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CONTRACTS, LICENCES AND UNDERTAKINGS

This article deals with legal instruments designated as contracts, licences and undertakings, respectively, purporting to effect some legal disposition. It comments on the legal nature of such instruments and, on that basis, reflects on the conditions of validity, effect and consequences prescribed by law as applicable to them. In England, Blackstone used to define a contract as "an agreement, upon sufficient consideration, to do or not to do a particular thing", and consideration remains to be an essential element of a contract in Anglo-American jurisdictions, whereas civil law systems do not require consideration as such and do not include principles resembling that doctrine. As noted in the article, differing premises as to the existence of an enforceable contract lead to differing conclusions also as regards other forms of juristic acts. Such differences should be taken cognisance of whenever one comes into contact with foreign legal language and, indeed, foreign legal systems. Using the common law doctrines as a point of reference, this article provides a general overview on the legal assessment of contracts, licences and undertakings in Finland.

1 Introduction

Juristic acts are conventionally divided into two groups depending on whether the legal effect of such an act arises out of the manifestation of intent by merely one person, or whether the consistent manifestations of intent by two persons are required for the desired legal effect to arise. A bilateral juristic act is referred to as a contract. The binding strength of a contract is based upon a mutual understanding between the contracting parties.[1]

Under the Finnish Contracts Act (228/1929, as amended), an offer to conclude a contract and the acceptance of such an offer constitute a binding contract between the offerer and the acceptor. In accordance with section 31(1) of the Act,

1 KKO 2012:1, para. 16.

acquiring or exacting a benefit which is obviously disproportionate to what one has given or promised, or for which there is to be no consideration whatever, may be deemed invalid towards the other party if the transaction has been effected by taking advantage of another's lack of understanding, imprudence, *et cetera*. Any general requirement for "consideration" however, within the meaning of a thing given or done by the promisee in exchange for the promise,[2] is not present unlike at common law. Whereas the conclusion of a lawful agreement necessitates signatures or other manifestations of intent by two or more parties, for instance the termination of a contract can be brought about by one person alone; it is typically a unilateral juristic act.

In addition to the classification between unilateral and bilateral – or multilateral, for that matter – juristic acts, juristic acts can also be grouped into gratuitous juristic acts and juristic acts for compensation. If a person receives an advantage on the basis of the juristic act without any counter-performance, the juristic act is gratuitous. Gifts are a prime example of such juristic acts, but basically any transfer and acquisition, for example a usufruct, can be gratuitous. If the transaction involves *quid pro quo*, it is a juristic act for compensation. Thus in a sale of goods the buyer receives and the seller delivers the goods on payment of the purchase price. It is a so called synallagmatic contract.

In this fourfold table of one-sided and reciprocal juristic acts and juristic acts for and for no compensation, a technology lawyer might wonder how licences are to be situated, in other words whether a licence is a contract or a juristic act of another kind. With regard to licences that relate to the use or other utilisation of subject matter covered by intellectual property rights, for instance, it is conceivable that a violation of the licence terms is either a breach of contract or an infringement of intellectual property rights, or possibly both. What would be the correct cause of action?[3] And what of different promises in the form of undertakings, such

2 See *Langdell* 1880 p. 58.

3 This line of enquiry becomes quite topical in Finland when the Market Court starts to hear cases related to intellectual property rights as of 1 September 2013. In accordance with section 5(1) of the new Act on Proceedings before the Market Court (100/2013), the Court's jurisdiction encompasses also other civil actions that are "associated with" the above cases. See HE 124/2012 p. 54.

as a unilateral non-disclosure undertaking; can they constitute a contractual relationship between the parties involved? Irrespective of the frame of reference or possible technical nuances, the binding nature of licences in one form or another is hardly to be questioned, but the *ex parte* characteristics of a unilateral undertaking might cast doubt on its enforceability and, therefore, on the remedies or sanctions available against the promisor. With considerations like these as a subtext, the conceptual relationship between contracts, licences and undertakings, respectively, is the central theme of this article.

In order to answer the research question formulated above, I shall first provide a brief review of the basics of contractual jurisprudence in civil and common law jurisdictions. Seeing that in the Anglo-American legal thinking the concept of consideration may have far-reaching repercussions for the subject under discussion, Section 2 starts with the latter and then moves on to contrast such findings with the continental paradigm, but a rather quick survey should suffice for our present purposes. Section 3 then addresses the issue of licences and Section 4 that of unilateral undertakings, building in both instances on the theoretical underpinnings of contract law and the doctrinal premises influencing legal thinking in this area. Some conclusive remarks in Section 5 bring the paper to an end. Because the research question is based on English terminology, the United Kingdom and the United States have been chosen as the points of reference against which views to be derived from sources of Finnish law are to be compared. Materials of a commercial agreement are commonly drafted in English even if they are to be governed by the substantive law of Finland, which calls for a clear understanding of what is actually meant by terms that are largely anglophone. The purpose of the comparisons below is to provide cognitive grounds for that.

2 Consideration in the Law of Contracts

2.1 Contracts 101: From St. Germain to the Bargain Theory of Contracts

According to the Oxford English Dictionary, "consideration" refers to anything regarded as recompense or equivalent for what one does or undertakes for another's benefit.[4] Consideration can be both a positive and a negative obligation. The dictionary notes that the first occurrence of the term in this context, although in the linguistic form of Early Modern English, dates to 1530 and the quill of the famous common lawyer *Christopher St. Germain*:

> "Yf the promyse be so naked that there ys noo maner of *consyderacyon* why yt sholde be made, then I thynke hym not bounde to performe yt."[5]

At its first appearance the word consideration was hardly a technical term or distinguishable from "motive", but it gradually acquired its nuanced legal meaning in Anglo-American contract law in the course of the 17th and 18th centuries in *Sir William Blackstone's* Commentaries and other suchlike works of authority. This doctrine, which goes by the name of benefit–detriment theory, states that valuable consideration, in other words a legal consideration having some economic value which is necessary for a contract to be enforceable, is either a benefit to the party promising it or some trouble or prejudice to the party to whom the promise is made.[6]

The benefit–detriment theory has later on in modern legal thought evolved into the bargain theory of contracts, where contracts are perceived as an end result of bargaining. In the bargain theory of contracts, the legal validity and binding strength of contracts is based upon reciprocity rather than a particular detriment to the other party.[7] Thus a promise is only binding as a part of trade in terms of bargained-for exchange: the promisee must give to the promisor some sort of

4 "consideration, n." 2012.
5 *St. Germain* 1623, fol. xviiiv. Emphasis added.
6 *Kent* 1827 p. 365.
7 See, e.g., *Lord* 2012 §§ 7:4–7:5.

compensation for the deal to be enforceable, and this compensation is referred to as consideration. Looking at from this offset the promise is not binding as between the contracting parties if the consideration of the bargain is not in order.

The idea of consideration, contrary to what one might presume, has not to do with the principle of contractual balance, for consideration can be quite nominal. In most common law jurisdictions, the link between consideration and the economic value of the promise is not what the law is first and foremost keeping an eye on. Rather, what matters is that something has been bargained in exchange for a promise. Not any consideration whatever is accepted, however, for the price of the bargain must be satisfactory in light of the bargaining position of the parties, although courts are reluctant to second-guess the subjective issue of equivalence. Note *Sally Wheeler* and *Jo Shaw*: "[Anglo-American c]ontract law looks for sufficiency of consideration but no adequacy"[8] – but the line between those two may be thin indeed.

2.2 Contractual Balance under Finnish Law

Finland is a civil law jurisdiction with no civil code. Our Contracts Act does address certain issues related to the conclusion, validity and adjustment of contracts as well as authorisation, but many aspects have been left open by the legislature to be governed by the unwritten general principles applicable to the law of contracts. As noted in Section 1 above the mere fact that there is no consideration for a contractual benefit does not have any effect on the validity of a transaction under section 31(1) of the Finnish Contracts Act. It is only where the contracting party has taken advantage of the other party's distress, lack of understanding, imprudence or position of dependence on the former that a juristic act thus carried through is not to bind the abused party. *Pacta sunt servanda*, unless there are specific grounds for invalidity.

The principle that contracts are legally binding on all parties concerned is not absolute, though. *Juha Karhu* (né *Pöyhönen*) has in his dissertation written of the

8 *Wheeler – Shaw* 1994 p. 318. The difficulty of delineation is evident already in the terminology itself: both the words "sufficiency" and "adequacy" translate in standard language into Finnish as *riittävyys* and into Swedish as *tillräcklighet*.

principle of equity in the system of contract law, bespeaking a qualified exception to the pacta sunt servanda principle whereby pacts must be respected – but only to the extent they are equitable.[9] The main instrument for subsequent interference in the contents of a juristic act in accordance with the grounds of equity is adjustment. Unlike norms that protect the underdog, the function of the principle of equity is not to nullify a contract but rather to refine its contents and retain the contract in force, albeit after an adjustment of its unreasonable conditions. In the final analysis, the principle of equity is in essence about maintaining the contractual balance: provisions on adjustment, such as the one laid down in section 36 of the Finnish Contracts Act, may in exceptional circumstances be used for balancing the performance and the counter-performance. Paragraph (3) of the section expressly provides that a provision relating to the amount of consideration is also deemed a contract term for the purposes of the norm.

Adjustment of contracts, however, occurs always *ex post facto*. The existence of statutory provisions to that effect does naturally act as an advance deterrent for the use of inequitable terms, seeing that they set peremptory, although nebulous, boundary conditions for the contents of the transaction. Nevertheless, their enforceable legal consequences, if any, take place only after the event. The *ex ante* and the more continuous element of equitability can be discerned more clearly in the so called principle of fidelity, which obligates the parties to take in commerce reasonably into account also the interests of the other party. This not only makes commercial sense especially in contracts of long duration, where both parties are able to reap profits from a successfully proceeding project, but also carries weight in its own right as a legal principle endorsed, too, by the Supreme Court.[10]

In the doctrine, for example *Leena Kartio* has described the requirement of respectability and integrity as the highest normative directive in all exchange. This brocard, or maxim if you like, finds its shape at the level of general theory and is subject to change from time to time. But in the form such maxim is societally applicable at any given time, argues Kartio, as a general requirement it will rise even

9 *Pöyhönen* 1988 pp. 262–266.

10 See, e.g., KKO 2007:72, KKO 2008:91. See also HHO 26.10.2000 S 82/00.

"above" the foregoing underlying principles of contract law.[11] Unlike the common law idea of consideration, which is more or less nominal, the doctrines of approximate equivalence in the Finnish system of contracts and contractual commitments are more concerned about the contentual merits of the case. It should be emphasised, however, that in terms of practical and economic reality, the pacta sunt servanda principle is the main rule. Adjustment of contracts and other forms of court intervention are rare especially in the business-to-business context. Against this backdrop, we now turn to the issue of licences.

3 Licences as Contracts

3.1 On Terminology

The term "licence" (*lisenssi*), without further qualifiers or compounds such as "licence agreement", "licence fee" or "licence holder", is used in Finnish legislation in three different meanings. In some statutes, a licence refers to a formal permission from a constituted authority to do something, that is to say an official permit. Thus in the Act on Implementing the Common Fisheries Policy of the European Community (1139/1994, as amended), for instance, engagement in professional fishery is under penalty of fines made conditional on the possession of a vessel-specific *licence* or a fishing permit determined as obligatory. In the Act on the Provision of Services (1166/2009, as amended), a permit is defined to mean any concession, *licence*, registration or corresponding approval from a competent authority, which is a prerequisite for commencing or practicing service activity.[12]

Secondly, in the context of legislation concerning taxation and accounting, the word licence is used in the sense of a piece of incorporeal property in its own right, as a part of the person's intangible assets. Chapter 5, section 5a(1) of the Accounting Act (1336/1997, as amended) provides that the cost of intangible as-

11 *Kartio* OJ 1997 pp. 159–160. Cf. Sale of Goods Act (355/1987, as amended) ss. 20(2), 33, 35, 39(2); Code of Real Estate (540/1995, as amended) ch. 2, ss. 22(3) and 25(3).

12 See also *valtioneuvoston asetus julkisesta työvoima- ja yrityspalvelusta* (1073/2012) s. 2(2).

sets acquired against a consideration, such as concessions, patents, *licences*, trademarks and similar rights and assets, is to be capitalised – that is, entered on the assets side of the balance sheet. In accordance with section 69h(2)(1) of the Value Added Tax Act (1501/1993, as amended), so called intangible services include, among others, the transfer of copyright, patent, *licence*, trademark and other similar rights.[13] A parallel is hence drawn between licences and intellectual property rights themselves, the two categories being considered equal for the purposes of financial regulation.

Finally, the word licence can be used for denoting an informal liberty do to something, especially with regard to an intellectual property right. The Finnish Copyright Act (404/1961, as amended) speaks in several provisions of a *sopimuslisenssi*, which translates into English roughly as an "extended collective licence". It refers to a statutory arrangement whereby a collective licence extends also to right holders who are not members of the collecting society agreeing the licence with a user. The Act, however, contains also section 16a(2) pursuant to which an archive, library or museum is permitted to communicate a work held in its collections to a member of the public for certain purposes, provided that the communication can take place without prejudice to the purchasing, *licensing* and other terms governing the use of the work.[14] Thus, rather than a permit or a right as such, a licence may carry the meaning of some sort of a juristic act.

This paper focuses on the last-mentioned concept. Unless otherwise specified, therefore, what is hereafter said about licences applies to the term in the meaning of permission not by an authority but by an individual right holder, which permits something that would otherwise constitute an infringement. This goes back to the Latin root word *licēre*, 'to be lawful'. So by licensing we mean yielding the privilege – in the Hohfeldian sense[15] – to use or otherwise utilise a given subjective right.

13 See also *valtiovarainministeriön asetus arvopaperimarkkinalain 3–5 luvussa tarkoitetuista esitteistä* (1019/2012) s. 6(1)(2).

14 See also *opetus- ja kulttuuriministeriön asetus näkövammaisten kirjaston suoritteiden maksullisuudesta* (837/2012) s. 2(2)(3).

15 See *Hohfeld* 2001 p. 12 ff.

3.2 Terms, Conditions and Covenants

To license is to grant permission to do what would otherwise be forbidden. At its simplest, a licence may consist of nothing more than a privilege to use, which remains subject to the licensor's power of revocation at will.[16] Taking that into account, especially in the United States doctrine, commentators have been arguing that licences are not contracts. Although a licence may arise from acts of contracting, the licensee is obliged to remain within the bounds of the licence not because it voluntarily promised to do so in the contract, but because it does not have any entitlement with regard to the protected subject matter except as intellectual property law and the licence permit. The contract formation issue of standard terms becoming part of the contract between the parties would not arise, for a "bare licence" does not require acceptance or other formality; the right holder's unilateral manifestation of intent suffices.[17] In practice, however, most licensing agreements are *both* conditional licences *and* contracts, and the formation of the contractual package will require bargaining, or express or implied adherence to the vendor's standard clauses.

The separation between licences and contracts is of relevance for two reasons. First, the remedies available for the breached or infringed party, as the case may be, vary depending on the nature of the obligation or prohibition. Under the United States Copyright Act, an infringer may be liable for statutory damages of up to USD 30,000 plus attorney's fees, irrespective of whether the right holder has incurred any actual losses.[18] Damages for the breach of contract, by contrast, are meant to be compensatory, but the injured party may be entitled to specific performance.[19] The second US-specific effect is jurisdictional: the creation (existence) and rearrangement (licensing) of jural relations under copyright arise out of federal code, whereas purely contractual matters are for the law of each individual state to govern – to the extent not pre-empted federal law. For this reason it signifies whether a term is a licensing condition or a contractual promise, covenant.

16 *Newman* IALR 2013 p. 1115.
17 *Hillman – O'Rourke* HSTLJ 2009 p. 314.
18 17 U.S.C. §§ 504(c)(1), 505 (2006).
19 See Restatement (Second) of Contracts §§ 347, 359 (1981).

A good example is the lawsuit of *Jacobsen v Katzer*, where a copyright holder filed an action against its competitor alleging infringement of copyright to a computer program. The claimant also sought declaratory judgment that a patent[20] issued to the defendant was not infringed on the one hand, and invalid on the other, so the case ended up before the United States Court of Appeals for the Federal Circuit. The claimant made the program at issue available for public download from its website without a financial fee pursuant to an open source licence widely used in projects written in the Perl programming language, rejoiced in the name of the Artistic License. The Artistic License is a non-copyleft[21] licence, the second version of which has been approved by the Open Source Initiative, which tries to be aesthetically pleasing but – from the lawyer's perspective – unfortunately at the expense of legal certainty.

In *Jacobsen v Katzer*, the heart of the argument on appeal concerned whether the terms of the Artistic License were "conditions of, or merely covenants to, the copyright license."[22] If the terms are both covenants and conditions, they are governed by copyright law. But if they are merely covenants, the governing law is that of contract. Thus, the question whether a breach of licence is actionable as copyright infringement or breach of contract depends on whether the provision which has been breached is a condition of the licence, or a mere covenant.[23] An independent covenant would not limit the scope of a copyright licence. In *Jacobsen v Katzer*, the District Court had not expressly stated whether the limitations in the Artistic License were independent covenants or rather conditions to the scope of the licence. Although it used the word "conditions", one can however gather from the District Court's analysis that it treated the licence limitations as contractual covenants rather than conditions. They were held not to limit the scope of the licence.[24]

The Court of Appeals disagreed. It relied on the phrasing of the Artistic License, noting that that the document states on its face that it creates conditions: "The intent of this document is to state the *conditions* under which a Package may

20 U.S. Patent No. 6,530,329 (filed Apr. 17, 2002).
21 For which see, e.g., *Honkasalo* NJCL 2009 p 4.
22 *Jacobsen v Katzer* 2008, p. 1380.
23 *Graham v James* 1998, pp. 236–237.
24 *Jacobsen v Katzer* 2007, p. *7.

be copied."[25] Furthermore, the Artistic License was held to use the traditional language of conditions in that it states that the rights to copy, modify and distribute, which are granted under the licence, are granted only *provided that* the conditions set out in the licence are met. Under California contract law, as in many states, "provided that" typically denotes a condition.[26] Having concluded that the choice to exact consideration in the form of compliance with the open-source requirements of the software package dealing with disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition under title 17 of the United States Code than money exchanging hands directly, the appellate court attributed an ordinary signification to the language used in the licence document and ruled that the terms of the Artistic License were enforceable copyright conditions.[27] The case was finally settled out of court.[28]

3.3 Specific Subject Matter of the Arrangement

In Finnish jurisprudence, no particular distinction has been drawn between conditions and covenants. Rather, as noted above, section 16a(2) of the Copyright Act, for instance, refers without further separations to the "purchasing, licensing and other terms" governing the use of the work. Accordingly, the answer to the question of whether an act constitutes an infringement of copyright or a breach of contract depends more on the *Natur der Sache* than the wording used. This is evident for instance in the following decisions of the Supreme Court of Finland.

The Supreme Court's ruling in KKO 2011:92 deals not with a licence agreement but with one concerning translation. The legal norm to be derived from the judgment, however, should apply to licensing arrangements equally well. In the case, a publishing house had received from a translator through a translation agreement an exclusive right to reproduce and make available to the public the translation of a literary work in the book format and under its own business name. For the re-

25 The "Artistic License" (n.d.), pmbl. Emphasis added.
26 *Diepenbrock v Luiz* 1911, pp. 717–720.
27 *Jacobsen v Katzer* 2008, pp. 1381–1383.
28 *Meeker* Hastings Sci. & Tech. L.J. 2012 p. 277.

maining parts the rights associated with the translation remained with the translator. After the book had been published, the publishing house had entered into an agreement with another company pursuant to which the former assigned to the latter an exclusive right to manufacture and market the book in paperback form. The translation was subsequently published as a pocket book, which carried on its title page information on both the publishing house and the pocket-book company.

The Supreme Court of Finland held that the agreement made between the companies involved a transfer of the copyrights associated with the translation.[29] Under section 28 of the Finnish Copyright Act, unless otherwise agreed, the person to whom a copyright has been transferred may not alter the work or transfer the copyright to others. The transfer of a whole business constitutes a specific exception, but in the lawsuit under consideration this had not been the case. The two companies had thus acted in contravention of the translation agreement, but was it a matter of a breach of contract or a copyright infringement? As for the pocket-book company, the answer was quite clear. It had exploited the rights acquired from the publishing house by reproducing and publishing a paperback edition of the translation without the translator's authorisation. It was, therefore, under an obligation to pay a reasonable remuneration for a copyright infringement.[30]

Pursuant to section 57(1) of the Copyright Act, anyone who utilises a work in violation of the Act is obliged to pay a reasonable remuneration to the right holder. The publishing house was found to have transferred rights acquired from the translator to the pocket-book company contrary to both the translation agreement and section 28 of the Copyright Act. However, referring to its earlier case law, the Supreme Court was of the opinion that the breach of the prohibition to transfer copyright within the meaning of section 28 of the Copyright Act does not constitute such utilisation of the work the consequence of which would be liability for remuneration under section 57(1) of the Act.[31] It followed that the publishing house was under an obligation to recompense the translator for the damage incurred, but owing to a breach of contract, not copyright infringement.

29 KKO 2011:92, para. 13.
30 *Ibid.*, para. 16.
31 *Ibid.*, para. 15.

The earlier case cited by the Supreme Court was KKO 1999:8, where the defendant had sold a batch of video cassettes containing film works, together with their rental rights, to another company. The sale was effected without the permission of the copyright holder and the assignment of the rental rights was not permitted under section 28 of the Copyright Act. It was held, however, that by assigning the video cassettes the defendant had not made copies of works available to the public in contravention of section 2 of the Act, which provides that the right holder has the exclusive right to control a work by making it publicly available, whether by rental or otherwise. Moreover, in agreeing on the transfer of rental rights contrary to section 28, the defendant had not infringed the copyright *per se*, nor utilised the works against the law. The charge against the defendant of copyright violation as well as the claims for remuneration and compensation were eventually dismissed. Any renting carried out by the purchaser would naturally have required a licence.

In these decisions, "contractuality" becomes emphasised. A licensing or other contracting party, it is argued, is deemed to perpetrate an infringement of intellectual property rights once the threshold of statutorily protected subject matter has been passed. If the party in question is otherwise in contravention of the contractual arrangement, it would appear to be liable to pay damages for a breach of contract but not for an infringement, in the sense of violation of the exclusive rights of the right holder. Then again, it could be maintained that any norms following from the applicable legislation would by implication be a part of the duties of a contracting – for which read licensing – party in a manner that makes it possible to classify any violation of these duties as a breach of contract.[32] Be that as it may, a licence *sensu stricto* would be a permission given by someone to another person to do something which would otherwise be illegal, and hence a unilateral juristic act. The other contractual material, by contrast, through which the legal relationship, of which the licence so defined is a part, is established, amended or dissolved would be reciprocal in nature.[33] Whether compensation is payable or not is hardly of any particular relevance here.

32 Cf. *Hemmo – Hoppu* 2006 p. 3:4.
33 Cf. HHO 4.7.2002 S 3027/00.

4 Unilateral Promises

4.1 Anglo-American Perspective

What is distinctive in this final category of legal instruments which we are about to cover is the lack of direct compensation.[34] A company that issues a non-disclosure undertaking is typically receiving no remuneration or royalties in exchange of the undertaking itself, although the commitment is normally given in expectation of a prospective investment or dissemination of information for some other business reason. Now "undertaking", by definition, is a promise to do something that has legal force.[35] At common law, as noted, consideration may itself be a promise. No promise, however, is enforceable without consideration – unless the promisor clearly intends to be bound by it under the doctrine of promissory estoppel or other principle of equity.[36]

In English law, the doctrine of promissory estoppel was developed by *Mr Justice Denning*, as he then was, originally in the 1940s. In the leading authority, Denning J held, obiter dictum, that where a person has made a representation on which another person relies, it would be inequitable for the former to be allowed to resile from his or her promise.[37] A party may therefore be estopped on the basis of reliance which would cause inequity if it is established that

34 The same naturally applies to open-source licences with "attribution-only" obligations, such as the Apache, BSD, MIT and Microsoft Public Licenses. See, e.g., *Vetter* Mich. St. L. Rev. 2008 p. 304. As noted by the US Court of Appeals for the Federal District in *Jacobsen v Katzer*: "The attribution and modification transparency requirements directly serve to drive traffic to the open source incubation page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce." *Jacobsen v Katzer* 2008, p. 1382.

35 *Collin* 2004 p. 305.

36 See *Kronman* 1995 p. 189.

37 *Central London Property Trust Ltd v High Trees House Ltd* 1947, pp. 134–135, relying on *Hughes v Metropolitan Railway Co* 1887, p. 448.

a) the parties have a relationship which gives rise to rights and duties,[38]

b) there has been a clear and unequivocal promise by words or conduct[39] and

c) the promisee is not trying to use the doctrine as a sword, that is for other than defensive purposes.[40]

Estoppel is a construct in equity, as opposed to a remedy available at law, which makes its application subject to judicial discretion.[41] Nevertheless, even an implied undertaking may vary contractual rights. Hence an express undertaking – for example to the effect that one will not infringe the patent rights of another party – can for all the more reason be given legal force in the Anglo-American system of contracts, not as an act in law but as a quasi-contractual instrument supported by the principles of equity. A confidentiality undertaking, for instance, would thus provide the necessary evidence to trigger the operation of such principles, but does not itself offer any protection under common law.[42]

4.2 Finnish Perspective

Because of the lack of any rigid requirement for consideration, a unilateral contract – for instance a one-way confidentiality agreement – is still a mutually binding juristic act under Finnish law, even though the primary obligations fall upon one party only, enjoining it to do or from doing something. For practical reasons, however, it is sometimes more convenient to replace a unilateral contract with an undertaking, issued and signed by or on behalf of merely one party. By and large, what distinguishes such undertakings from licences *sensu stricto* discussed in Section 3.3 above is the direction of the manifestation of intent: to use a figure of speech, in undertakings it flows towards and in licences out of the stat-

38 *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* 1968, p. 847.

39 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* 1982, pp. 534–536.

40 *Combe v Combe* 1951, pp. 218, 224.

41 See generally *Virgo* 2012 pp. 28–29.

42 *Christou* 2009 p. 578.

utory[43] or other subject matter. As *Tom Vapaavuori* notes in his treatise concerning business secrets, execution in one counterpart only may cause difficulties relative to the interpretation of the contents of the commitment and, consequently, may in borderline cases call for amendments for reasons of equity, as discussed in Section 2.2 above.[44]

Difficulties as to evidence or making equitable cannot, nonetheless, alter the fact that a unilateral promise, undertaking, is an obligation *in personam* in the Finnish system of law of property.[45] In the Act on Guaranties and Third-Party Pledges (361/1999, as amended), for instance, a "guaranty" is in section 2(1) of the Act defined as an undertaking where the undertaking party (guarantor) promises to answer for the repayment of another person's (debtor) debt to a creditor. A juristic act is regarded as a guaranty and will be governed by the provisions of the Act on Guaranties and Third-Party Pledges irrespective of the rubric used on a document, provided that the contentual characteristics of the undertaking meet the definition set out in section 2(1) of the Act.[46] Under the privity of contract, duties cannot be created to an outsider, but there is no legal hindrance for a person to grant a right to another person through a unilateral juristic act.[47]

An obligation is a duty to perform, which applies in the legal relationship of given persons; in other words, the content of an obligation is a performance of some sort. A commitment has legal force if it is associated with a duty to fulfil the obligation. If the promisee does not have a right of action, even though he or she has a right correlated with the promisor's duty, the obligation is incomplete in the legal sense, and if the obligation – again in the legal sense – is missing altogether, only moral norms can put the screws on any performance.[48] An obligation can stand for giving, making or doing something, or for refraining from giv-

43 As regards business secrets, the legal basis being the Unfair Business Practices Act (1061/1978, as amended) s. 4, the Employment Contracts Act (55/2001, as amended) ch. 3, s. 4 and, ultimately, the Criminal Code (39/1889, as amended) ch. 30, ss. 4–6, as applicable.

44 See *Vapaavuori* 2005 pp. 161–162.

45 I use the term here in the sense of *Vermögensrecht*, encompassing both the *Sachenrecht* ('law of things') and the *Obligationenrecht* ('law of obligations').

46 *Saarnilehto – Hemmo – Kartio* 2001 p. 1121.

47 Cf. Limited Liability Companies Act (624/2006, as amended) ch. 10, s. 1(1).

48 See *Hakulinen* 1965 pp. 31–32.

ing, making or doing something, obligations can be non-recurrent or continuous, and so on and so forth. What matters is that there is an intent to be committed and an act of commitment.

Inasmuch and insofar as undertakings are obligations, they can be enforced and a certain set of sanctions is available for the promisee against the promisor. As regards breaches of contract, such means of compulsion include specific performance, abstaining from one's own performance, termination or, if the breach is material, cancellation of the contract, forfeiture of previous performances such as a deposit and reduction of price of other compensation.[49] Owing to the unilateral and gratuitous nature of an undertaking, unless the deed provides for cross-default or a similar construction, the possibility to demand specific performance is most essential of these. A judgment granting affirmative relief on account of an undertaking can also take the form of an injunction or a court-confirmed duty to tolerate. Indemnification for losses incurred by the promisee because of the promisor's non-performance is another important means of redress and, especially if the undertaking document has been drafted by the promisee, it is conceivable that the promisor would also have committed to liquidated damages.

5 Conclusive Remarks

Rights and duties can be established on the basis of voluntary contracts, authorisations, promises and whatnot. What matters is not so much the form of the juristic act but rather that the interested party or parties have employed their free will so as to constitute a legal relationship. The presumption is that both parties understand what the juristic act in question means and what consequences result of it. According to the will theory, the function of rights is to make it possible for free, rational persons to utilise their volition.[50] Underlying this theory of subjective intention is the notion that persons are in principle free to make, and not to

49 *Aurejärvi – Hemmo* 1998 p. 69 ff.

50 See *Kolehmainen* BLF 2005 pp. 125–126. Cf., in terms of psychology and behavioural economics, *Thaler – Sunstein* 2009, passim.

make, contracts with one another, by means of which they are capable of voluntarily limiting their own negative freedom.

In this article, three broad categories of legal arrangements have been considered. At the level of black-letter law, there would appear to be grounds to argue that the Finnish law of contracts is a more direct application of the reliance theory than the will theory, and reliance in the other party's utterances can therefore be emphasised in trying to find a theoretical explanation for the binding nature of contracts.[51] Assuming that the premises meet the normative criteria, a binding contract is formed when the contracting parties have reached a mutual understanding, whether through negotiations, the offer–acceptance mechanism or otherwise. In Anglo-American jurisdictions, as we have seen, a binding contract presupposes not only consistent manifestations of intent by two or more persons, but also some legal value in the form of consideration. The enquiry, however, is not concerned with the monetary value of consideration, but rather whether there is some sort of bargained-for exchange.

With licences, the problem of classification lies often with inexact usage: the same term is sometimes used for referring to the permission itself, sometimes to the document embodying such a permission. My substantive argument is that the hard core of a licensing agreement, in other words the authorisation to do something that would otherwise be illicit, can be perceived as a unilateral juristic act which bestows a specific benefit on its recipient. The other subject matter of the agreement, by contrast, such as terms dealing with the validity or transfer of the above-mentioned licence in the strict sense, are reciprocal in nature and can most naturally be characterised as a contract. The remunerativeness of a licence depends on the performance terms of the licensing agreement as a whole.

As for unilateral undertakings, the common law doctrine of consideration means that a promise, so long as it is not backed up with sufficient compensation, is unenforceable as a legal obligation.[52] As a consequence, special purpose tools of equity have had to be developed so as to reach a just outcome in individ-

51 *E.g. Mäkelä* BLF 2008 p. 115 with further references.

52 Unless made by deed. *Andrews* CLJ 2001 pp. 364–365. Cf. Finnish Gift Promises Act (625/1947, as amended) s. 1(1).

ual circumstances where the rigid rules of law would lead to an outcome that is, all things considered, simply not fair. In our jurisdiction no such difficulty exists. An undertaking constitutes an obligation and can be enforced by having recourse to those sanctions which are available at law or under the particular instrument taking into account the unilateral character of such a juristic act. That said, the requirement of respectability and integrity arguably finds application also in this area of private law, and a substantial disequilibrium in the overall arrangement may give rise to adjustments in the contents of the juristic act.

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