Regulating Contract Terms in the United States and Sweden: A Comparative Analysis of Consumer Protection Law and Policy

Bruce A. Silverglade
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I. INTRODUCTION

In recent years, the regulation of standard form contracts has begun to receive serious attention by consumer advocates and government alike. The standard form contract is often defined as a contract that contains predrawn terms and is intended to be used in a large number of individual transactions, irrespective of individual differences. In the large majority of cases, it is drawn unilaterally by the seller, the party in the stronger bargaining position. The standard form contract has found wide acceptance among American trade and industry, since it eliminates the time and expense of individual negotiations. While transactions become faster, more efficient and more predictable for the seller, the use of standard form contracts creates special problems for the consumer.

This Note will examine the innovative Swedish approach to regulating standard form contracts, which will then be contrasted with the more traditional American approach. After this initial discussion, an examination will be made of various factors which have facilitated and hindered the development of fundamental reform in Sweden and the United States respectively. A final analysis reveals that a new approach may be required in the United States.

II. FREEDOM OF CONTRACT AND ITS RELATION TO STANDARD FORMS

When the contemporary consumer purchases goods or services from today's typical retailer, he or she no longer bargains over terms. Rather, consumers are handed a pre-printed standard sales form to which they simply agree. In


practically all cases, 99% according to one study, standard form contracts between sellers and consumers lack the bargain element of the traditional offer-acceptance-mutual assent contract model. Consumers enter into such agreements with no knowledge of the actual terms or possibility to influence their bargaining position. The "small print" is either not read by the consumer, or not fully comprehended, since it is generally written in technical language. The use of standard form contracts overlaps competitive boundaries and consumers have no practical alternative but to accept the printed terms or deny themselves the material benefits of a consumption oriented society.

Because such contracts lack the traditional element of bargaining and mutual assent, many commentators have suggested that such agreements should be treated outside of the regular law of contracts. However, in the United States, the law has been slow to change and a serious gap remains between theory and reality.

The widespread, unregulated use of standard form contracts is largely due to the concept of freedom of contract which has traditionally been recognized as the foundation of our system of contract and commercial law. The freedom of contract concept arose in conjunction with the doctrine of laissez faire created by 19th century economists.


5. TIME, April 10, 1978, at 56. New York is the only state which has enacted a statute requiring the use of plain language in consumer transactions. 1977 N. Y. Laws ch. 747; 1978 N. Y. Laws ch. 199. However, some sixty language simplification bills are pending in 27 states. Siegel, 'Plain English' Results: Companies Heed Sullivan Law; Public Yawns, N.Y. Times, April 1, 1979, § 3, at 4, col. 3.

6. Sheldon, supra note 1, at 18; Rotkin, supra note 2, at 606.


8. Kessler, supra note 7, at 637-38; Sheldon, supra note 1, at 18.


11. Williston has stated: "Adam Smith, Ricardo, Bentham and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress; and imposed their theories on the educated thought of their times with a thoroughness not common in economic speculation." Williston, Freedom of Contract, 6 CORNELL L.Q. 365, 366 (1921); see also G. Gilmore, THE DEATH OF CONTRACT 6-7 (1974) [hereinafter cited as G. Gilmore].
dividends, unregulated by government restrictions, interact freely. They meet, bargain and in their own interests agree to enter contracts. Traditionally, the notion of freedom of contract compelled legislatures to abstain from regulating sales agreements. Under the same reasoning, courts, when deciding to enforce sales agreements, abstained from evaluating the content of the terms and simply examined whether or not the contract was properly formed. Typically, a court begins its analysis by asking "Did the parties agree?" and then examines the nature of offer and acceptance, the existence of consideration, the competence of the parties, the presence or absence of duress, and the accuracy of representations made during negotiations leading to the agreement.¹²

Today, however, the law’s reliance on the freedom of contract concept defies the reality of the contemporary consumer sales transaction. The reluctance of legislative bodies to enact comprehensive regulations of standard form contracts and the judiciary’s emphasis on the bargaining process which occurs during the formation period is increasingly inappropriate.¹³ The reason is that the freedom of contract concept simply allows sellers, because of their superior bargaining power, to draft standard form contracts which place a multitude of unfair terms on the consumer. The consumer, who theoretically also possesses freedom of contract, is in reality unable to bargain with the seller and improve his or her position. Because of the superior bargaining power of the seller, freedom of contract has become a unilateral privilege resulting in a system of law where sellers are free to draft pre-printed contracts which consumers are compelled to accept.

Despite the fact that the freedom of contract concept has facilitated the use of standard form contracts and has hindered the regulation of such contracts by government, the last decade has been marked by numerous attempts to regulate the use of standard form contracts on a national level.¹⁴ Credit terms of consumer contracts are now controlled in part by several statutes, including the Consumer Credit Protection Act,¹⁵ the Fair Credit Reporting Act,¹⁶ and the Equal Credit Opportunity Act.¹⁷ Warranty provisions of consumer contracts for the sale of goods have become regulated by the Magnuson-Moss Warranty Act.¹₈ In addition, many types of consumer contracts such as door-

¹² See generally G. Gilmore, supra note 11, at 7-14, where the author cites the first edition of S. Williston, The Law of Contracts (1920).
¹³ Llewellyn, Book Review, 52 Harv. L. Rev. 700, 704 (1939); Kessler, supra note 7, at 629-34.
¹⁴ Consumer problems concerning standard forms also have received substantial attention from state governments. For example, most regulation of insurance contracts is found on the state level. This Note, however, will be confined itself to a discussion of progress on the national level, either through federal action or uniform state law, in part to facilitate a comparative analysis of overall national policy between the United States and Sweden.
to-door sales agreements19 and mail order purchases20 have become the subject of trade regulations promulgated by the Federal Trade Commission.21 Furthermore, the Uniform Commercial Code, now adopted in every state except Louisiana, has facilitated the uniform development of commercial law on the national level. Particular sections of the U.C.C., such as § 2-302 dealing with unconscionable sales agreements, specifically govern the types of consumer sales agreements that will be enforced by the courts.

However, many abuses still exist in this area and the work of the consumer lawyer and advocate is far from completed. Too often, the consumer is still subjected to oppressive contract terms by trade and industry. Millions of consumers and billions of purchasing dollars are involved22 and, arguably, oppressive contract terms disrupt the proper functioning of our market-oriented economic system.23 This failure of current government activity has occurred because most of the legislation, administrative regulations and judicial activity directed at protecting the consumer, have attempted to remedy the situation without fundamentally altering the freedom of contract concept. Rather, government activities have been directed at safeguarding the consumer's interest while leaving the freedom of contract concept largely intact.

In analyzing this matter, it may be helpful to view current government activity as attempting to remedy only the "symptoms," but not the cause of problems in the standard form contract area. More specifically, current government activity is directed at remedying symptoms such as misleading credit terms, deceptive warranties, and unfair door-to-door sales practices. Such activity does not attempt to remedy the root problem which in part creates such unfair practices; namely freedom of contract. Elimination of such symptoms by government, through a patchwork scheme of legislation, administrative regulations and judicial activity may alleviate the most obvious oppressive conditions, but has not and will not eliminate the cause of such conditions. This latter result can only be accomplished by a coordinated program of legislation, administrative rule making and reform of common law doctrine, directed at adjusting the notion of freedom of contract to the reality of the contemporary consumer sales transaction.24

21. Of course, the last decade is not the first period in which the federal government has engaged in the regulation of contract terms. In past years, substantial federal activity has been directed towards the regulation of contracts for communications services, food and drugs, common carriers, and energy, among other areas. Yet, this earlier period of regulation differs from the current period in the regulation of contracts for goods and services often were directed towards furthering industry interests, as well as the consumers' interests.
22. Slawson, supra note 3, at 529.
23. Id. at 531.
24. Of course, economic and social costs exist in government intervention and the cost of implementing and administering a remedy generally should not exceed the cost of the imperfection
The problems underlying the use of standard form contracts transcend national boundaries. It is useful, therefore, to examine how other nations have attempted to protect consumers in this area. As a result of varying political systems, national legislative traditions, and social and economic conditions, some nations have been quick to develop reforms in this area while others have been slow to take action. At the present time, the Scandinavian countries, particularly Sweden, appear to be most active in this field.

The Swedish effort is of particular interest because that nation has taken a number of pioneering steps towards protecting the consumer who signs a standard form. In particular, the Swedish reforms are directed beyond just alleviating "symptoms" and attempt to remedy the cause of the problem itself. In analyzing the use of standard form contracts, Sweden has recognized that effective regulation of standard forms cannot be accomplished without reform of the freedom of contract concept as it applies to consumer transactions.

In implementing its consumer policies in this area, Sweden has enacted several comprehensive statutes that provide not only for administrative regulation, but also for alteration of contract law doctrine. The scheme is unique in that it weaves traditional administrative control with reform of private law into a system that functions as a whole. The result may prove to be a fundamental improvement in the consumer's position.

corrected by it. Comprehensive public policy analysis is required to even approximate the actual costs of government policy and is too lengthy a task to be presented in this Note. Yet, such analysis is recommended before attempts at reform are made.

25. Standard contract provisions and standard form contracts are used extensively throughout the European continent and in Great Britain. While the use of standard forms makes mass transactions easier, there are substantial dangers with their use. Von Calmmerer, Standard Contract Provisions and Standard Form Contracts in German Law, 8 VICT. U. WELLINGTON L. REV. 235 (1976).


27. These pioneering steps taken by Sweden to deal with the standard form contract problem on a comprehensive basis have been adopted in addition to more traditional legislation designed to deal with product safety and warranty protection. These latter legislative enactments are quite similar to steps that the United States already has taken. This Note will emphasize only the former, pioneering developments.


29. As in the United States, actual progress in terms of tangible impacts on the lives of consumers, and the health of the economic system, is difficult to assess. Consumer protection measures in the last decade are still relatively new developments and, as such, comprehensive evaluations may not be possible for many years. Nonetheless, Swedish progress, in terms of legal reform, has made that nation a worldwide leader in the area.
The Swedish approach contrasts with American efforts. Current administrative regulations in the United States operate in a vacuum, as they often conflict with existing common law. The result is a patchwork approach to consumer problems, and a lack of fundamental reform.

III. TRADITIONAL CONTROL OF CONTRACT TERMS IN SWEDEN

The first measure adopted in Sweden which reflected a new attitude toward the freedom of contract principle was the enactment in 1971 of an Act to Control Contract Terms, also known as the Contract Terms Act. Prior to this time, Swedish institutions had adhered rather strictly to the freedom of contract doctrine, despite the increasing use of standard form contracts which had rendered the doctrine obsolete. The basic statutes in the area where the Sale of Goods Act of 1905 and the Contracts Act of 1915, both of which reflected the traditional freedom of contract principle. The only qualification in these acts is a requirement that the circumstances of the creation of contract terms must not be "incompatible with honor and good faith." In this period, Swedish courts were generally hesitant to intervene in private agreements. In a few cases, covert techniques occasionally were used by courts wishing to void particularly offensive terms.

As in the United States, early attention was given to the regulation of contracts dealing with medicine and foodstuffs. In the 1920s, mandatory private law rules were introduced which were directed at safeguarding the consumer's interest in installment and insurance contracts. During the 1940s, problems

32. Law of July 18, 1905, [1905] SFS 38 (Swed.).
33. Law of July 10, 1915, [1915] SFS 218 (Swed.).
34. Id. § 33.
35. For example, the principle of contra bonos mores (invalidating contracts contrary to good practice or morals) has found scant support in Swedish law. Sheldon, supra note 1, at 20 n.14.
36. The approach of Swedish courts to covert control of unduly one-sided standard contract terms has been to limit the application of onerous clauses through restrictive construction. For example, in 1957 Nytt juridiskt arkiv. avd. I [N. J. A.] (Swedish Supreme Court reports) 426 it was held that a garage owner's exemption from the obligation to pay for damage to a car parked in his garage did not include such damage as was caused by a garage watchman who in the course of his employment used the auto for a purpose inconsistent with the contract. Another case, 1971 N. J. A. 51, concerned a used car that was sold to a consumer under an oral misrepresentation that it was free from rust damage. The Swedish Supreme Court concluded that the conduct of the seller created a right to rescind the contract in spite of the fact that the car was sold in accordance with the general term of the trade, "in existing condition." According to Bernitz, Standard Contracts, supra note 28, at 34, one may find in certain cases that a court has carried a restrictive construction so far that a term is "interpreted out" of a contract.
of war shortages led to the establishment of state information bureaus to provide consumers with needed advice. In the 1950s, this activity was extended by the creation of various consumer agencies whose primary purpose was to conduct research into consumer problems, such as the use of standard form contracts. 39 Additionally, various types of industry-wide self-regulation efforts were commenced.40 The contemporary period of consumer protection activity in Sweden began with the passage of the Market Court Act 41 which created two important institutions: the Market Court 42 and the Consumer Ombudsman. 43 The Market Court is a court of first and last resort that was initially created to deal only with cases arising under the Marketing Practices Act. It is empowered to issue injunctions enforceable by a fine. This special tribunal is headed by an impartial chairperson, and staffed by consumer protection specialists and laypersons. The Consumer Ombudsman is a government appointee and is responsible for administration of the Act. The Ombudsman’s office investigates unfair market practices, seeks to obtain voluntary adjustments through negotiations, and brings actions before the Market Court. 44

SFS 77 (Swed.); see Sheldon, supra note 1, at 20 n.17; Bernitz, Swedish Consumer Law, supra note 26, at 15-16.

39. These included the National Institute for Consumer Information, Institute for Information Labeling, National Consumer Council and National Price and Cartel Office. See Sheldon, supra note 1, at 23 n.27.

40. Swedish trade and industry groups established special business practices councils to consider consumer problems. Also an active on-going revision of consumer standard forms has taken place for a long period of time within trade and industry. Examples are offered at 1971 Riksdagen Protokoll Bihang [S. Prop.] (Record of Riksdag proceedings) 15, at 15-17 (Proposal for Act Prohibiting Improper Contract Terms), as cited in Sheldon, supra note 1, at 21 n.19.


43. Id. § 11.

IV. CONTEMPORARY REGULATION OF CONTRACT TERMS IN SWEDEN

As a result of the inadequacies of prior legislation, and the recognition by the Swedish Government that effective regulation of standard form contracts required a new attitude towards reform of the freedom of contract concept, the Act Prohibiting Improper Contract Terms was enacted. The structure of the Act, which is enforced by the Consumer Ombudsman and the Market Court, is rather simple. Its only substantive provision is a general clause in the first section:

If an entrepreneur, when offering a commodity or a service to a consumer for personal use applies a term which, in regard to the payment and other circumstances, is to be considered as improper towards the consumer, the Market Court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a term substantially the same in similar cases in the future. 46

The legislative history of the Act sets the standard for judging contract terms:

A contract term may typically be regarded as improper towards consumers if deviating from valid dispositive law, it gives entrepreneurs an advantage or deprives consumers of a right and in that way produces a weighing of the parties' rights and obligations so lopsided that a reasonable balance between the parties no longer exists. 47

The Act is directed toward "entrepreneurs" which have defined as any natural or legal person who professionally carries on an activity of an economic nature. 48 The Act applies to "consumers" which are parties who acquire goods and services for final consumption and private use. 49 In 1977, the Act was amended to cover sales and leasing of housing and other contracts in the real property area. 50 Before terms may be voided by the Market Court under the Act, the entrepreneur must "apply" the term. This condition is satisfied if in at least one case, the entrepreneur has actually called for the term to be included in a consumer contract. 51

46. Id. § 1.
47. 1971 S. Prop. 71, as cited in Bernitz, Standard Contracts, supra note 1, at 45.
48. 1970 S. Prop. 57, at 90, as cited in Sheldon, supra note 1, at 34 n.102.
49. 1971 S. Prop. 15, at 81, 86, as cited in Sheldon, supra note 1, at 34 n.104.
50. Letter from Professor Ulf Bernitz to author (Mar. 3, 1978) [hereinafter cited as Letter from Prof. Bernitz].
51. 1971 S. Prop. 15, at 86, as cited in Sheldon, supra note 1, at 34 n.106. For a more general discussion of the implications of the Act, see Bernitz, Standard Contracts, supra note 28, at 43-46.
If the above conditions are satisfied, the Market Court may issue an injunction if the public interest so requires. Additional legislative history indicates that the Act protects consumers as a collective group and not as injured individuals. The emphasis is placed on systematic revision of terms which have broad impact on market problems. Standard form contracts are never specifically mentioned in the Act, but the public interest provision implies that they are a central target because an individually negotiated contract could rarely satisfy this requirement. The injunctive remedy itself is limited to a prohibition of the same or similar contract clauses, in terms of their legal or economic effect. The Act limits injunctions to future activities, and does not affect contracts formed prior to the Act. The Contract Terms Act represents a pioneering legal innovation in consumer protection by explicitly empowering a government agency to regulate contract terms and implicitly recognizing the adverse impact of standard form contracts on consumer interests.

To guide the Consumer Ombudsman in the initial enforcement of the Act, a list of obvious violations was comprised by the Minister of Justice. Included in the list were:

a) terms by which a purchaser is held unilaterally bound to an order with no cancellation rights while the seller receives an unlimited approval period;

b) terms which contain the clause "in existing condition" for the sale of factory new goods;

c) terms which are "warranties" yet give the purchaser no right to cancel the purchase for defects in the goods, even if the purchaser receives some other rights, e.g., to have the goods repaired;

d) terms which give a seller, manufacturer or general agent the right to decide unilaterally whether goods are defective and whether a defect comes within their responsibility;

e) terms which give the seller the right to raise the contracted price because of circumstances outside his control.

By the second year after enactment of the Act, the Consumer Ombudsman had entered into negotiations concerning improper terms in standard forms with numerous trade organizations, including the following:

a) Swedish Association of Auto Dealers and Service Shops;
b) Association of Finance Companies;
c) Federation of Swedish Wholesale Merchants and Importers;
d) Swedish Motor Industry and Wholesale Association;

52. Sheldon, supra note 1, at 34; Rotkin, supra note 2, at 616-17.
53. 1971 S. Prop. 15, at 65, as cited in Sheldon, supra note 1, at 35 n.111.
55. Sheldon, supra note 1, at 36.
A few specific examples of the Consumer Ombudsman’s negotiations indicate the potential impact of the Act. In a case involving the Association of Electrical suppliers, the Ombudsman has challenged several terms in the regulations for the sale of electricity to household consumers. In the past, utilities could discontinue service following any delay in payment and were allowed to make preliminary charges based on a customer’s past consumption rates. The policy of discontinuing service for even minor delays in payment was shown to have serious effects on families with children and the aged and has been abandoned. Relating to the practice of assessing preliminary charges, the Consumer Ombudsman persuaded the industry to grant adjustments to consumers upon a showing of cause. In another case, involving the Association of Swedish Driving Schools, the Consumer Ombudsman was confronted with a trade that did not utilize written contracts. The Ombudsman believed that, lacking written forms, the terms of the oral contracts were so unclear that they should be considered improper under the Act. As a result of negotiations, the Ombudsman has created a new requirement that contracts must include a written presentation of terms. In two other cases involving the laundry and the auto repair industry, the Consumer Ombudsman has taken a similar position.

V. RECENT TRENDS IN SWEDISH CONTROL OF CONTRACT TERMS

The Contract Terms Act has been augmented by several other enactments of the Swedish Riksdag (Parliament). In 1974, the Consumer Sales Act became law and provided a series of mandatory rules giving the Consumer basic rights as a purchaser of goods. The Act recognizes the impact of standard forms and specifically regulates consumers’ rights in cases involving defective goods, warranties, and goods not delivered at the agreed upon time. It was

56. D. KING, CONSUMER PROTECTION EXPERIMENTS IN SWEDEN 57 (1974) [hereinafter cited as KING, EXPERIMENTS].
57. Svenska Eleverksföreningen (2645/71), Konsumtombudsmannen [KO] no. 4, at 37 (July 1972), as cited in Sheldon, supra note 1, at 53 n.244.
58. Id.
59. Sveriges Trafikskolors Riksförbund (17/72), KO no. 5, at 34 (Sept. 1972), as cited in Sheldon, supra note 1, at 54 n.246.
60. Elag-Produkter AB (1370/71), KO no. 1, at 32 (Jan. 1972), as cited in Sheldon, supra note 1, at 54 n.250.
63. Id.
intended to complement the non-mandatory requirements of the Sale of Goods Act. The Consumer Sales Act applies not only to the sales of consumer goods by sellers in the ordinary course of business, but also to purchases from other parties such as agents of the seller.\textsuperscript{64} In this manner, the Act covers sales of used cars by dealers (who often act as agents for earlier car owners) and similar arrangements.\textsuperscript{65}

Overall, the Consumer Sales Act interacts harmoniously with the Contract Terms Act in that it defines the latter by providing examples of the types of contract terms that should be deemed improper. The Contract Terms Act provided no real standard or direction for its chief enforcer, the Consumer Ombudsman, but he can now use later enactments as guidelines.\textsuperscript{66}

The passage of the Consumer Sales Act is being followed by a new Consumer Services Act. This new legislation will be directed to consumers who enter contracts for the supply of services such as auto repairs, medical care and legal advice.\textsuperscript{67} Similar to the Consumer Sales Act, the new legislation will define more fully the effect of the Contract Terms Act on service agreements and provide the Consumer Ombudsman with guidelines and direction in the area for future activity. The Consumer Services Act will provide a number of general rules applicable to the entire service industry and several specific rules to cover special problem areas. A final draft of the Act is expected in 1979.\textsuperscript{68}

The Contract Terms Act and its companions, the Consumer Sales Act and the Consumer Services Act, represent a unique body of administrative law which recognizes that abuses in the standard form area are "symptoms" that result from the law's adherence to the freedom of contract concept. Additionally, this body of law recognizes the need to alter the role of the freedom of contract doctrine in consumer transactions, in light of the widespread use of standard form contracts. Yet, Sweden also has recognized the limits of administrative control and the difficulty in institutionalizing new concepts dictated by regulations. Thus, two critical steps were taken to ensure that individual consumers could utilize the legal system to protect themselves from oppressive contract terms.

The first was an addition to the Consumer Sales Act which gives the consumer a private right of action to enforce the Marketing Act.\textsuperscript{69} The second

\begin{footnotes}
\item[64.] Id. § 1.
\item[65.] Id.
\item[66.] See Bernitz, \textit{Standard Contracts}, supra note 30, at 46-47. A section of the Consumer Sales Act also changed the "improper" standard of the Contract Terms Act to a "reasonable" standard, but this alteration is considered to be merely semantic by most commentators. Law of April 12, 1973, § 3, [1973] SFS 138 (Swed.); see Sheldon \textit{supra} note 1, at 63.
\item[68.] Letter from Prof. Bernitz, \textit{supra} note 50.
\end{footnotes}
measure taken to compensate for the limits of administrative control concerns a far-reaching proposal for the reform of civil law doctrine in the contract area. In 1976, the first of a series of civil law revisions was enacted which, in effect, may alter long-standing doctrines developed by the Swedish courts. This far-reaching initiative evolved from the lack of coordination of administrative law developed by the Consumer Ombudsman under the Contract Terms Act and the traditional civil law used by parties engaged in private litigation.

The problem which spurred this initiative began when the terms enjoined as improper by the Market Court were not necessarily voided or improper before the regular courts. Contracts entered into prior to a particular Market Court action, or contracts used by someone other than the entrepreneur enjoined by the Market Court, could not be altered by the regular courts under the Act. Furthermore, general dissatisfaction with the traditional civil law doctrine increased as precedent under the Act developed. Consequently, the Government felt that greater degrees of congruity in private and administrative law were desirable. Thus, means have been sought to provide courts with wider possibilities to set aside or modify contract terms which are improper or unreasonable in a particular case. In 1976, the first recommendation of the Commission working in the general area became effective when a "Provision in General Terms" was added to the Contract Terms Act of 1971 allowing courts to adjust contract terms which are deemed unreasonable, in accordance with the Consumer Ombudsman’s guidelines in the area.

The enactment of civil law general clauses, which permit courts for the first time to comprehensively examine the content of contracts and adjust the terms accordingly, ensures that administrative progress by the Consumer Ombudsman will not continually conflict with traditional civil law doctrine. Overall, the scheme is unique in that it weaves together administrative control and civil law reform into a system that functions as a whole. This approach ensures that administrative regulations of standard form contracts will be institutionalized in the Swedish law system and that consumer protection policies will harmonize with that nation’s system of private law.

In summary, control of contract terms in Sweden is accomplished by a complete legal network that embraces administrative regulation, private rights of action under consumer legislation, and reform of traditional judicial doctrine in the contract area. The scheme implicitly recognizes that oppressive standard form contract terms are largely the result of the law’s adherence to the

71. For a discussion of the practice and procedure of the Market Court in this area, see Sheldon, supra note 1, at 40-44.
72. Bernitz, Standard Contracts, supra note 28, at 47.
73. Letter from Prof. Bernitz, supra note 50.
74. Bernitz, Swedish Consumer Law, supra note 26, at 36.
freedom of contract concept in a time when consumers cannot "bargain" or exercise their theoretical rights in any practical manner. The Swedish approach recognizes that government regulations that leave the freedom of contract concept intact will only alleviate "symptoms," but not causes of the problem. As such, the Swedish approach represents an innovative pioneering effort and is in contrast to efforts to control contract terms in the United States.

VI. CONTROL OF CONTRACT TERMS IN THE UNITED STATES

A. Federal Regulation of Contract Terms

Unlike Sweden, the United States has not yet taken measures which explicitly recognize that remedying the underlying problem of oppressive terms in standard form contracts requires alteration of the freedom of contract doctrine as it applies to consumer transactions. The United States does not have a comprehensive Contract Terms Act nor a National Consumer Act which would give consumers similar rights as those provided in the Swedish Consumer Sales Act and the forthcoming Consumer Services Act.75

The Federal Government, however, does carry on a great deal of consumer protection activity that is directed toward controlling contract terms. Consumer contracts for food and drugs,76 communication services,77 energy,78 and common carriers,79 among others, are regulated in whole or in part by various agencies of the Government. In addition, credit clauses of most consumer contracts are regulated by the Truth in Lending Act,80 the Equal Credit Opportunity Act81 and the Fair Credit Reporting Act,82 and warranty terms are controlled by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.83 Still, none of these measures is directed toward comprehensively regulating the typical standard form contract. Some measures are directed only to specific types of contracts while others are limited to clauses of consumer contracts which have been open to particular abuse by trade and industry. As such, these measures attempt to remedy only the visible symptoms of consumer abuse and fail to recognize that such symptoms result from a larger problem.

75. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES 49-60 (1972) [hereinafter cited as CLARK & FONSECA]. The National Consumer Act was drafted by the National Consumer Law Center in 1970 as a model for future legislation.
76. 16 C.F.R. §§ 209, 419, 424 (1978); see also 21 C.F.R. §§ 1, 3, 125, 201, 226, 861 (1978).
While the United States lacks a comprehensive legislative enactment that regulates contract terms, several potential sources of contract control do exist. The most prominent source of potential control are the Wheeler-Lea amendments to the Federal Trade Commission Act. Under these amendments, the Federal Trade Commission has the power to restrict unfair and deceptive trade practices in commerce. While this mandate may provide the Commission with the power to broadly regulate contract terms, it has unfortunately paid little attention to this area. Rather, the FTC’s policy, in part, has been to restore the power of the consumer to the point that it would theoretically enjoy in a competitive market economic system. Thus, a large portion of the Commission’s work has been directed toward providing the consumer with information so that he or she may be able to make an informed choice as to whether to enter a sales agreement. Similarly, a great deal of Commission activity has been aimed at eliminating misleading or deceptive sales practices which would undermine the consumer’s bargaining position, e.g., the FTC’s proposed rule on food advertising, which in part is directed at protecting consumers who wish to purchase natural, organic, low cholesterol and similar type “health foods,” states:

Statements [concerning cholesterol content] should always include the caveat that the relationship of diet to the risk of heart or artery disease is the subject of controversy among scientific experts, but the prevailing view in the scientific community is that the relationship exists and prudence in the diet is indicated although not established. . . . No food should ever be described as a health food because this expressly represents that such products are superior to other products and that claim cannot be justified under any standard.

Despite many recent changes in direction and policy, the Commission still states that the chief mission of its Bureau of Consumer Protection is to:

1. Ensure that consumers can make informed buying decisions based on accurate, comprehensive and useful information about goods and services. This entails the development of sound test protocols and uniform terminology as well as the requirement that pertinent information is disclosed to consumers.
2. Eliminate false or unsubstantiated claims and increase the

84. 15 U.S.C. § 41 (1976); see also Rotkin, supra note 4, at 620.
reliability of advertising so that consumers may better assess competing products or services and make more informed purchasing decisions.88

Overall, the Commission activity in the contract terms area is in line with the traditional concept of freedom of contract which compels judicial bodies to focus on the bargaining process, and to ignore the content of contract terms. The Commission simply concentrates its efforts on ensuring that the consumer will have a sufficient amount of information to enable him or her to "bargain" and make an informed choice.89 Regulations which require the disclosure of specific information to the consumer are important consumer protection tools. However, they are particularly ineffective in combatting consumer injuries which result from the use of standard form contracts.

In almost all cases, consumers can never bargain with the merchant who uses a standard form contract, no matter how much information they have concerning the sales transaction that they wish to enter. Typically, the use of standard forms overlaps competitive boundaries and leaves the consumer with no practical alternative. In a few instances, the Federal Trade Commission has recognized this fact and has taken appropriate, if limited, action. The Commission has promulgated rules directly controlling the terms of door-to-door sales contracts,90 mail order contracts,91 so-called negative option sale agreements,92 vocational school and home study contracts.93 The Commission also has adopted rules controlling warranty and credit terms of consumer contracts.94 Yet, these rules are limited only to the areas most open to blatant abuse. Future Commission rulemaking activity under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,95 may begin to recognize the need to limit the freedom of contract doctrine and comprehensively regulate standard form contracts.96 Still, the FTC Improvement Act

89. See the Commission’s recently promulgated rule on Advertising of Ophthalmic Goods and Services, 16 C.F.R. pt. 456 (1978) which, in part, encourages advertising of prescription eyeglass prices.
90. 16 C.F.R. § 429 (1978).
94. See, e.g., 16 C.F.R. § 701 (1978) which requires disclosures of written consumer product warranty terms and conditions, and 16 C.F.R. § 433 (1978) which alters the holder in due course doctrine as it applies to consumer contracts.
96. See, e.g., the Commission’s Proposed Trade Regulation Rule on Unfair Credit Practices, 40 Fed. Reg. 16347 (1975). See also the following FTC proposed trade regulation rules: Hearing Aid Industry, 40 Fed. Reg. 26646 (1975) (which gives the consumer the right to cancel purchases
does not specifically empower the Commission to review standard form contract terms. The lack of a specific mandate may hinder Commission activity in the area. Furthermore, the United States has no equivalent of the Swedish Consumer Sales Act or the Consumer Services Act which enumerates uniform consumer rights and provides a private right of action for Swedish consumers to enforce the Market Practices Act. The FTC Act does not provide a private right of action and amendments to this effect have been repeatedly rejected by Congress.97 Additionally, the passage of a National Consumer’s Act, proposed several years ago, has not received acceptance by most state legislators.98

B. State Regulation of Contract Terms

On the state level, American consumers must look, in part, to the merchant-oriented Uniform Commercial Code for a definition of their rights in sales transactions. The U.C.C., while primarily applicable to merchants in the sale of goods, provides some rights to consumers in limited situations. Section 2-302 of the Code, contains what may be the law’s primary deviation from the freedom of contract principle.99 This section, entitled “‘Unconscionable Contract or Clause,’” appears to permit a court to examine the substantive effect of the contract and its individual terms. However, the Code’s use of the term “unconscionable” is unclear. A Comment states that the principle of the section is to prevent “‘oppression’ and ‘‘unfair surprise.’”100 “Unfair surprise” refers to formation of the contract, while “oppression” might refer to the formation or the substantive effect of the contract. Whether or not a court can look beyond the bargaining process and adjust contract terms directly is further obscured by the Comment which states the section’s purpose is “not the disturbance of allocation of risks because of superior bargaining power.”101

The vagueness of § 2-302 is apparently due to disagreement among drafters of the Code. In examining the travaux préparatoires of this section, one commentator has noted that the authors’ intentionally used language that clearly indicates the courts’ power to rewrite contract terms, but later drafted the more

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98. CLARK & FONSECA, supra note 65, at 49-60.
100. Id., Comment 1.
101. Id.
vague language that appears in the current version of the Code.\textsuperscript{102} The confusion is recognized by Swedish and American commentators alike. Ulf Bernitz, a prominent Swedish authority in the standard contract area, characterizes § 2-302 of the Code as authorizing "covert" control by courts of contract terms, but believes that the practical significance of the section is limited because it compels courts to consider whether a contract was unconscionable "at the time it was made."\textsuperscript{103} Thus, a court would be reluctant to openly rewrite contract terms and is likely to focus upon the bargaining period prior to the consummation of the agreement.

Some American commentators point to the line of cases dealing with the effect of § 2-302 on the price term of the contract as evidence that most courts have interpreted the word "oppression" as giving them authority to alter the substantive effect of the contract.\textsuperscript{104} Yet, a close examination of these areas reveals that most courts have chosen not to interpret § 2-302 broadly. To date, few courts have ruled directly on the question of whether excessive price, by itself, is sufficient to be held unconscionable under § 2-302. In \textit{American Home Improvement, Inc. v. Machtver},\textsuperscript{105} an oft cited price unconscionability case, the creditor not only sold aluminum siding for an excessive price but also failed to disclose the interest rate on the installment sale, in violation of the New Hampshire disclosure law. In \textit{Toker v. Perl},\textsuperscript{106} the Law Division of the New Jersey Superior Court specifically held that where a $300 food freezer was sold for a total of $1092.96, the conscience of the court was shocked and the price was an unconscionable term of the contract.\textsuperscript{107} Yet, the court also found that the defendant's contracts were procured by fraud.\textsuperscript{108} On appeal, the lower court's opinion was upheld on the issue of fraud alone.\textsuperscript{109}

Courts have found substantive oppression evidence by terms other than price; such as warranty disclaimers, limitation of remedy clauses and particular credit provisions.\textsuperscript{110} However, where courts have refused enforcement,

\textsuperscript{103} Bernitz, \textit{Standard Contracts}, supra note 28, at 36.
\textsuperscript{104} See \textit{Toker v. Westerman}, 113 N.J. Super, 452, 274 A.2d 78 (1970), where the court cited § 2-302 in refusing to enforce a consumer contract for the sale of goods in which the price term was two and one-half times the reasonable value of the merchandise.
\textsuperscript{105} 105 N.H. 435, 439, 201 A.2d 886, 888-89 (1964). \textit{But cf. Frostifresh Corp. v. Reynoso}, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966), \textit{rev'd on other grounds}, 54 Misc.2d 119, 281 N.Y.S.2d 964 (App. Div. 1967), where it was held that the purchase price alone may be found to be unconscionable, therefore bringing § 2-302 into play.
\textsuperscript{106} 103 N.J. Super, 500, 247 A.2d 701 (L. Div. 1968).
\textsuperscript{107} Id. at 503, 247 A.2d at 703.
\textsuperscript{108} Id. at 502, 247 A.2d at 702.
the oppressive terms typically have been accompanied by defects in the bargaining process. In *Williams v. Walker-Thomas Furniture Co.*, the District of Columbia Court of Appeal refused enforcement of an "add-on" credit clause. Yet the court remanded the case for a determination of whether the defendants had lacked choice and could not have bargained over the terms. Similarly, a disclaimer of warranty clause in *Henningson v. Bloomfield Motors* was not effective where it contradicted explicit representations made by the seller and was hidden in a complex and nearly unreadable form. In this case, the express representations were advertising statements which limited the plaintiff's ability to bargain. Thus, despite indications of increasing freedom for courts to alter the content of contracts, the concept of unconscionability still directs the courts to inquire into the bargaining behavior of the parties. Courts continue to search for defects in the formation process — the presence of unfair surprise, absence of bargaining, fraud or duress.113

Furthermore, § 2-302 is not analogous in many crucial respects to the Swedish civil law revision which added a clause to the basic Contracts Act that permits Swedish courts to rewrite contract terms found to be "unreasonable." Section 2-302 requires a higher standard, *i.e.*, unconscionable as opposed to unreasonable, and, in any case, does not allow courts to interpret the section in terms of Federal Trade Commission or other administrative guidelines. This latter omission contrasts with the Swedish civil law revision which allows courts to rewrite contract terms in accordance with the guidelines and precedent developed by the Consumer Ombudsman.

Many such differences between the Swedish and American approach to contract term regulation are caused, in part, by political and social forces. An understanding of these forces is necessary to fully comprehend the differences in a foreign nation's legal system and the difficulties that may ensue as one attempts to adapt foreign concepts to our own legal system.

VII. POLITICAL AND SOCIAL ASPECTS OF CONSUMER PROTECTION IN SWEDEN AND THE UNITED STATES

The willingness of Sweden to limit the freedom of contract doctrine by directly controlling contract terms (legislatively, administratively, and judicially), and the respective unwillingness of the United States to do the

111. 350 F.2d 445 (D.C. Cir. 1965). The court stated that unconscionability has been recognized to include an absence of meaningful choice on the part of the parties and emphasized the disparity of bargaining power between the two parties before it. 350 F.2d at 449.

112. 32 N.J. 358, 161 A.2d 69 (1960). The New Jersey Supreme Court recognized the procedural factors relevant to the use of standard forms — lack of choice, unclear wording, and the absence of bargaining — and relied upon defects in the formation process to find for the plaintiff.

113. Kornhauser, supra note 9, at 1159-64.
same can be traced, in part, to the background of the consumer protection movement in each nation. Consumer protection in Sweden is in harmony with that nation's well-developed system of social welfare and concern for the dignity and well being of the individual.114 Consumer protection measures are viewed as beneficial to society as a whole. This fact is illustrated in the proposal for the Market Practices Act,115 the first contemporary piece of Swedish consumer legislation. In the proposal, the Government announced its policy that "Society should have the primary responsibility to see that a good, ethical standard is maintained in the area"116 and that public bodies should assume the task of developing norms. In this context, the alteration by Swedish governmental institutions of long-standing doctrines, such as freedom of contract, becomes politically feasible since the reforms face less opposition from special interest groups. Opposition from special interest groups is also minimal because Swedish society is homogeneous and interest groups play a much smaller political role than they do in American society.117

Also significant is the manner in which government policymakers in Sweden view consumer protection issues and problems. Generally, consumer problems in Sweden are considered to be an integral part of social welfare, in that their existence lowers the quality of life of the average Swedish citizen.118 Because consumer issues and problems are so viewed by policymakers, remedies tend to be broad and comprehensive. The favoring of comprehensive solutions may explain, in part, the enactment of the broad Contract Terms Act, as opposed to the enactment of several pieces of narrow legislation which deal with particularly offensive contracts or contract terms. Similarly, the realization that consumer problems are interrelated, and thus demand broad solutions, leads to the willingness in Sweden to enact civil law general clauses which permit courts to review contract terms.119

However, contrasting conditions in the United States have made such reforms difficult. In this country, consumer protection has not been viewed by all major segments of society as mutually beneficial; thus, major reforms face political opposition.120 Unlike Sweden, the United States does not have a comprehensive system of social welfare that encompasses consumer protection problems and remedies. Consumer protection is not viewed in the same manner as such widely accepted social services as free public education, social

114. KING, EXPERIMENTS, supra note 56, at 83-85.
117. Scandinavia and the Low Countries — A Symposium, CURRENT HISTORY, April 1976, at 45.
118. KING, EXPERIMENTS, supra note 56, at 83.
119. Additionally, the same factor has led to the creation of a unified consumer agency in Sweden, as opposed to the American practice of delegating consumer protection functions to several departments and agencies. See Bernitz, Swedish Consumer Law, note 26, at 30.
120. L. FELDMAN, CONSUMER PROTECTION PROBLEMS AND PROSPECTS 8 (1977) [hereinafter cited as FELDMAN].
security or veterans disability payments. Many segments of American society argue that consumer protection is actually just one more vested interest of another special interest group. For example, many business leaders apparently believe the consumer movement is sustained by self-serving, publicity-seeking groups who often create controversy where no substantive issue exists. As a result of such conflicting attitudes, major consumer protection reform measures are politically unpopular in the United States. In their place, limited measures are enacted which attempt to remedy only the most offensive business practices. This trend becomes obvious as the control of contract terms in the United States is examined. One can find statutory and administrative regulation of home solicitation contracts, credit and warranty terms, but no overall statutory or administrative provision which permits government to regulate contract terms comprehensively.

Furthermore, consumer problems in the United States generally are not viewed as interrelated with the social welfare of the average American citizen. Rather, consumer problems are viewed in isolation and remedies are designed as solutions to particular, isolated problems. In this context, broad enactments similar to the Swedish Contract Terms Act or reform of civil law general clauses are unlikely to be considered in the public policy formation process.

In addition, historical analysis reveals that consumer protection measures in the United States are the result of a temporary public pressure resulting from the discovery of a particular business practice perceived as “evil.” In most cases, the solution is simply the elimination of the perceived “evil” business practice by legislation or administrative regulation. Generally, after the ad hoc enactment of limited legislation or the promulgation of administrative regulations, the public pressure for reform subsides and little consumer protection activity occurs until a new business practice, perceived as “evil,” gains public attention.

VIII. CONCLUSION

The United States, unlike Sweden, lacks a comprehensive program designed to regulate standard forms. The chief administrative agency responsible for consumer protection, the Federal Trade Commission, has not embarked on an active role in regulating contract terms, as has the Consumer Ombudsman in Sweden. Additionally, the United States lacks a National Consumer Act similar to the Swedish Consumer Sales Act, and American consumers, unlike their Swedish counterparts, have not been provided with a

121. The failure of Congress to approve a bill providing for a new Consumer Protection Agency is but just one example of this attitude. N.Y. Times, Feb. 15, 1978, § A, at 21, col. 3.
122. Feldman, supra note 120, at 4.
123. Id. at 19.
124. Id. at 8-16.
private right of action under the primary consumer protection act in the United States, the Federal Trade Commission Act. Finally, the Uniform Commercial Code fails to provide courts with clear power to substantially rewrite contract terms; rather, it compels the judiciary to focus its inquiry on defects in the bargaining process. Thus, common law doctrine remains rooted in the freedom of contract concept and conflicts with the limited amount of fundamental law reform that may be made on the administrative level. Overall, the failure of the United States to weave administrative regulation with common law into a systematic legal doctrine hinders progress and development in the area.

Practically all legislative, administrative and judicial activity is directed toward the "symptoms" of consumer abuse rather than to the cause of such symptoms. Federal legislation is limited to particularly outrageous abuses by certain industries or specific clauses of standard form contracts most susceptible to abuse. Furthermore, greater distribution of information to the consumer and ensurance of a fair bargaining process through administration regulation may eliminate only the symptoms of abuse in the contract term area. Such measures alone will not give today's consumer power to bargain on equal terms with large oligopolistic corporate sellers.

The adverse impact of oppressive standard form contract terms on individual consumers and our entire market-oriented economic system cannot be underestimated. Thus, fundamental reform must be initiated. Further government intervention should be directed at limiting the application of the freedom of contract concept as it applies to consumer transactions which use standard forms. By so doing, such regulation will remedy not only the symptoms but also the underlying cause of oppressive contract terms. In implementing future controls of standard form contracts, emphasis must be placed on creating a harmonious system of administrative regulation and common law which will insure the institutionalization of reforms. While a variety of political and social forces in American society hinder such comprehensive reforms, the task should receive the attention of both the government and the American consumer movement.

Bruce A. Silverglade*

125. Administrative enforcement measures also are not coupled with private rights of enforcement, as they are in Sweden.

*Attorney, United States Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C.; B.A. 1975, University of Illinois; J.D. 1978, Boston College Law School. The views expressed herein are solely those of the author and do not necessarily represent those of the Commission or any individual Commissioner. This Note was written when the author was a member of the third year class at Boston College Law School.