THE IMPACT OF CONSUMER LAW ON THE LAW OF CONTRACTS IN DENMARK

BY

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1. THE PRINCIPAL TRAITS OF CONSUMER LAW*

1.1. *Introduction. Consumer law and the legal protection of consumers*

1.1.1. In judicial terminology consumer law and consumer protection are relatively new words. The consumer movement (*Consumerism*), which as an independent pressure group originated in the USA, developed in Western Europe during the 1960s. In England the so-called Molony-Report,[1] published in 1962, pointed out a number of shortcomings in the field of consumer protection. As a result the first proper Consumer Protection Act was passed in England in 1966, later amended as the Trade Descriptions Act of 1968.

In Denmark, in a 1966 report on a new competition Act, attention was paid to the English legislative developments which implicitly meant a recognition of consumer protection as an independent legal *leitmotif*;[2] but in 1966, even though consumer viewpoints to a certain extent also were manifested in the Danish report, and the consumers to some extent actually were protected by the competition rules, it was still the mutual competitive relations of businessmen and their interests in other respects that determined which problems were to be investigated.

However, developments progressed rapidly in Denmark. The Danish government in 1969 appointed a large *Consumer Commission* with broad representation, which during the 1970s submitted several reports involving proposals and recommendations concerning legislative measures for consumer protection.[3]

In leading political circles in Denmark as well as in the other Scandinavian countries there was a growing acknowledgement of the fact that in modern society the fast growing and differentiated supply of goods and services had made the market increasingly confusing for consumers, who often found it

* This paper is concerned with *Danish* law on the whole, but there are many points of resemblance to the consumer legislation of the other Scandinavian countries. *Swedish* consumer law has previously been treated in 17 *Sc.St.L.*, pp. 11 ff. (1973), and also in 20 *Sc.St.L.*, pp. 11 ff. (1975), by Ulf Bernitz. Under the auspices of the EEC Commission a more detailed account of *Consumer Legislation in Denmark* has been written in English by Børge Dahl in 1981 as part of an overall research into consumer legislation in the EEC countries (published by Van Nostrand Reinhold Company Ltd., Molly Millars Lane, Wokingham, Berkshire, England).

[1] Final Report of the Committee on Consumer Protection, Cmnd. 1781, London 1962.

[2] Report no. 416/1966 concerning a new Competition Act, p. 45.

[3] Reports of the Consumer Commission I–IV, nos. 597/1971, 681/1973, 738/1975, and 816/1977, respectively.

difficult to orientate themselves as regards the goods or services available or to evaluate price, quality, etc. Therefore, the Danish Consumer Commission was assigned the task of "carrying out an overall evaluation of the whole of this field as a basis for the working out of an up-to-date consumer policy".

Since then the Consumer Commission Reports directly or indirectly have formed the basis for the launching of an extensive body of legislation comprising the Price Marking and Display Act 1977, the Marketing Practices Act 1974, the Consumer Complaints Board Act 1974, the Consumer Contracts Act 1978, the Sale of Goods Act 1906, as amended by the Consumer Sales Act 1979, and the Credit Sales Act 1982.

1.1.2. Even though the general priority given to consumer interests and the appearance of consumer law as an independent legal discipline are of a recent date, statutory provisions with an actual protective effect have long been in existence, just as also earlier on isolated efforts were made to protect the contracting party who in certain types of situations has the weakest position when bargaining for a contract. Through above all the statutory provisions in public law regarding quality and price control important and reliable consumer protection has long been in existence—especially in the sphere of the public product control of food, medicine, housing, and motor vehicles. Furthermore, through special laws applicable to certain types of contract, protective statutory provisions have before now intervened more directly in individual legal relations to the advantage of the presumptively weakest contracting parties, as e.g. employees, tenants and hire-purchase buyers.

However, the characteristic feature of the recent legislation in the field of consumer law is that it adopts an overall view of consumer problems and from a quite pragmatic efficiency point of view cuts across the distinction between public law and private law, traditionally predominant in the Danish—and the Continental—legal system. While relations between public authorities and private citizens traditionally are treated in *public law*, and mutual relations between private citizens traditionally are treated in *private law* (or *civil law*), modern consumer law *coordinates* public law (the Marketing Practices Act and the Price Marking and Display Act) with private law (the Contracts Act, sec. 36, the Consumer Contracts Act, the Sale of Goods Act, and the Credit Sales Act) to a far greater extent than used to be the case. The system of sanctions in public law and the system of sanctions in private law are not here conceived as two essentially different and separate worlds, but merely as two different sets of sanctions or possibilities for enforcement, the choice between which is determined by an evaluation of what most *effectively* will protect the consumers' legal rights. Furthermore, as a supplement to consumer legislation some statutory provisions of legal *procedure* are attached, which through the introduc-

tion of a Consumer Complaints Board and a Consumer Ombudsman supply suitable and effective means for the protection of the rights contained in the substantive rules.

1.1.3. All this new complex of rules is based on the *consumer* concept, and it will be discussed below how firm or unambiguous this concept is, and what boundaries the consumer concept itself sets for the penetration of the principles which thus have been expressed. In particular, a more explicit account will be given as to what possibilities the omnibus clause in the Contracts Act, sec. 36, provides for expanding the protective considerations in question.

1.2. *The demarcation of consumer law. The consumer concept*

Originally, consumption and consumer were economic concepts. From an economic point of view businessmen are also "consumers" in so far as their total purchases are concerned. However, the protective purpose of consumer legislation demarcates the consumer concept in a narrower legal sense.

According to the Consumer Commission, it would generally not be necessary to define the judicial consumer concept exactly. The Commission thought that the courts' interpretation of the term consumer would be more appropriate than a precise legal definition, for which reason the Commission did not recommend the legislator to attempt to formulate in such a definition the objectives inherent in the consumer concept.[4] Clearly, the codification of an unambiguous general consumer concept also involves a risk, as the need for differentiation may arise with regard to the legal systematic character of the statutory rules as well as with regard to the separate protective considerations, of which a dogmatic locking of the consumer concept could prevent proper consideration. However, it was agreed that in all cases the consumer must be "the last link in the sales chain".

Furthermore, the Consumer Commission admitted that there could be a greater need for a precise definition of the consumer concept in relation to protective *mandatory private law* legislation.[5] It was emphasized that in view of the general increase in national income, protection should not be confined only to special groups of the population, where particular social considerations applied, or to the necessities of everyday life. On the other hand, it was held in accordance with the English Fair Trading Act 1973 (sec. 137) that a *non-commercial* requisite had to be maintained as something characteristic.[6] The

[4] The Consumer Commission's Report III, no. 738/1975, pp. 11 ff.

[5] "*Mandatory* legislation" is used in the sense that these rules cannot legally be dispensed with by agreement between the parties.

[6] See similarly the even earlier definition of a consumer concept in the American Uniform Commercial Code, sec. 9–109.

notion of making the size of the claim the only criterion in the consumer field was turned down, and in doing this the Commission discarded the idea which, e.g., underlies the definition of "Consumer Credit Agreements" in the English Consumer Credit Act 1974 (sec. 8), and which—irrespective of the consumer terminology used—actually equates a loan to a consumer in the ordinary sense of the word with a loan to a businessman, as all such credit arrangements under a certain limit are covered by the protective rules.

In several Bills embodying the results of the Commission the Ministry of Justice found that an explicit definition of the consumer concept should be included in *private law* consumer legislation. Consequently, the Act on Interest on Overdue Payments, sec. 7, the Consumer Contracts Act, sec. 1, the Sale of Goods Act, sec. 4(a), and the Credit Sales Act, sec. 4, all contain such a definition, the reason being that the numerous provisions on the adjustment of claims in these private law regulations have a direct bearing on a number of individual legal relations between buyers and sellers. Thus, a precise definition of the consumer concept may be considered as much in the interest of the trade as in the interest of consumers. This definition of the private law consumer concept is identical for all the regulations mentioned and is essentially in accordance with the proposal of the Consumer Commission.

According to this definition private law consumer legislation applies to agreements entered into by a businessman in the course of his business and a consumer, when the service of the businessman is primarily intended for non-commercial use by the consumer, and the businessman knew or ought to have known this. A purchase of goods between two private parties ("consumers") handled by a business intermediary would also be considered as a consumer sale.

However, one should be aware of the fact that the same definition of the consumer concept is *not* made in relation to *public law* and *procedural law* protective legislation. Here the concept where it occurs must be determined by interpreting the individual statutory provisions with the support of the *travaux préparatoires* of the legislation. In general, public law and procedural law consumer provisions are more closely attached to the (comprehensive) economic consumer concept, which, *inter alia*, means that a businessman, too, may file complaints with the Consumer Complaints Board regarding goods bought for commercial use, provided the businessman can be characterized as "the last link in the sales chain", which means that the goods or services concerned must not enter into commercial production or be acquired for resale. To the same degree the consumer concept is demarcated in relation to the Marketing Practices Act, sec. 6, which forbids a businessman to give something into the bargain (collateral gifts or premium offers) when selling to a "consumer". Besides, the Marketing Practices Act, which is the most important public law

consumer protective regulation, uses the word consumer in only a few sections (secs. 2, 6 and 10) and even then not always in the same sense. In the Marketing Practices Act, sec. 2(2), according to which statements must not be used in marketing which are improper towards other businessmen or consumers, the word "consumers" is used almost synonymously with "citizens" or "certain groups of the population".[7]

There is reason to emphasize that the objective of the Marketing Practices Act is not to promote consumer interests solely, but rather generally to create a sound market for the sale of goods and services on the basis of a balancing of the interests of business, consumers and society in general. There are distinct parallels here to the English Trade Descriptions Act 1968, which (contrary to the originally proposed consumer protection Act, which was purely a consumer protection Act) applies equally to all business within the trade. However, some of the regulations in the Danish Marketing Practices Act may find their English counterpart in the Fair Trading Act 1973, which besides being a consumer protection Act contains regulations which on the whole correspond to the Danish Monopolies and Restrictive Practices Act.

1.3. *Legal standards and omnibus clauses in consumer law*

A special characteristic of consumer law is the extensive use of *legal standards* or the so-called *omnibus clauses* (or "general clauses"). The cornerstones of Danish consumer law are the omnibus clauses in the *Marketing Practices Act, sec. 1*, and the *Contracts Act, sec. 36*. While the Marketing Practices Act, sec. 1, generally requires business activities to conform to good marketing practices, the Contracts Act, sec. 36, supplements it by setting up a test of reasonableness and fairness for the enforcement of a particular contract or contractual term. Moreover, legal standards are included in all sections of the Marketing Practices Act, ch. 1, and also in the Contracts Act, sec. 33.

The widespread use of legal standards is probably due to several things. First of all it reflects an acknowledgment of the fact that detailed legislation would fail to cater for the many, varied and ever-changing patterns of contracts and especially for the imagination which can be exercised within the trade. The two "major" omnibus clauses in the Marketing Practices Act, sec. 1, and the Contracts Act, sec. 36, are to a great extent just reserve rules both for the quite special rules and for the more "minor" legal standards, among which may be included, e.g., also the Contracts Act, sec. 33, according to which invalidity of a contract may follow from a test of dishonesty. In this there also lies a wish to create a dynamic justice, which without continual

[7] *FT* 1973–74, supplement A, pp. 2257–58.

amendments can keep pace with developments in society and with new needs. In any case, the legal criteria are more easily moved within the framework of a standard rule than within more precise and detailed rules. Perhaps the fact that we are entering a rather new legal field, where the outlines are still relatively blurred, also plays a role.

Neither of the two omnibus clauses in the Marketing Practices Act, sec. 1, and the Contracts Act, sec. 36, respectively, are in their field of application restricted to consumer matters, but they both have an important part of their applicability in this field. Within contract law, where the sharp demarcation of the private law consumer concept may be said to have left a certain need for protection also in other fields not involving consumers in this sense, the Contracts Act, sec. 36, has, *inter alia*, the important function of giving authority to meet this need in individual cases. More precisely, the implementation of the new regulations concerning consumer protection must thus be presumed to make it easier, especially for a small businessman, to invoke the Contracts Act, sec. 36, since the protective considerations in consumer law could presumably, and to a varying extent, be incorporated in the text of reasonableness and fairness contained in that section. According to the Contracts Act, sec. 36(2), regard should be had to the circumstances at the time of the conclusion of the agreement, the substance of the agreement, and later developments. The Contracts Act, sec. 36, is concerned with *unreasonable terms of contract in general* and does not, like, e.g., the English Unfair Contract Terms Act 1977, aim especially at exemption clauses or other particular terms (cf. 2.2 *infra*).

2. THE IMPORTANCE OF CONSUMER LAW FOR ORDINARY CONTRACT LAW

2.1. *The position of the small businessman*

Any assessment of the impact of consumer law and the protective considerations implied is especially complicated by the fact that it is virtually impossible to assign all businessmen to one fixed legal category and treat them along the same lines in every relationship. For instance, when trading with big enterprises many *small businessmen* will often find themselves in a position not very different from that of consumers. Furthermore, a businessman—typically a small business retailer—runs the risk of being cornered between mandatory consumer legislation, e.g. on sales, and terms of contract in relation to his own supplier, who can prevent him from retreating into the sales chain with demands corresponding to those that he himself has had to meet in relation to consumers.

This problem was considered thoroughly already during Parliament's reading of the Bill on the Consumer Contracts Act, which was the first of the new private law consumer Acts. In its comments on the Bill and also in a reply to Parliament's standing legislation committee the Ministry of Justice has acknowledged the different needs for protection of small and large businessmen, but for purely technical reasons it was considered impossible to find a generally applicable criterion for commercial contract matters where special protective considerations have manifested themselves. A precise definition in this respect of the term "small businessman" was even considered rather arbitrary, since a precise demarcation—irrespective of the criterion on which it might be based—could only be a very rough measure seen in relation to the aim of protecting such businessmen, who must generally be described as the weaker party to a contract.[8] The same evaluation of both the desirability of distinguishing the small businessmen from the large businessmen and the impossibility of implementing the distinction in precise legal terms was expressed both in the Credit Sales Report[9] and in the Consumer Sales Report,[10] as well as in the comments of the Ministry of Justice on the Bills put forward in this connection with regard to amendments to the Sale of Goods Act and the implementation of a new Credit Sales Act.[11] Therefore, a distinction between small and large businessmen has not been made in any part of the consumer legislation mentioned.

2.2. *The Contracts Act, sec. 36, in the light of the consumer rules*

On the other hand, it has been repeatedly emphasized in reports and other *travaux préparatoires* that the need for further protection of the small businessmen could be largely met by the application of the Contracts Act, sec. 36, concerning the invalidity of unreasonable agreements (see 1.3 *supra*). Under sec. 36 disputes must be solved *concretely* from the special conditions in the individual case; however, the implementation of the new consumer rules may to some extent make it possible for a commercial buyer to invoke the Contracts Act, sec. 36, as a basis for setting aside particular contractual terms which disregard the reasonable interests of the small businessman.[12]

This is also expressed quite clearly by the Minister of Justice in a reply given on December 11, 1980, to Parliament's standing legislation committee: "In

[8] *FT* 1977–78, supplement A, p. 739, and supplement B, pp. 463–69.
[9] Report no 839/1978 concerning Credit Sale, pp. 33 f., and 63 f.
[10] Report no. 845/1978 concerning Consumer Sale, p. 16.
[11] *FT* 1978–79, supplement A, p. 2164, and *FT* 1981–82 (2nd session), supplement A, pp. 1665 ff.
[12] Report no. 845/1978 concerning Consumer Sale, pp. 16 f., and also *FT* 1978–79, supplement A, p. 2164.

deciding whether an agreement should be set aside according to the omnibus clause, consideration must also be given to whether the agreement, if it had been a consumer sale, would have broken the protectively mandatory rules that apply to a consumer sale, provided that in the case at issue the same protective considerations apply which have led to the introduction of the protectively mandatory rules."

Sec. 36 of the Contracts Act applies to all private law contracts and terms of contract as well as to any party irrespective of his status as a consumer or businessman. The main object of the provision is to give *consumers and others* protection against an economically or intellectually stronger party, e.g. one who takes advantage of his superior position by using standard-form contracts which deviate unreasonably from the normal balance between rights and obligations in a contractual relation.

However, saying that the Contracts Act, sec. 36, has to be used *concretely* in consideration of the particular circumstances in every single case is not the same as saying that in the application of the rule no generalization or analogy must be made from the general criteria. On the contrary, it is assumed that the courts naturally must take as their starting point the balancing of interests which is reflected in the non-mandatory rules in the field and also to a certain extent in the mandatory rules in other similar fields.[13] The idea of the Contracts Act, sec. 36, is not to make a quite arbitrary and isolated equity assessment, but on the contrary to ensure that a concrete balancing is made of the considerations and modes of solution based on generalizations or analogies.

In this way, especially, increased consumer protection, implemented by detailed mandatory consumer legislation, must be expected to influence ordinary contract law in a way that benefits the small businessmen, in relation to whom an analogous application of the consumer protection rules seems particularly appropriate. In a number of cases, which in the *travaux préparatoires* of the Contracts Act, sec. 36, were particularly emphasized in order to illustrate the possibility of applying the rule (e.g. door-to-door selling), more detailed legislation affecting the consumer field has subsequently been implemented. As a consequence, the Contracts Act, sec. 36, has lost some of its importance in these particular fields. These particular consumer Acts can appear as a legal "filling out" of the criterion of reasonableness of sec. 36.[14] The *travaux*

[13] *Foreløbig redegørelse om formuerettens generalklausuler* (Preliminary Account of the Omnibus Clauses of Contract Law), Copenhagen 1974, pp. 26 ff., and also—from the *travaux préparatoires* to the corresponding Swedish omnibus clause—*SOU* 1974:83, pp. 135 f., 137 ff.

[14] To give one example, the Consumer Complaints Board found in a decision of 1978, referred to in the Board's annual report (*Forbrugerklagenævnets Årsberetning*) in 1978, p. 70, that the rules concerning withdrawal notices in the Consumer Contracts Act, sec. 14 (concerning continuing services), which first took effect as from January 1, 1979, had to provide guidance as to what, pursuant to the Contracts Act, sec. 36, could be considered as reasonable terms of notice in a subscription contract.

préparatoires of the Contracts Act, sec. 36, are based on the same protective considerations towards consumers as well as towards other weaker contracting parties, and, as is noted above, for technical reasons solely detailed legislation for the small businessman has not been implemented. For these reasons detailed consumer legislation must be used extensively for "filling out" what the Contracts Act, sec. 36, establishes as a criterion of reasonableness in relationships other than those involving consumers.

A 1982 Supreme Court case (*1982 UfR 176*) is illustrative and indicates at the same time also a limit to the extent to which consumer law norms have penetrated contract law. A farmer had, in 1973, taken out a hailstorm insurance not to be terminated before 1983. When the farmer learned later on that the insurance company had switched to a policy of one-year insurances without any increase in premiums, he cancelled his insurance as from 1979. During the subsequent law suit, which the insurance company had instituted claiming payment of the following year's premiums, the farmer maintained in his defence that a farmer like himself in reality was not a businessman possessing knowledge comparable to that of the insurance company where insurance conditions were concerned. In the Consumer Contracts Act, sec. 14, a considerably shorter maximum binding period is fixed for most[15] consumer contracts dealing with continuing services and even though the farmer acknowledged that he was not a consumer in the meaning of the Act, he felt, however, that this provision analogously or the Contracts Act, sec. 36, ought to apply to the case. On this point opinions in both the High Court and the Supreme Court differed.

The majority of judges of the *High Court*[16] found it unreasonable under these circumstances to hold for a number of years a policy-holder such as the person in question to a contract of this character, and, in view of the Contracts Act, sec. 36, therefore set aside the contractual provision of irrevocability for 10 years. Instead it was thought that a reasonable binding period of one year should be fixed in accordance with "the principles" of the Consumer Contracts Act, sec. 14(1). A dissenting judge of the High Court found no basis for invoking the principles of the Consumer Contracts Act or the Contracts Act, sec. 36, and, therefore, voted in favour of the insurance company.

In the *Supreme Court* the votes were divided so that a minority of three judges voted in favour of affirming the judgment of the High Court setting aside the

[15] The Consumer Contracts Act does not apply to insurance contracts at all. *Insurance contracts* were exempted from the rules of withdrawal in the Consumer Contracts Act because it was thought more appropriate to carry out the regulation of insurance contracts in the insurance Contracts Act, cf. *FT* 1977–78, supplement A, pp. 754 and 772. However, this has not happened as yet. But in the light of this there is no doubt—nor was it contested in the case—that the Contracts Act, sec. 36, is applicable to insurance contracts in consumer relations and that the standard to apply was the ordinary terms of notice of the Consumer Contracts Act.

[16] The judgment of the High Court has also previously been published in 1980 UfR 917.

provision of 10 years' irrevocability pursuant to the Contracts Act, sec. 36. However, a majority of four judges voted in favour of the insurance company, inasmuch as they did not find that the farmer as policy-holder could be considered as or "comparable with" a consumer. Subsequently, they did not find sufficient reasons to set aside the term of 10 years' irrevocability pursuant either to the Contracts Act, sec. 36, or to other provisions.

Even so, the judicial decision seems to confirm the fact that *the application of the Contracts Act, sec. 36, will take place in close connection with the protective considerations and principles which are embodied in the more recent consumer legislation.*

Even though consumer legislation thus clearly marks out a certain *direction* for that development of the law for which the Contracts Act, sec. 36, provides a vehicle, it is, however, *on the one hand*, clear that economic strength and expert knowledge do not necessarily give enough protection in all circumstances, and that the application of certain protective views cannot solely be connected with the constellation weak versus strong contracting parties.[17] Similarly, *on the other hand*, it is equally clear that the individual consumer Acts can only regulate the relations between consumers and businessmen from a more or less crude average estimate and, therefore, that there should be an opportunity for the consumer to invoke the Contracts Act, sec. 36, as the basis for the setting aside of a contractual term in a particular case, irrespective of the fact that this term may be in agreement with the consumer law's regulation of the matter in question.[18]

2.3. *Interpretation of agreements and statutory provisions in the light of consumer law*

A principal aim of modern contract law is to ensure reasonable terms of agreement, and the wish to give the agreement of the parties a reasonable content has of course played a decisive role in the application of law even prior to the passing of the Contracts Act, sec. 36. However, this objective can be reached in several ways. Besides the application of the classical rules of invalidity of the Contracts Act (duress, fraud, etc.) and the specific mandatory rules which apply to particular fields, an extensive, but more "covert", control

[17] The Consumer Commission's Report III, no. 738/1975, p. 14.

[18] That the Contracts Act, sec. 36, according to the circumstances, can be used concretely to give the consumer a *better* legal position than the consumer law generally gives in a particular case, is clearly anticipated in the *travaux préparatoires* of the protective provision in the Consumer Contracts Act, sec. 14, cf. *FT* 1977–78, supplement A, p. 776. Similarly, from *Foreløbig redegørelse om formuerettens generalklausuler*, 1974, p. 27, it appears that the Contracts Act, sec. 36, could, in particular cases, be used for the setting aside also of terms of contracts which are in accordance with non-mandatory rules of contract law. On the other hand, the Contracts Act, sec. 36, must *not* be used for the setting aside of the protectively mandatory rules contained in consumer law where these might in specific cases be found to be unfair towards the businessman, cf. *FT* 1977–78, supplement A, pp. 773 f.

of fairness had also previously been present under the pretext of applying the ordinary *rules of offer and acceptance or interpretation.* Since Danish statutes do not provide general rules on the interpretation of contracts, the existing rules are based on case law. As a rule the Danish courts interpret contracts from a presumption that the parties have tried to obtain a reasonable and usual result in consideration of what the two parties intend through the agreement and their interests in other respects, as well as in consideration of public policy. It is, therefore, in good accordance with Danish rules of interpretation that the wording alone should not be decisive in the determination of the content of a contract. Unusual and very oppressive terms in a standard-form contract would not be considered agreed on as a starting point, unless they were clearly and distinctly emphasized to the other party.[19]

In the *travaux préparatoires* of the Contracts Act, sec. 36, it is emphasized that court practice, from which the said principle of interpretation on the disregard of unusual and oppressive terms have been formed, could be instructive for the application of this omnibus clause, though the possibilities of setting aside contractual terms according to the Contracts Act, sec. 36, have probably increased.[20] The advantage of a rule like the Contracts Act, sec. 36, apart from ensuring a somewhat *increased* control in general, would also be to ensure in particular an *open* control of standard-form contracts, which can easily include terms that are unreasonable towards consumers or other inferior contracting parties. Even though the solution of interpretation in certain situations would presumably still be more adequate in ensuring the reasonable legal effects of a contract, the possibility of quite openly setting aside a contract or contractual terms as unreasonable according to the Contracts Act, sec. 36, would be much more suitable in promoting a "feed-back" effect, e.g. to the line of business in question, and by this would be more likely to ensure that the judgment has an overall preventive influence on future contractual usage in the trade.[21]

That the Contracts Act, sec. 36, should in this way function as a provision for ordinary principles of law which, *inter alia*, have been manifested in the rules of interpretation, and also as a warrant for an open judicial development of these principles, is clearly predicted in the *travaux préparatoires* of the provision and is confirmed in later legal usage. However, until recently it has not been equally obvious that the rules of interpretation are also influenced by the development of the "substantive" statutory provisions on contracts, including the consumer rules. Interpretation, like any other judicial activity, involves the

[19] See, e.g., Palle Bo Madsen, *Aftalefunktioner* (The Functions of Contracts), Copenhagen 1983, pp. 27 ff., 62 ff.

[20] *Foreløbig redegørelse om formuerettens generalklausuler*, p. 27, cf. pp. 5 f.

[21] Somewhat similar thoughts underlie sec. 2–302 in the American Uniform Commercial Code (Unconscionable Contract or Clause), see, e.g., Hawkland, *A Transactional Guide to the Uniform Commercial Code*, vol. 1, Philadelphia 1964, pp. 46 f.

application of legal norms, and naturally interpretation must as far as possible fit in with the results which are sought by other rules. *The general judicial balancing of interests, which is reflected in the recent consumer rules, will clearly have an impact of similar importance on the rules on the interpretation of contracts.* In the continuing development of the law which has taken place during the past decade where consumer rules are concerned, the allocation of contractual risk, which is determined on the basis of the rules of interpretation as well as in accordance with the opportunities for adjustment provided by the Contracts Act, sec. 36, will take increasing account of wider *social criteria* at the expense of the subjective conceptions of the parties involved. Here, the decisive criteria must be the type, character, form, and mode of formation of the contract, and also the commercial status of the parties. It is natural for ordinary interpretation, as well as for an evaluation according to the Contracts Act, sec. 36, to make the distinctions between commercial agreements (between businessmen), civil agreements (between non-businessmen), and consumer agreements (between a businessman and a non-businessman) which as a result of consumer rules have now been introduced into contract law.[22]

However, the borderlines between the judicial rules and principles that apply to each of the three "blocks" mentioned within contract law are not always equally well defined. Although the statutory definitions of commercial agreements and consumer agreements are not binding outside their statutory fields of application, the principles of consumer legislation can, as mentioned under 2.2 *supra*, expand even into the field of commercial agreements when similar protective considerations apply. It is just as evident that the commercial or non-commercial character of a contract may be taken into consideration also in other respects than those which have been explicitly legislated for in special statutory rules. Some parts of the new consumer legislation rely quite obviously upon contractual interpretation. For instance, when the rules on some of the compulsory information about the terms of credit which, according to the Credit Sales Act, a seller must give to the buyer in consumer credit sales, do not provide for express sanctions, this is because the influence on the contract of absent or incorrect information in such cases is perhaps best considered in the concrete interpretation of the contract, in the same way as the ordinary contractual principles of interpretation will on the whole provide

[22] Up to now this has been more clearly expressed in *Swedish* court practice than in Danish, but there is no reason to believe that Danish courts will adopt a different standpoint. Cf. from Swedish court practice, e.g., 1979 NJA 401, where the Swedish Supreme Court explicitly defines the present contracts as consumer contracts, and subsequently takes a position on the particular problem of formation and interpretation of contract in the light of "the values which now are in evidence in the field of consumer protection". Likewise 1975 NJA 575. Cf. also Palle Bo Madsen, *op.cit.*, pp. 70 f.

for the necessary private law protection of the buyer.[23] When ordinary contractual legislation, as the case often may be, includes criteria such as "essential", "without undue delay", "without good reason", "in good faith", "reasonable", etc., which give the courts a certain authority to form their own discretionary judgment in consideration of the circumstances of the individual case, the courts would certainly also have an eye to the possible commercial nature of the matter, the expert knowledge of the parties, etc., and in this way let the social tendency contained in consumer law be reflected.

If we look at e.g. the Sale of Goods Act, which could roughly be said to consist of a "general part" in secs. 1–71, and "a special part" in secs. 72–86 containing some additional rules for consumer sales, it could, on the one hand, be said that these special rules do on the whole express ordinary legal principles in the field of sales, previously developed in the legal usage on the basis of the ordinary rules of the Sale of Goods Act. On the other hand, in certain decisive respects the special rules indisputably give far greater protection to the buyer than could be considered to exist outside consumer relations. Therefore, it seems natural to consider whether the consumer sale rules, where they give increased protection, could be expected to have repercussions on the ordinary rules on sale and contribute to a development of these rules in the direction of increased protection for the buyer outside consumer sales. Such an influence can hardly be denied and it is especially likely where in consumer rules criteria are used which according to the *travaux préparatoires* of the rules aim to give the consumer better protection than previously, but which at the same time are identical to the former criteria that now (solely) regulate the same situation outside consumer sales.

If we look at, e.g., the rules regarding the buyer's duty to give notice of defects, an absolute time limit of one year for such notice applies within the field of the Sale of Goods Act, since the buyer's claim will be rejected if he has not given notice within a year after delivery. This applies both in and outside consumer sales and results from sec. 83 and sec. 54 respectively of the Sale of Goods Act.[24] However, in both rules there are a few exceptions to the one-year time limit. Thus, it does not apply, e.g., when the seller has guaranteed the object for a longer period of time. The wording is identical in both sections, but according to the *travaux préparatoires* of sec. 83, which is a new consumer rule, a guarantee under this section must be presumed to exist to a greater extent than

[23] *FT* 1981–82 (2nd session), supplement A, pp. 1731 f.

[24] However, the absolute time limit of one year for a notice of defects is of course important only in respect of defects which only can be discovered after a certain period of time. If the defect becomes evident soon after the delivery of the article, the buyer must already at this stage give the seller notice of the defect if he does not wish to forfeit his remedies for defects, cf. the Sale of Goods Act, secs. 81 ff. and 51 ff., in and outside consumer sale respectively.

according to former court practice under sec. 54.[25] Even though a special property of the goods is not expressly guaranteed, there must, according to sec. 83, presumably exist an implied "guarantee" for the properties which in general are of decisive importance for the usefulness of goods of the type in question. To give one example, a person who builds his house himself must be able to claim that the bricks are faulty if they are not weather-resistant, even though this defect does not show itself until after the expiry of the one-year time limit. Therefore, the requisites of guarantee in the Sale of Goods Act, sec. 83, should, if anything, be understood as a criterion of fairness which, through interpretation and the implied terms of the agreement, should ensure that the notification of defects is not barred in an unreasonable way. However, the courts have so far been very reluctant to make exceptions on the basis of guarantees from the time limit of one year in the Sale of Goods Act, sec. 54, which now applies solely outside consumer sales. However, as sec. 83 is formulated in the same way as sec. 54, the interpretation of guarantee in sec. 83 will presumably have a certain impact on the interpretation of that concept in sec. 54, so that the increased buyer protection which at this stage has been implemented in the consumer law will on the whole probably lead to increased buyer protection.

The presumable impact of certain parts of the consumer rules on ordinary contract law will, however, probably be limited to contractual situations where, at least in part, the same protective considerations apply, cf. 2.1 *supra*. In a recent case (1982 UfR 915) concerning some defective tiles bought by a bricklayer to be used in a building for which he had secured the contract, the Eastern High Court of Copenhagen rejected the argument that a guarantee should be implied solely in view of the nature of the article or its expected durability beyond the period of one year in the Sale of Goods Act, sec. 54. It is not yet quite clear how firm a precedent this case will set, but the judgment should presumably not be understood as a flat rejection of the view that in the interpretation of guarantees under the Sale of Goods Act, sec. 54, one may take into consideration the commercial status of the parties and according to circumstances let a clear protective need draw in the direction of the consumer law guarantees in the Sale of Goods Act, sec. 83. Even before the recent implementation of consumer legislation there has apparently been a certain tendency in court practice to make such a differentiating evaluation of guarantees under sec. 54.[26]

[25] Report no. 845/1978 on Consumer Sale, pp. 43 and 86, and also *FT* 1978–79, supplement A, p. 2160.

[26] See also 1960 UfR 1048 (on sale between businessmen) and 1968 UfR 828 (on "consumer sale"). In principle, both these cases involve the same problem concerning guarantees of authenticity, but in relation to "the vouching" according to the Contracts Act, sec. 54, they had different results, cf. commentaries of Supreme Court Justice Th. Gjerulff in *TfR* 1961, pp. 301 ff.

2.4. *The impact of the Marketing Practices Act on contract law*

According to the *Marketing Practices Act, sec. 1*, briefly mentioned under 1.3 *supra*, private business activities and public activities comparable herewith do not allow the carrying out of actions contrary to "good marketing practices". In this connection the expression "marketing" should be understood as including every action carried out for business purposes. Therefore, "marketing" does not only cover advertising, publicity, and modes of contracting, but also the appearance and content of the contract itself. One of the most important fields regulated by the Marketing Practices Act, sec. 1, is, therefore—in business relations as well as in consumer relations—*unreasonable contract terms*.

However, a violation of the Marketing Practices Act, sec. 1, is in itself not punishable, but can only be prohibited under sec. 14 of the Act, though a subsequent violation of such an injunction is punishable by a fine or imprisonment, cf. sec. 19(1) of the Act. The same applies to violation of the Marketing Practices Act, secs. 3 and 4, which require businessmen to give proper guidance in the individual marketing situation and also to refrain from using expressions such as "guarantee" or the like, unless the other party really is promised a better legal position than according to private law legislation. Among the provisions of the Marketing Practices Act, secs. 1–4, only sec. 2, which requires businessmen to refrain from using incorrect, misleading, or unreasonable insufficient specifications, is provided with a direct sanction, cf. sec. 19 of the Act.

Therefore, the provisions of the Marketing Practices Act, secs. 1–4, are likely to have at least as much importance through *contract law*, which intervenes directly in individual legal relations and is largely *influenced by and corresponds to legal marketing norms*. The Marketing Practices Act, sec. 1, corresponds most directly to the Contracts Act, sec. 36, which opens up the possibility of setting aside agreements wholly or in part when it would be unreasonable or at variance with fair conduct to base a claim on such agreements, cf. 1.3 *supra*, while the rules on information in the Marketing Practices Act, secs. 2–3, correspond just as directly to the Sales of Goods Act, sec. 76, according to which incorrect or misleading information or the setting aside of the duty loyally to disclose all information relevant to the buyer's evaluation of the article in a consumer sale can constitute a defect and give the buyer authority, e.g., to cancel the contract and claim damages. Besides, there is great similarity between the substantive contents of the requirements of the Marketing Practices Act and the private law obligations imposed on the professional and commercial contractual party.

While, as previously mentioned (1.2 *supra*), the Marketing Practices Act is

not solely a Consumer Act, but on the contrary aims at a balanced protection of both consumers and businessmen, the corresponding norms in the private law legislation (with the partial exception, however, of the Contracts Act, sec. 36) only find explicit expression in the consumer rules. However, this should *not* be taken as an indication that the norms of the Marketing Practices Act find their private law correspondence solely within consumer law. On the contrary, the fact that the marketing rules in question, which apply to *all* business activities, find an expressed and detailed correspondence in the private law consumer rules, and at the same time the fact that the legislators have intended to improve in general the correlation and interplay between public law and private law rules, can be seen as further arguments to the effect that the increased protection provided in consumer law may to some extent influence the application of the law within ordinary contract law.

In line with the influence which the new consumer law must be considered to exert on contract law relating to the formation and interpretation of contracts, cf. 2.3 *supra*, it is clear that the way in which the goods or services have been marketed, viewed in the light of ordinary marketing norms, must also strongly influence any contractual relation and the fixing of the legal effects of the particular contract. After the adoption of the rules of the Marketing Practices Act one would presumably be more inclined to regard the information given in advertising and publicity as an integral part of the contract, since (having in fact been known to the buyer) it must be considered likely to have influenced the buyer's evaluation of the article or service in question or the contract in other respects. In 1980 UfR 756 a piece of information in the purchase conditions, which a real estate agent had worked out in connection with a sale of real property, was found to imply a guarantee for the buyer irrespective of the fact that the information was not repeated either in the contract note or in the deed. From the practice of the Consumer Complaints Board there are also several examples of a contract entered into in this way having been interpreted in accordance with a previous advertisement.[27] In view of the actual protective intention, the inclusion of information from advertisements, etc., as a conclusive fact of interpretation in particular contract relations is of course quite adequate in consumer relations, but it could certainly also occur in other relations where a similar need for protection makes this desirable.

2.5. *Final remarks*

The development in the last few decades of an actual *consumer law*, which can with some justification be called an independent legal discipline, has brought

[27] E.g. the Consumer Complaints Board's annual report (*Forbrugerklagenævnets Årsberetning*) 1980, p. 99, and 1981, p. 70. Cf. also 1980 UfR 255.

certain innovations into Danish contract law. As opposed to, e.g., German and French law, where the contractual rules have long been clearly divided into a civil sphere (*Bürgerliches Gesetzbuch* and *code civil*) and a commercial sphere (*Handelsgesetzbuch* and *code de commerce*), respectively, the aim up to now in Danish—and Scandinavian—law has been to maintain the unity of contract law so that in principle common rules for the whole of the contract law should apply. However, there has also been some talk of a bipartition of contract law since special rules for commercial agreements have had to be introduced, although the *aim* of the legal development has always been to maintain as far as possible the common provisions for all contracts. However, a rejection of the aim of unity is a prerequisite for the beginning of a consumer law, and one can now with some reason regard contract law as *divided into three parts*, a commercial sphere, a civil sphere, and a consumer sphere (cf. at footnote 22 *supra*).

The consumer movement and consumer law have had the important objective and effect of promoting the *social tendency* in contract law, which in places has manifested itself in new legal thinking characterized by untraditional solutions. It is here that consumer law is important for ordinary contract law. On the other hand, the tripartition of contract law should not be taken too literally since, as noted, the lines of demarcation are sometimes rather blurred. However, it seems reasonable to expect that the principles of protection which have manifested themselves in consumer law, especially through the Contracts Act, sec. 36, and the rules of interpretation, will expand into other parts of ordinary contract law.