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Unfair Contract Terms: New Control Systems

One of the most interesting legislative developments in Western Europe in recent years has been the upsurge of laws dealing with unfair (standard) terms in consumer contracts. In 1970, when Vera Bolgár published her Pescara report on adhesion contracts[1] in this journal,[2] only Italy among West European[3] countries had some specific provisions regarding standard contract terms in her Civil Code.[4] Since then, Sweden (1971),[5] the United Kingdom (1973),[6]

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1. Both "general conditions" and "standard terms" denote the same phenomenon, i.e. the written draft terms which have been formulated in order to be incorporated—without negotiations as to their contents—in a usually unknown number of contracts to be concluded. The term "adhesion contract" is mainly used for the contract into which unilateral standard terms have been incorporated. Since the term "adhesion contract" denotes a far less precise phenomenon than "general conditions" and "standard terms" (how *much* of a contract should be in small print in order for it to become an adhesion contract?), preference should—and at least in this article shall—be given to the latter terminology.

2. Bolgár, "The Contract of Adhesion: A Comparison of Theory and Practice," 20 *Am. J. Comp. L.* 53-78 (1972).

3. The first general provision regarding standard terms—art. 71 of the Polish Law of Obligations 1933—actually was an East European one. The "general conditions" which are presently used in Eastern Europe, such as the General Conditions of the COMECON and the various *Allgemeine Leistungsbedingungen* of the German Democratic Republic, are not standard terms in the sense of our definition in n. 1, but rather a form of delegated legislation.

4. Italian CC (1942) art. 1341, 1342, 1370.

5. *Lag om förbud mot oskäliga avtalsvillkor* (Law on prohibiting unfair contract terms) of 30 April 1971 *Svensk författningssamling* 1971: 112, as amended. This proce-

Denmark (1974),[7] the German Federal Republic (1976),[8] France (1978)[9] and Finland (1978)[10] have adopted new legislation in this area. In Austria,[11] Belgium,[12] Luxemburg,[13] The Netherlands[14] and Norway,[15] bills or draft bills have been submitted to Parliament or brought into circulation. Switzerland is the only West European nation which has explicitly stated that it does *not* intend to introduce specific legislation with regard to standard contract terms.[16] On the international level, the Council of Europe (Strasbourg) has adopted a resolution on unfair contract terms,[17] while the EEC is considering the introduction of a directive.[18] Other international agencies have also evinced an interest.[19]

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dural law was supplemented by a general clause in the law on contracts by an Act of 22 April 1976 *Svensk f.* 1976: 185.

6. Fair Trading Act 1973, supplemented by the Unfair Contract Terms Act 1977.

7. *Lov on markedsføring* (Marketing Practices Act) of 14 June 1974 *Lovtidende* A 1974 no. 297, supplemented by a general clause in the law on contracts by an Act of 12 June 1975 *Lovtidende* A 1975 no. 250.

8. Infra p. 551.

9. *Loi no. 78-23 sur la protection et l'information des consommateurs de produits et de services* of 10 January 1978, *Journal Official* 11 Jan. 1978.

10. Consumer Protection Acts 1978 Nos. 38-43, which entered into force on 1 September 1978.

11. *Entwurf Konsumentenschutzgesetz* (Draft Consumer Protection Bill) 1977, 744 *Beilagen zu den stenographischen Protokollen des Nationalrates XIV. gp.*

12. *Voorontwerp van wet tot herziening van de Wet betreffende de handelspraktijken* (Draft Bill to Amend the Marketing Practices Act) 1977.

13. *Avant-projet de loi relatif à la protection juridique du consommateur* (Draft Legal Consumer Protection Bill) 1977.

14. Sociaal-Economische Raad/Commissie voor Consumentenaangelegenheden, Advies inzake het vraagstuk van de toepassing van standaardvoorwaarden bij transacties met de consument (Dutch Consumer Council, Report on standard terms in consumer transactions), The Hague 1978, no. 7.

15. Draft bill to amend the *Lov om kontroll med markedsføring, Norges Offentlige Utredninger* 1976: 61.

16. In answer to a question by Mr. Welter MP, the Swiss government has recently stated that no bill on standard terms is to be expected (answer 77.738 of 23 November 1977). The government approved of resolution 76/47 of the Council of Europe, but submitted that the existing possibilities of the Swiss Law of Obligations have not yet been fully explored and that experience with the German *AGB-Gesetz* should be awaited. The government pointed to recent legislation and bills still pending, regarding certain unfair terms in specific contracts. Reference was finally made to the possibility of increasing the powers of consumer organizations to challenge unfair marketing practices in court.

17. Unfair terms in consumer contracts and an appropriate method of control, Resolution (76)47 adopted by the Committee of Ministers of the Council of Europe on 16 November 1976.

18. Commission of the European Communities, Consumer protection and information policy/First report, Luxemburg 1977, 35.

19. Unidroit (Rome) is presently working on a harmonization project of construction and interpretation of commercial transactions and standard terms. Cf. J.H. Herbots, "Interpretatievoorschriften voor handelsovereenkomsten en standaardbedingen," 41 *Rechtskundig Weekblad* 2429-2442 (1978). On a more academic level, Unidroit devoted its 50th anniversary congress, held in Rome in 1976, to the "aspects privés et publics du droit du commerce international," with papers by David and Popescu on "Le droit du commerce international: une tâche nouvelle pour les législateurs nationaux ou une nouvelle 'lex mercatoria'?" and by Eörsi and Schmitthoff on "Contrats d'adhésion et protection de la partie économiquement plus faible

Most of the new legislation can be divided into two parts. The first consists of substantive law provisions of the traditional type, such as form requirements regarding the incorporation of standard terms,[20] rules of construction, general clauses enabling the courts to set aside unfair contract terms,[21] and "black lists" of clauses which are deemed unfair. A near-perfect catalogue of such provisions is contained in the German *AGB-Gesetz*.[22] Although enactment of such new substantive law provisions may have a profound impact upon the civil law, the more innovative and imaginative part of the new legislation concerns the control procedures.

This article deals with the new control systems which were set up by West European legislatures in the 1970s and by Israel in the 1960s. Israel is included, because her Standard Contracts Law 1964,[23] although not very successful in Israel, may be regarded as a pioneer in this area. Only the general control systems, dealing with all or most (consumer) transactions will be discussed. This leaves out the control of standard terms in specific branches, like insurance. While the general control systems are all very recent, it should not be forgotten that useful lessons may be drawn from the historical development of specific control systems, such as the insurance control which originated in the fifteenth century.[24]

For the sake of systematic analysis, I shall group similar control systems under four main headings. First I will analyze the advantages and disadvantages of the voluntary control systems of Israel and the United Kingdom; in a second part (2), the two-layer control systems, which have been introduced or are on the verge of being introduced in most Northern and Central European states; in part (3), the French model and, finally, in part (4) the model standard terms of the Dutch and the Luxemburg (draft) bills.

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dans les relations commerciales internationales." The Academy of Comparative Law discussed the subject of standard terms and adhesion contracts during its VIIIth International Congress in Pescara (Italy) in 1970 [for references to the national reports written for Pescara cf. Bolgár, 20 *Am. J. Comp. L.* 53-78 (1972)]. At the first International Congress on the Law of Civil Procedure, held in Ghent (Belgium) in 1977, M. Cappelletti suggested that the new control machineries dealing with consumer protection and environmental pollution might be one of the themes of such a second congress, see Storme & Casman, eds., *Towards a Justice with a Human Face* 527 (1978).

20. See my report on Consumer information and standardized contract terms in: 2 *Symposium on Consumer Information* (Brussels 1977) 69-96.

21. The nearest equivalent to a general clause in American law is the unconscionability provision of the UCC §2-302: see Bourgoignie, "Clauses abusives et le concept d'unconscionability en droit américain: une arme juridique efficace au service des consommateurs?," 1977 *Rev. dr. intern. & dr. comp.* 19-52; Deutch, *Unfair Contracts: The Doctrine of Unconscionability* (1977).

22. Supra n. 8.

23. Standard contracts law 5724-1964.

24. The earliest known legislation on marine insurance, the Barcelona ordinance of 21 November 1435, already contains provisions against abuses, which in that time were mainly committed by the assured. The ordinance is reproduced by Pardessus, 5 *Collection de lois maritimes antérieures au XVIIIe siècle* 493 (1839).

After the discussion of the main advantages and disadvantages of the various control systems concerning unfair (standard) terms, some questions—to be treated in part (5)—remain. Very important is the problem how to delimitate the scope of application of the control: should all unfair contract terms be controlled or only standard terms, should the system afford protection only to consumers or to professionals as well, should government contracts be included? In a final paragraph, I shall indicate an area which still needs to be surveyed. Two questions which will not be treated here are the problem of harmonizing control systems and the still dormant question whether the new control systems are adequate from the point of view of special interest groups.

Abstract Control

The one characteristic which all control systems envisaged in this article have in common is that they have instituted abstract procedures: procedures which have been abstracted from "concrete" litigation concerning the question whether or not a supplier of goods or services may validly invoke a standard term. Under the new control systems, standard terms *in general*—and not the terms which have been incorporated into a specific contract—are subject to control. From a macro-juridical point of view, three main objections may be formulated against the effectiveness of traditional judicial control: access to the courts is difficult, the reach of court decisions is limited and the control comes late. The new approach of European control legislation meets many of these objections. First, the mobilization of public officials like the Consumer Ombudsman in the Scandinavian countries or of private (consumers') organizations in the German Federal Republic and The Netherlands can be considered a remedy against the unwillingness[25] on the part of individual consumers to challenge the fairness or the validity of standard terms in court.

Second, the introduction of injunctions and cease-and-desist orders against further use of specific clauses endows the new-type decisions with an effect on a large number of future transactions, far transcending the single contracts at stake in traditional litigation.[26]

25. In a paper delivered at an EEC-symposium at Montpellier in 1975, I mentioned as the main causes of the difficulty of access to *traditional* courts (in some countries the access problems seem to have been solved by the creation of *special* small claims courts or by the introduction of simplified proceedings): (a) the ignorance of consumers as to their rights, (b) the insufficiency of legal aid, (c) the financial risks involved in going to court, (d) psychological factors, such as austere court buildings and antiquated rules of procedure, (e) the passivity of judges: Hondius, "Les moyens judiciares et parajudiciaires du consommateur aux Pays-Bas," EC Symposium 1975, Luxemburg 1976.

26. As a German author puts it, [traditional, EH] judicial protection would only be effective when a decision favorable to the consumer were to have "Breitenwirkung," urging not only the defendant, but all enterprises using the same or similar

The use of injunctions against trade organizations which recommend the use of standard terms to their members, even makes the need for an *erga omnes* effect of decisions (as opposed to the traditional *intra partes* effect) no longer urgent. Finally, the new control systems enable standard terms to be subjected to scrutiny before they have actually been invoked in practice. This makes it unnecessary to look out for test cases (which may not arise until the standard terms have been incorporated into contracts for years on end).[27]

At the same time, abstract control makes it possible to retain the courts—either the ordinary courts or special tribunals—as the official bodies entrusted with the exercise of control. Traditionally the courts have shown themselves to be flexible, able to assimilate new social and technological developments, expert and independent. Retaining the courts as the controlling agencies also makes it easier to reconcile the outcome of abstract procedures, initiated by public officials or private organizations, with individual litigation by private individuals. If the new-type control were to be entrusted to administrative agencies, none of these advantages would be available to that same extent. This does not necessarily mean that the new-type control should be qualified as a judicial control: although the control is entrusted to judicial bodies, the *nature* of the control may possibly be considered administrative. Anyway, some difficulties as to the interrelationship of traditional control and the new-type control remain, as we shall see later.

(1) Voluntary Control Systems

The Israel Board of Restrictive Trade Practices

The first control system ever established, back in 1964, is the Israeli voluntary control procedure.[28] Prior to the 1969 amendments, this procedure amounted to a voluntary approval system, with certain benefits for suppliers who submitted their standard terms to the Board of Restrictive Trade Practices. Under s. 2 of the Standard

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standard terms to let their future conduct be oriented more or less by this court decision: Kötz, "Welche gesetzgeberische Massnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?," 1 *Verhandl. des fünfzigsten deutschen Juristentages* (München 1974) A 53.

27. This advantage was stressed during a recent symposium on unfair contract terms in Bougival (France), June 1978, by Calais-Auloy, member of the French *Commission des clauses abusives.*

28. See Adler, "Restrictive Covenants and the Standard Contracts Law," 5 *Isr. L. Rev.* 580-585 (1970); Bin-Nun, "Type Contracts and Adhesion Contracts," in: *Israeli Reports to the Eighth International Congress of Comparative Law* (1970) 107-119; Elman, "Restrictive Terms in a Standard Contract," 7 *Isr. L. Rev.* 433-441 (1972); Tedeschi & Hecht, "Les contrats d'adhésion en tant que problème de législation," 1960 *Rev. intern. dr. comp.* 574-592; Yadin, "Legislative Control of Standard Contracts," in: *Richterliche Kontrolle von Allgemeinen Geschäftsbedingungen* (1968) 143-150.

Contracts Law, anyone may submit his standard terms to the Board for approval. The Board may only give a decision as to the so-called restrictive terms, which are set out in a limitative way in s. 15. In deciding upon the validity of a restrictive term, the Board shall consider whether, having regard to the terms of the contract, the term is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers (s. 6).

If the Board approves the standard terms submitted, and if the supplier mentions this in the contract concluded upon the basis of these terms, the ordinary court may not declare these terms null and void (s. 10, 13). The approval is valid for a five-year period or for a shorter period to be determined by the Board (s. 9). If the Board refuses its approval, the term is null and void. This refusal of approval has retroactive effect even with respect to terms in contracts already concluded (s. 11).

The Board of restrictive trade practices was established by the Restrictive Trade Practices Law 1959. Members are appointed for an indefinite period. Under the Interpretation ordinance (new version) 1967 they can be suspended or dismissed at any time. They therefore lack the standing of an ordinary judge—although some of the members are also judges in ordinary courts.

Disappointment with the effectiveness of the original control system led to the addition, in 1969, of s. 2A, which empowers the Attorney-General to apply to the Board for the cancellation of a restrictive term of a standard contract entered into by a supplier.[29] The Attorney-General's position may to some extent be compared to the Consumer Ombudsmen in the Scandinavian countries, with two important differences however. First, unlike the Consumer Ombudsmen, the Attorney-General does not (yet)[30] have the power to order a supplier to submit a copy of his standard terms. Second, the Attorney-General cannot be said to occupy the same independent position as the Consumer Ombudsmen.[31]

Now that the Standard Contracts Law has been in force for 14 years—and the 1969 amendments for 9 years—it should be possible to say something about its effectiveness. However no studies in depth of unfair standard terms before and after 1964 (or 1969) are available. The only data concern the number of cases which have come before the Board of Restrictive Trade Practices and before the

29. The full text of section 2A reads: "The Attorney-General may apply to the Board for the cancellation of a restrictive term of a standard contract which is entered into by a supplier with customers, and so may, with the consent of the Attorney-General, the Israel Consumer Council and any organization of customers which the Attorney-General has approved in that behalf."

30. An amendment that would give him such power is in the course of preparation.

31. This may cause problems, when it is the State which operates as supplier of goods or services—not uncommon in a heavily socialized nation like Israel. As to the way in which the Israeli legislature has tried to solve this problem, see below.

(ordinary) courts. The number of cases in which suppliers asked the Board for approval of their standard terms amounted to no more than approximately 20 in the first ten years. The judicial control of restrictive terms by the ordinary courts has also rarely been used.[32] The 1969 amendments might have changed this, but there are no indications that they have done so. A number of cases have been brought to the attention of the Attorney-General, but not once has he brought a case before the Board; the Israel Consumer Council has done so only once. This does not signify that the Attorney-General does nothing at all. Since 1969 a practice has developed for suppliers to contact the Attorney-General before asking the Board for its approval; in every such case, the restrictive terms in question were later approved by the Board.

Proceeding to an evaluation of the Israeli control system, we first have to answer the question why the system, or at least the voluntary approval part of it, has failed to achieve the desired effects. Let us try to place ourselves in the position of a supplier of goods or services. What reasons might induce him to go to the Board? His only benefit—apart from a possible increase in goodwill from a consumer point of view—is that this step may safeguard his standard terms against judicial intervention. But this possible benefit may be more than offset by the following considerations:

(a) If he has already used the standard terms in consumer transactions, the supplier runs the risk, by submitting these terms to the Board, that certain restrictive clauses will *not* be approved. This has as a consequence that the clauses in question are null and void, not only in future consumer transactions, but also in existing contracts.

(b) Even if he has not yet used the standard terms, the supplier can avoid the just-mentioned risk of nullity only by awaiting the Board's decision. Meanwhile he must necessarily refrain from using the terms which, in his view, are evidently superior to previously used terms (or the absence of such terms).

(c) A negative decision of the Board may result in unfavorable publicity for the supplier.

(d) For the supplier the legal advantage of a positive decision (no judicial interference) will probably be more than outweighed by the legal disadvantage of a negative decision (nullity of the clause in question for a five-year period).

32. As far as I could ascertain, in only one case did a court declare a clause void—Ornan v. Israel Lands Authority, 67 *Psakim Mehoziim* 255 (1969), 5 *Isr. L. Rev.* 474 (1970). In a number of other cases, the terms in question were not considered void, either because they were not "restrictive" or not "prejudicial," or because they were not used by a "supplier of goods or services."

(e) The courts may reach a conclusion different from that of the Board, which might possibly associate itself more with the consumer point of view.

A more fundamental defect of the Israeli system, as originally conceived, is that it did not provide suppliers of goods or services with a countervailing agency with whom they might negotiate their standard terms. The question what actually is prejudicial to consumers is difficult to answer when there are no consumers to consult; it is easier to answer when consumers themselves are (re)present(ed) at the bargaining table. To a limited extent the 1969 amendments have had the effect that the Attorney-General became such a countervailing power. As we have seen, the practice has grown for suppliers of goods or services—or at least for some of them—to submit their standard terms to the Attorney-General for his advance approval. The amendments also make it possible for the Attorney-General to challenge the validity of restrictive terms before the Board. This brings us to the two-layer control system, which will be discussed later. Why the Attorney-General has so far taken so little interest in consumer protection is not clear but one reason, easy to guess, is that, having many other, more pressing, functions he simply does not find the time to do more about it.

The British Director General of Fair Trading

An interesting and quite novel approach to standard terms is the adoption of codes of practice by (private) trade associations after consultation with a public official.[33] This approach has in practice become the most important one of the various control systems[34] envisaged by the UK Fair Trading Act 1973. Two preliminary remarks should be made here. First, the use of standard terms is but one of many areas covered by the UK codes of practice and in fact a minor one. Such codes may also be compared with legislation. Compared to legislation, which of necessity must be far more general, a major advantage of a series of codes relating to particular trades and professions is that each can be designed to deal with the individual problems of the trade concerned.[35] Even when the codes

33. In 1973-1976, the British Office of Fair Trading approved eleven codes of practice—see Annual reports of the Director General of Fair Trading 1973-1974, p. 16; 1975, p. 24-29; 1976, p. 11.

34. Two other control methods are (a) the rather cumbersome procedure leading to an order in the sense of s. 22—the Consumer Transactions (Restrictions on Statements) Order 1976, *Statutory Instruments* 1976 No. 1813, was an outcome of this; (b) the actions under Part III against traders or individual companies who persist in a course of conduct detrimental to the interests of consumers by breaking the civil or criminal law.

35. To give but one example, s. 4 of the code of conduct between tour operators of the Association of British Travel Agencies and members of the public reads as follows:

Booking Conditions

(i) Booking conditions, if any, shall define the extent of the responsibilities as well

do not increase the amount of protection offered to consumers, they clarify what that protection is, or at least what trade and industry perceive their obligations to be.[36] Second, even if the adoption of codes of practice might prove to be ineffective as a method for the Director General of Fair Trading to control standard terms, this would not disqualify the codes themselves. Additional to *any* system of control, self-regulation by trade organizations may play a useful, if auxiliary role.

A major disadvantage of this type of control, however, is that a code of practice applies only to members of the organization(s) promoting the code, and then only to those who choose to accept the standards set out by the code and to remain members.[37] Not in all branches of trade or industry do such organizations exist. Perhaps a remedy—but a very heavy one—would be to organize all suppliers in a certain branch of trade by force of law. Such a corporate structure exists in The Netherlands, where public trade corporations have indeed on some occasions exercised control over the standard terms of their members,[38] although without the endorsement of a more consumer oriented official like the Director General.

Returning to the United Kingdom, a second disadvantage which can be discerned is that while individual conflicts as to the codes or to the extent that suppliers adhere to them may well be taken care of by simple conciliation procedures as provided in (almost) all UK codes of practice, the more *structural* problems relating to the mere existence of unfair contract terms at variance with the code may remain unsolved. The codes themselves do not make clear what disciplinary action may be taken by the organizations against recalcitrant members; and it still remains to be seen whether the organizations are in fact willing to take such action if necessary.

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as the limits of the liabilities of tour operators towards clients and shall be so designed that they are easily read and understood.

(ii) Booking conditions shall not include clauses:
  (a) purporting to exclude responsibility for misrepresentations made by the tour operator, his servants or his agents;
  (b) purporting to exclude responsibility for the tour operator's contractual duty to exercise diligence in making arrangements for his clients or for consequential loss following from breach of his duty; and
  (c) stating that complaints will not be considered unless made within a fixed period after the end of a tour or holiday if such a period is of less than 28 days' duration.

(iii) Booking conditions (and/or brochures) shall prominently indicate the circumstances in which and the conditions on which surcharges may be made to clients.

(iv) Booking conditions shall conform with all relevant provisions of this Code.

(v) Tour operators shall in practice interpret their booking conditions in accordance with the provisions of this Code.

36. Marsh, "Voluntary Codes of Practice," 1977 *New Law J.* 419-420.

37. Mitchell, "Government-Approved Codes of Practice," 2 *J. Cons. Pol.* 144, 146 (1978).

38. Hondius, *Standaardvoorwaarden* 725 (1978).

Third, as brought out in legal writing, several provisions have been included in the various codes which might operate against the consumer's interests.[39] Finally, it should be observed that the UK system may not readily be transplantable to other countries. Not every country has at its disposal a public official like the Director General of Fair Trading who can scrutinize the voluntary codes of practice. Possibly private consumer organizations might pick up this role, but the experiences of the Dutch and Belgian consumers' associations in a related area—the introduction of standard terms of their own[40]—seem to indicate that the willingness of trade associations to negotiate with them, in the absence of any stick behind the door, is not very great.

My provisional conclusion, in the absence of data on their effectiveness, is that voluntary codes of practice by themselves do not seem to provide a reliable system; they may however play a useful *auxiliary* role.

(2) Two-Layer Control Systems

General Observations

The two-layer control system may be described as the prevailing control machinery for standard terms in Northern and Central Europe. This system has been introduced, or is on the verge of being introduced, in all Scandinavian countries, the German Federal Republic, Austria and The Netherlands. It has also been recommended by the Council of Europe. Originating in Israel, where it does not seem to have been very successful, the two-layer control system has had varying degrees of success in the two Scandinavian countries where it has been in operation for some time. Within this group, two major divisions exist, one as to each of the two control layers. As regards the first echelon of control, some systems have entrusted control to public officials like the Consumer Ombudsman, while others have conferred this power to private consumer (and sometimes trade) organizations. As regards the second echelon, some systems have established a special court (Market Court) or board (Board of Restrictive Trade Practices) to adjudicate conflicts between the first-echelon controllers and suppliers of goods or services, while others rely on the ordinary courts (or special panels of such courts).

The basic philosophy underlying the two-layer control is that most of the disadvantages of unilaterally drafted standard terms can be eliminated when the standard terms are negotiated between two organizations on an equal footing. These negotiations will result in

39. Supra n. 36.

40. Cf. my article on the standard terms of the Dutch *Consumentenbond* in 1974 *Nederlands Juristenblad* 157-170.

bilateral collective agreements, which have the advantages but not all of the disadvantages of standard terms (*some* disadvantages are common to all standard terms, to be sure). To establish such a negotiating body, either new institutions have been established or traditional organizations have been given new tasks (and the funds to exercise these tasks). In order to force the suppliers of goods or services or their organizations to come to the bargaining table, there must be a stick behind the door and that stick is the cease-and-desist order against the further use of unfair terms by a second-layer controlling agency: the Market Court or any ordinary court. This court in turn gives guidance to the first-echelon controllers by establishing precedents.

When we survey the various control systems under this heading, we perceive that initially the basic philosophy described above has not yet been fully realized, or at least not fully translated into legislation. The Swedish *Avtalsvillkorslagen* for instance only speaks of unfair clauses in the singular and of cease-and-desist orders against individual suppliers.[41] Under the more recent statutes, like the German *AGB-Gesetz*, standard terms are covered in their entirety and cease-and-desist orders may be issued not only against individual suppliers who use the standard terms but also against trade organizations which recommend their use. In Sweden these imperfections of the law do not seem to have made much difference—the Consumer Ombudsman negotiates standard terms with trade organizations anyhow—but in Denmark it seems that the basic philosophy has either not (yet) been realized or accepted.

Why the System Works in Sweden, but not in Denmark

When comparing the control systems introduced or proposed in the Scandinavian countries, one is struck by the resemblance of the control legislation (the more informed reader who still remembers the time when much Scandinavian legislation was uniform, may be struck more by the differences). The more surprising it is to learn that Danish and Swedish practice—the Finnish act only entered into force on 1 September 1978, the Norwegian draft bills have not yet entered into force—have had such disparate success. How to explain the incomparably greater success of the Swedish system? A number of answers has already been suggested in Danish legal writing.[42]

41. On the Swedish control system see Bernitz, "Consumer Protection and Standard Contracts," 1973 *Scand. Stud. L.* 11-50; id., *Standardavtalsrätt* (3d ed. 1978); id., "Consumer Protection/Aims, Methods, and Trends in Swedish Consumer Law," 1976 *Scand. Stud. L.* 11-36; King, *Consumer Protection Experiments in Sweden* (1974); Sheldon, "Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control," 22 *Am. J. Comp. L.* 17-70 (1974).

42. Especially Dahl, "Standardvilkår og forbrugerbeskyttelse," in: *Konsumenten*

First, it appears that the Swedish Consumer Ombudsman has had a better hand in assigning priorities to his various tasks than his Danish counterpart. Informing Danish suppliers of goods and services about new legislation may be useful as a means of consumer protection and as a public service, but it should not supersede other means of consumer protection. This is not only the fault of the Danish Consumer Ombudsman; the Danish legislature is also to blame, since it has refused to recognize unfair contract terms as a separate field,[43] thereby creating the possibility that nothing is done in that field when such matters as unfair trade practices seem to be more pressing.

Second, it may be observed that while the Swedes may complain about a lack of substantive consumer protection law, this is even truer in Denmark which still has no *Konsumentköplagen* (Consumer Sale of Goods Act). Then there is the question of adequate staffing and funding; the fact that while the Swedish Consumer Ombudsman concentrates on negotiations with trade organizations,[44] his Danish colleague is more inclined to attack the standard terms of individual suppliers;[45] and the fact that the Swed-

i samhället: Rapport från det andra nordiska konsumentforsknings-seminariet (1978) 295-336. On the Danish control system in general see Christiansen, "Standardvilkår," in: von Eyben (ed.), 2 *Juridisk grundbog* (3d ed. 1975) 444-488; Jørgensen, "Unreasonable Contract Conditions in Nordic Law," 1975 *J. Bus. L.* 324-326; Lando, "Standard Contracts: A Proposal and a Perspective," 1966 *Scand. Stud. L.* 127-148.

43. The provision on which the whole control system is based, § 1 Marketing Practices Act, reads as follows: "The Act is applicable to private business activities and to similar public activities. There may in such activities not be committed acts which are contrary to good marketing practices" (my literal translation).

One needs some imagination to grasp that this paragraph provides the basis for a control of unfair contract terms. This is only made clear by the explanatory memorandum, which under Danish law—as in most continental laws—must be taken into consideration when interpreting a law. As appears from the explanatory memorandum, the incorporation of unfair terms in contracts—and especially in contracts with consumers—should be considered an act which is contrary to good marketing practices. More specifically, this will be the case when the stronger contracting party has dictated the contract terms in its own interest.

44. Although this approach may in general be quite effective, it does not seem to be the case in those branches, where the standard terms of trade organizations are not generally followed, such as the trade in used cars. See J. Luft, "Konsumentköp av personbilar/En studie i formulärutvechlingen inom Göteborgs området 1971-76," thesis Göteborg (1977) (criticized by the Consumer Ombudsman S. Heurgren in 1978 *Svensk Juristtidning* 52-56).

45. Unlike his Swedish counterpart, the Danish Consumer Ombudsman does not systematically supervise the consumer market, although para 15 Marketing Practices Act requires him to do so. In consequence all actions against unfair contract terms are begun at the initiative of third parties (while in Sweden some 80% of all cases taken up by the Consumer Ombudsman are a result of his own activities: Bernitz, 1974 *Svensk Juristtidning* 81, 194). Most of these actions concern the standard terms of individual companies: out of 225 cases, which were considered between 1 May 1975 and 30 June 1976, only 10 concerned standard terms drafted by trade organizations. By 1976 four of these ten cases had been settled, but in only two of the four had the Consumer Ombudsman negotiated the terms; in the other two cases he restricted himself to the statement that the standard terms in question were not contrary to the

ish Consumer Ombudsman has worked out a far more effective system of information input. Finally—but here we enter into a more speculative area—the different personalities of the officeholders and their staff may also have contributed to the difference in outcome.

The first three suggestions lead us to the following conclusions:

(a) The remedy against unfair contract terms should not be hidden in a general clause basically directed at unfair trading practices.

(b) It is often argued that good law which is not enforced is not worth very much.[46] Danish—and to a more limited extent Swedish—practice shows that the reverse is also true: good enforcement procedures fail when there is no substantive law to enforce.

(c) Sufficient public funds should be available for the pursuit of consumer interests.

Public Officials or Private Organizations?

A major dividing line between the control systems discussed in this part is the German-Danish border. North of that border the primary control function is exercised by public officials, the Consumer Ombudsmen and their staff. South of that border private consumers' organizations have been assigned that role. This difference may to a large extent be attributed to historical developments. Still, what are the arguments in their favor? The Consumer Ombudsman solution has been said to have the following advantages: (a) a public official has more authority than a private organization, (b) a public official is more representative for consumers in general, (c) it avoids quarrels among different private organizations, (d) the Swedish experience has been quite successful, while (e) the German experience in the related area of unfair trading practices has been less successful.

A close examination reveals that not all of these arguments are valid. There can be little doubt that the first argument in favor of a public official is quite valid. A Consumer Ombudsman, being a public official, will probably have more authority with suppliers of goods and services than a private consumer organization. In fact, a Consumer Ombudsman's powers are larger than those of a private organization both in theory and in practice. The Swedish Consumer Ombudsman's powers are already theoretically larger than

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Marketing Practices Act. In the large number of standard terms of individual companies, the Consumer Ombudsman has not seized the opportunity to negotiate the contents of these terms on a trade-wide basis, even when there was such possibility: Dahl, (supra n. 42), 12.

46. E.g. Eovaldi & Gestrin, "Justice for Consumers: The Mechanisms of Redress," 66 *Nw. U.L. Rev.* 281 (1971): "Recently enacted federal and state legislation, as well as court decisions, have enunciated new substantive legal rules for the conduct of consumer transactions. Yet, this focusing of attention on the creation of new doctrines and laws has tended to obsure the need for a thorough examination of the adequacy of the mechanisms through which these new rights are to be made effective."

for instance those of the *Berliner Verbraucherzentrale.*[47] The Consumer Ombudsman may (i) fine suppliers who fail to answer his questions or to give information requested by him, and (ii) issue cease-and-desist orders which, when agreed to by the supplier, have the same effect as an injunction imposed by the Market Court. The *Verbraucherzentrale* lacks either of these powers. In addition there is the practical, if more intangible, element that the Consumer Ombudsman's office—like most public offices—is organized as a hierarchy, which tends to enhance the authority of the incumbent. Private consumers' organizations are usually set up along more democratic lines, which from the point of view of authority with the business community has the disadvantage that the board members or directors seem to command less authority and a lower standing.

The second argument advanced in favor of the Consumer Ombudsman solution is less persuasive. One may indeed wonder who is more representative for consumers: a public officer who is nominated and dismissed by the government, or the board of a private organization with nearly 500,000 members like the Dutch *Consumentenbond.* On the one hand, one might argue that a public official, being directly responsible to government and thus indirectly to Parliament, which represents the whole people and so by definition all consumers, should be considered more representative than a private organization, which can never encompass all consumers. This view however does not take into account that for a public official to operate effectively it is absolutely necessary that he have a position which is more or less independent from government. If the links between government and public official were too close, the Consumer Ombudsman might (i) come under the control not only of consumer interests but also of business interests, (ii) not be able to negotiate with other government agencies the standard terms used by government and public corporations.

The representativeness of consumer organizations can also be challenged from a different angle: that there are simply too many of them.[48] A large number of organizations with power to file for an injunction with the court is not necessarily prejudicial to consumers—some competition might indeed be useful. There seems to be little danger however that different consumer organizations will attack the same standard terms in court; the costs of the procedure are simply too high. More important is the disadvantage that for a supplier or for an organization of suppliers it may be difficult to

47. The regional consumers' organizations have entrusted the task of challenging unfair trading practices and the use of unfair contract terms to a specialized consumers' organization, the *Berliner Verbraucherzentrale.* In 1977, The *Haushaltsausschuss* of the *Bundestag* accorded this organization a supplementary sum of DM 350,000 to finance its activities in the standard terms area.

48. This seems to be the case in France: Bihl, *Consommateur défend-toi* (1976) 95-119.

choose a consumer organization for his negotiations—the ultimate objective of the two-layer control. This disadvantage can only be eliminated when consumer organizations themselves divide their tasks very clearly, as for instance the German *Verbraucherzentralen* have done by establishing a separate organization for such negotiations.[49] If the number of consumer organizations were to become too large, it might be necessary to limit the number of those that may go to court. Such a limitation can be achieved by various means, the most important being the establishment of certain criteria in the law and entrusting the control over whether an association conforms to them either to the courts or to the government. In a different field France has taken the latter way;[50] in the area of standard terms the Austrian bill specifically empowers the *Verein für Konsumenteninformation* to go to court.[51]

The good experiences in Sweden are counterbalanced by the meager results in Denmark, illustrating once again the difficulty of transplanting an institution from one legal system to the other. The Scandinavian countries, and especially Sweden, have a long tradition with Ombudsmen in general and with public disclosure of administrative acts. In Central European countries like Germany, Austria and The Netherlands such traditions are lacking. On the other hand, it has been argued that the German experience with consumer organizations in the field of unfair trading practices has been unsatisfactory. However, a recent research project disclosed that consumers' associations have, on the contrary, been moderately successful in this area.[52] Only industrywide offenses as well as repeated, intentional unfair trading practices by individual companies are not adequately pursued. Does this outcome presage the effect of the *AGB-Gesetz*? Not precisely. It seems that the very industrywide use of standard terms and the repeated, intentional use of un-

49. Supra n. 47.

50. Art. 46 of the *Loi Royer* declares that a decree shall lay down the conditions under which the consumers' organizations may be approved, after the advice of the public ministry, taking into account whether or not they are representative on the national or local level.

51. A claim for a cease-and-desist order under para 28 of the draft *Konsumentenschutzgesetz* may be brought by any one of a number of public authorities—the *Bundeskammer der gewerblichen Wirtschaft*, the *Österreichischer Arbeiterkammertag*, the *Österreichischer Landarbeiterkammertag*, the *Präsidentenkonferenz der Landwirtschaftskammern* and the *Österreichischer Gewerkschaftsbund*—or by the *Verein für Konsumenteninformation*, which is a private organization (para 29).

52. V. Falckenstein, *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* (1977). The author comes to the conclusion that sporadic unfair practices by usually blameless firms can be prosecuted satisfactorily, but that industrywide offenses, as well as repeated, intentional unfair trading practices of individual companies are not adequately pursued. The costs of taking cases to court are often prohibitive. Within these constraints, the consumers' organizations accomplish successful work.

fair terms by individual companies will be the easiest to control. In case of industrywide use of standard terms, it must be quite easy to start negotiations with the trade organizations which promote the use of these terms. It is only where standard terms are *not* standardized—each company has its own general conditions—that consumer organizations may get into trouble for having to fight over too wide a front. Only when an individual company generates many complaints, will it once again be easy to obtain an injunction against it. This difference between the practices in the area of unfair trading practices and of standard terms stems from the different importance of negotiations in either one. Negotiations regarding standard terms often have a positive result: the negotiating parties reach agreement on the future use of certain terms. But in the area of unfair trading practices the truce is of a more temporary nature—negotiations concerning misleading advertising have only a negative result: such and such a campaign will not take place; next year the negotiations may have to start all over again. This difference stems from the more basic gap between the bilateral (standard) contract (terms) and the unilateral trading practices. Only recently have there been signs that the gap is being narrowed by the trend towards a more positive approach to trade practices, as witness the call for consumer information.[53]

Special Tribunals or Ordinary Courts?

Another dividing line between the two layer-control systems is that concerning the second control echelon. Here we have a large diversity of systems, which for our purposes may be grouped together under three main headings:

(a) systems with special tribunals or boards (Israel, Sweden, Norway, Finland);

(b) systems with special panels of ordinary courts or specific ordinary courts (Denmark, The Netherlands);

(c) systems using the ordinary courts (Germany, Austria).

Concerning category (a), a psychological distinction can still be made between Sweden and Finland on the one hand with their *marknadsdomstolen* (Market *Courts*), and Israel and Norway on the other with their *boards*. The powers of the courts and the boards are the same, but the use of the word 'court' may well enhance the authority which the controlling body enjoys—at least that was what the Swedish legislature thought when it changed the name from board to court. A disadvantage of all systems of category (a) is that the link between the special tribunal and the ordinary court is less assured. But in practice this disadvantage may not be very important, since many of the legally qualified members of the boards and

53. Consumer information, *E.C. Symposium*, Brussels 1977.

courts just mentioned are actually also judges or justices of an ordinary court. A more important disadvantage seems to be that no appeal lies to a Supreme Court, which may lead to inconsistency between the case-law of the ordinary court and the special tribunal. An advantage of category (a) may be that it is possible to appoint lay members to the special tribunals. However that is also possible for ordinary courts in category (b); besides, such a possibility is not universally accepted as an advantage.

Category (b) does not have the disadvantages of (a), but retains the advantages of a single second-echelon controlling agency: the Copenhagen Maritime and Commercial Court in Denmark and one of the courts of appeal in The Netherlands. The question remains whether laymen should sit on these panels. Do courts actually need additional expertise in the area of standard terms in consumer contracts? In my opinion this is not the case. Seen from the consumer side, one may say that every citizen, including a judge, is a consumer. And from the other side, it does not seem that standard terms present such a different legal problem that judges need the support of experts. On the other hand, not much can be said *against* lay-experts. Moreover, quite possibly the special court or the special panel will later be entrusted with additional tasks in the consumer protection area, tasks which may call for experts.

Finally in category (c), the consumer organizations address themselves to the ordinary court. Although I have put Germany into this category, the *AGB-Gesetz* actually leaves some room for regional specialization.[54] This does not seem to be a good solution. Diversity of decisions and lack of experience threaten the effectiveness of the German solution. Admittedly appeal lies to the Courts of Appeal and eventually to the *Bundesgerichtshof*, but that seems a very costly way to bring about consistency. However, the inability of ordinary courts, compared with a special court or panel, to build up a strong expertise in the area of standard terms seems to be of less importance in the German context: their enormous case-load gives the impression that every German court must already be expert in these matters.

54. In a previous report by the federal working group on standard terms, it was proposed that the decision of abstract litigation should be entrusted to the *Oberlandesgerichte* (courts of appeal). This proposal was rejected by the legislature. The only remaining remnant of the concentration concept is the possibility for local governments under para 14 to appoint one particular *Landgericht*, from among several such courts, to hear the cases brought under para 20.

(3) One-Layer Control Systems

The French Model

The French control system, established by the *loi-Scrivener* earlier this year, differs from most other European systems by providing for a one-layer control by the *Commission des clauses abusives* (art. 36).[55] This commission may recommend prohibition or amendment of unfair contract terms (art. 38). By decree from the Council of State such terms may be prescribed, limited or regulated, when (a) they are among the list set out in art. 35, (b) they are being imposed on non-professionals or consumers by an abuse of economic power by the other party and confer upon the latter an excessive advantage (art. 35). With singular rapidity, the members of the Commission were appointed, and the Commission issued its first recommendation only five weeks after the enactment of the law and two weeks after the appointment of its members. By decree of 24 March 1978, based upon this recommendation, four clauses were forbidden as abusive: clauses aiming to (a) establish (or having the effect of establishing) the adhesion of a nonprofessional or consumer to contractual obligations which do not figure in the writing he has signed (art. 1); (b) eliminate or diminish (or having the effect of eliminating or diminishing) the right of repair of a nonprofessional or a consumer in case the professional fails to fulfill any of his obligations (art. 2); (c) reserve (or having the effect of reserving) to the professional the right to modify unilaterally the characteristics of the goods to be delivered or the service to be rendered (art. 3); (d) guarantee the goods to be delivered or the service to be rendered without mentioning clearly that the legal warranty is applicable. All prohibitions are only applicable to contracts between a professional on the one hand, a consumer or a nonprofessional on the other; art. 2, moreover, is only applicable to contracts for the sale of goods.

The far-reaching effects of this decree—and of the sweeping art. 1 in particular—will not be discussed here, but the heavy criticism directed against it makes it clear that as a control system the French approach has its drawbacks. First, the controllers are not controlled. The control procedure does not provide for business interests or consumers' representatives to be heard. The recommendations of the Commission are secret. This is a major difference compared with the open control systems described above. Second, it is not clear what place negotiations should have in the French system. The explanatory memorandum to the bill asserted that the procedure was "fondée sur la concertation." This might indicate that the legislature envisaged negotiations taking place

55. The Belgian control system may come out to be similar to the French system, but as of 1978 it is still not certain which of several conflicting views is going to prevail. The present Belgian draft bill, which seems unlikely to become law unamended, will therefore not be discussed in this article.

within the Commission. Yet this seems implausible, since the Commission has only negative powers.[56]

It is also conceivable, although not very likely, that negotiations will take place between the Commission and French trade organizations. But is the Commission to have adequate funds for a staff of its own civil servants? Yet another possibility is that, under the auspices of the Commission, negotiations will take place between private consumer and trade organizations. In The Netherlands, the experience with such negotiations between private consumer and trade organizations under the auspices of the *Commissie voor Consumentenaangelegenheden* (the Dutch Consumer Council) has not been very encouraging for lack of a "stick behind the door." The French system provides such a stick and therefore might be more successful.

A last possibility is that the negotiating partner of trade organizations will in fact become the *Institut National de la Consommation* (INC), a public agency.[57] This seems to be the most plausible possibility, since at the moment the INC is already actively engaged in negotiations with business interests concerning standard terms.[58] The new law may provide the INC with the leverage which it lacks at present.[59] If French practice is going to develop in this direction, it would presage once again a two-layer control. A major disadvantage of the present French act is that it is not attuned to such a system; it simply leaves open too many questions: who may file an application with the commission, how can the INC force a trade organization to come to the bargaining table or to give information, can bilaterally agreed standard terms (between the INC and a trade organization) still be attacked by the commission, etc. The French control system therefore compares unfavorably with the acts and bills discussed previously.

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56. At an earlier stage of the bill, the possibility of enabling the Commission to lay down standard terms itself—the Dutch-Luxemburg solution, see below—was seriously considered, but finally rejected: *Exposé des motifs* 8.

57. The agency was created by a decree of 5 December 1967, *Journal Officiel* 14 December 1967. It works under the auspices of the all-important Ministry of Economy and Finance. The Board is composed of representatives of consumers' organizations (12), business interests (6), and the Ministries (5): Nguyen-Thanh, *Contribution à l'étude des techniques juridiques de protection des consommateurs: la qualité des biens de consommation* (thesis Caen 1969, Paris 1970) 239-240.

58. Cf. for example the *Protocole d'accord* of 20 September 1976, concluded between the *Institut National de la Consommation* and the *Chambre Syndicale Nationale du Commerce et de la Reparation Automobile.*

59. The lack of leverage was lamented by the Head of the Legal Division of the INC, Jeanine Jacquot, during a recent symposium on unfair contract terms, held in Bougival (France) in June 1978.

(4) Model Standard Terms

General Considerations

The control systems so far analyzed all reflect a negative approach to the problem of unfair contract terms: the controlling agency can withhold its approval, break off negotiations, etc. A controlling agency may however also play a positive role by setting out model conditions. Such a role is quite common in the insurance branch. What are its advantages? From the government's point of view they may be the following:

(a) the model terms may provide the consumer with some clarity as to the complexities of the law;[60]

(b) the establishment of model terms may hide the fact that the government has failed to achieve, as a mediator, agreement between consumer and trade organizations;[61]

(c) it may be quite possible to launch model standard terms without cumbersome parliamentary proceedings;

(d) the model terms may indicate to trade organizations and individual suppliers what will be considered in conformity with the law.

The latter possibility is only available when administrative approval is required for standard terms. Still, the government may try to persuade suppliers to adopt such models by other methods, the most obvious being to exempt such model terms from judicial interference, somewhat like the voluntary approval system in Israel. That indeed is exactly what a German working group proposed in a 1975 report,[62] but it was later rejected by the legislature. However, the idea seems even less rewarding from a supplier's point of view. Thus, it seems hardly promising as a general system of control though it might work as an auxiliary.

The Dutch and Luxemburg Standard Regulations

The Dutch Draft Civil Code[63] and the Luxemburg Draft Consumer Protection Law both contain a provision which empowers the

60. See the *Mustermietvertrag '76* (Standard Rent Contract), adopted by the German Ministry of Justice.

61. This was the case with the Standard Rent Contract, mentioned in the previous footnote, which failed to obtain the consent of the houseowners.

62. Arbeitsgruppe beim Bundesministerium der Justiz, Zweiter Teilbericht 1975, theses 24.

63. Art. 6.5.1.2 Draft Civil Code reads:

1. In addition to the statutory provisions a contract made by one of the parties in the conduct of his business is subject also to standard terms if for the class to which the business belongs standard terms are in force in respect of such a contract. The particular kinds of contracts for which standard terms may be made and the class of business for which each set of these standard terms is intended are designated by Legislative Decree.
2. Standard terms are made, varied and revoked by a commission to be appointed to that end by Our Minister of Justice. Further rules are laid down by statute for the composition and procedure of the commissions.
3. The establishment, variation or revocation of standard terms does not

Minister of Justice to appoint a commission or commissions with power to establish "standard terms."[64] Dutch legal writing has either hailed this solution as a consumer protection measure or execrated it as a highlight of government interference. In fact it is neither. At least the intention of the Dutch provision is that with the cooperation of all interests concerned, standardized general conditions might be established which are more uniform and of a better technical quality than those presently used in the trade. As a general measure of consumer protection this provision would be bound to be ineffective, but as a minor auxiliary it may prove helpful.

(5) Some Specific Problems

Standard Terms or Unfair Terms

Some of the acts or bills previously discussed use the concept of standard terms as their point of departure (most notably the German *AGB-Gesetz*), while others are more generally applicable to all unfair contract terms, whether standardized or not.[65] Which system is the most suitable from the control machinery point of view? To this end let us return to the basic philosophy behind the two-layer control system. In order to provide remedies against the inadequacies of judicial control, an *abstract* control system is projected, implying that the abstract control procedures should basically deal with standard terms rather than with individual terms. The German approach therefore seems to be the most logical. However, there are some considerations pointing in the other direction:

(a) If the control is exercised by a public official, an exact definition of the terms subject to control need not necessarily be included in the law—it may as well be given (or an indication may be given) in his instruction.

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come into force until it has been approved by Us and promulgated together with Our decree of approval in the Netherlands State Gazette.

4. In standard terms deviation from statutory provisions is permissible, except those from which even in a contract deviation is in no way permissible. The provisions of the foregoing sentence do not apply if a different inference is to be drawn from a statutory provision.

5. The parties may deviate from standard terms in their contract. Such terms may however prescribe a certain form for deviation.

Art. 6 of the draft Luxemburg bill also provides for a delegation of legislative power: A grand-ducal regulation may prescribe, for certain branches of trade and of the supply of services, that for the contracts concluded between professionals and private final consumers standard form contracts be used, which have been established by the Minister of Justice and the Minister of Middle Classes after consultation of the chambers of professionals concerned and the associations which are representative for the consumers.

64. More accurate than the official English translation ("terms") would have been "regulations" since they are imposed by law, though variable.

65. Examples of a more general approach are UCC § 2-302 (United States) and the Scandinavian general clauses.

(b) More generally, if the abstract control system would be available for control of individual unfair terms, it is doubtful whether any consumer organization would find it worthwhile to go to court for such unimportant stakes—especially when so much else remains to be done.

(c) There is the problem of proof. How is one to prove that a term incorporated in a contract is a standard term? Modern typewriting techniques make it hard to distinguish between individual and standard terms.

(d) Finally, most legislatures have found it difficult to define standard terms. This problem may be circumvented by extending the field of application of the control system.

In conclusion, there are few objections to a broader scope of the control procedure, although a limitation to standard terms would be more logical. However with respect to *substantive* law, the answer may well be different.[66]

Consumer Protection or General Protection

On the question whether a control system should be limited to protection of consumers, it is even more important to keep in mind that we are here only dealing with control procedures. Indeed several Scandinavian countries have introduced general clauses not limited to consumers, while their control procedures were so limited. This approach seems quite defensible: the inadequacies of judicial control, previously described, are far less urgent when a *professional* supplier of goods or services wants to challenge the fairness or the validity of a standard term. The only reason for the professional to go to the special tribunal would be that he in turn has been asked to defend his own general conditions. But to extend the scope of protection just because of this procedural difficulty seems a bit farfetched.

A more important neglected group seems to be the category of private citizens who do not fall within the definition of consumers. Here the Swedish approach seems quite commendable: initially, the scope of goods and services covered by the *Avtalsvillkorslagen* was rather small, gradually it is being extended,[67] so that eventually private citizen and consumer may become identical.

66. The limitation of the scope of application of the substantive law provisions to standard terms is still a heavily debated issue in Germany: Lieb, "Sonderprivatrecht für Ungleichgewichtslagen? Überlegungen zum Anwendungsbereich der sogenannten Inhaltskontrolle privatrechtlicher Verträge," 178 *Archiv Civ. Praxis* 196-226 (1978).

67. Thus, by Act of 9 June 1977, immovable property was brought within the scope of the Contract Terms Act. At the moment a change of Swedish insurance legislation is being considered. See Konsumentförsäkringslag, Delbetänkande af försäkringarättskommittén, Statens offentliga utredningar 1977:84.

Government Contracts

Government (state and local) has become a major contracting party in modern society. For obvious reasons governmental contracts tend, if anything, to employ standard terms even more than private ones do. Moreover, these are no whit better than those employed by private enterprise. Are they covered by the legislation previously discussed? As a first observation, they sometimes fall outside the scope of the substantive law provisions. The German *AGB-Gesetz* for instance contains several exceptions for the standard terms of utilities.[68] More important is that in countries like France, with a separate concept of administrative contracts, the latter also fall outside the scope of the new legislation. Assuming however that government contracts do fall under the scope of private law, should they be exempt from the control machinery? In Italian legal circles it has been argued that the unity of the state does not allow that one government agency control the standard terms of the other. This is not the prevailing view in Europe: most laws make no distinction. What is more, at least in Sweden the Consumer Ombudsman has in fact started negotiations with the State Railways, the Post Office, etc.

Some problems remain, especially when the public official who exercises the first-layer control is too dependent upon central government, as is the case in Israel. The Israeli legislature has tried to solve this problem by substituting an independent lawyer for the Attorney-General in such cases.[69]

Acceleration of the Legislative Machinery

Reports on the advantages and disadvantages of substantive law usually end with the statement that all will be to no avail if the law is not going to be enforced.[70] It is perhaps fitting to end this article with the reverse: enforcement procedures are of little avail, when there is no substantive law to enforce. But have not all the recent acts and bills on standard terms introduced substantive rules as well as control procedures? True, but what has been forgotten in most systems—with the exception of the United Kingdom—is that substantive rules, no less than procedural rules, are in constant need of updating. Experience shows that the so-called black list of clauses in the Italian Civil Code no longer covers all terms prejudi-

68. §§ 26-27 *AGB-Gesetz.*

69. S. 5A Standard Contracts Law: "Where the State has filed an application under section 2, the Board may appoint an advocate not in the State Service to appear before it and present his arguments, and such advocate may appeal under section 8 against the decision of the Board. The fee and expenses of the advocate shall be paid out of the Treasury."

70. See supra n. 46.

cial to consumers.[71] The late President of the Israeli Board of Restrictive Trade Practices, Zeltner, also expressed his doubt whether the catalogue of s. 15 of the Standard Contracts Law would still be adequate in the near future.[72] In the area of services there is almost everywhere a constant need for more legislation.[73] One of the major reasons for the rapid rise of standard terms has in fact been the inadequacy of the legislative machinery to keep up with social and technological change.

How can this be remedied? Apart from the possibility of delegated legislation, which has already been discussed briefly, there seem to be a number of possibilities. First, the signalling of problems may be helped when all decisions on standard terms—whether by special tribunals or by ordinary courts—are registered centrally.[74] Second, the input of bills may be promoted by giving consumer protection agencies the right to set the legislative machinery in motion. This is what the UK Fair Trading Act in effect does.[75] The UK procedure is somewhat cumbersome, but may still be heralded as an important innovation. Finally, parliamentary treatment may also be speeded up by again taking the Fair Trading Act as an example.[76] This solution is also used in many countries for approval of treaties.

CONCLUSIONS

The most effective control system over unfair contract terms has so far proven to be the two-layer system which is already in operation in Sweden, Denmark, Israel and the German Federal Republic, and envisaged in Norway, Finland, Austria and The Netherlands.

Whether the first-echelon control should be entrusted to public officials or private organizations is as yet unclear. Since the private

71. See the plethora of judicial decisions, mentioned by R. Nicolò, Stella Richter (eds.), *Rassegna di giurisprudenza sul codice civile,* book IV part II (art. 1321-1410) 236-276. On the Italian control of standard terms see also G. Alpa, "Contratti standard, tutela des consumatore e rilevanza di interessi diffusi," 1976 *Riv. delle società* 297-306; G. Gorla, "Standard Conditions and Form Contracts in Italian Law," 11 *Am. J. Comp. L.* 1-20 (1963); C.M. Mazzoni, *Contratti di massa e controlli nel diritto privato* (1975); E. Roppo, *Contratti standard* (1975).

72. Verhandlungen des fünfzigsten Deutschen Juristentages, Munich 1974, H 109.

73. In the Scandinavian countries reports on the need of substantive legislation in the consumer services area are expected to be submitted to the governments this fall. The English Law Commission recently suggested that new rules should be enacted with regard to contracts of supply analogous to sale and to contracts of hire: Working Paper No. 71 (1977).

74. § 20 *AGB-Gesetz* prescribes this for the German Federal Republic. Under s. 14 A Standard Contracts Law (Israel), the Court shall bring the matter to the knowledge of the Attorney-General, wherever in a civil proceeding between a supplier and one of his customers a plea is entered against a restrictive term of a standard contract between them.

75. §§ 14, 17, 21, 83 Fair Trading Act 1973.

76. § 22 Fair Trading Act 1973 provides that orders by the Secretary of State shall be approved only by a resolution of each House of Parliament.

organizations will have to be financed by public funds, this may not make much difference anyway. As to the second-echelon control the best possible solution seems to be the Danish-Dutch one of entrusting the control to a special panel of an ordinary court.

Danish practice shows that the control of standard terms should be explicitly mentioned in the law and not hidden in some general clause relating to unfair trading practices.

A system of voluntary control, as practiced in the United Kingdom, may play a useful auxiliary role, but should be backed up by a compulsory control system. A one-layer control system as envisaged by the French law has not yet been put into practice, but may well turn into a two-layer control, without the new law being adjusted to this change. A system of model standard terms and a system of binding standard regulations also play useful auxiliary roles; they cannot however replace two-layer control.

There is little need to limit the application of control machinery to *standard* terms, although many substantive rules should only apply to standard terms. With regard to the issue of consumer protection v. general protection, the reverse seems to hold true: whereas a number of substantive rules, such as general clauses, may be necessary to protect small (or even large) traders, this is not the case with regard to the control procedure.