Contracting in the Contemporary world

enrico baffi
Introduction

This paper considers some characteristics of mass contracting, without dwelling on the analyses that have previously been widely explored in the literature. For example, there will be no attempt to present a new, detailed exposition of the problem of minimising agency costs, which is controlled in hierarchised organisations such as large companies through the constraints placed on agents (those directly in contact with the clientele).

The attempt to represent what may occur in the future through a lowering of transaction costs allowed by information technologies and especially Internet technologies will also remain outside this analysis. Rather, this paper will conclude with the question: What will the future be like because of these new technologies that lower transaction costs? Will contracts be more detailed, and are they perhaps already, which means that this paper may already be dated?

1. Some characteristic features of mass contacting

There are basically four characteristic features of mass contracting: a) the reduced negotiations, b) the dissemination of standard form contracts, c) the

---

I wish to sincerely thank Carlo Drago and Giacomo Rojas Elgueta for their helpful comments. All remaining mistakes are my sole responsibility.
presence of abusive clauses and d) the recapitulation of the contract and its execution in a single act of stipulation, as in a simultaneous exchange without obligations

a) The reduction in negotiations is the result, first of all, of the costs that this activity requires and of the costs required to manage personalized contracts. Secondly, this reduction is the consequence of the greater advantage of mass-produced goods compared to personalized goods. Thirdly and lastly, it also derives from the limit of the range of possible clauses that can be inserted into the contract, a limitation due to those very clauses that will be indicated in this section as being at the basis of the phenomenon of “contact as a single act with a coincidence of conclusion and total execution.”

b) The affirmation of standard form contracts is a consequence not so much of a culpable inadequacy of legal provisions as of their objective inability to regulate all possible contractual relationships.

c) The spread of inequitable clauses depends basically on a phenomenon of adverse selection, by virtue of which the “bad” clauses drive out the “good” ones. This adverse selection phenomenon is due to the information costs that consumers have to bear.

d) The phenomenon of *uno actu* recapitulation of the contract’s conclusion and execution (that is the coincidence between conclusion and execution of the contract without remaining duty to fulfill later) is a consequence of the growing ineffectiveness of the instrument of legal bindingness in controlling opportunistic behaviour, an ineffectiveness that leads operators to adopt other remedies suitable for pursuing the same purpose, i.e., those that are used to being called “remedies of the state of nature”\(^1\), first among them the remedy of the simultaneous nature of the exchange.

We shall now look more carefully at these explanations of the characteristics of mass contracting.
a. **Reduction in negotiation**

Normal negotiating activity can be said to be aimed at achieving two purposes, which can be summarized as follows:

1) The purpose of seeking an opportunity for exchange that is mutually advantageous for the parties, and seeking exploitation of all possible joint earnings; and

2) The purpose of reaching an agreement for the division of the contractual surplus.

Through negotiation, individuals seek to determine whether mutually advantageous exchanges are possible between them. Sometimes the parties—or one of them—know that the space for a mutually advantageous exchange exists between them. This situation occurs very frequently, inasmuch as parties interested in trading generally release information about their willingness to conduct certain contractual operations. In many cases, in fact, it is more economical to convey information by means of instruments addressed to indeterminate audiences of subjects rather than by means of mechanisms suitable only for ensuring communication with specific parties.

In addition, when the parties negotiate, they do not limit themselves to identifying the existence of a space for a possible advantageous agreement; they also aim at exploiting all possible opportunities for earning associated with that agreement. When they draw up the contract, the contracting parties seek to identify all those clauses that involve services and counter-services that are mutually advantageous. These clauses, which are aimed at maximizing the joint return, are also called “efficient clauses” and, as previously indicated, are usually sought out by the traders. In fact, any clause suitable for increasing the joint return can ensure a Paretian improvement, i.e., an improvement in the wellbeing of the parties involved in the operation. This possible result pushes the parties to seek them out.
There are however very significant circumstances in which efficient clauses are not sought. These circumstances are characterized by the fact that the increase in the joint return (the size of the pie) probably or necessarily includes a reduction in the contractual surplus obtained by one party (the share of the pie). Based on this result, the party destined to be injured is driven to avoid including the efficient clause.

The most important hypothesis under which such a situation occurs comes when opportunistic behavior by one party is possible, for which reason the other party, so as to avoid improper behavior, must oppose inclusion of the efficient clause. There are three types of opportunistic behavior that can cause this effect:

I) Firstly there is manifest non-performance. Thus, for example, if the contract’s legal effectiveness is not adequate to intimidate anyone intending not to perform, it may be worthwhile for one party to avoid calling for the other to perform second, and thus to construct the contract so that the services are performed simultaneously.

II) Secondly there is opportunistic strategic behaviour associated with court costs.

If in fact a court system applies some costs to the winning party as well, then an unfair contracting party might adopt a strategy of threatening a legal


3 There is also another important case examined by I. Ayres E. R. Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87 (1989), in which one party waives inserting efficient clauses so as not to be included in the category of worst clients and hence to be able to continue being treated like an average client. A thorough critique of the position of these two authors was made by E. Posner, There Are No Penalty Default Rules in Contract Law, available at http://ssrn.com/abstracts=690403. For an attempt to re-examine the theory of penalty default rules, see E. Baffi, Ayres and Gertner v. Posner. A Re-examination of the Theory of Penalty Default Rules, available at http://ssrn.com/abstracts=948916.
challenge even in the event he is wrong. This could happen because it is possible that the likely winner will fear the court dispute more than the party who is likely to lose. This situation may be even more apt to occur when the results of the dispute are uncertain. In a situation of this type, efficient clauses that might permit strategic court behavior are avoided.

III) Thirdly there is opportunistic behavior consisting of exploitation of asymmetric information that enables a party to carry out actions that the other party cannot know about. In fact, this opportunistic behavior falls into the category of moral hazard.

So in this case of opportunistic behavior there is no incentive for maximizing the joint return.

However, when such impediments are not present, interest in maximizing the joint earning is present, and efficient clauses can be sought through negotiations.

In addition to being intended for the purpose indicated, the activity of negotiating, consisting of a search for an opportunity for exchange and for exploitation of the efficient clauses, also serves another purpose. This purpose is represented by division of the contractual surplus. For simplicity’s sake, let us assume an exchange consisting of a purchase and sale. Let us imagine that X, the buyer, values a given property at $100, whereas Y, the seller, values it $50. Let us also assume that there is a guaranty clause that X values at $10 while for Y it involves a cost of $5. We will additionally assume that Y is obligated to provide transport for the property and that this service is valued by X at $30, whereas it costs Y $10. In a situation of this type, the contractual surplus is equal to: $100 - $50 + $10 - $5 + $30 - $10, or $75. One of the purposes at which the negotiation is aimed consists of establishing a division of the contractual surplus, which in the example considered is represented by earnings of $75.

Having thus identified the two main purposes pursued through negotiation, we can now turn to a study of the motives that seem to push individuals and companies to surrender this activity. But before attempting to provide an answer to this problem, a further preliminary examination would seem necessary, an
examination regarding the structural characteristics of the activity of negotiation, especially in order to determine what type of costs it carries for those involved.

Negotiating activity, as traditionally practiced, requires the commitment of both parties. In the event of an exchange between entrepreneur and consumer, negotiation requires an activity on both their parts. Their activities are characterized by being labour-intensive for both, i.e., they basically require work as their cost. If we did not wish to consider the client’s activity as work, it would be more correct to use the term time-intensive rather than labor-intensive. In other words, negotiation basically requires that the entrepreneur use the work factor, whereas it mainly requires a commitment of time from the consumer.

These activities are also characterized by their not having enjoyed—to date—the advantages associated with technological innovation. Both aspects lead us to conclude that the cost of negotiations has risen considerably in the last few decades, in tandem with the increase in the cost of the labor factor and the opportunity cost of time.

Examined in light of what has been said regarding the purposes typically pursued through contracting, this conclusion leads to two considerations:

---

4 The expression “time intensive” was coined by G. Becker, *A Theory of Allocation of Time*, 75 Econ. J. 493 (1965).

5 In 1967 economist W. Baumol, *Macroeconomics of Unbalanced Growth: The Anatomy of Urban Crisis*, 57 Amer. Econ. Rev. 415 (1967), made a distinction between productive activities that have experienced increased productivity because of technological innovations and the accumulation of capital and productive activities that have not experienced such increased productivity. He used the expression “technologically progressive activities” to indicate the former and “nonprogressive activities” to indicate the latter. Baumol shows that this difference between progressive and nonprogressive activities involves a constant increase in the relative costs of the goods produced through nonprogressive activities as opposed to goods produced by means of progressive activities. As the cost of goods produced by nonprogressive activities rises, it is possible that their production will tend to diminish to the point of disappearing. Baumol theorizes that this may be the fate of theatrical performances, for example, of extremely luxurious homes, of made-to-order clothing and of hand-decorated ceramics. However, for those goods for which demand is increasing as individual incomes increase, this end does not seem predetermined.
The first is that the activity aimed at division of the contractual surplus is destined to decline. Indeed, with the increase in the cost of labor and of the opportunity cost of time, the costs of negotiation aimed at dividing the surplus also increase without the possible earnings from such activity increasing proportionately. If, for example, it is possible to achieve a contractual surplus of $100 after one hour of negotiation, whether it is worthwhile to undertake the negotiation depends on whether the cost of the labor factor is $10 per hour or $200 per hour, and, likewise, on whether the opportunity cost of time is $10 or $200 per hour.

The second consideration is that this increase in costs relating to negotiation may also carry with it a reduction in negotiation, also with regard to the search for efficient clauses.

However, it is not only the increase in the cost of negotiation that influences the decline in this activity. There is also a worsening of relative costs required to manage personalized contracts, which has made them less economical. Only in recent years has the activity of managing personalized contracts begun to enjoy some form of lowering of costs associated with innovations in the IT field. Prior to the changes that occurred with the introduction of the electronic processor, the activity of managing personalized contracts also seemed “stagnant,” and hence its cost, relative to all “progressive” activities, underwent major increases.

In addition, it must be noted that negotiation of the contract is a necessary activity especially in those cases in which the object of the main service is also personalized. However, the increase in productivity of the production factors basically requires standardized production. This means that the greater production capacity of economic systems is basically associated with lowering the costs of producing standardized goods. It follows from this that the cost relating to personalized goods compared to standardized goods has increased steadily in recent decades.

---

6 See supra note 6 on William Baumol’s thoughts.
All these considerations lead us to believe that the changes in costs relating to goods and services—changes due primarily to technological innovation and to the accumulation of capital—have given consumers a strong impetus to give up “negotiated contractual regulation” and personalized contracts in order to use the wealth (including the wealth obtainable by using one’s own time in work rather than in negotiations) thus saved for the acquisition. This is accomplished without negotiation of standardized goods and services.

Finally, we must look at two further considerations regarding the reasons for the decline in negotiating activity. In examining the purposes that traders may achieve through negotiations, we underscored the parties’ interest in seeking efficient clauses. In fact we showed that the inclusion of an efficient clause can generally ensure a profit for both parties. However, we pointed to circumstances in which this result cannot be achieved, since the increase in the joint earning probably or even necessarily carries with it a reduction in the earning of one party. We saw how this impediment to seeking efficient solutions can be obtained when opportunistic behavior is possible.

We assert that certain transformations occurring in today’s society seem to favor opportunistic behavior, and hence seem to discourage the search for efficient clauses. If this is true, it seems reasonable to maintain that interest in undertaking negotiations is destined to undergo a consequent decline, inasmuch as the spaces in which the parties can look for clauses to include in the contract are being restricted. This hypothesis will be examined when we consider the causes of that phenomenon which has been defined as a “uno actu recapitulation of the contract’s conclusion and execution”. 8

---

7 Some aspects examined in this paper cite the comments made by R. Posner and L. Bebchuk, One-Sided Contracts, available on http://ssrn.com/abstracts=845108 who maintain that companies often offer contracts that are unbalanced to their advantage even while behaving fairly towards their clients. Their explanation is that, if the companies dictated balanced contracts, opportunistic behavior by consumers would become too easy, so in the end the balanced approach would be disadvantageous for the same consumers. The idea that will be defined in this work as “uno actu reduction of contract conclusion and execution” seems in part to hark back to the idea
b) **Affirmation of standard form contracts**

As stated above, the decline in the possibility of negotiation for companies has not meant giving up an auto-regulation of contracts. In fact, by using the general contract conditions, firms have been able to define the rules of the contractual relationships different from those defined by legal regulations. This phenomenon must be attributed to the objective inability of lawmakers to draft provisions suitable for satisfactorily filling in any gaps that may be present in each type of contract. The great variety of goods sold in the marketplace is such as to make it extremely difficult for a lawmaker to draw up a legal provision that manages to take into account this extreme variety.\(^9\)

However, it does not seem unreasonable to assume that some companies have begun resorting to this tool for the main purpose of being able to include inequitable clauses, possibly justifying this with consumers by unjustifiably citing the imperfection of legal provisions.

---

of the two authoritative authors. The expression used here was coined by Professor Natalino Irti, who discussed it in many papers and in his classes.


“An additional perspective from which to look at the role played within the corporate organization by the use of general contract conditions is available to anyone who compares the standard contractual regulations contained in business forms with the legislated regulations. That such standards often create a gap-filled system inadequate to the situations and relationships institutionally governed by them is a phenomenon made largely inevitable by the evolution of socioeconomic relationships and (in particular) by the needs expressed by the system of companies which, in times of rapid technological progress, change constantly, worsening the tension between economic realities in constant movement and legal forms crystallized in the codes. But for the deficiencies of a regulatory system that is often incapable of providing adequate responses to the “legal question” expressed – in increasingly complex and sophisticated terms – by the enterprise system, the latter has a remedy. By setting up autonomous negotiating schemes (and hence legal regulations alternative to the legal system’s regulations), enterprises in fact create for themselves a “law that (…) better corresponds to the situation and dynamics of market relationships.”
The diffusion of standard form contracts has also been a consequence of a dimensional growth of many firms: when the owner or a family member cannot sign the contract, he or she must resort to strangers. In this situation the principal-agent problem emerges and the standard form contract becomes a tool to create bonds for the agent. It is however right to stress that both legislative and jurisprudential law has favored the spread of standard form contracts, both in Europe and in the United States.

c. The spread of inequitable clauses

The phenomenon of the spread of inequitable clauses, that is, the affirmation as part of the general contract conditions of clauses so unbalanced in favour of the party dictating them as to lead one to believe that in normal contracting they would not be accepted, was emphasized in the 70s. The notion, developed in the 1970s and substantiated in the following decade, stated that the clauses in the general conditions

---

One particular case was considered by G. Gorla, Standard Conditions and Form Contracts in Italian Law, 11 Am. J. Comp. L., 1 (1962), who assumes “The document signed by the customer, or an oral contract, makes express and clear reference to standard conditions, but these are to be found elsewhere. The majority of our legal writers seem to maintain that in this situation to the customer has to take the trouble to find the standard conditions and read them”.
But it needs to be said that, according to the second paragraph of §1341 of Italian civil Code, one-sided clauses, in order to be incorporated into the contract, must be specifically approved in writing. The second paragraph of § 1341 gives a list of such clauses.
11 The idea of a possible adverse selection involving the clauses inserted in standard form contracts can be found in an article written by D. Slawson in 1970, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1970), but it’s Lewis Kornhauser who expressly states the idea,
of the contract would be subject to a phenomenon of adverse selection, by which the “bad” clauses would tend to drive out the “good” ones. In summary, this phenomenon can be explained as follows: A study of the contract’s general conditions by consumers carries with it costs for the latter, mainly represented by the opportunity cost of the time that must be devoted to this activity. These costs are such that the consumer finds it more economical to waive evaluating all the clauses and to concentrate on a few of them, i.e., on those most important from an economic point of view (for example, the clause setting the fee in money, or certain clauses governing the more important guarantees). Based on this rational choice, the consumer carries out his comparison of the various available proposals,

Unconscionability in Standard Form, 64 Cal. L. Rev. 1087 (1976) p. 1177: “When confronted with an oppressive contract, one must ask why and how did the market arrive at the production of a “bad” or non-optimal good. Conventional economic theory has few models of product selection. One model suggest the difficulty is an informational one: the ordinary consumer cannot distinguish between good quality and bad quality goods. Since it’s more expensive to produce high quality goods and purchasers cannot distinguish the good from the bad, the market will produce low quality merchandise. Complex, fine print standard forms might be viewed as goods whose quality people cannot determine (…) As consumers are making decisions upon price grounds, a seller offering a better warranty must either suffer a lower profit margin at the same price or charge a higher price and attempt to disseminate information to prevent a loss of sales because of the raised price. Dissemination of information might be difficult…”

Some years later, a similar idea was expressed by Todd Rakoff, Contract of Adhesion: an Essay in Reconstruction, 96 Harv. L. Rev. 1174 (1983), pp. 1227, according to whom, “Drafting parties introduce contracts of adhesion to minimize their exposure to external risks and to further internal organization aims. Adherents respond not by reading, but instead by focusing on a few items. They compete in regard to those items. The incentive for the firms is to save whatever they can with defensive form terms and employ the savings to compete with respect to the shopped terms.”

After these first explanations the idea that a phenomenon on adverse selection could involve some clauses of standard forms contracts with the possibility of a “lemon equilibrium” became widely accepted. However, see now R. Posner and L. Bechuk, supra note 8, who have given the new explanation already exposed.

We have stated that the cost of being informed discourages consumers from acquiring an adequate awareness of contractual clauses. It must however be added that possibly more economical mechanisms for producing information run into the classic market failures.

Indeed, a decidedly more economical mechanism for ensuring that consumers acquire information could be represented by the collection and processing of such information by specialized companies, which could then sell this information to consumers. The problem that this mechanism encounters is represented by the fact that producing information involves very high costs, whereas once it is produced, anyone can sell it at a very
taking into consideration only the clauses he has selected. His attention thus does not fall on those clauses deliberately ignored. Once the consumer selection is understood, the companies supplying the goods or services requested, which operate in competition with one another, are pushed to save as much as possible on those clauses that have not been evaluated by potential consumers. By so doing, the companies can improve—in order to prevail in the competition with competing firms—those clauses based on which the choices are made. In other words, companies focused only on the clauses selected by the consumers, and, in order to improve their offer with reference to these clauses, exploit all possible savings by worsening the other clauses. Over time, this mechanism leads to the presence of many inequitable clauses accompanied by other clauses that are particularly advantageous.

The inefficient outcome of this phenomenon lies in the fact that consumers might prefer a different combination of clauses, for example, a combination characterized by a greater balancing of all clauses governing the relationship.

There could be another explanation of inefficient harsh clauses in the standard form contract. A firm could insert a clause, in a position that can be read, that states: “All harsh clause in this contract are ineffective. This clause should attract consumers a should enable firm to make money. But there is a big problem. This clause I similar to the legal dispositions that are called standards. It’s a clause imprecise, vague, that needs a lot o legal precedents to be clarified. A single firm should bear a lot of costs for producing a clarified clause while the other should wait until the clause s clarified and then they can insert I without any expense. This clause is a public good in economic sense because it is impossible to avoid that those who did not participate at the expenses make use of the clause. They are free rider.

In this way a clause like this it is difficult that appears in a contract spontaneously because the first firm should bear all the costs of litigation and then the other can exploit learning externalities. A legislator decide that all firms must have this clause in the contract an the problem o free riding is offsetting.

In this chapter, in which we seek to present the most credible reconstruction of the

low cost without having to bear the production costs. In other words, the production of information runs into
the same problems that characterize the production of innovations and that are sometimes defined as the ‘problem of the appropriability’ of benefits.”

In addition, another mechanism for producing information could be represented by enterprises conveying
information to consumers. Here the problem of free-riding arises. In fact, much of the information that an
industrial company can convey to consumers also involves other companies, with the consequence that the
company that produces the information also ensures a benefit for other companies. This situation may encourage a
behavior of waiting, in the hope that others produce the information. In addition, when information
production includes a cost such that it is not worthwhile for a single company to produce it but may be
economical for several companies together, the problem arises of agreement among them.

14 M. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World,
supra note 2, probably presented this theory in the simplest and clearest way.

15 See Posner and Bebchuk, supra note 5. In fact R. Coase, The Choice of Institutional Framework: A Comment,
17 J. Law Econ. 493 (1974), albeit for somewhat different reasons (regulator’s lack of jurisdiction, market’s ability
to function) had previously rejected the theory by which the public authorities should intervene in contractual clauses of standard contracts to avoid a phenomenon of adverse selectio
d. **Affirmation of a new contract model**

We stated previously that a unique feature of the phenomenon of mass contracting is represented by the affirmation of a model of exchange that recapitulates *uno actu* the conclusion and execution of the contractual relationship, i.e., a model characterized mainly by the simultaneous recapitulation between the contract’s conclusion and execution of the services.

This phenomenon appears to be mainly the result of mass production. Mass production, in fact, involving the standardization of products, has made the acquisition by firms of prior commitments by consumers for acquisition of the goods less necessary. The standardized product, not having been made to meet the particular demands of an individual consumer, but being aimed at broad categories of potential buyers, can be produced even in the absence of specific orders from consumers. Instead, once it is produced, the personalized product may be of interest only to the consumer for whose needs it was adapted; but the standardised product, being produced with standard characteristics adapted to the needs of broad categories of consumers, can be sold indifferently to anyone belonging to those categories.

However, this explanation of the phenomenon of the *uno actu* recapitulation of the contract’s conclusion and execution, while it certainly appears able to justify the willingness of companies not to seek preliminary promises from consumers,
does not seem capable of offering an explanation for the other aspect of the phenomenon in question, an aspect consisting of the tendency of businesses to require of consumers the immediate execution of the counter-service.

We shall now try to provide an explanation for this phenomenon.

The contract’s legally binding nature is provided by legal systems in order to remove a situation of the “prisoner’s dilemma” type which would impede the implementation of a mutually advantageous exchange between two parties. There are particular expedients that make it possible to remove this type of impediment to exchanges with no need for the legal effectiveness attributed to the contract by law. Indeed, a plausible method for avoiding fraudulent behaviour is to make the exchanges more simultaneous.

In modern states, the legally binding nature of the contractual agreement is universally recognized, albeit within limits that differ from one legal system to another. The existence of the legal constraint ought to discourage opportunistic behavior, and in any case the possibility of undertaking the legal actions that derive from the legal constraint ought to ensure remedies of restitution or compensation in the case of non-performance.

The guarantee thus given to the parties making the exchanges should exclude the need to rely on those other expedients indicated above.

However, in the event this guarantee is ineffective, what behavior should businesses engage in order to prevent opportunistic behavior? How can businesses ensure compensatory remedies? Is it possible that this tendency to recapitulate uno actu in the conclusion and execution of the contract is the consequence of the ineffectiveness of the legal constraint and of all remedies other than simultaneous exchange to check opportunistic behavior?
As we said, manifest non-performance and strategic opportunistic behaviour can be effectively controlled by legal constraint. In fact, legal constraint can discourage opportunistic behavior, whilst the legal action deriving from this constraint can ensure remedies of restitution and compensation. However, this result is achieved only if these two conditions exist: 1) Positive law must ensure the winning party of a complete indemnification, and 2) There can be no *ex ante* doubts regarding the rights and duties of the parties.

If these two conditions are not met, the effectiveness of the legal constraint as an antidote to opportunism and of legal action as an instrument for obtaining remedies of restitution are partially compromised.

These two conditions do not seem to exist in today’s legal systems; it may even be utopian to imagine that they may occur in any social system. Generally not all litigation costs are charged to the losing party, and in any case the result of the proceeding almost never seems certain. If we take into account trial costs, costs that have risen in recent years because of the length of the trials themselves and because of the characteristics of the activities that are carried out in them, it may be determined that interest in keeping legal disputes from arising is very strong among companies. This preference to avoid legal disputes must necessarily push companies to seek other expedients to ensure performance of the counter-services.

So what are the mechanisms that seem capable of functioning in today’s society? The first thing to be considered is the mechanism of reputation. This mechanism requires that operators be able to collect and utilize a great deal of information about the parties making the exchanges. In a world in which information about

---

16 The activities carried out in trials are characterized by requiring almost exclusively the use of the work factor, of the judge and of counsel. The costs of these activities are increased in the same way as all “nonprogressive activities.”

17 The taxonomy used here was developed by A. Kronman, *Contract Law and the State of Nature*, supra note 1, *passim.*
individuals does not circulate readily, interest in maintaining a good reputation has waned. On this basis, it can be concluded that in today’s large cities, characterized by the fact that individuals move about essentially anonymously, the mechanism of reputation does not seem capable of correcting the opportunistic behavior of individuals, particularly of consumers.

The use of hostages\(^{18}\) to ensure compliance with contractual commitments can be found only in residual hypotheses, and this scarcity denotes its particular ineffectiveness. For example, some hotel companies normally withhold their customers’ ID documents until all obligations have been met. Rather than responding to the company’s desire to be able to know its customers’ precise data and to be able to rely on possible proof in the event of a legal dispute, this practice seems to respond to the company’s interest in making it worthwhile for the customer to fulfill his obligations, since the loss of his ID documents could involve costs greater than the earnings obtainable through non-performance. The scant use of this expedient seems to be attributable not just to its intrinsic drawbacks, but to the fact that there are strong legal limitations in modern law on recourse to it.

The use of collaterals\(^{19}\) is also not very widespread. Forms of precaution in which we can recognize the characteristics of the technique called “use of collaterals” include, for example, the demands that some companies make that

\(^{18}\) The hostage is an asset or an individual having a value for the debtor but having less value for the creditor. Consider, for example, the debtor who gives “as hostage” a young and rather sickly child. In this case the debtor’s interest lies in performing in order to have the loved one back, whereas the creditor’s interest does not lie in holding the hostage and waiving performance of the service. The risk of using hostages lies in the fact that the asset or individual may be of little value for the debtor as well, in which case the latter relinquishes performing the service and leaves the hostage to the creditor, the hostage being of no value for the latter.

\(^{19}\) Collateral is an asset or individual having value for both parties, creditor and debtor. The use of collateral is much riskier, because if the appraisal is not correct, the debtor could leave the collateral to the creditor and not perform, but most of all the creditor might keep the collateral and ask the performance called for in the contract. Consider the case of the debtor having given as collateral an especially beautiful daughter. The creditor might keep the daughter and waive performance of the service.
they be able to hold receipts for authorization to credit sums by credit card without indicating the amount being authorized. In this case, the creditor reacts to failure to comply with the obligation (for example, with reference to a fairly widespread circumstance, failure to return a rented car) by taking a sum of money as compensation for damages. However, use of this technique runs up against the legal limit represented by the prohibition against forfeiture agreements.

However, we must note that deposit of the sum of money, allowing the ability to obtain payment through the credit card amounts, seems to be destined to become widespread. It must also be noted that knowledge of credit card data by many companies offering goods and services at a distance constitutes an effective deterrent to non-performance or partial performance. From this standpoint, the economic system seems to have thought up an effective remedy to non-payment or to the request for compensation for damages. But, as we indicated at the start, we will deal only superficially with the changes that the new technologies are bringing us.

In today’s world, the instrument of self-enforcing agreements\textsuperscript{20} seems to be entirely unutilized, and this denotes either its excessive cost or its clear ineffectiveness.

Regarding the remedy of creating affective bonds, there is no doubt that in many cases the bonds of friendship among partners are a guarantee that contractual relationships will be respected. However, the large number of consumers with whom each company stipulates contracts certainly makes it difficult to use this expedient.

Finally, there remains the remedy of making exchanges simultaneously with just a few obligation destined to live after the conclusion of the contract.

\textsuperscript{20} Self-enforcing agreements are agreements stipulated before a group of citizens, meaning that failure to respect it leads to the loss of reputation and hence the possibility of subsequently stipulating new agreements with other associates. In Kronman’s classification, self-enforcing agreements do not share anything with Nash’s equilibria, by which the parties may agree to follow specific strategies.
This remedy seems to be the one that most effectively and without many drawbacks manages to avoid the risk of opportunistic behaviour, especially that opportunistic component represented by complete non-performance.

The preference of firms for simultaneous exchanges is justified by taking the following need into account. As in other historic periods, when the legal constraint and interest in reputation did not appear to be effective deterrents for avoiding improprieties or even instruments suitable for removing the harmful consequences caused by these improprieties, today when the “costs” of trials and the scant interest in reputation do not encourage respect for the rules of cooperation and loyalty, the exchange system is implemented essentially through contractual operations that require the simultaneous performance of the services of the exchange.

2. Conclusion

We have seen how the contract has changed over the last century, both in the way it is concluded and in its content. The recognized motivations seem economic and not mere whims, or worse, political programs of businesspeople banding together. This does not mean however that contract law should remain the same. On the one hand we need to be cautious in reform, as critics of the theory of the adverse selection of contractual clauses demonstrated with regard to the conviction that the courts should intervene. For example, in 1993 the European Commission adopted Directive 13/93, intended to invalidate all clauses which, to the consumer’s harm, caused a significant imbalance between the parties’ rights and obligations. Now, in light of the work by Posner and Bebchuk, this arrangement seems to ultimately risk harming those who were to be protected, i.e., the consumers. The risk of unintended consequences, when a phenomenon is not fully understood, always hangs over the work of the regulator (or legislature).

On the other hand, it is possible to proceed. From a liberal and economic-efficiency standpoint, we should ask what the consumer is requesting from the State. Does
the consumer want to delegate control over contractual clauses to the State? Does he want imperative clauses, i.e., clauses which the parties cannot amend? Does he want some regulation other than error or withdrawal imposed from the above? We will attempt to answer these and other questions in order to respect the sovereignty of the consumer and of liberal principles.

The initial question remains unanswered: Will information technology change the situation as it exists today? Will the consumer’s ability to read proposed contracts on the Internet at any time, i.e., when his time has the least value, lead to greater awareness of them, and to a more sophisticated comparison of them? The ease with which contractual alternatives can be explained, even in the case of standardised alternates, leads to more personalized contracts. (Consider the possibility today for buying the insurance coverage or choosing a type of transport service over the Internet). Additionally, will the exchange of information, which the Internet allows among consumers, make it possible to have more knowledgeable buyers? In this paper, all these questions remain unanswered.