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Employment and other Long-term Contracts between Unequal Parties in Sweden

– a brief comparison of employment, franchise, residential lease and some consumer contracts

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Preface

This is a Swedish national report for the 16th World Congress of the International Society for Labour Law and Social Security to be held in Jerusalem in the year of 2000. The report deals with the theme III of the conference "Similarities and Differences between Labour Contracts and Civil and Commercial Contracts".

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1 Introduction

Similarly to contract law in many other western countries, the classic contract law in Sweden has developed with the sale of goods on the commodity market as its social model.[1] Although the Swedish Contracts Act from 1915 is applicable to all types of contracts, including employment contracts, it is obvious that it has been drafted with sales on the commodity market as its paradigmatic example. The Contracts Act provides no general codification of Swedish contract law in the way in that, for instance, the German Bürgerliches Gestezbuch does. The provisions of the Act were not intended to be exhaustive. The idea behind the Act was instead to limit the legislation to questions where there was a real need of legislation and where it was possible to formulate practical rules. As it is, the Act provides only some major rules concerning the formation of contract, agency and invalidity. In addition to the generally applicable Contracts Act there are various other acts regulating different types of contracts. The most important is the Sale of Goods Act (the first from 1905 and the latest from 1990). In the absence of explicit regulation by contract or statute the answers to legal questions have to be sought in the general principles and dogmas of contract law. These principles and dogmas are to large extent analogies taken from statutes, such as the Contracts Act and the Sale of Goods Act.

There are several important differences between the ways in which the sale of goods and employment relationships are organised. It is important to note these differences in order to understand the differences in their legal regulation. In this report I shall concentrate on two of these differences.

From the *economic* point of view it worth stressing the open-market character of sales of commodities. In such a market the goods and contracts become standardised and the identity of the parties is regarded as irrelevant. Further, sale of commodities is a momentary transaction

[1] See, for instance, Nystén-Haarala, S., The Long-term contract (Helsinki 1988) p. 17 ff.

and its regulation is based on the idea that the content of the contract is exhaustive and definite at the time of the conclusion of the contract.[2]

The employment contract is a long-term contract. It is dynamic in the sense that both parties typically intend that the content of the contract should change. Further, the personal element of the employment relationship is essential. The mobility of employees between different employers is limited. Companies frequently engage employees at lower positions, while higher positions are filled with people already working in the organisation. The training of the employees, either in the form of internal courses or by using the hands-on technique, is an important part of the relationship, and the know-how of the employees is often specific to the firm they are working for.

In these two aspects the employment contract has a lot in common with some commercial long-time contracts. The most widely discussed and best developed contract of this kind is the franchise contract.

Also from the *social* point of view there are import differences between sale of commodities contracts and employment contracts. The point of departure for traditional contract law is that the parties have equal bargaining power. The parties are described in a very abstract way, as, for instance, buyers and sellers, without any reference to their social position.

In labour law the point of departure is different. The basic assumption stipulates that employees constitute the weaker party and that they are therefore in need of protection. In fact the inequality between the parties is one of the characteristic features of the employment contract.[3] The employment contract is of greater importance to the employee than to the employer. Whereas the employment contract is usually one of many as regards the employer, it constitutes the necessary basis of daily life for the employee. Employment is also an essential element of what constitutes most people's social position. Further, the employer is better informed about his or her business and legal regulations.

The reason for protective measures in labour law is more or less the same as in the field of consumer law. Similarly, in the field of franchise it is commonly accepted that the bargaining power of the franchisee is

[2] See, for instance, Mcniel, I., "Contracts: Adjustment of Long-term Economic Relations Under Classic, Neoclassic and Relation Contract Law", North Western University Law Review vol. 72 (1978) p. 854–906.

[3] See, for instance, Veneziani, B., "The Evolution of the Contract of Employment" in Hepple, B. (ed.) The making of European Labour Law, (London 1986) p. 62–70.

weaker than that of the franchisor. However, this inequality has not affected the legal regulation of franchise contracts.

Above, some differences between employment contracts and sales of commodities contracts have been pointed out. In this report the ways in which these differences are reflected in the legal regulation of the employment contract are discussed, together with the corresponding questions regarding other types of contracts sharing some of the characteristics of the employment contract, such as franchise contracts, residential lease contracts and different types of consumer contracts.

In section 2 a comparison of the main actors regulating the different contract types will be made, and types of regulatory measures which are commonly used will be discussed. Section 3 deals with contract forms. Section 4 describes the principles of general contract law concerning the duration of long-term contracts and the ways in which these principles can be amended in order to give one party an option to maintain the contract relationship. Section 5 deals with changes in the terms of long-term contract.

2 Regulatory strategies

2.1 General contract law

Legal regulation of contracts is affected by a large number of different sources of law. These sources are activated by different actors, such as the Parliament, the courts or, in labour law, the social partners. Other rules emanate from a direct interaction between the parties to the contract. There are also rules which do not originate in any particular actor, such as custom or usage.

In general contract law the individual parties to the contract are the most prominent actors. Legislation, where such exists, has a supplementary function. It is mostly optional and will thus only be applied if the parties have not agreed otherwise. Further, legislation is not applicable if other rules follow from custom or usage, which are to be held binding on the parties.[4]

[4] See, for instance, section 3 of the Sale of Goods Act.

Although the role of the legislator is limited in this way to fill in the gaps in individual or standard contracts, one other function of optional contract legislation should be mentioned. According to section 36 of the Swedish Contracts Act a contract term which is unfair, or where its application would lead to an unfair result, may be adjusted or set aside. When considering whether a certain contract term is unfair, optional legislation may be used as a yardstick. In this way even optional legislation will, to some extent, limit the contractual autonomy of the parties. In saying this it should be stressed that a contract term is not seen as unfair only because it deviates from an optional rule. In determining what is unfair regard shall be had to the entire content of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, as well as other factors.

According to the Contracts Terms (Tradesman) Act of 1984,[5] the Market Court may issue an injunction prohibiting a particular company to go on using a contract term found to be unfair. The act, which aims at protecting small merchants, is modelled after the Contracts Term (Consumer) Act.[6]

2.2 Franchise

There is no general legislation concerning franchise. In 1987 an official commission presented a draft for a Franchise Act.[7] In 1991 the Government decided not to put forward any bill before the Parliament.

In the absence of a statute, the most important source of law concerning franchise is the contract between the franchisor and the individual franchisees. The contract is usually drawn by the franchisor in the form of a standardised contract. The possibility for individual franchisees to influence the content of the contract seems to be very limited. The franchisor signs many contracts, and it is important for these contracts to be almost identical in order to make the franchise system work.

It has been argued that the franchise contract shall be regarded as a contract *sui generis*. Thus, when courts or arbitrators are to supply missing terms in a contract or when they otherwise have to shape the terms of a

[5] SFS 1984:292

[6] See below page 7. The Consumer Ombudsman does not have locus standi before the Market Court, in cases concerning trades man.

[7] Franchising, SOU 1987:71.

given contract, they should not automatically resort to analogies from existing rules of other types of contracts, but rather apply terms which are commonly used in franchise contracts.[8] Since court cases regarding franchise are rare, it is impossible to decide whether this opinion reflects *lege lata*.

The development of the content of contractual regulation has been influenced to some extent by the Swedish Franchise Association which associates both franchisors and franchisees. Similarly to the European Franchise Federation, the Association has adopted an ethical code of conduct. It has also set up a Board for Ethical Conduct with the task of promoting good business practice in franchise relations. This is done through statements about concrete cases. The Board consists of two lawyers and one representative each for the franchisor and the franchisee. The present chairman of the Board is a former judge of the Supreme Court. The Association does not participate directly in the making of individual contracts, nor has it adopted any model contract.

Control of the fairness of a franchise contract can also be exercised through the general clause in section 36 of the Contracts Act. The clause is not limited to the field of consumer law.[9] In the absence of legislation the means of assessment as to whether a contract is unfair have to be sought elsewhere, for instance in contractual customs. Since most franchise contracts contain an arbitration clause, this control will be exercised by arbitrators and not by the courts.

Legal regulation and control of franchise contracts is thus not exercised by the legislator or by the courts, but by the franchisee and the franchisor, and it is obvious that the latter is the one who actually decides upon the conditions of the contract. Nevertheless, this freedom of contract may be said to be exercised in the "shadow of the law". In the 1990s the Swedish Parliament turned down private members' bills proposing new legislation in the area on several occasions. In doing so the Parliament referred to self-regulation exercised by the Swedish Franchise Association and by the Board of Ethical Conduct, and at the same time underlined its commitment to follow the future development of franchise contracts.[10]

[8] Sohlberg, S., Franchisejuridik, (Stockholm, 2 ed. 1993) p. 26–27.

[9] See for instance, Judgements of the Supreme Court, NJA 1979 p. 666 and NJA 1989 p. 346.

[10] Reports by the Parliamentary Committee on Legislation 1992/93:LU2, 1997/98LU7 and 1998/99:LU7.

2.3 Consumer contracts

If the state policy in relation to franchise contracts can be described as *laissez-fair*, in other fields the legislator has recognised the need of intervention in order to modify the result of contracting between parties with unequal bargaining power.

Legislation provided for the protection of a typical weaker party has a long tradition in Sweden. The first examples can be found in the legislation from the beginning of the 20th century. These statutes dealt with different types of contracts, where the parties were typically unequal, such as in the case of residential and agricultural leases (1907), instalment sales (1915) and insurance contracts (1927). Since the beginning of the 1970s we find legislation which is applicable solely to consumers contracting with merchants for private reasons. Today there exist a large number of statutes regulating consumer contracts, such as, for instance:

- the Home Sales Act (the first from 1971),[11]
- the Act on Contract Terms in Consumer Relations (the first from 1971),[12]
- the Consumer Sales Act (1973),[13]
- the Consumer Credit Act (the first from1977),[14]
- the Consumer Insurance Act (1980),[15]
- the Consumer Services Act (1985),[16]
- the Act on Package Tours (1992).[17]

It is possible to distinguish three different legislative approaches to the relationship between consumers and merchants. One approach is to produce *mandatory legislation* favouring the consumer. This type of legislation typically prescribes the rights and duties of the parties in a relatively concrete fashion. Contracts are not valid to the extent they stipulate less favourable terms for the consumer than those stipulated by the statute. Mandatory legislation often contains certain provisions allowing explicit deviation by way of contract.

[11] SFS 1981:1361
[12] SFS 1994:1512
[13] SFS 1990:932
[14] SFS 1992:830
[15] SFS 1980:38
[16] SFS 1985:716
[17] SFS 1992:1672

It is impossible to cover each type of consumer contract and every aspect of it by mandatory legislation. This is why mandatory legislation has been complemented with *the general clause* in section 36 of the Contracts Act.[18] As described above, this clause provides the courts with the power to control the fairness of already concluded consumer contracts.

This *ex post facto* control by the general courts is complemented with the third type of legislation which allows *advance control of standardised contracts*. According to the Act on Contract Terms in Consumer Relations, the Market Court may issue injunctions on future use of contract terms which are unfair with regard to the price and other factors. The injunction is issued under the penalty of a fine (section 3). It has a legal effect only against a merchant or a group of merchants against whom it is directed. The injunction does not effect thus other merchants who use the same terms in their standardised contracts. It does not formally affect the validity of a contract between a consumer and a merchant.

Cases concerning injunction are brought before the Market Court by the Consumer Ombudsman (section 4). This option has provided the Consumer Ombudsman with an important role in the supervision of the fairness of standardised consumer contracts. The Ombudsman conducts negotiations with merchants and business organisations concerning the content of standardised contracts used in their branch. Such negotiations frequently result in new standardised contracts. This objective could not be achieved without the possibility of bringing cases before the Market Court.

Further, the breakthrough of the consumer legislation has made the courts more inclined to take the inferior position of the consumer into account, even when deciding questions which are not covered by the consumer legislation. This tendency is clearly shown, for instance, in

[18] As regards consumer contracts which have not been individually negotiated the general clause is found in section 11 of the Act on Contract Terms in Consumer Relations. The content of this section, which was adopted in order to implement the directive on unfair terms in consumer contracts (93/13/EEC), is not identical with section 36 of the Contracts Act. See further Government Bill 1994/95:17.

cases concerning the interpretation of contracts[19] and the authority of agents contracting with consumers.[20]

As we have seen the Swedish policy in the field of consumer contracts aims at restricting the power of the market forces. The main actors implementing this policy are the *public organs*. The Parliament has formulated the rights and duties of the consumer and the merchant in many important areas by way of mandatory legislation. Further, the general courts have been empowered to control the fairness of the already concluded contracts. A special authority – the Consumer Ombudsman – and a special court – the Market Court – have the task of supervising the fairness of future contracts. On the other hand private consumer organisations play a very insignificant role in Swedish consumer law.

Although consumer legislation limits the freedom of contract in a radical way, it has been argued that such legislation is not inconsistent with economic efficiency. It has been claimed that mandatory legislation is used only in those areas where no perfect market exists, and that its aim is to produce a result which would have been reached in a perfect market.[21] This argument clearly shows that the basic approach of Swedish consumer legislation is to reach the same *result* as would have been reached if a perfect market existed, and not to *create a perfect market* by, for instance, promoting disclosure of information. This content-orientated consumer law distinguishes Swedish and Nordic consumer law to some degree from the consumer law of the European Community.[22]

2.4 The employment contract

Collective agreements

The social partners have traditionally been the most important creators of norms on the Swedish labour market. The Swedish trade unions and the

[19] See, for instance, the judgements of the Supreme Court NJA 1979 p. 410 and NJA 1984 p. 280. See also section 10 of the on Contract Terms in Consumer Relations.

[20] See, for instance, the judgement of the Supreme Court NJA 1986 p. 596. See further Bengtsson, B., "Konsumentskyddsprincipen och domstolarna" in Höglund, O. et al (eds.) Festskrift till Lars Welamsson (Stockholm 1998) p.13–42.

[21] See, for instance, Grönfors, K, "Några synpunkter på tvingande rättsregler i civilrätten" in Festskrift till Nial (Stockholm 1966) p. 205.

[22] Wilhelmsson, T., Social Contract Law and European Integration, Aldershot 1995, p. 128–130. See also below at page 14.

employers' organisations have considered that the relationship between the employer and the employee should be regulated exclusively by collective agreements. This opinion was highlighted in the basic agreement concluded by the Swedish Employers' Confederation[23] and the Swedish Confederation of Trade Unions[24] in 1938. By regulating the protection of third parties in the event of industrial action by an agreement, the social parties avoided the risk of the Parliament having to pass legislation concerning industrial conflicts. For a long time this view had also been accepted by the Parliament so that labour law legislation could be kept at a minimum.

Legislation[25]

Since the 1970s the Parliament has become more active in regulating employment relationships. During the last three decades we have witnessed a huge growth in statutes regulating this very issue. It is enough to mention here the following examples of legislation:

- the Employment Protection Act (the first from 1974),[26]
- the Act on Employee's Right to Educational Leave (1974),[27]
- the Parental Leave Act (first from 1978),[28]
- the Equal Opportunities Act (the first from 1979), [29]
- the Acts to Counteract Ethnic Discrimination in Working Life (the first from 1986),[30]
- the Acts against Discrimination in Working Life on the Grounds of Sexual Orientation (from 1999)[31], and

[23] Svenska Arbetsgivarföreningen (SAF).

[24] Landsorganisationen i Sverige (LO).

[25] Since the time when Sweden became a member of the European Union in 1995 several European actors, such as the Council, the European Court of Justice and the European social partners have become important "lawmakers" on the Swedish labour market. The role of these actors will not be discussed in this report. For a short review of how Swedish labour law has been affected by the EC labour law, see Nyström, B., "Community Labour Law – Challenge to the 'Swedish Model'?" in Engels et al (ed.) Labour Law and Industrial Relations at the Turn of the Century, Hague 1998, p. 353–372.

[26] SFS 1982:80

[27] SFS 1974:981

[28] SFS 1995:584

[29] SFS 1991:433

[30] SFS 1999:130

[31] SFS 1999:133

- the Act against Discrimination of Disabled Persons in Working Life (from 1999),[32]

In employment law, legislation has primarily been introduced in order to protect employees from detrimental treatment and unfavourable contract clauses. These legal rules are usually mandatory only with regard to the employer; i.e. it is only contract terms that are unfavourable to the employee which are void.

Notwithstanding this growth in the volume of legislation, collective agreements are still considered to be the quantitatively most important source of Swedish labour law. There are several reasons for this. First, exemptions from statutory provisions are to a large extent allowed through collective agreements concluded or approved of by the unions at the national level (industry-wide agreements). These acts are said to be *semi-mandatory*. Secondly, a large majority of the workforce is covered by collective agreements. Over 80 % of the employees are members of a trade union. Further, Swedish collective agreements contain a huge number of provisions, covering most of the questions that may arise between an employer and an employee.

Individual agreements

The idea of social partners being the main actors in creating and administrating the rules on the labour market has had an impact not only on the role of the Parliament, but it has also affected the sphere of individual agreements between an employer and individual employees. The trade unions were highly sceptical of such a solution in the beginning. It was thought that the working class could only influence their working conditions by internal solidarity and by way of collective negotiations with the employer. One expression of this view was that some trade unions claimed that written employment contracts constituted a breach of the collective agreement even if these contracts only restated the content of the collective agreement.[33] As a consequence of the opinion that the employment contract should not be regulated individually the majority of the provisions of the collective agreements were made mandatory. With this in mind the famous labour law researcher Folke Schmidt wrote in

[32] SFS 1999:132

[33] Labour Court Judgement AD 1932 no. 66.

1959 that the individual agreement only regulated the fact that a person was employed for a certain job.[34]

This view of individual regulation persisted for a long time. Nowadays industry-wide collective agreements allow a large degree of derogation from their terms through local collective agreements or even through individual agreements. The relative importance of individual agreements varies among different categories of employees. For instance, the salaries of white-collar workers are normally determined individually. The collective agreement provides only a certain minimum standard.[35] Even though today individually agreed provisions are common, individual agreements proposing to fully regulate the employment relationship are rare. Such individual contracts are usually concluded only in the case of executives or employees' at comparable positions.

Although there are examples of employers using standardised contracts which have been unilaterally determined[36], individual agreements seem mostly to be negotiated freely. The employee is often assisted by his or her trade union in the negotiations.

The influence of various organisations is not maintained in labour law through the negotiation of standardised or model contracts which are to be individually incorporated into the employment contract. One exception is the agreement from 1969 between the Confederation of Swedish Employers' Association and the Central Organisation of the Salaried Employees concerning the so-called non-competition-clauses. This agreement contains provisions which are supposed to be included in individual agreements.[37] Instead, organisations normally conclude collective agreements which are "automatically" binding upon the members of the organisation under s. 26 of the Joint Regulation Act.

There are no public or private institutions intervening in any other way if disputes arise during the negotiation of individual agreements. If the parties are unable to reach an agreement on their own, no contract will be concluded.

[34] Schmidt. F., Tjänsteavtalet, (Stockholm 1959) p. 31.

[35] Eklund, R. in Schmidt, F., Löntagarrätt (Stockholm revised edition 1994) p. 302.

[36] See, for example, AD 1993 no 141.

[37] Adlercreutz, A., & Flodgren, B., Om konkurrensklausuler vid anställningsavtal och vid företagsöverlåtelse, (Lund 1992) p. 64.

3 The form of contract

3.1 Franchise contracts

As we have already seen, there are no general statutory provisions governing franchising in Sweden. Thus, there are no legal requirements on the written form of such contracts. Nevertheless, franchise contracts are customarily formulated in writing. In fact these types of contract would be practically impossible to handle without a written document. Written form is also required by the Code of Ethical Conduct of the Swedish Franchise Association. The contracts are usually very comprehensive and written with the intention to cover every important aspect of the franchise relationship.

Swedish contract law does not possess any rule like the Anglo-American parol (or extrinsic) evidence rule. According to this rule of evidence, testimony about the circumstances before the conclusion of the contract is not allowed to affect the interpretation of a written contact. This rule is subject to many exceptions.[38] In Swedish law the written form of a contract does not prevent the courts from taking other facts into account when interpreting it, such as what has been said during the negotiations. The courts may also consider to some extent the conduct of the parties after the conclusion of the contract. The written form does not prevent the parties from modifying or terminating the contract by an oral agreement. Nevertheless, the wording of a contract is an important factor in the interpretation of a written contract.[39]

3.2 Employment contracts

Employment contracts need not be prepared in writing in order to be legally binding. Nevertheless, there are rules prescribing a written

[38] See, for instance, Cheshire, Fifoot and Furmtson, Law of Contract (London 1991, 12th ed.) p. 123–127 and Treitel, G.H., The Law of Contract, (London 1987, 7th ed.) p. 150–158.

[39] Hellner, J., "The parol evidence rule och tolkningen av skriftliga avtal i svensk rätt" in Agell et al. (ed.) Festskrift till Bertil Bengtsson (Stockholm 1993) p. 185–206 and Adlercreutz, A., "Om den rättsliga betydelsen av skriftlig avtalsform och om integrationsklausuler" in Bernitz et al (ed.) Festskrift till Jan Ramberg (Stockholm 1996) p. 17–29.

employment contract. The most important rule is section 6a of the Employment Protection Act. According to this rule employers are obliged to inform the employees in writing about the terms and conditions applicable to their employment. This obligation was introduced in 1994 upon the implementation of the Council Directive 91/533/EEC on the employer's obligation to inform the employees of the conditions applicable to the contract or the employment relationship.

The following elements should be included in the information:

1. The name and address of the employer and of the employee, the commencement date of the employment and the workplace;
2. The employee's duties, occupational designation or title;
3. Whether the employment is for a fixed term or for an indefinite term, or whether it is probationary; and
    a) with respect to indefinite-term employment: the periods of notice applicable,
    b) with respect to fixed-term employment: the final date of employment or the conditions governing its termination;
    c) with respect to probation employment – the length of the probationary period;
4. The initial salary, other wage benefits and the intervals at which wages are to be paid;
5. The length of the employee's paid holiday and the length of the employee's normal working day or working week;
6. The applicable collective agreement, where relevant;
7. The terms and conditions of the employee's work abroad, where such work is intended to be of more than one month' duration.[40]

The purpose of these rules is to improve the employees' protection against possible infringements of their rights. By making the employees aware of their rights it is assumed that these rights will be exercised more frequently. Further, the rules are intended to create greater transparency on the labour market.[41]

The sanctions for not informing the employee are damages, including non-financial damages. On the other hand, the written form is not a

[40] Section 6a of the Employment Protection Act (1982:80)

[41] See the second recital in the preamble to the directive and Governmental Bill 1993/94:67 p. 36–37.

prerequisite for a binding regulation of the issues mentioned in section 6a of the Employment Protection Act. Oral agreements are still accepted.

Under section 6a of the Employment Protection Act written information can be provided in several ways. The way in which information is provided is essential to its contractual effects. If the information is provided in a written contract signed by both the employer and the employee, the conditions of the contract are legally binding on both parties, as long as they do not violate any mandatory provisions of the legislation or the collective agreement in force. If, on the other hand, the employer unilaterally handles the information, the question as to whether the terms indicated in the information form a part of the employment contract is more complicated. If the information is provided before a binding employment contract has been concluded, the content of the information will normally form a part of the employment contract. If, on the other hand, the information is provided after the conclusion of a binding (oral) employment contract, it will normally form a part of the employment contract only if it is more favourable to the employee than supplementary rules.

3.3 Consumer contracts

Consumer legislation possesses several rules requiring merchants to provide written information regarding at least some of the contract terms.[42] The purpose of the information requirements is to strengthen the individual consumer's possibility to enforce his rights. In older legislation such requirements were only enforced through administrative remedies. In accordance with the *travaux preparatoires* the duty to provide written information does not have any contractual effects. In later consumer legislation there are examples in which requirements of written form have been given contractual effects. A contract between a real estate agent and a consumer shall be written, and the agent may not invoke unwritten provisions. The consumer may, however, rely on oral provisions.[43] This kind of regulation could be described as an asymmetric, formal requirement. The idea behind such a requirement is to penalise the merchant for not providing information.

[42] See, for instance, sections 5–6 of the Consumer Insurance Act (1980:38).
[43] Section 11 of the Real Estate Agents Act (1995: 400). A similar provision is found in section 9 of the Consumer Credit Act (1992:830).

As we already have seen the Swedish legislator has abstained from using this technique to strengthen the possibility for individuals to enforce their rights in labour law. This is well in line with the general policy of Swedish labour law of giving priority to enforcement through the trade unions instead of individuals.

3.4 Comments

Franchise, employment and some consumer contracts are usually done in writing. The reasons for using written contracts differ to some extent. The duties and obligations stipulated in franchise contracts are complex, and supplementary regulation is very uncertain and written form is needed in order to stipulate and clarify the duties of the parties. Written form is thus being used irrespectively of whether it is or it is not legally required. In the case of employment contracts the situation is entirely different. The information that shall be provided in writing is not needed to stipulate or clarify the legal obligations of the parties. To a large extent the regulation would be the same even if no information – not even oral information – was given. The aim of the requirement is instead to make the employee aware of the legal conditions of the contract that he or she is about to enter or has just entered. Thus, the aim of providing information has to do not so much with the shaping of the conditions, but with their enforcement.

4 The period of contract and prolongation of the period of contract

4.1 Introduction

As regards long-term contracts Swedish contract law distinguishes between contracts for a limited period of time (fixed-term contracts) and contracts of indefinite duration (open-ended contracts).

Fixed-term contracts expire, in principle, at the end of the contract period without prior notice having to be given. The contract period can be fixed in different ways. For instance, the end of the contract period

may be stipulated as a certain date, or it may be fixed till after a certain period of time, or at the end of the service contracted for. The are no general principles providing for the prolongation of fixed-term contracts.

Further, a fixed-term contract may not be terminated during the contract period. Exceptions from this rule may follow from the contract itself. Each party is also allowed to terminate the contract without a period of notice if the other party breaks the terms of the contract, that is if this breach is of fundamental importance to that party and the other party could foresee this fact.[44] Further, a contract may be terminated in exceptional cases during the contract period due to a change in circumstances. The are several, partly conflicting, rules and principles applicable here, such as the general clause in section 36 of the Contracts Act, the phenomenon of force majeure and the doctrine of assumptions.[45]

An open-ended contract may be terminated by any of the parties for no specific reason without any threat of damages. Usually a reasonable period of notice is required.[46] It is generally assumed that a long-term contract containing no explicit provisions about the contract period shall be regarded as an open-ended contract. This rule is applicable in circumstances where the parties successively exchange their performance of their respective obligations, but not in cases when one of the parties has performed his or her obligations right from the start.[47]

In several types of contracts, which are of special importance to individuals, such as contracts of employment, consumer insurance and residential tenancy contracts, the legislator has adopted measures to secure the continuity of contract relations. As regards franchise, equivalent regulations are often found in standardised contracts. In the following sections different kinds of regulations used in order to promote long-term contract relationships are described.

[44] This general principle is derived from, inter alia, section 25 of the Sale of Goods Act. See further Hellner, J., Speciell kontraktsrätt II Kontraktsrätt, 2 häftet (Stockholm, 3 ed. 1996) p. 173–181.

[45] See for instance Nystén-Haarala, S., The Long-term Contract, (Helsinki 1998) p. 182–196 and Hellner, J., Speciell kontraktsrätt II Kontraktsrätt, 2 häftet (Stockholm, 3 ed. 1996) p. 59–74.

[46] Support for this rule has been sought in, inter alia, section 46 of the Law of Agents and Chapter 2 section 24.2 of the Partnership Company Act. See further Hellner, J. Speciell kontraktsrätt II Kontraktsrätt, 2 häftet (Stockholm, 3 ed. 1996) p. 63 and Rodhe, Obligationsrätt, Stockholm 1956 p. 700.

[47] NJA 1946 p. 697, NJA 1992 p. 439 and Bergström, S., Tidskrift utgiven av Juridiska föreningen i Finland 1973 p. 108 f.

4.2 Franchise contracts

Although open-ended franchise contracts sometimes do occur, franchise contracts are commonly concluded for a definite period of time. This period is usually 2-3 years. These relatively short-term contracts (American franchise contracts are often for twenty years or more) are selected in order to be able to change the terms of a contract or to sign a new contract.

Franchise contracts frequently contain an option for the franchisee to prolong the term of the contract. These clauses normally give the franchisee the right to conclude a new contract for the same period of time as the original contract. The franchisee does not have the right to extend the period of contract if he or she has not fulfilled the contractual obligations during the contract period (even when this does not mean a fundamental breach of contract).[48]

4.3 Consumer insurance

The Swedish Consumer Insurance Act of 1980 applies to property and liability insurance of consumers. It does not cover personal insurance, such as life, accident and sickness insurance.

According to section 10 of the Act a period of contract longer than one year is not allowed, except where there are exceptional circumstances. The reason for this rule is that the consumer should then have the option to consider if he or she would prefer to change or discontinue the insurance. The insurance companies do not mind this short duration of insurance, since they are given an opportunity to alter the premiums or other conditions (se further p. 23)

Upon the expiry of an insurance contract it is renewed automatically, unless a notice is given (section 12). The possibility for the insurance company to give a notice of termination is restricted, and it is only allowed in exceptional circumstances (section 15.1). For instance, an unusually high proportion of damages or a refusal to follow the safety requirements can be regarded as such exceptional circumstances. The insurance companies' reasons for not prolonging the contract shall be weighed against the interests of the consumer to continue with the

[48] Sohlberg, S., Franchisejuridik, (Stockholm 2 ed. 1993) p. 82.

insurance. If the insured does not except the notice of termination, he or she may contest the validity of the notice in court (section 42).

4.4 Residential lease

Residential leases are regulated in chapter 12 of the Land Law Code. The provisions are mostly mandatory in favour of the tenant. The landlord and tenant are free to agree on the duration of the contract. If the duration is not regulated in the contract it runs for an indefinite period.

If one of the parties wishes to terminate an open-ended lease contract a notice must be given. The contract then expires on the last day of the third full month after the notice.

If a fixed period has been agreed, no notice is required unless the total duration of tenancy is more than nine months. The length of the period of notice depends on the duration of tenancy. The nine-month-rule is a modification of the general rule described above.

If neither of the parties' gives a notice of termination in due time, the contract is automatically prolonged, usually for an indefinite period. The same rules apply if a tenant continues using the apartment after a fixed-term contract has expired and the landlord has not requested him or her to move.

Of more importance is the fact that, with some exceptions, the tenant has the right to the prolongation of the contract even when the landlord has given her or him a notice of termination, unless the landlord has a good cause to end the lease. What constitutes good cause is described in section 46. This right to the prolongation of residential leases is referred to as legal protection of tenancy right.

4.5 Employment contracts

The Employment Protection Act distinguishes, similarly to the general rules, between contracts of indefinite duration (permanent employment) and contracts for a limited period (fixed-term employment).

There are different legal effects with regard to these two categories of employment contract. Both the employer and the employee may terminate a permanent employment, following a stipulated notice period. However, dismissal by the employer must be based on a just cause. A fixed-term contract, on the other hand, expires without the necessity of

giving notice at the end of the contract period, or upon the completion of the work contracted for. The reasons for not extending the term of a fixed-term employment contract may not normally be contested in court. Employment protection enjoyed by employees with fixed-term contracts is thus, generally speaking, inferior.

Whereas the objective of the Act is to ensure employment protection, combating the use of fixed-term contracts is considered to be the task of the law. This has been done mostly in two ways. First, employment contracts for a limited period may be concluded only under certain circumstances specified in the Act, such as in the case of temporary replacement posts. In response to the needs of greater flexibility on the labour market the Swedish legislation has become, however, less restrictive in this sphere during the last two decades.[49] Another way of counteracting fixed-term contracts is by establishing a default rule stating that an employment contract is permanent, unless otherwise agreed upon. (section 4 (1)). In this way an employer who wishes to sign a fixed-term contract must make his intentions explicit. Since contracts providing for deviations from the default rule involve tangible disadvantages to the employees, one may wonder whether it was not this very fact that has led the Labour Court to make it more difficult to deviate from the rule stipulating that an employment contract is normally permanent.

As far as case law on this issue is concerned, certain decisions can be seen as having been motivated by the desire to encourage permanent employment contracts. When interpreting a contract the court would tend to take as the point of departure the statutory default rule stipulating that contracts are permanent, in preference to the express wording of the contract. This approach can be seen as intended to ensure that the default rule becomes more widely applicable, but another reason for this approach can be found in the vagueness of the individual contracts in the cases in question. In the cases in which the Court has made use of this approach no written contract existed, and it was uncertain what the parties had intended at the time of its conclusion.

On the other hand, employment protection has not been granted any decisive influence in other cases. For example, the Labour Court appears to take the view that well-established business practice for the profession in question should have precedence over section 4(1) of the Act, although

[49] Eklund, R., "Deregulation of Labour Law – the Swedish Case", Juridisk Tidskrift 1998–99 p. 534–538.

no support for this view can be found in the wording of the Act. On the whole, case law does not support the approach suggesting that section 4(1) should have a greater influence on the interpretation of employment contracts than other default rules.[50]

4.6 Concluding comments

The regulations concerning franchise, consumer insurance, residential lease and employment contracts described above aim at making it possible for the weaker party to demand performance of contracts. Nevertheless, the general rules described in section 4.1 are basically applicable to all these types of contracts. The special rules applying to them may be seen as amendments to the general rules described above, rather than their alterations.

The techniques that are used in order to promote the maintenance of a contract relationship differ depending on the contract type. As far as the first three types of contracts are concerned, the rules are constructed in such a way as to provide an option for the weaker party to renew or prolong the contract which has expired. In this way fixed-term contracts are also protected. The construction of Swedish employment protection can be described, on the other hand, as a ban to give notice of dismissal without a just cause. Since fixed-term employment terminates without notice of dismissal, it is not afforded protection. This difference explains the reason why fixed-term contracts are perfectly acceptable to the legislator in the case of residential lease and consumer insurance, but not in labour law.

5 Changing contract terms

5.1 Introduction

The principle of a binding contract means that the parties shall fulfil their duties and enjoy their rights following from the contract. This principle is far from absolute. Under certain circumstances contracts may be altered

[50] Malmberg, J., Anställningsavtalet (Uppsala 1997), p. 214-215.

or terminated. Especially in long-term relations there may be reasons for altering the terms of a contract.[51]

The classical way of changing the terms of a long-term contract is by giving notice of termination or by awaiting the end of the contract period, and then proposing a new contract on different conditions. If the counter-party accepts the offer, a new contract is concluded. If, on the other hand, the offer is rejected, the contract relationship is ended. [52]

This simple example shows three basic alternatives when a change in contract terms is desired: an agreement to change the terms of the contract, the preservation of the status quo, or the ending of the contract relationship.

The example also underlines the fact that the binding force of a long-term contract depends on the possibility of each party to unilaterally terminate the contract. As we already have seen, the possibilities of terminating a contract relationship differ depending on whether a fixed-term contract or a contract of indefinite duration is concerned.

Termination of a contract does not lead, of course, to any change in the contract terms. But the possibility to terminate the contract greatly influences the possibility of reaching an agreement on new terms and conditions. At the time when employment contracts could be terminated without any period of notice, or with only a very short one, and for no specific reason, changes in the terms of employment contracts did not give rise to any legal disputes. If the employee did not accept the terms proposed by the employer, the employment relationship simply ended.[53]

A special problem arises in the case of contracts where one party is entitled to the prolongation of the contract. In such cases the third of the three basic alternatives (i.e. ending the contract relationship) is not available. For instance, it would be unreasonable not to let the landlord rise the rents in long-term leases. On the other hand, if a landlord could stipulate any conditions that he or she might think of in order to prolong

[51] In exceptional cases the terms of the contract may be changed by the courts or arbitrators, in accordance with for instance the general clause in section 36 of the Contracts Actor or the doctrine of assumptions. For literature see footnote 45

[52] It is preferable, of course, if an agreement between the parties can be reached. Unfortunately, it is not possible to force the parties to an agreement. What is possible, however, is making it easier for the parties to reach an agreement, for instance, through re-negotiation clauses or mediation. See further, for instance, Grönfors, K., Avtal och omförhandling (Stockholm 1995) and Lehrberg, B., Omförhandlingsklausuler (Stockholm 1999).

[53] See, for instance, the Judgement of the Labour Court AD 1933 no. 185.

the tenant's contract, the security of tenancy would be of minor value. The same problems could arise in franchise, insurance and employment contracts. As we shall see there are different solutions to these problems.

5.2 Franchise contracts

As has been shown, Swedish franchise contracts are usually fixed-term contracts. According to general contract law no changes in the content of a contract are allowed during the term of the contract unless the parties have agreed otherwise. Thus, changes in the terms of a franchise contract are normally possible only in connection with its prolongation.

If the contract carries no right of prolongation, the franchisee has to accept any offer that the franchisor proposes to him, or else the relationship will end.

The situation is somewhat different if the contract carries a prolongation clause. Such a clause in a franchise contract often stipulates that the content of the contract shall be the same after the prolongation as the content of contracts that the franchisor concludes with new franchisees. This means that the franchisee has no right to the prolongation of the original contract, but he has the right to a new contract carrying the same conditions as contracts concluded with other franchisees.[54] In this way the clause limits the franchisor's freedom with regard to offers that he might want to make.

The purpose of the clause is to make it possible for the franchisor to make successive changes in his or her stock of franchise contracts and, at the same time, give the franchisee some protection against arbitrary behaviour of the franchisor.

The situation described above concerns the terms of the main contract. Swedish franchise contracts commonly contain enclosures which regulate issues concerning the product range, price of goods or services, general terms of delivery used in relations with customers, manuals and other practical aspects of co-operation. The contracts often state that a franchisee has to follow the latest edition of the enclosure. In this way the franchisor are allowed to change the enclosures during the

[54] Sohlberg, S., Franchisejuridik (Stockholm 2 ed. 1993) p. 82-83 and Franchising SOU 1987:17 p. 55.

contract period. Sometimes the franchisee may terminate the contract if he or she thinks the change is too burdensome.[55]

These kinds of clauses have not been legally contested as far as can be seen from the reports. Contract terms that enable one party to alter the terms of a contract unilaterally without a valid reason stipulated in the contract are often regarded as unfair according to section 36 of the Contract Act.[56] It could be argued that the same should apply to the clauses described above. However, it is not unlikely that smooth operation of the franchise system would be regarded as a valid reason for accepting such clauses, at least their application in individual cases does not lead to offensive results.

5.3 Consumer insurance

In relation to consumers the insurance companies commonly use standard terms. Thus it is possible to talk about contract terms which are generally applicable between a certain company and its customers. The Consumer Insurance Act is based on this condition.

In the same way as in franchise contracts, the terms of consumer insurance contracts may be changed in connection with the renewal of a contract, usually once a year. The insurance company may advertise the changes by sending the consumer a message including the new terms not later than two weeks before the expiry of the insurance period (section 17.2). If the consumer pays the insurance fee, he is bound by the terms which the company has presented to him or her.

This does not mean that the insurance company is free to propose any terms it might wish. According to the *travaux preparatoires*, changes in contract terms are not allowed in individual cases if their purpose is to scare a certain consumer away. Such an offer would be regarded as a notice of termination, and such a notice is allowed only in exceptional circumstances.[57]

[55] Sohlberg, S., Franchisejuridik (Stockholm 2 ed. 1993) p. 84 f. and 96 and Franchising SOU 1987:17 p. 61–62.

[56] See, Judgements of the Supreme Court, NJA 1979 p. 666 and NJA 1983 p. 332. This follows explicitly from the directive on unfair terms in consumer contracts (93/13/EEC) the annex littra J. However, the directive does not cover the relationship between merchants, even if they are of unequal bargaining power. See also the Government Bill 1994/95:17 p. 96–97.

[57] Government Bill 1979/80:9 p. 47.

This regulation shows clear similarities to the prolongation clauses of franchise contracts. It does not intend to secure fair or balanced contract terms, but only to guarantee that individual consumers are not treated worse than the remaining consumer collective is. In this way the regulation gives the consumer some protection against the arbitrary behaviour of the insurance company.

5.4 Residential lease

The regulation of changes in the terms of residential leases is more elaborate than that of franchise and consumer insurance.

If the landlord or the tenant wishes to change the terms of the lease, he or she shall inform the other party in writing, stating that he or she wants to renegotiate some of the conditions. It is not necessary to give a notice of termination of the lease contract in order to initiate this process. Thus, the process of changing the terms of a lease is disconnected from the question of the continuation of the lease. From the tenant's point of view this is very important, since he or she may initiate the process without risking losing the contract.

If no agreement can be reached, the party who has initiated the negotiations may apply to the Rent Tribunal, asking for the determination of reasonable conditions. According to Chapter 12 section 54 of the Land Law Code, the rent is not reasonable if it is evidently higher than the rent for apartments with the same "utility value". Rents in privately owned houses are compared with rents in publicly owned houses. The latter are not supposed to bring profit. As regards conditions other than the rent, the determination of what is reasonable is done in a more discretionary way.

Rent Tribunals are public tribunals composed of one legally qualified member and two lay members. One of the lay members must be well versed in the administration of apartment buildings, and the other shall have experience from housing disputes from the point of view of the tenant. The decision of the Rent Tribunal, or, if an appeal is made, the decision of the Court of Appeal, is binding on the parties.

Regulations concerning changes in the terms of lease contracts are more interventionist than regulations found in consumer insurance and those concerning prolongation clauses in franchise contracts. The principle of 'utility value' has a wider function than if it was just to

protect the tenant's right to possession of his or her apartment. It also aims at providing such level of rent that will guarantee the majority of the inhabitants high and equal housing standards.[58]

> There are import rules as regards collective bargaining concerning rents and other terms of lease. Negotiations take place between the landlord (or an organisation of landlords) and an organisation of tenants. The parties may agree on the rent level. The agreement is then binding on the tenant if he or she has a collective bargaining clause in his or her contract, irrespective of whether the tenant is a member of the tenant organisation or not. These rules are not dealt with in this report, however.

5.5 Employment contracts

The legal system provides a number of different methods for bringing about changes in the employment relationship during the period of employment.

The most important method for changing the content of the employment relationship is by means of the *collective agreement*.

Under s. 26 of the Joint Regulation Act, a collective agreement is binding for employers and employees who are members of the organisations, which are parties to the agreement. Employers and employees who are bound by a collective agreement cannot reach individual agreements, which conflict with the collective agreement (section 27). Section 26 does not mean that collective agreements lack any significance for employees who are not members of a trade union which is party to a collective agreement. If he or she is employed by an employer bound by a collective agreement, the provisions in the collective agreements, as a result of case law, usually fill out also their employment contracts. But here, the provisions of the agreement only have a default character in relation to the employment contract.

Thus, when a new collective agreement is concluded, the content of the individual employment relationship automatically changes. This is one of the strong sides of the collective agreement. The employer can conclude an agreement through negotiations with one party, or a small number of parties, which changes the terms and conditions of employment for his entire workforce, without having to negotiate with or dismiss individual employees.

[58] Christensen, A., Hemrätt i hyreshuset (Stockholm 1994) p. 381–382.

Changes in the content of the employment relationship can also be made by means of individual *agreements between the employer and the employee*.

Furthermore, as regards certain questions, the employer may *unilaterally decide on changes* in the employment relationship. This right of the employer is especially extensive as regards the employee's working tasks. Changes which can be decided upon unilaterally by the employer are said to lie *within the scope of employment*. The general rule as regards transfers of employees to other working tasks within the scope of their employment relationship is that an employee may be transferred without a period of notice. Nor has the transfer to be justified by quoting reasonable grounds. This rule is subject to many exceptions. For instance, a transfer may be contested in court if it is discriminatory or contrary to good practice.

If an employee refuses to carry out working tasks which lie within the scope of his employment, it can constitute a just cause for dismissal. By contrast, should the employer request that an employee perform work for a longer period of time which lies outside the scope of his employment, it would be regarded by the law as dismissal from work in combination with an offer of new employment. The employer would then have to abide by the rules concerning just cause and the notice of dismissal, as stipulated by the Employment Protection Act.

There is no general statutory provision regulating the work which an employee is obliged to perform. To determine what is permissible and what is not, it is necessary to resort to case law. According to the so-called 29/29 principle (originating from judgement no. 29 of the Labour Court in 1929) a blue-collar worker is obliged to carry out all work which is naturally connected with the employer's business activities and falls within the worker's general qualifications. Public employees are obliged to be able to take on different working tasks as long as these do not involve a fundamental change in their category of employment.

If it is impossible to reach an agreement with either the individual employee or the trade union (in the form of a collective agreement), and if it is not a question on which the employer may decide unilaterally, the employment relationship will have to continue in the current form. If one of the parties is not happy about it, the only solution is to terminate the employment contract. The provisions of the Employment Protection Act become applicable when the employer resorts to dismissal. Thus, if it is the employer who wishes to change the content of the employment contract, he must show a just cause.

5.6 Concluding comments

This section has discussed different methods of dealing with a contract which is no longer able to effectively regulate the co-operation between the parties. In the light of this survey the three basic methods mentioned on page 21 can be amended with two other methods. The full list of the basic methods is given below.

- Agreement on changing the conditions of a contract
- The contract remains unchanged
- Unilateral right to terminate the contract relationship
- Unilateral right to change the contract
- Third-party decision

If no agreement can be reached and if it is impossible or desirable to either end the contract relationship or leave it as it is, the only remaining alternatives are, as far as I could see, to let one of the parties, or a third party, decide upon the content of the contract.

The method of changing the terms of a contract unilaterally is used in consumer insurance contracts and employment contracts as well as in the extension clauses of franchise contracts. It is obvious that the unilateral decision-making power must be restricted if this method is to be acceptable.

As regards consumer insurance and franchise the freedom of companies and franchisors is restricted in two ways. Firstly, they are not allowed to decide upon the terms of a contract on an individual basis. The members of the consumer collective as well as franchisees are to be treated equally. In this way the principle of equal treatment gives them some protection against arbitrary treatment. A further restriction lies in the fact that consumers and sometimes also franchisees may terminate the contract relationship if the new conditions are unacceptable.

In Swedish labour law there are no generally applicable principles of equal treatment.[59] Instead, restrictions on the employer's unilateral right to change contract terms are constructed primarily as a ban on taking into account in his decision-making certain circumstances, such as, for example, an employee's membership of a trade union. In this respect the restrictions placed on the employer seem to be less severe than those placed on the insurance companies and franchisors. On the other hand, the employer's unilateral right to change contract terms is limited to

[59] See, for instance, Labour Court Judgement AD 1994 no. 60.

certain aspects of the employment relationship, concerning mainly direction and distribution of work.

The only example in this survey where the third party method is used is residential lease. This method is also used sometimes, however, in long-term commercial contracts.[60]

[60] See, for instance, about the hardship clauses of the International Chamber of Commerce in Ramberg, J, International Commercial Transactions (Stockholm 1997) p.53–54.

Summary

Swedish contract law has developed with the sale of goods on the commodity market as its social model. There are, however, several important differences between the ways in which sales of goods and employment relationships are organised. Sales of commodity are typically momentary transactions in which the identity of the parties is regarded as irrelevant. The employment contract is a long-term contract. It is dynamic in the sense that both parties typically intend the content of the contract to change. Further, the parties are not easily exchangeable. Another difference is that in traditional contract law the parties are assumed to have equal bargaining power, while in labour law the basic assumption stipulates that employees constitute the weaker party and that they are therefore in need of protection.

The aim of the report is to discuss the ways in which these differences are reflected in the legal regulation of the employment contract, together with the corresponding questions regarding other types of contracts sharing some of the characteristics of the employment contract, such as franchise contracts, residential lease contracts and different types of consumer contracts.

In section 2 a comparison of the main actors regulating the different contract types are made, and types of regulatory measures which are commonly used is described. Section 3 deals with contract forms. Section 4 describes the principles of general contract law concerning the duration of long-term contracts and the ways in which these principles can be amended in order to give one party an option to maintain the contract relationship. Section 5 deals with changes in the terms of long-term contracts.