in *Germany*. In a judgment pronounced by the Oberlandesgericht of Frankfurt (Main) in a pools agency case of June 6, 1974, it was said that "es handelt sich um einen entgeldlichen Geschäftsbesorgungsvertrag, bei dem im Prinzip für Verschulden in jeder Form gehaftet werden muss (§ 675 BGB)" (a recompensatory business agency contract must in principle bestow liability in every form it comes).

as such coupons could still be accepted by another agent in a neighbouring town. The agent did not inform the customer of this but accepted the coupon.

Pure questions of failure to give guidance with respect to the filling-in of the pools coupon, possible age limits to participation in doing the pools, and other things do not seem to have come up in court practice. The ordinary compensation rule is based on the general, flexible fault concept which does not in itself contain any answer to the question whether a pools agent's failure to check whether or not the accepted coupons are filled in in accordance with the rules of play and, if not, to guide or help the person doing the pools to fill in the coupon brings liability. In all kinds of business, persons—such as insurers or estate agents—who commercially arrange the entering into of contracts have unquestionably a certain duty to help their customers to fill in forms (e.g. insurance applications) and on the whole to guide them on how they can best protect their interests. In the Danish "Guidance for People Doing the Pools" it is stated, *inter alia,* at point 15, "In order that, in the interests of both the agent and the company, the public can be given the best possible service, the agent ought, upon acceptance of the filled-in coupons, to examine them closely before stamping them in the pools control machine and thereby make sure that the coupons are completed in accordance with the rules of play." At the same time, however, the "Rules of Play" make it clear in point 12 that "if, because of mistakes, a coupon is invalid or is declared invalid by the company (see, on this, point 6 of the Rules of Play), a participator cannot make any valid claim against the company or its agents". A similar provision on freedom from liability can be found in the rules of the other Nordic companies. The filling-in of a pools coupon is—in contrast to the preparation and entering into of many other contracts—a simple matter. A person who is a "beginner" as a pools punter, or is in doubt for special reasons, must make inquiries. The great majority of punters are fully conversant with the system. A punter who has filled in his coupon wrongly has himself been at fault and cannot, in general, get compensation. However, liability may perhaps be established on the part of the agent in a case where he had special reason to be aware of the mistake and to have it corrected. The provision in the rules of play on freedom from liability does not give him full protection against incurring liability; see below, section 6.

4.2. *The standard of fault and the burden of proof*

4.2.1. *The standard of fault*

Court practice gives no reason for supposing that the liability of the pools agent should be limited to qualified forms of fault. It is stated quite clearly

in the comments to 1964 UfR 803 cited above that "it seems that the starting point for future cases of this kind is that there is no duty of compensation even though one may suppose that there exists minor negligence or forwarding errors, but that questions on this may arise in the case of more serious mistakes or negligence". However, the commentary has no support in the official reasoning of the judgment and cannot in itself bear a limitation to the general compensatory rules. Pools agents in Denmark are responsible for mistakes, in accordance with the fault-liability rule.

4.2.2. *The burden of proof*

The importance of the liability rule depends, to a great extent, on what demands the courts make as to the proof of fault. While the majority of the judges in 1964 UfR 803 wanted to lay the burden of proof of fault on the shoulders of the punter and therefore discharge an agent who had to be assumed to have accepted a correctly filled-in coupon if this later disappeared in an unexplained way, it seems that the judgments that have been pronounced in the other Nordic countries and in Germany would keep to the ordinary rule of the law of contractual compensation, with the burden of proof the other way round. The outcome of most cases brought for damages of this kind depends on the rule of the burden of proof: the reason why the plaintiff can produce a correctly filled-in and stamped coupon while the pools company has not received a corresponding coupon cannot usually be ascertained with certainty. This applies both to suits which the punter gives up pursuing, in cases which are decided by amicable settlement, and to cases which are litigated in the courts. In the court cases, there were no indications that the punter had tinkered with the coupons, or any positive evidence that any tinkering had been done by anyone; nor was there evidence of incorrect forwarding or of negligence by the agent.

1964 UfR 803, which is to the effect that the pools punter has the burden of proof of fault by the agent, or that he must show it to be likely (i.e. produce evidence of a certain, even though not particularly great strength) that the presumable loss of the coupon is due to the agent's error, is, as the commentary to the judgment discussed in section 3.3 underlines, based on a reluctance on the part of the majority of the judges to make the pools agent the sole bearer of a risk which—in the opinion of these judges—should be borne by the company. However, the judges build this view on shaky foundations.[43] Reasons for this view cannot be found in the

[43] See also the commentary's remark on this at p. 146.

law applicable till then—see section 5 below. Decisive reasoning, which ought to have been present for the judges defensibly to have been able to make a decision to reform the law, was not found to exist in the case. The preparation of a guarantee arrangement for pools punters would need a closer investigation into, and evaluation of, the risk of liability, the earnings of the agent and other advantages the agent has, the risk of cheating and the possibilities of covering the risk by insurance or the making of an "insurance fund" or the like by the pools company.

It is not possible, either, to support a deviation from the evidential rule of contract damages by a provision in the rules of play that the counterfoil cannot be used as documentary evidence of how the punter filled in his coupon and played; see, e.g. point 2(2) of the Danish rules. This provision would, if it were to be taken literally, be much too wide. Nor is the provision regarded as having played any role in practice. Among other things, the Swedish judgments have awarded damages despite the fact that the correct placing of the pools symbols could only be documented with the help of the counterfoil.

All the judgments other than 1964 UfR 803 place the burden of proof on the pools agent, and there is no reason to believe that the Danish judgment would be able to take the practice in other countries with it. It is of doubtful wisdom to depart from the general rules of contract in the absence of legislative backing and without substantial justification.

4.3. *Mitigation of damages*

If and when the general rule of mitigation, which is proposed in Report no. 829 of 1978, is also implemented in Denmark, the Nordic countries ought to be able to have a uniform rule whereby liability and the burden of proof is imposed on pools agents according to the general contract compensatory rule, but with an opportunity to reduce the size of the damages so that the liability does not become unreasonably heavy.[44]

The general rule of mitigation of damages which, in recent years, has been under preparation in the Nordic countries, has already wholly or

[44] There is perhaps a special difficulty here in Finland as the Finnish *Skadeståndslag* of May 31, 1974, in ch. 1 sec. 1 the formulation of which is different from the Swedish *Skadeståndslag* of June 2, 1972, as later amended in ch. 1 sec. 1 according to a direct reading, seems to exclude modification of contract liability. The question of the Act's correct meaning at this point is discussed by Godenhielm in *FJFT* 1975, p. 412, who goes along with the Swedish understanding whereby modification of contractual relationships is not excluded; see Hellner, *Skadeståndsrätt* (Law of Torts), 3rd ed., Uppsala 1976, p. 39. The mitigation rule ought, at any rate, to cover all situations where the injury is of an accidental character and the liability cannot be described as a part of the debtor's performance in normal cases. The Danish Report no. 829 of 1978 clearly opts for this point of view.

partly been implemented in Finland, Norway and Sweden. As mentioned, in Denmark there are proposals for such a rule in the Report no. 829 of 1978, where the Nordic Acts already in force and the legislation proposals that exist are mentioned (p. 63). The way to Nordic legal unity is open with respect to the legal position of pools agents, inasmuch as the Danish judgment in 1964 UfR 803 is regarded as an anticipation in the judge-made law of the rule of mitigation. Complete legal unity is perhaps not brought about by the rule of mitigation, as opinions about what is big and what is small can differ in the Nordic countries. In Norway, in 1955, a lost winning of 4 300 NOK (Norwegian kroner) was compensated for, whereas in Denmark, in 1964, a lost sum of 6 000 DKK was not.[45] The winnings in two earlier Swedish pools cases, 1940 NJA 442 and 1947 NJA 13, where the pools agents were found liable, amounted to 1 742 SEK (Swedish kronor) and 3 362 SEK. The more recent Swedish judgment, pronounced on December 2, 1976, by the Court of Appeal in Scania and Blekinge, imposed full liability on the pools agent for a vanished coupon with winnings of 17 986 SEK. The question of mitigation was not raised by the agents in any of the Swedish cases.

5. THE DUTIES AND LIABILITY OF THE POOLS COMPANY

5.1. *Received coupons*

A company that legally and professionally arranges gambling is bound by gambling contracts entered into, in accordance with ordinary rules on the completion of contracts. This is laid down in 1942 UfR 269 (Supreme Court) where a horse-racing course was found to be obliged to honour a tote ticket even though the content of the ticket, owing to a mistake on the part of the salesman, was unintended, the punter being in good faith.[46] This was contrary to the rules of play. The salesman was certainly not authorized to hand over a ticket with such a content, but the punter's contract with the salesman on the tote's behalf was, by virtue of the salesman's position, binding on the company.

Doubt about liability for coupons that get lost or may have got lost on the way from the agent to the company is eliminated if the punter delivers or forwards his coupon direct to the pools company. The company is responsible for coupons it has received. The Norwegian and Swedish, but not the

[45] See, however, the vote of the minority in 1964 UfR 803.

[46] See sec. 32 of the Contracts Act. Cf. the court practice discussed in section 3.3 and the earlier case, 1884 UfR 989, concerning a lottery.

Danish, pools companies give the public the opportunity to do the pools direct, but the vast majority of pools betting is not done this way, and never will be. Direct pools betting is not convenient for punters, nor is it attractive administratively. The pools companies may be presumed, in the future too, to want to avail themselves of a large number of authorized intermediaries for making the contract between the pools company and the punter; see section 2 above.

5.2. *The organization and control of the activities of the pools agents as a part of the gambling process*

Although, as described below in section 5.3, it probably must be accepted that the pools company does not have vicarious liability for the agents and that the agents do not have authority to bind the company, the participation of the independent pools agents in the gambling process cannot be totally irrelevant for the pools company. The agents are thus integrated in the overall activity which is conducted by the company, so that there must rest on the latter some degree of liability for seeing that the system functions properly as a whole and is subject to the necessary control.[47] It should at any rate be accepted that the company has a direct responsibility to the punter for defects in the exercise by pools agents of their activities, which, to a certain extent, the company has had a chance to deal with, e.g. upon the pools agents' repeated dereliction of their duties to ensure that the bet proceeds smoothly, without mistakes.

Both the pools agent's dependent role in the gambling process, which is totally controlled by the rules of the company, and the pools company's direct appearance in relation to the punter in the drawing-up of the pools coupon and in other ways, support the view that the liability of the company cannot be limited just to its own activities in connection with coupons received.

The organization of the pools activities with one central organization and a large number of agents as "satellites" whose proper cooperation is a precondition for the working of the game argues for the pools company's having an independent responsibility for the procedure ensuring the timely arrival of the pools coupons at the company. The pools company has not merely prescribed what procedure is to be followed in the receiving and stamping of pools coupons, but has also laid down rules on the forwarding of the coupons to the company. In all the Nordic countries, the ordinary mail is used. As the deadline for valid delivery to the agent must be set at a

[47] See, on this, Anna Christensen in *SvJT* 1974, p. 763 with note 4, and Anson, *Law of Contract*, 24th ed., p. 600.

period which expires quite shortly before the match day (see, as far as Denmark is concerned, point 17 of the Rules of Play), there is a certain risk that validly handed-in pools coupons do not validly reach the company. It is the company's task to exercise reasonable control, and at any rate to make a special effort, so that the individual agents' coupon deliveries arrive in time. The question whether a pools company had made a sufficient effort, after a delay was ascertained, was the point to be decided by the Norwegian Supreme Court in 1978 NRt 1019. The Supreme Court found, in contrast to the majority of the High Court, that both the general rules and the concrete, normal, effort were acceptable. The standard set is not high. No criticism was made of the fact that the pools company used only the ordinary mail as the forwarding method rather than registered mail, or that the pools company in this particular case had not used air taxis to transport delayed coupons, which would have prevented the punter's making a loss.

5.3. *Liability for the pools agents. Vicarious liability and agency*

The investigation of whether the pools company is liable for their agents' activities must follow the two main paths in the rules of ordinary contract law on liability in connection with the delegating of tasks: viz. the making of binding contracts through intermediaries (agency) and compensation for employees' and helpers' damages. The main question with respect to the intermediary position of the pools agent is (i) whether he has authority to complete the pools contract or is merely a messenger or only has authority to accept the punter's offer and delivery to the company, and (ii) whether the company is responsible as the master of the pools agent. Even the fact that the pools agents, in their main functions as owners of newspaper stands, tobacconists' shops or the like, occupy an independent position does not exclude the possibility that, in their function as intermediaries in the pools company's contract with the punters, they are regarded as such an integral part of the company's production and sales apparatus that the company is vicariously liable for the agent in the same way as for its permanent employees. The answers to these two questions cannot just be deduced from the legislation. Both the rules on position authority in sec. 11 of the Contracts Act and the rules on vicarious liability—in Denmark in D.L. 3-19-2, and in Finland, Norway and Sweden in the new Torts Acts—are so wide that a more detailed independent consideration of whether and to what extent the company can be made liable by the pools agents is necessary. Neither the Commissions Act nor the Con-

tracts Act can be regarded as having settled the question whether and to what extent the rules of vicarious liability can create a wider protection than the rules of agency give him.[48]

5.3.1. *Vicarious liability*

5.3.1.1. VICARIOUS LIABILITY FOR INDEPENDENT CONTRACTORS

Vicarious liability covers people who are employed in, or in a similar way work in, the service of the company or employer (the master). A person or company that is given assistance, normally according to contract, by independent contractors is generally not vicariously liable for these contractors, whether the assistance consists in giving advice, other acts of service or in supplying.[49]

The pools agents do not have the same relationship to the pools companies as do the staff employed in the companies. The agents are thus not covered by the Acts which regulate employees' conditions of work and which give them protection.[50] The pools agent chosen by the pools company, usually from several applicants, can be dismissed by the company at fairly short notice (in Denmark one month). The pools agent is paid on a commission basis, but the remuneration the agent gets does not count as wages, and the pools company must therefore not deduct taxes at source or make pension contributions according to the national supplementary pension scheme. The agents engage their own staff and this staff is managed and instructed by the agents.[51] His position as an independent contractor does not mean that the pools agent is free to arrange his activities just as he wants. The stamping apparatus which the agent uses belongs to the pools company and the agent must keep the sums paid in as pools bets separate from his own till receipts.[52] On the whole, the pools company has laid down quite strictly how pools coupons are to be dealt with and the

[48] See, on this, Ussing, *Aftaler*, pp. 129 and 338, Agell in *SvJT* 1973, pp. 797 ff., and Anna Christensen in *SvJT* 1974, p. 741 with note 17. See further, in illustration, 1969 UfR 380 (Supreme Court) (*UfR* 1969 B, p. 243) and 1976 NRt 1117 on the overlapping of contractual liability and vicarious liability outside contract.

[49] In Denmark and Norway, but not in Finland and Sweden, a general master's liability has long been in force. The proposal in the Danish Report on Employers' Damages Liability, etc., no. 352 of 1964, pp. 9 f., 26 f. and 39, recommends that D.L. 3-19-2 should be written in modern and clear language and in such a way that the rule only covers the narrow master's liability. As far as liability for independent contractors and agents is concerned, it is recommended that applicable law should be preserved. Only the liability of owners or occupiers of real property is proposed to be modified (sec. 2 of the Draft State). Cf. in the same direction for Sweden, Hellner, *Skadeståndsrätt*, p. 107, with references.

[50] See, for Denmark, *inter alia* the Employment Act, the Vacations Act and the Insurance Against Injuries At Work Act.

[51] See, on this, sec. 1(3) of the Danish Guide for Pools Agents.

[52] See point 21 of the Danish Guide.

company checks that the agent sends in received coupons and also checks the sums paid in every week. The work procedure is laid down in the agents' contracts and in the Guide for Pools Agents which is incorporated in the contracts. However, the relationship between the pools company not being an employer and the agents and their staff is not covered by applicable agreements or statutory regulations on consultation and participation in management.

The scope of the rules of employment law can give an indication of, but is not conclusive as to, whether a person who gives another assistance is covered by the rule of vicarious liability. The vicarious liability must, on its own assumptions, be subject to independent interpretation.[53]

Against this background, it must be clear that the pools companies are at any rate not fully liable under the general rule on vicarious liability for damage caused by their agents. The pools companies do not have any liability for damage which is caused by the agents or their staff and which has nothing to do with the pools. Nor are the pools companies vicariously liable for damage suffered by a pools customer which is not caused by acts or omissions specific to the entering into or performance of the pools contract, e.g. damage to person or property which has occurred by punter's falling on a slippery floor or in some other way during his visit to the agent's shop. The pools company—alone among the agent's suppliers and contractors—is naturally not responsible for damage of this kind.[54]

In the Nordic countries as well as elsewhere, it is accepted that the rules on vicarious liability in contractual relationships prevail over the rules on contractual liability, so that, *inter alia,* the debtor in a contractual relationship is to a certain extent responsible for mistakes committed by any independent contractors whose help the debtor has used in the *contracting,*

[53] Illustrative is 1972 UfR 935, where a dentist's assistant, because of the independent nature of the job, was held not to have the status of servant; see Carlsen, *Dansk Funktionærret* (Danish Employee Law), Copenhagen 1973, 2nd ed., with note 17. None the less, the dentist could be liable for the assistant under the rules of vicarious liability, at any rate in situations characterized by contract.

[54] In accordance with this, the court found, in 1966 UfR 658, an insurance company not liable to make compensation for an injury which one of its agents had negligently caused to a horse belonging to a customer who, immediately before the accident, had made an application to the agent for insurance for the horse—to come into force two days later. The decision would perhaps have gone against the company had the causer of the damage not been an independent insurance broker but had been attached to the company, employed in a service relationship; on Danish court practice, cf. A. Vinding Kruse, *Erstatningsretten* (Law of Damages), 3rd ed., Copenhagen 1977, pp. 239 f. The exclusion of liability for damage to person and property in the case of independent contract agents or brokers also derives a certain support from the legislative position. The wide rule in sec. 223 of the Merchant Shipping Act on liability for, *inter alia,* a pilot is regarded as an extension, *sui generis,* of the general vicarious liability; see Selvig in *TfR* 1977, p. 413, Bredholdt and Philip, *Søloven* (The Merchant Shipping Act), Copenhagen 1977, p. 349, and Hellner, *Skadeståndsrätt,* p. 106, with references.

and has a wider responsibility for mistakes made in the *performance* of the contract.[55]

English law on liability for independent contractors has had some influence in the Nordic countries, at any rate in Denmark.[56] In Danish court practice, liability has been imposed for mistakes made by an "independent contractor" in a number of cases where the safety of the general public was put at risk through the bad condition of roads, paths, buildings and excavations.[57] In contractual relationships, liability is extended to cover in addition damage caused by independent contractors in cases where it is not normal practice for, or foreseeable by, the contractee and is not sanctioned by him that the contractor wholly or partly delegated the task which he undertakes to fulfil.[58] Liability is also imposed where it is important from the point of view of the contractee who carries out the performance which the contractor has undertaken to do, and the delegation of the work to another is not sanctioned by the contractee.[59] On the other hand, the freedom from liability of independent contractors is maintained, in addition, with respect to the performance of contracts where the contractor's use of an independent subcontractor is clearly intimated to the contractee when the contract is entered into or where it is in accordance with the usual practice.[60]

The rules of liability for independent contractors are not completely

[55] Thus see, for Denmark, Ussing, *Almindelig Del,* pp. 116 f., A. Vinding Kruse, *Erstatningsretten,* pp. 233 f., and Gomard, *Obligationsretten* (Law of Obligations), Copenhagen 1972, 2nd Part, pp. 152 f.; for Norway, Selvig, *Det såkaldte husbondansvar* (So-called Master's Liability), Oslo 1968, pp. 86 ff.; for Sweden, Hellner, *Skadeståndsrätt,* p. 105; for England, Atiyah, *Vicarious Liability in the Law of Torts,* London 1967, pp. 327 f., and for Germany, *inter alia* Soergel/Siebert, *Commentary on BGB,* 10th ed., *Anm.* 2 to § 278.

[56] Frost thus referred, in a paper on the subject in *TfR* 1944, p. 15, to English law (p. 23, p. 42 note 1, p. 46 note 2).

[57] See Frost's paper and Trolle, *Risiko og Skyld* (Risk and Fault), 2nd ed., Copenhagen 1969, at p. 108 and elsewhere.

[58] See 1949 UfR 535 (Supreme Court).

[59] See 1970 UfR 340 (Supreme Court) and 1956 UfR 876 (Eastern High Court). Cf. for Sweden, *SOU* 1964: 31, pp. 52 ff., and Hellner, *Skadeståndsrätt,* pp. 105 f.; and for Norway, Augdahl, *Den norske obligasjonsretts almindelige del* (General Part of Norwegian Law of Obligations), 4th ed., Oslo 1972, pp. 226 f., and Nils Nygaard, *Skade og ansvar* (Damage and Liability), p. 114. Finnish law before the Damages Act 1974 is discussed in Taxell, *Avtal och rättsskydd* (Contract and Legal Protection), 1972, pp. 332 f., and the present law by Saxén, *Skadeståndsrätt* (Law of Damages), Åbo 1975, pp. 200 f.

[60] See 1972 UfR 387 (Supreme Court) commented on in *UfR* 1972 B, p. 234; see also 1946 UfR 320 (Supreme Court). The special arrangement regarding the carrier's liability in sec. 123 (with sec. 168) of the Merchant Shipping Act, and sec. 4 of the CMR Act does not justify the formation of any general rule on an "Assistance-in-performance liability"; cf. on exemption from liability, Günther Petersen, *Ansvarsfraskrivelse* (Exemption from Liability), Copenhagen 1957, p. 88. The liability problem in the case of subcarriers is discussed in the 4th Report on the Revision of the Merchant Shipping Act, no. 642 of 1972, pp. 24–6, and in Selvig, *Det såkaldte husbondansvar,* pp. 205 ff. See, too, sec. 11 no. 7 and sec. 23(2) no. 4 in AGB-Gesetz and, *inter alia, Anm.* 8 to sec. 11 no. 7 in the commentary to AGB by Ulmer–Brandner–Hensen.

clear or solid. A liability on the part of the pools company for its agents would not, however, be in harmony with the points of view which have become crystallized in court practice up to now. It is obvious to pools punters that the pools company receives the coupons via agents who are independent contractors. To regard the situation as meaning that the pools companies have delegated the performance of their contractual duties with respect to punters to others (the pools agents) must imply that the "natural" organization of doing the pools is that the contract is made direct with the company via its employed staff, and there is no basis whatever for this assumption. There is a difference between cases where the real contracting party leaves some parts of the performance of the contract to others and cases such as the pools where the task left is the mediation of the making of the contract itself.

5.3.1.2. VICARIOUS LIABILITY FOR INDEPENDENT CONTRACTORS IN A PARTLY DEPENDENT OR INTEGRATED POSITION?

The traditional rule of master's liability or vicarious liability draws a distinction between employees or "assistants" who work under the direction and control of the employer, and independent contractors.[61] The dividing line between (dependent) employees and (independent) contractors has, until now, had a natural connection with the basic rule of employment law concerning the employer's right to direct and distribute the work which is done by the employees who are employed in his service. Nowadays, however, the right to direct and distribute the work is restricted by rules on collaborative committees and participation in decision making; on this, see, for Sweden, Act on Joint Decision-Making in Working Life—the opportunity for employers to direct and organize the work as they want can in practice be quite significantly limited. On the other hand, it is obvious that certain independent contractors who work as permanent subsuppliers of goods or services are greatly dependent on their customers, who thus have a certain amount of power to control the activities of the subsupplier. The question can therefore be asked whether the scope of the employer's right to decide, which has been the traditional criterion for testing the range of vicarious liability, can be maintained in full as being the only criterion. It is conspicuous that in Finnish and Swedish law, but not in Norwegian or Danish, there is a special concept of "beroende uppdragstagare" ("dependent agents"). This special group is regarded in many respects as being independent contractors, but they are equated with employees in other

[61] See, e.g., Ussing, *Almindelig Del*, p. 116.

respects, *inter alia* as far as vicarious liability is concerned.[62] The dependence can be attributed to, *inter alia,* narrow contractual terms including detailed provisions as to how the dealing is to be done, franchise monopoly or restrictions on access to adequate substitution for supplies of proprietary articles, use of trade marks, financing, etc. Dependence is an ambiguous concept. It seems impossible, nor is it attempted, to find an indicator that gives a realistic expression of the character and grade of the dependence between the main concern and the subsupplier. It would be an important extension to vicarious liability if dependent agents, including those who perform dependent *secondary duties,* were to be included in the concept. The exercise of a secondary task can be just as tied by the employer as that of a main task, but the personal dependence is less in so far as the proceeds from a secondary task are secondary profits. The background of employment law which seems to have played the main role, or at any rate a significant role, in the formation of the concept dependent agents is not present in the case of secondary duties and the pools agents are therefore not covered by this special Swedish-Finnish concept.

One of the clear trends of development in present-day contract law and law of contractual liability is the introduction and extension of specific *consumer protection.* Anna Christensen has—for Swedish law—advocated the extension of vicarious liability to cover all damage which is caused to consumers by a contract agent in connection with the making of consumer contracts, regardless of whether the contractual agent is employed in the supplier's firm or occupies an independent position.[63] The proposed extension of liability would probably necessitate an amendment of the legislation, and furthermore the proposal only aims at compensating the consumer for his positive expenses, etc. (*damnum emergens*), but not lost profit (winnings) (*lucrum cessans*). The proposal would therefore not be of any significance for pools punters even if it were to be found that this special form of consumer protection ought also to cover participators in gambling.

A consistent use of the rules which are currently regarded as constituting part of valid law leads to the result that the pools company is not liable for the consequences of mistakes which the agents might make in the receiving and processing of pools coupons. On the other hand, the possi-

[62] See Hellner, *Skadeståndsrätt,* p. 101. Examples given in both Finland and Sweden of dependent agents are petrol dealers (garage owners or lessees); see 1941 NJA 89 and Adlercreutz, *Arbetstagarbegreppet* (The Concept of Employee), Lund 1964, pp. 74 ff., and Thomas Wilhelmsson in *FJFT* 1973, pp. 389 ff. with note 29. See, too, for the use of the concept with respect to transporters, K. Grönfors, *Successiva transporter,* Stockholm 1968, pp. 100 ff.

[63] See *SvJT* 1974, pp. 760 ff. Cf. Stig Jørgensen in *UfR* 1966 B, p. 230.

bility cannot be totally ignored that a development moving in the direction of increased company liability for the activities of the agents will be regarded as natural and correct. Judicial statements in connection with 1964 UfR 803 (Supreme Court) that fairness argues in favour of such liability indicate that this sort of development can emerge and become stronger. If such liability is introduced, it would have to be limited, so as not to cover the other activities of independent contractors, through the significant degree of "integration" of the pools agents in the organization of the pools company, as opposed to other contractual agents such as travel agents in relation to transport companies and hotels. Any extended liability would, furthermore, have to be limited to damage which is specific to the pools, as opposed to damage which has no close connection to the pools transaction and which concerns other activities. However, such a limited extension of vicarious liability would be less important were one to reach the conclusion that, in contrast to applicable law, the pools agents ought to be able to bind the company through agency, see section 5.3.2. below.

5.3.2. *Agency. Making of standard contracts*

A pools agent cannot be regarded as being an agent empowered to bind the company. The basis of a position of agency is, according to sec. 10(2) of the Contracts Act, customary practice, and no practice has developed that pools agents have the power of contractual agency. On the contrary, the opposite interpretation has consistently been emphasized in the rules published by the pools company. The pools agents are independent contractors in another branch; their business is also to have, as a service or an attraction, the delivery point for pools coupons. The agents thereby directly obtain extra earnings and indirectly they get the advantage that visits to their shops are more attractive. The functions of pools agents in connection with the pools are not suitable for giving the impression to customers that they have authority to do anything more than perform certain simple acts of receiving the coupons. The fact that pools agents—like, for example, insurance brokers and estate agents—do not in general have authority to enter into binding contracts with the customers accords with the general rule in the Kommissionsloven (Commissions Act) on commercial agents and representatives. Under secs. 77 and 78 of the Commissions Act, commercial agents and representatives cannot conclude a binding sale on the principal's behalf without having authorization therefor. The function of the commercial agent is limited to conveying the customer's offer to the principal. A binding contract comes into force only upon the principal's acceptance of the offer or upon his failure to repudiate the agent's

message concerning the order taken; see, further, secs. 78–80 and 89 of the Commissions Act.[64]

Even though this understanding that middlemen do not in general have decisional authority is unquestionably the prevailing rule in Danish law. it is not, however, completely absolute and without exceptions. Even though the differences between gambling and *insurance* are great, a significant similarity appears in some respects, e.g. the situation of the making of the contract. Just like pools agents, insurance agents often have a secondary and less permanent attachment to their company than do the administratively employed staff at head office. The insurance company, just like the pools company, appears to the public very directly through the use of standard request forms bearing the company's name, through information brochures and conditions of insurance, etc.[65] An insurance agent cannot, in general, on his own initiative, make final and binding insurance contracts. There is no authority for this in his position.[66] None the less, according to the circumstances, significance is attached to an insurance application as soon as the application is received, whether by the agent or the company. The insurance is taken to be accepted if the company's risk has, according to the request, already begun upon its being signed, where an insurance event has occurred, whereby the company must, according to its usual practice, be taken to have been willing to accept the insurance. As it is usual that the risk begins to run at once from the time of the request, all current insurances are in reality binding upon the making of the "contract" with the agent.[67] The reason for this departure from the normal rules is to be found in the fact that in general those seeking insurance need to be covered already at the time of the application for the insurance, and in the fact that the new, special rule on "immediate coverage" does not give rise to the possibility of a dangerous misuse. The danger that dishonest insurance takers or brokers will together engage in a fraudulent antedating or other alteration of insurance applications that are not yet forwarded is so small that the rules need not take it into account.

The legislative background to the general rule which is adopted in secs.

[64] Under Norwegian law, however, representatives who are employed in the service of the commercial house (permanent representatives) have full contractual authority; see Sandvik, *Handelsagentur og andre mellemmennsforhold i varehandelen* (The Business Agent and Other Intermediaries in the Products Trade), Oslo 1971, p. 197.

[65] In the modern law of consumer sale, the marketing of the producer and wholesaler is, according to the circumstances, given effect as an undertaking by the retailer or the producer (the wholesaler himself) to the final receiver of the goods; see further secs. 76 no. 2, 85 and 86 of the Sale of Goods Act as amended in Act no. 147 of April 4, 1979.

[66] See 1951 UfR 204. Cf. Lyngsø, *Forsikringsret* (Law of Insurance), Copenhagen 1978, pp. 45 f., and Hult in *In Tribute to Erik Marks von Würtemberg*, Uppsala 1931.

[67] See 1948 UfR 51 (Supreme Court) and 1950 UfR 823. See, too, Lyngsø, *op. cit.*, pp. 47 f., and Ussing, *Aftaler*, pp. 79 f.

77 and 78 of the Commissions Act is that the rule gives the principal the possibility of avoiding having to undertake bigger duties of supply than he is able to fulfil and also of investigating the liquidity of customers before he enters into business relations with them. These reasons, which argue against a wholesaler's agent having the power to contract on his behalf without special authority, do not apply to the making of current insurance contracts. A refusal to accept an application for immediate cover based purely on the fact that damage has already occurred would make the customer's promise to pay premiums from then on meaningless and ineffective.[68]

The situation existing in the case of doing the pools is in many, but not all, respects like that arising in making a contract of insurance. The pools contract is characterized by the fact that (1) payment is made straightaway, i.e. at the moment the pools agent stamps the coupon; (2) the pools company therefore has no need to investigate the security of the gamblers or other circumstances; (3) on the basis of the filled-in coupon, only one gambling contract with one unambiguous content can be entered into; and (4) there is no risk of "overbooking" because, practically speaking, the capacity is unlimited. In these respects, the similarity to private standard insurance contracts is considerable. But in other respects there are important differences. There is a much greater risk in the pools of (disguised) fraud in the shape of winning coupons that have been tampered with, and coupons which arrive late cannot simply be accepted with a fixed validity date, as with an insurance application, but are, and must be, excluded from being taken into consideration in the distribution of the prize pool. To take an analogy from insurance contracts in the case of the pools is therefore, for many reasons, inappropriate. There is no good reason for regarding pools contracts as already completed upon the (punctual) delivery of coupons to the agent.

> If the pools agents had an authority of acceptance, the further fate of the coupons, including any delay by the postal service or other transporters, would be of no legal significance for the punter. The punter would only have been interested in which coupons the agents can accept and the deadline for valid delivery, including evidence that such a coupon has been delivered. The pools company would be liable for the fact that coupons do not reach the company. The ignorance of a contractual debtor concerning his duties is generally not regarded as exempting him from liability even though the ignorance is excusable; see Ussing, *Almindelig Del,* p. 118, and Almén, *Köp* (Sale), Stockholm 1960, sec. 23 at note 27 ff. Were the pools agent to be regarded as having authority by virtue of his position to conclude the pools

[68] See sec. 36 of the Contracts Act.

contract, in contrast to what is stated here, the obligation of the company would presumably have to be extended to cover coupons which it is attempted to deliver, but which are refused as invalid; cf. 1956 UfR 480 (Supreme Court) in section 5.3.3 above. The legal position, if the pools agent has contractual authority, could not differ so greatly from the legal position if the pools company were to be accepted as being vicariously liable for the pools agent. The condition in the rules of agency of good faith corresponds to a great extent to contributory negligence in the rules of vicarious liability for negligence. However, exculpation, among other things because of lack of causation, e.g. a pools agent's acceptance of an (incurably) invalid coupon, would probably be easier under a rule of vicarious liability than under an agency rule.

Another difference would be that vicarious liability could only lead to liability for the acts of the pools agents, but not for delay caused by the postal service.[69]

If it were desired to introduce some arrangement which gave a disappointed punter compensation, and the risk of fraud was not found to be an insuperable hindrance, one could not recommend adoption of the general rules of vicarious liability or of contractual agency, but one would recommend the establishing of a "made-to-measure" guarantee arrangement which to a reasonable extent secures punters against disappointments.

6. EXCLUSION OF LIABILITY

6.1. *Exemption clauses*

All the Nordic companies have, in their general conditions, disclaimed responsibility for any damage caused by the pools agents. Thus, in point 11(2), the Danish rules of play exempt the pools service from liability for "... the damage an agent might have caused a participator through not observing the regulations which are issued by the company as to the receiving and sending in of coupons and receipts or in any other way". It is self-evident that this clause can only be described as an exclusion from liability if the pools company would have been liable for the agents had the clause not been present. If the pools company, according to the usual rules, see section 5 above, is without liability for its agents, the contents of the clause do not contain an exclusion of liability but are a statement for information purposes only of the punters' legal position. Many clauses contained in standard contracts are of this nature. It is useful to inform and to guard against ignorance. Exclusion of the agents' liability is discussed below in section 6.3.3.

[69] See, for Norwegian law, 1978 NRt 1019.

6.2. *On exclusion of liability in general*

Exclusions of liability are, in principle, valid like any other conditions in a contract. However, the legal system has, in different ways, limited the recognition and range of these conditions on the basis of a more or less clearly formulated opinion whereby any person who has a liability according to the usual rules probably also *ought* to have it and *ought* generally not to be able to absolve himself from it through contracts which have the character of fixed business conditions. A desire to reduce the burden of liability ought at any rate only to have effect if the exemption clause aiming to do this is pointed out to the other contracting party and is clearly formulated, so that the exclusion of liability does not take him by surprise. And even in such cases, only exclusions of liability which are reasonable should be accepted.

Three legal figures are put to use:

(1) *A rule of agreement* whereby a standard clause in the usual business conditions or contract forms of a company which is unusual or disadvantageous to the customer is only regarded as having formed a part of the contract where the customer was aware of the clause or where the clause has been pointed out to the customer in a way that is reasonable in the circumstances; cf., on this, the special statutory rule in the Danish Leases Act, sec. 5(2) and (3), and the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* of 1976 (*AGB-Gesetz*), sec. 3.[70] In many relationships, references *en bloc* to general business conditions are not a sufficient reason for regarding an exemption clause as having been accepted.[71] On the other hand, such references are accepted in areas where exemption clauses are generally used and known about in the circles affected.[72]

(2) *A rule of interpretation* to the effect that exemption clauses only have effect in so far as their wording expressly (or at least clearly) aims at exempting the contracting parties from their liability to each other under

[70] The provision runs as follows: "*Überraschende Klauseln.* Bestimmungen in Allgemeinen Geschäftsbedingungen, die nach den Umständen, insbesondere nach dem äusseren Erscheinungsbild des Vertrags, so ungewöhnlich sind, dass der Vertragspartner des Verwenders mit ihnen nicht zu rechnen braucht, werden nicht Vertragsbestandteil."

[71] See, for example, 1951 UfR 782, 1968 UfR 282 (commented on in *UfR* 1968 B, p. 342) and 1976 UfR 337, all Supreme Court decisions concerning the liability of forwarders.

[72] Cf. 1971 UfR 81 (Supreme Court) with note 1 and the comments in *UfR* 1971 B, p. 72, on liability for goods under the Merchant Shipping Act. See also Günther Petersen, *Ansvarsfraskrivelse,* pp. 121 and 129 f.; Stenov, *De skandinaviske speditørbetingelser* (The Scandinavian Forwarding Conditions), pp. 226 ff.; and Bernitz, *Standardavtalsrätt,* pp. 20 ff. Selvig in *Lov og Rett* 1965, at p. 254, does not think that the rule of acceptance can be given weight in the case of contractual conditions developed by railways, the postal service or other "monopolies which cannot be expected under any circumstances to be willing to make contracts on the bases of conditions other than those laid down".

the usual legal rules.[73] This rule, which usually works together with the ordinary principle that general business conditions or contractual terms are interpreted against the person who made them,[74] could in itself also be thought to be of some significance for precise types of statements of liability in areas where the legal position is not clear under the ordinary rules, or cannot be accepted as being clear to the company's customers.

(3) *A standard of reasonableness,* either on the basis of *general clauses* applying to all contracts or for individual types of contract such as sale or instruments of debt, or on the basis of *specific rules* on the setting aside of further defined, inadmissible contractual terms.[75]

In Sweden and Denmark, sec. 36 of the Contracts Act contains a general stipulation giving the courts the power to set aside or modify contractual terms which are unreasonable or are contrary to good business practice. Norway has long had a prohibition against the use of unreasonable contractual conditions in sec. 18 of the Prices Act, but this rule has never been of great practical importance. In 1974, a general stipulation of the same type as that in the Swedish/Danish sec. 36 was inserted into the Norwegian Sales Act, and in both Norway and Finland a change in the Contracts Act corresponding to that in the Danish and Swedish Acts seems to be on the way.[76] The Norwegian and Finnish Acts on Damages contain special provisions on the modification of contractual terms.[77] In Finland, the Supreme Court has drawn an analogy with sec. 8 of the Instruments of Debt Act with respect to an unreasonable rule of preclusion on a lottery ticket.[78] Both in Norway and in Sweden, and now also in Denmark, there are specific "preceptive" rules on consumer sales which to a certain extent prevent exclusion of liability for breach of contract by the vendor in these contracts. In Sweden, there is a special Act on unreasonable terms in standard contracts,[79] and in Norway a similar legislative initiative is ex-

[73] See Günther Petersen, *op. cit.*, pp. 139 ff., particularly at p. 144 on 1929 UfR 207 (Supreme Court); Gomard, *Obligationsretten,* 2nd Book, pp. 202 ff.; and Bernitz, *Standardavtalsrätt,* pp. 31 ff.; Adlercreutz, *Avtalsrätt,* 2nd ed., 1978, pp. 81 ff., and Taxell, *Avtal och rättsskydd,* pp. 458 f.

[74] AGB-Gesetz, § 5: "*Unklarheitenregel.* Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen geht zu Lasten des Verwenders."

[75] Cf. on this, in the case of Sweden, Bernitz, *Standardavtalsrätt,* p. 34.

[76] See Selvig in *FJFT* 1977, p. 21.

[77] The Norwegian Damages Act no. 26 of June 13, 1969 (as amended by Act no. 26 of May 25, 1973) says in sec. 4-1(2) that "contracts which depart from the rules of the law by reducing rights or increasing the employee's liability can be set aside in so far as their effect is obviously unreasonable"; see Kristen Andersen, *Skadeforvoldelse og erstatning,* pp. 457–9, and sec. 1 of ch. 7 of the Finnish Act.

[78] Pirkko-Liisa Aro in *FJFT* 1974, p. 171, and Stig Jørgensen in *FJFT* 1977, p. 9. In England, sec. 2 of the Unfair Contract Terms Act limits the extent of exemption clauses to what is in accordance with "reasonableness"; see, *inter alia,* Yates, *Exclusion Clauses in Contracts,* London 1978. In Germany, a general provision on standard contracts is contained in § 9 of AGB-Gesetz.

[79] See Bernitz, *Standardavtalsrätt,* ch. 6.

pected.[80] A somewhat similar rule can be found in sec. 14(4) of the Danish Marketing Act.

The adoption of all these rules must be taken to have resulted in a strengthening both of the *open* test of reasonableness which in Denmark now has authority in sec. 36 of the Contracts Act, and of the *disguised* standard of reasonableness which comes into the rules of acceptance and interpretation that have developed in court practice.[81]

6.3. *Exclusion of liability by company and agent*

6.3.1. *Peculiarities of exclusion of liability in the case of the pools*

The legal evaluation of exemption clauses is influenced both by the justification or need that one party should limit his legal liability in particular situations and by the reasonableness of the contractual arrangement.[82] In the situations being discussed here, three special circumstances apply. The *first* is the not inconsiderable risk of abuse of rules of liability by the committing of fraud (cheating) with coupons. The *second* special circumstance is that the size of the loss of winnings is disproportionate for both parties and a duty to pay full compensation in respect of a large prize could be unreasonable for this reason and particularly in relation to the pools agent because of his relatively small payment and role in the pools transaction. These points of view are emphasized in the commentary on the Danish pools case.[83] Finally, it should be mentioned as a *third* special characteristic that the special organization of the pools can be regarded as arguing in favour of a transfer of the risk from the agents to the companies.

6.3.2. *Exclusion of liability by the company*

The rules of play of all the Nordic pools companies contain a rule that the pools company accepts no liability for loss caused by the acts of the agent; see section 6.1 above. The counterfoil to the pools coupons contains, in addition to the necessary practical instructions to the punter, a general reference to the rules of play. Only the Swedish counterfoil makes special mention of the question of liability.

In principle, both exclusion of vicarious liability and of liability for independent contractors are possible in contractual relationships. Günther

[80] See Selvig in *FJFT* 1977, p. 21.
[81] Cf. on this, regarding Sweden, Bernitz, *Standardavtalsrätt*, p. 34.
[82] Taxell, *Avtal och rättsskydd*, p. 459.
[83] 1964 UfR 803 (Supreme Court).

Petersen[84] approves the existence of a further freedom to exclude liability for independent entrepreneurs than the usual vicarious liability. The recent legislation on a standard of reasonableness, discussed above in section 6.2, has led to a further limitation of the effectiveness of exemption clauses. The provision of the pools company, despite its being regarded as an exemption clause, is not affected by the rules on there being a (patent) standard of reasonableness. None of the special rules discussed covers the pools, and the pools company's desire not to be liable for its agents does not afford that degree of unreasonableness that is a prerequisite for interference by the general provisions of the ordinary law of contract.[85]

Another question concerns whether the exemption clauses can be set aside on the basis of *rules of acceptance and interpretation,* such a setting aside sometimes being called a "disguised" standard of reasonableness.[86]

The lack of any special emphasis on the clause on the Danish, Norwegian and Finnish coupons cannot be given such weight that the clause is regarded as being insufficiently clearly expressed to the pools punter. A demand of emphasis on a coupon, receipt, ticket, etc., is of less significance in the case of a fixed, unified standard contract. Nor can the clauses be reduced by the application of a *rule of interpretation* because they do not expressly use terms such as "fault", "negligence" and the like, and because it would thus merely be possible to interpret the clauses in such a way that they only cover accidental damage caused by the pools agent and others,[87] or that they leave room for the understanding that the pools contract is arranged through the acceptance of the coupon by the agent; see section 6.1 above on the agency construction. This is obviously not the intention of the clauses, nor have the clauses been so understood in the Danish and Norwegian pools cases that have referred to them. However, the clauses have never been independently tested in an action directly against the pools company.[88]

The possible—albeit small—uncertainty surrounding the exemption clause is not dispelled by the recognition of the rules of play which has been given by the public sector as a part of the pools companies' concession. The Pools Acts (lottery instrument) contain no authority to evade the ordinary rules of the legal system.

[84] In *Ansvarsfraskrivelse,* pp. 88 and 99.

[85] See 1978 NRt 1019 on sec. 18 of the Norwegian Prices Act, discussed above.

[86] See Bernitz, *Standardavtalsrätt,* p. 34; Adlercreutz, *Avtalsrätt,* p. 76. See, too, Anna Christensen in *SvJT* 1974, pp. 763 f.

[87] Cf. 1929 UfR 707 and on Danish practice in general Günther Petersen, *Ansvarsfraskrivelse,* p. 145, and, on independent contractors, p. 88.

[88] In the rules of play of the "Class Lottery", the exclusion of liability expressly covers "mistakes" by the collector. This clause formed the basis of 1924 UfR 909.

6.3.3. *Exclusion of liability by the pools agent*

In Denmark and Sweden, the rules of play do not limit the liability of the pools agent to the punter. On the other hand, in Norway a ceiling of 500 NOK on the amount of the pools agent's liability has been laid down. In Finland, the rules contain a limitation whereby the agent is only liable for damage caused *intentionally*. In general, an exclusion of liability for matters that are his own serious fault is regarded as being invalid,[89] but a Finnish court has, after the coming into force of the new Damages Act—upheld a similar clause in relation to a V5 player (tote ticket). The question was never taken to the Supreme Court of Finland.[90] The ceiling contained in the Norwegian arrangement was probably originally a reasonable balancing of the interests of the parties. Because of inflation, the limited amount is now so low that the arrangement is more like a total exclusion of liability for the agent. It must be emphasized in this connection that a reasonable limitation of liability clause finds recognition much more easily than does a total exclusion of liability.

The reasons for recognizing changes whereby the pools agents protect themselves against the economic consequences of mistakes in the pools mediation are somewhat stronger than for a single exclusion of the pools company's liability, but otherwise rules and points of view concerning the validity of clauses excluding liability are the same.

[89] Cf. Ussing, *Almindelig Del*, p. 162, and Taxell, *Avtal och rättsskydd*, pp. 457 and 459. See, too, secs. 120(6) and 122(3) of the Merchant Shipping Act.

[90] German law has recognized such wide exemption clauses for the agents by holding authorized "Lotterieverträge" to be outside sec. 11 no. 7 of AGB-Gesetz, which prevents the exclusion of liability for serious matters; see sec. 23 no. 4. This provision is based on the risk of fraud; see Ulmer–Brandner–Hensen, *Commentary on AGB*, 1977, p. 426.