

## “Demand’st thou, Pedant, too, a document?” – The Past and Future of the Form of the Contract in the Light of Goethe's *Faust*

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*The Devil's Pact scene is one of the most famous passages from Goethe's Faust. Until now, little attention has been paid to its underlying theme: the self-binding of the free, enlightened human being through the contract. With this, Faust takes up a turning point in Western philosophical thinking and contract theory. Due to the digitalisation and automation of business processes, we are currently facing another paradigm shift for the contract. In this context, its development in terms of the history of ideas is of particular interest. Using the premises and methodology of Law and Literature research, this paper examines the mechanisms of contractual binding negotiated between Mephistopheles and Faust. The findings are then used to consider the extent to which these concepts may also be effective in the future. The overall result is that the mechanisms outlined in the Devil's Pact scene will remain important, albeit in new forms and with a different relevance; however, completely new phenomena are not to be expected in this field.*

**Keywords:** *Devil's Pact scene, form of contract, contractual compliance, digitalisation and automation, future binding mechanisms*

### A Legal-Historical Look into the Future

“Demand’st thou, Pedant, too, a document?”<sup>1</sup> Faust replies in Johann Wolfgang von Goethe's drama *Faust* to Mephistopheles' wish to record in writing the pact they have just concluded orally. He considers this small-minded and superfluous because, after all, “Man's word” should be enough to bind him. The dispute in which the controversy is embedded, the famous Devil's Pact scene, brings to light the paradigm shift from the cumbersome, limited formal contract to the form-free, in particular oral, consensual contract<sup>2</sup>, which took place during the period in which *Faust* is set. The then emerging idea of the individual having free will and being able to realize it autonomously through contracts did not gain the upper hand in Europe until the 16th century. Although important contracts are still recorded in writing today, it was only at this time that the oral contract became conceivable as an instrument that is legally effective beyond formal rigour and ritual. So, when

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<sup>1</sup>So the translation by Taylor; cf. Goethe (1942). Personally, the author prefers Taylor's translation of *Faust*, as it vividly evokes the medieval period in terms of language. For the purposes of the present study, however, Kline's translation (Goethe 2003) seems more suitable, as it is easier to follow. All further quotations from *Faust* are taken from it. The historical-critical edition Goethe (2018) was used as the German reference. In each case, the citation indicates the line of the verse (l.).

<sup>2</sup>For more detailed information see Kegel (2000, p. 351 ff.) and Casas (2020, p. 3 ff.).

Faust and Mephistopheles argue about how to set up their pact, it is about far more than legal niceties; it is about the idea of the world and the human being.

Today, we seem to be facing a similar paradigm shift for the contract. Technical innovations such as automation, digitalisation, blockchain technology and artificial intelligence are revolutionising the contract and its handling to an extent that calls for a rethinking of its functions, content and form<sup>3</sup>. This also includes the issue of its binding force, a topic that touches on the very foundations of modern society, for which the contract is the most important means of social coordination<sup>4</sup>.

What can a work of literature that is more than 200 years old and, moreover, set in the Middle Ages contribute to this discussion? An answer to this question first requires clarity about the time-dependent nature and legal substance of the concepts discussed in *Faust*. In order to gain these insights, the premises and methodology of the Law and Literature Movement<sup>5</sup> are used, a stream of research which is now well established in Anglo-Saxon countries and gradually gaining a foothold in Germany as well (Albrecht et al. 2021, p. 122). Although its concept is interdisciplinary, it is typically applied to works of art in order to make them usable for the discussion of legal issues by means of the humanities (Scheel 2020, Mölk 1996, p. 7), while literary scholars show a striking reluctance to draw on legal and, above all, legal-historical knowledge. Law and Literature research has met with many objections<sup>6</sup>, the most prominent being that of Posner (1986, p. 1359 f.) who argues that a member of a particular discipline can hardly have any advantages in the field of another discipline. Nevertheless, the achievements of this stream of research are recognised, for example when current legal issues are discussed against a concrete life background. Andruszkiewicz (2021, p. 619) accordingly emphasises its ability to balance "the one-sidedness of the technicalities of legal formalism and positivism" through its historical depth and the vividness of the unfolding life situation. Where literary works deal with phenomena of social change that are brought about by the law or necessitate changes in the law, the hypotheses set out in them can therefore contribute to a discussion of legal policy or legal philosophy (Morant 1998, p. 19; Malloy 2017, p. 3). This approach is followed here with regard to the question of the binding effect of the contract.

The legal-historical perspective has proven to be particularly fruitful for Law and Literature research, especially as it originally focused on canonised works, so-called Great Books, from Shakespeare to Dickens. Little (2005, p. 6 ff.) has identified three approaches to this, including taking the work of literature as a cultural reference point for analysing a particular legal-historical development. It is methodologically relatively uncontroversial and enables a better understanding of the Devil's Pact scene and thus of *Faust* as a whole, because it must be borne in mind that contract, pact, blood, written form etc. do not mean here, or at least not only, what we understand them to mean today. Moreover, this approach can serve to reveal the

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<sup>3</sup>For an overview see Schuhmann (2020).

<sup>4</sup>According to M Weber, modern society is a contractual society, and for E Durkheim, contractual relations constitute the heart of social ties. On this and for further evidence see Collins (1999, p. 17 ff.).

<sup>5</sup>For a brief overview of the Law and Literature Movement see Olson (2015, p. 37 ff.).

<sup>6</sup>Noteworthy is, for example, the criticism of the limiting dichotomy of law and literature; cf. Peters (2005).

legal and idea-historical dimensions of the issue of the contractual form and thus the temporal conditionality of its manifestations.

Equipped with these methodological tools, the Devil's Pact scene allows us to take a double look back at the development of the idea of contract conclusion. Goethe inserted the scene into *Faust I* between 1797 and 1803 (Gaier 2011, p. 834)<sup>7</sup>, at a time, then, when the formation of our present understanding of contract was just reaching its conclusion with the great codifications of natural law. He places the story around 1500 C.E. and thus at the beginning of this process, so that *Faust* allows a view from today's perspective on both the ideas of the Late Enlightenment (Goethe) and those of the Late Middle Ages (Faust and Mephistopheles), whereby the substance and the conditionality of the concepts of contractual commitment emerge more clearly. The experience gained with this method encourages us to reverse the process and take a look into the future using *Faust* as a starting point. This does not, of course, allow for a differentiated forecast, but it adds a historical dimension to the current discussion, especially as the comments of Goethe, a so-called poet-lawyer, on the conclusion of the pact and its binding effect are precise and strikingly differentiated. Moreover, the dramatic and aesthetic pleasure that the Devil's Pact scene and its consequences provide can stimulate an examination of the subject and a review of habits of thought, which is always helpful when questions about the future arise. It is therefore worth following the dispute between Faust and Mephistopheles for several reasons.

### **The Contractual Commitment from Mephistopheles to Goethe**

*Faust* is a multifaceted work with several thematic cores. On the whole, it revolves around the issue of how a human being, emancipated from the constraints of religion, can develop its abilities to the fullest possible extent, what limits it encounters in the process, and what moral entanglements it gets itself into (Bauer 2018, p. XII). The work consists of two parts, usually referred to as *Faust I* and *Faust II*, which are only loosely connected in terms of content. At the core of *Faust I* are the tragedy of the scholar and the tragedy of Gretchen, both linked by two parallel bets. In what is known as the frame bet, Mephistopheles (the devil) bets with God that he will lead Faust astray, and in the so-called internal bet, which is concluded through the devil's pact, with Faust that he can fulfil all his wishes on earth. The wager in each case is Faust's soul. For the further development of the plot, the way in which the pact comes about is not important, but on closer reading the scene reveals substantial statements and will therefore be examined in more detail below.

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<sup>7</sup>Goethe worked on the Faust material in several phases for more than 60 years. In the *Urfaust*, written between 1772 and 1775, as well as in *Faust. Ein Fragment*, published in 1790, the devil's pact was not yet developed. On the Genesis of *Faust* see Gaier (2018, p. 811 ff.).

The Faust saga has inspired European literature like hardly any other material since the 16th century<sup>8</sup>, with works mostly focusing on the aftermath of the pact. Its effective and binding conclusion by signature or consent is always presupposed without further ado, and the rest of the story then revolves around the question of how the human figure can evade the consequences of the pact and outwit the devil. What sets Goethe's *Faust* apart from these pieces of literature is that it also deals with the conclusion of the contract and thus with the very process of binding oneself, which leads to dependence on evil. By addressing the reasons for Faust's commitment to his promise, *Faust I* underpins its central theme, the struggle of the autonomous, enlightened individual for an ultimate fulfilment of being and meaning, with the salient aspect of voluntary self-binding and thus the deliberate restriction of the freedom they just gained. In doing so, it delves deeply into the social fabric of the contract made up of autonomy and responsibility, individual and community, morality and religion, and tradition and progress.

For today's readers, the Devil's Pact scene is hardly comprehensible if they are not familiar with the history of ideas of the contract. The relevant concepts of the Middle Ages were still strongly influenced by Roman law, according to which a person's obligation arose from its promise, a unilateral act which did not require acceptance by the other party (Weller 2012, p. 444 ff.). In *Faust*, too, the legal acts are unilateral, as can be seen from the fact that the Devil's Pact scene is only about Faust's signature, not Mephistopheles'. According to the understanding of the time, however, an act had to be added to the oral promise to make it legally valid, either a solemn, ritual declaration, the handing over of an object or a document (Puntschart 2020, p. 281; Heinrich 2000, p. 20). Aspects of these Roman legal concepts continue to have an effect up to the present day, most obvious in the Anglo-American jurisdictions in the concept of consideration, the giving of a value as a prerequisite for the legally valid conclusion of a contract, and in the deed, a document that substitutes the act of giving in an abstracting manner, hence the name. The mere legal will of a person was of no significance for the conclusion of the contract (Heinrich 2000, p. 23 ff., Kegel 2000, p. 353), and until the end of the 15th century oral contracts, so-called *Pacta nuda*, were considered morally binding, but were not actionable under secular law<sup>9</sup>. Unlike the contract (*Contractus*), the pact (*Pactum*) was thus not protected by a powerful authority (Pierer 1861, p. 549). Canon law, however, has recognised oral contracts as actionable since the 13th century (Heinrich 2000, p. 25), as God demands the fulfilment of the promise through the commandment not to bear false witness (Casas 2020, p. 4). This introduced the principle of "pacta sunt servanda" (contracts must be honoured), which is universally recognized today, into legal thinking (Kegel 2000, p. 355).

With the rise of natural law and the law of reason in the wake of the Enlightenment, the ideas about the origins and reasons for contractual commitment also changed. The concept of autonomy of the will, i.e. the idea that the effects of a contract are the product of a person's free decision, owes its breakthrough largely to Hugo

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<sup>8</sup>Bauer (2018, p. XI) speaks of a "flood of Faust adaptations" even before the publication of *Faust. A Tragedy* in 1806. Russell (1986, p. 56) states in this regard that the "figure of Faust is – after Christ, Mary, and the Devil – The single most popular character in the history of Western Christian Culture."

<sup>9</sup>"Ex nudo pacto actionem non nasci"; cf. Casas (2020, p. 3), Heinrich (2000, p. 23 ff.).

Grotius' seminal work *De Iure Belli ac Pacis* (Ehmann 2011, p. 4, Weller 2012, p. 436), which was published in 1625. There, the author also argues that the promise alone is not binding, but requires acceptance by the promisee to be legally effective, which was a significant step towards the modern concepts of contract conclusion<sup>10</sup>. This idea only became established towards the end of the 18th century, when contract theory had largely developed into its current form (Heinrich 2000, p. 36). Now the Pactum was on an equal footing with the Contractum and the "liberalisation of the given word", as Casas (2020, p. 3) put it, i.e., its far-reaching emancipation from the constraints of form and type, was complete. This has brought us to the time of Goethe, who, with the problem of the form of the contract and contractual commitment, thus takes up a legal and philosophical issue that was current for his contemporaries and reflects it back to the time of its emergence, in which he places Faust and Mephistopheles.

### Word and Act in Faust's World of Imagination

The topic of contractual binding is developed in the scene The Study 2, but has already been effectively prepared by the so-called Logos monologue<sup>11</sup> at the beginning of the previous scene, for it is here that Faust first expresses his views on the meaning of word and act, which prove decisive for his later argument with Mephistopheles. So we find Faust sitting over a translation of the Revelation of John from the Greek original into German, in the course of which he gets stuck right at the beginning when it comes to setting the decisive philosophical starting point (l. 1224-1237):

Faust:

It's written here: 'In the Beginning was the Word!'  
 Here I stick already! Who can help me? It's absurd,  
 Impossible, for me to rate the word so highly  
 I must try to say it differently  
 If I'm truly inspired by the Spirit. I find  
 I've written here: 'In the Beginning was the Mind'.  
 Let me consider that first sentence,  
 So my pen won't run on in advance!  
 Is it Mind that works and creates what's ours?  
 It should say: 'In the beginning was the Power!'  
 Yet even while I write the words down,  
 I'm warned: I'm no closer with these I've found.  
 The Spirit helps me! I have it now, intact.  
 And firmly write: 'In the Beginning was the Act!'

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<sup>10</sup>On the development of the contract and consensus principle see Ehmann (2011, p. 6) and Weller (2012, p. 440 ff.).

<sup>11</sup>Faust is obviously drawing on the German wording. The Greek word Logos, and thus the trigger for his considerations, is not mentioned at all in the Logos scene.

This monologue provides insights into Faust's world of imagination and sheds light on the arguments he later holds against Mephistopheles in the Devil's Pact scene. It is usually interpreted as an expression of the change in attitude he has undergone recently (Schmidt 1999, p. 119 ff.): the scientist, committed to the word and the meaning, out of frustration at the futility of his efforts, decides to become a man of the world who is active and enjoys himself and therefore attaches the highest value to power, but even more so to the act. The variety of meanings of the German word "Sinn" can hardly be captured in a single English term. In the translation used here, Kline (Goethe 2003) speaks of "Mind", whereas Taylor (Goethe 1942) prefers "Thought", but "Sinn" also includes what in English would be expressed by sense, meaning and purpose. However, many of the terms just mentioned have a specific meaning in contract theory and practice: wording, sense and purpose are the decisive criteria for the interpretation of an agreement; act stands for its execution, whereby the text and its implementation – word and act – are often in a pronounced state of tension; finally, as already seen, action is also the handing over of an object at the conclusion of a contract, the drafting of a document or the performative ritual<sup>12</sup>.

Against the background of this monologue, the subsequent dispute between Faust and Mephistopheles about the form of their pact – oral, written or signed in blood – takes on a much greater significance than it is usually attributed: *Faust* thereby illustrates the paradigm shift from the medieval to a liberal-enlightened world and legal order and thus a new image of the human being by means of a topic of its own – the interpersonal binding through contracts.

### **"So you still have laws in Hell, in fact?"**

When Mephistopheles and Faust meet for the first time in Faust's study, we can witness a situation that is as comical as it is indicative: Mephistopheles finds himself prevented from leaving the room he entered as a poodle because a spell sign on the doorstep, a pentagram, is blocking his way out. When asked why he does not use the window then – apparently there was no fireplace – he replies (l. 1410-1412):

To devils and ghosts the same laws appertain:  
The same way they enter in, they must go out.  
In the first we're free, in the second slaves to the act.  
Hereupon Faust (l. 1413-1415):

So you still have laws in Hell, in fact?  
That's good, since it allows a pact,  
And one with you gentlemen truly binds?

On the one hand, these verses indicate that, according to Faust's understanding, a contract between him and Mephistopheles could work if there were rules to bind

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<sup>12</sup>A performative act means an act executed in speaking; cf. Austin (1975). Performative utterances *do* things. With regard to a contract, this means that the form, and not the declaration of intent, creates the obligation; cf. Puntchart (2020, p. 282).

the latter. He obviously believes that a contract requires an authoritative backing to be effective and that the law grants such a support. It is as Hobbes (1651, p. 85) stated in his *Leviathan*: “Covenants, without the Sword, are but Words, and of no strength to secure a man at all.” On the other hand, Mephistopheles, by admitting to being bound by laws, being a “slave” in this respect, reveals that he is a modern devil: by no means omnipotent, but subject to laws, not sovereign, but – as we would say today – norm addressee.

The tricky point is, of course, how a contract between a human being and the devil is to be effective. Needless to say, that such a pact – in *Faust* as in historical reality – is a fiction; it never existed, except in people's imagination. However, since Goethe has rationally constructed Faust's and Mephistopheles' argumentation and carefully substantiated it in legal terms, there must be references in the work to a system of order that binds both sides. Before looking into this issue, however, it is necessary to examine how the author organised the conclusion of the pact according to the legal concepts of the time. And this is precisely what the negotiation between Faust and Mephistopheles in the scene The Study 2 is about.

### **Mechanisms that Bind to the Contract**

In contrast to traditional adaptations of the devil's pact material, in *Faust*, as we understand it today<sup>13</sup>, no contract on the exchange of services is concluded, but a bet, an agreement according to which, in the face of two contradictory assertions, the party whose assertion proves to be true receives the wager. At first, however, Faust and Mephistopheles also negotiate a contract on the exchange of services, which Mephistopheles outlines as follows (l. 1656-1959):

I'll be your servant here, and I'll  
Not stop or rest, at your decree:  
When we're together, on the other side,  
You'll do the same for me.

Thus, Faust would have to commit his soul to the devil in exchange for the latter's services, i.e. for worldly pleasures, and thereby, according to Christian understanding, forego his redemption in the afterlife. Soul, however, has not only a religious but also a secular meaning, insofar as it is considered the seat of the good and the true. Even today, it is said that he or she has “sold their soul” if someone enters into a dependency that contradicts their ideals for superficial benefits. But such contract on the exchange of services does not come into being because Faust simply doubts that Mephistopheles will be able to keep his part of such an agreement. His mockery of the actual possibilities and the limited imagination of this modern devil culminates in the words (l. 1675):

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<sup>13</sup>It is one of the most controversial questions of the Devil's Pact scene whether a contract on the exchange of services or a bet, or both, is concluded. “Pact” then often stands for such contract, from which the “bet” is distinguished. Cf. Sudau (1998, p. 72 ff.), Hohlfeld (1991, p. 394), Witkowski (1906, p. 229).

Poor devil what *can* you give?

Whether Mephistopheles steers the conversation in this direction, or it gets there through its own momentum is not to be decided here, but when he insists that he is able to fulfil all of Faust's wishes and that, with his help, the latter should now enjoy the pleasures of life, Faust feels incited to bet that Mephistopheles will not succeed in satisfying him in this world. This is because the great seeker Faust is not interested in simple worldly pleasures, but in nothing less than reconciliation with the limitations of human existence and thus with himself, which seems impossible to him (l. 1692-1698):

When I lie quiet in bed, at ease.  
Then let my time be done!  
If you fool me, with flatteries,  
Till my own self's a joy to me,  
If you snare me with luxury –  
Let that be the last day I see!  
That bet I'll make!

Hereupon Mephistopheles (l. 1699):

Done!

With his "Done!", he orally accepts Faust's betting offer. But Faust tops up (l. 1698<sup>14</sup>-1706):

And quickly!  
When, to the Moment then, I say:  
'Ah, stay a while! You are so lovely!'  
Then you can grasp me: then you may,  
Then, to my ruin, I'll go gladly!  
Then they can ring the passing bell,  
Then from your service you are free,  
The clocks may halt, the hands be still,  
And time be past and done, for me!

This passage is significant in two respects. Firstly, Faust hereby indicates again that he cannot be satisfied on earth. But if Mephistopheles were to succeed in giving him supreme satisfaction, so that – this is one of the most famous passages in *Faust* – he says to the moment "Ah, stay a while! You are so lovely!", then he would be reconciled with everything, including his immediate death. Secondly, the passage from line 1699 onwards reveals a crucial element of the conclusion of the pact. Unfortunately, Kline (Goethe 2003) completely misses the meaning of the German "Schlag auf Schlag" of the next line of verse, and Taylor (Goethe 1942) also fails to express it clearly enough<sup>15</sup>. With the German expression "Top!", Mephistopheles

<sup>14</sup>A counting error occurs here in both the German and English editions.

<sup>15</sup>He translates it as "And heartily!".

verbally accepts Faust's betting offer. This onomatopoeic word refers to the ceremonial touch to confirm the legal validity of an agreement concluded (Drosdowski et al. 1989, p. 747) and thus stands for an act, which is why Kline aptly translates it as "Done". In the scene under consideration, it is followed by a double handshake (Witkowski 1906, p. 229)<sup>16</sup>, with which the parties confirm the agreement in a ritualised act. Faust verbalizes it simultaneously through his "Schlag auf Schlag". According to older German law, it is therefore a form of Wadiation, an obligation assumed and strengthened by oath, word of honour or handshake (Heusler 1886, p. 245). As the bet is an aleatory contract and not valid under German law<sup>17</sup>, the handshake is still common in this context today and serves as a special affirmation of the awareness of being socially bound; "Betting debts are debts of honour", as the saying goes. The pact between Faust and Mephistopheles was thus concluded by word ("Top!") and act (handshake). By finally making it a bet and not a contract on the exchange of services, compositional symmetry is established with Mephistopheles' bet with God.

Although the agreement is thus effective, Mephistopheles continues to hem and haw; he would rather have it in writing (l. 1714-1715):

One thing, though! – Re: life and death, I want  
A few lines from you, at the least.

This shows that he does not particularly trust Faust's word – which is no surprise, since in the guise of a poodle he witnessed the Logos monologue in which Faust displayed his disdain for the word – and therefore prefers the greatest possible legal security, which only a written contract can provide him, as it is actionable in court.

Faust reacts to this request with mockery and incomprehension (l. 1716-1733):

You pedant, you demand it now in writing?  
You still won't take Man's word for anything?  
It's not enough that the things I say,  
Will always accord with my future?  
The world never ceases to wear away,  
And shall a promise bind me, then, forever?  
Yet that's the illusion in our minds,  
And who then would be free of it?  
Happy the man, who pure truth finds,  
And who'll never deign to sacrifice it!  
Still a document, written and signed,  
That's a ghost makes all men fear it.  
The word is already dying in the pen,  
And wax and leather hold the power then.  
What do you want from me base spirit?  
Will iron: marble: parchment: paper do it?  
Shall I write with stylus, pen or chisel?

<sup>16</sup>Traditionally, it was struck first with the right and then with the left hand.

<sup>17</sup>Cf. section 762 (1) sentence 1 German Civil Code. However, the amount paid on a bet, the wager, cannot be reclaimed according to section 762 (1) sentence 2.

I'll leave the whole decision up to you.

With his reply, Faust provides an almost modern-sounding outline of a critique of the contract, starting with the "illusion" of expecting a promise to be kept in the face of rapidly changing circumstances and thus party interests<sup>18</sup>, moving on to the honourable but naïve loyalty to the contract, and ending with its authoritative sanctioning, which soon turns it into an end in itself and frightens the parties instead of reassuring them. In doing so, Faust largely denies the practical significance of the written contract in particular and reduces it to authoritative insistence, "illusion" and crude formalism. In light of this torrent of words, Mephistopheles misses an important point that Faust makes, which is that he only considers his promise to be valid during his lifetime<sup>19</sup> and not in the afterlife.

On its surface, the Devil's Pact scene presents Mephistopheles' struggle to reach a legally secure agreement with Faust. This is one of its layers of meaning, but underneath lies a discourse on traditional and modern concepts of commitment to the contract and thus a variation on the central theme of *Faust*: the possibilities and limitations of the autonomous, enlightened human being. Faust considers an oral contract, backed by honour ("Man's word") and self-respect ("truth"), to be entirely sufficient. Even though both lack rational substance, he nevertheless pays them respect, which becomes apparent in the fact that he uses words with positive connotations only in their context ("happy", "pure"). The written contract favoured by Mephistopheles he refers to as a "ghost" that kills the idea of the agreement and intimidates the parties. In the end, however, he is indifferent to the form of the pact because he doesn't care about life after death and therefore any promise directed towards it.

Mephistopheles calms down the excited Faust and then casually comes to his point (l. 1734-1737):

Why launch into oratory too?  
Hot-tempered: you exaggerate as well.  
Any bit of paper's just as good.  
And you can sign it with a drop of blood.

This is followed a little later by his sphinxic statement (l. 1740):

Blood is a quite special fluid.

Mephistopheles' interest is thus not only aimed at putting the bet in writing, but he also wants it signed in blood. The first part of this request is readily understandable, for the written contract has – as we have seen – a greater binding effect than an oral one. The intentions pursued with the signing in blood, though, are less obvious. From today's perspective, it seems more like a prop for a horror story than a means

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<sup>18</sup>This aspect was only systematically researched in the second half of the last century, originally by Macneil and Macaulay, and is now part of the academic mainstream as the Theory of the Relational Contract.

<sup>19</sup>More literally translated, l. 1719 reads: "Will always accord with my days?"

to increase the efficiency of an agreement, but signing in blood was not alien to Faust's time, even if it was used predominantly for religious and only rarely for secular contracts (Scheutz 2002, p. 26). Blood was simply given a higher declaratory power than other writing substances, hence the saying "Blood is thicker than ink". But blood also bears a religious significance, as according to biblical tradition it is considered to be the seat of the soul (Oschema 2017, p. 111, Bleeker 1963, p. 206). In the context of the devil's pacts of the Middle Ages, signing with blood was therefore a ritual act that endowed the pact with indelible force and bound the one who gave his or her blood for eternal times (Bleeker 1963, p. 206), much like its secular counterpart, the blood brotherhood. Of course, such a pact could also be concluded in another form and without blood or written words, namely through a mere act, for example through ritual worship of the devil or sexual intercourse with him.

A pledge in the legal sense cannot be meant in *Faust*, even if Mephistopheles speaks in l. 11830 of the "noble soul" having "mortgaged" itself to him. Although the personal pledge, the offering of another person or oneself as collateral, is widespread in archaic communities, it had largely disappeared in Central Europe by the Early Middle Ages (Büter 2005, p. 16). However, the legal concepts of bet and pledge are very close to each other, as both refer to agreements designed for an uncertain outcome, and the bet as well is characterised by the surrender of a security, the wager that is to be paid in advance. In the High Middle Ages, the German terms for pledge and bet then underwent a change in meaning and finally merged to a certain extent (Gierke 1910, p. 22, Büter 2005, p. 5, Puntschart 1896, p. 133). At the latest when Mephistopheles presents the "blood-signed title" after Faust's death, it becomes apparent that it has no effect in rem.

By signing in blood, Mephistopheles strives for the highest binding force of the pact that he can achieve. Faust is not at all scared by this archaic ritual; to him it is, literally translated, a grimace ("Fratze"), a distorting and deceptive image, but in the end harmless (l. 1738-1739):

If it will satisfy you, and it should,  
Then let's complete the farce in full.

The distance between Faust's and Mephistopheles' worlds of imagination is illustrated by the fact that the latter's remark that blood is a quite special fluid is not even worth a reply to Faust. Instead, he immediately follows up with another argument to dispel Mephistopheles's concerns (l. 1741-1743):

Have no fear I'll break this pact!  
The extreme I can promise you: it is  
All the power my efforts can extract.

Faust thus contrasts the mystical and eccentric exaltation of blood with a sober consideration of expediency. It is based on the idea that only found its way into New Institutional Economics in the 1980s with the concept of the Self-enforcing Contract (Scott 2003; Klein 1996), which essentially holds that such agreements do not require

authoritative enforceability which are in the self-interest of a party to an extent that renegotiation or breach of contract is not to be expected.

When Faust and Mephistopheles quarrel about the form of their pact and thus about older and emerging ways of securing the commitment to the promise, they also negotiate the relationship between word and act. Faust's ideas, which already breathe the spirit of the Enlightenment, are based on the free will of the individual and its capacity to bind itself through the spoken word, "Man's word". Mephistopheles, for his part, is an adherent of form and ritual, which do not refer to what is spoken but to what is written or done. On closer look, the superficial wrangling over the form of the pact is a discussion about whether external, institutional constraints are decisive for a person's commitment to their promise or their inner constitution, i.e., their individual will and interests. Faust acknowledges the externally mediated binding effect, but values the aspect of self-binding more highly. In this respect, he is enlightened and liberal. It is not without irony that the word, which the frustrated scientist – but also the theologian and lawyer that he is<sup>20</sup> – now holds in low esteem, becomes for him one of the decisive criteria for the binding force of a contract, whereas the newly found ideal of the act stands for an archaic conception of law, that of Mephistopheles. But this is only an apparent contradiction, since for Faust, the word creates an effective binding and thus equals the act. The exclamation he makes shortly afterwards is therefore programmatic (l. 1785):

But, *I* will!

### ***Faust* and the Future Form of the Contract**

The paradigm shift for the form of contract discussed in the Devil's Pact scene is taken up again at the very end of *Faust II*, when Faust's promise is to be honoured and its binding effect put to the test. Addressing the lemurs, the spirits of the dead, whom he has summoned to help him collect Faust's betting debt, Mephistopheles laments the complication of his affairs that has come with the new times (l. 11612-11622):

The body's here: if the spirit tries to fly,  
I'll show it my blood-signed title swiftly:  
Yet men have found so many methods, sadly,  
To cheat the Devil of their souls, or try.  
We carry on the same old way,  
New ones aren't recommended:  
I used to work alone: today  
I have to use the help extended.  
And everything goes badly too!  
Ancient right, traditional use,  
One can't rely on those much longer.

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<sup>20</sup>With caustic irony, the use of the word in jurisprudence and theology is dealt with in the Student scene, l. 1990-2000.

In these lines of verse, Mephistopheles deplores the situation of no more and not yet and the resulting legal and actual uncertainties. Today, he would find himself in a similar situation if he were to ask not only about the future formal requirements for a legally valid contract, but also about the conditions that lead to a contractual commitment, as the form of the contract determines its binding force. Drawing on the concepts negotiated in *Faust*, we will therefore venture a look ahead, whereby the nature of the chosen reference – a work of art – and the uncertainty of technical, social and business changes allow us at best to throw a spotlight on the issue.

Today, there is a consensus that the majority of contracts will soon be digitalised and handled automatically, and only the speed of this development and the type of transactions covered are still under discussion. Digitalised means that a document is not only in a digital format, i.e. digitised, but can also be processed by machines or has even been written directly in code (Cummins and Clack 2020). A contract is automated if it is managed on the side of at least one party without direct human intervention. Already today, the negotiation and drafting of contracts and, to some extent, their fulfillment can be automated. This does not yet apply to all types of transactions, but it is already largely a reality for the consumer business and will be the future for most contracts, some even say for all of them (Breidenbach and Glatz 2018, p. 244). What this implies for their binding effect can be shown using the mechanisms discussed in *Faust* – ritual, external sanctioning, given word and party interest.

When Mephistopheles asks Faust for “a few lines”, he is concerned with the external enforceability of the pact, which presupposes a sanctioning authority and compliance with formal requirements. Insofar as he is seeking a signature with blood, he trusts or hopes for the effects of the ritual act. Ritual, symbolism and tradition are still important for the conclusion of contracts today (Roxenhall and Ghauri 2004, p. 262, Macaulay 2003, p. 61), just think of the ceremonial signing of important agreements or the handshake. Although their significance is noticeably declining, they will continue to play their role as a means of social self-assurance and building trust (Whitehouse and Lanman 2014). However, to the extent that contracts are processed automatically, the social and emotional functions of the ritual are dispensable, and it will disappear.

The writing of the contract as a perpetuation of what has been agreed upon, but also for reasons of proof, has been undergoing a transformation for some time now: from natural language to machine-readable code, from writing to mouse clicks, from words to icons, from handwritten to electronic signatures, to name just a few. Its functions are then fulfilled in a different form and manner, but still have to meet the requirements of authoritative sanctioning adapted to technological developments. From a contractual perspective, it will no longer be the spoken or written word that expresses the will of a person and thus triggers the legal obligation, but the action: the mouse click or the setting up of automated processes.

Authoritative sanctioning as a means of ensuring compliance has always been central to the functions of the contract, and both Mephistopheles and Faust recognise its importance. It is difficult to predict what form it will take and what role it will play in the future, as the technologies are developing just as rapidly as society is

adapting to them. However, some of the features that can be expected are already recognizable: To the extent that blockchain technology automates contract processing, the parties are deprived of their influence on the fulfillment of the obligations, so that no binding effect is required in this respect<sup>21</sup>. This imparts the characteristics of performativity to the conclusion of the contract, because the execution of its obligations to perform is now unavoidable, even if the release of a self-executing contract does not yet lead to its immediate fulfillment. Furthermore, the anonymisation of business transactions resulting from their automation suggests that traditional forms of social control will lose their power, while others will emerge in a new guise. Even today, scoring, rating or commenting in social media offer effective forms of social sanctioning, and we can observe new communities with their own codes of conduct emerging in virtual spaces. Finally, technology-assisted or even fully automated Online Dispute Resolution will make external conflict resolution cheaper, faster and thus much more attractive. Overall, it can be assumed that legal and social sanction mechanisms will change in form but rather gain in importance.

Unlike Mephistopheles, Faust emphasizes the binding force of the given word. Today, the rather antiquated-sounding concepts of "Man's word" and "truth" would be clothed in the garb of ethics, which plays an increasingly prominent role in corporate governance. With the automation and standardisation of contract processes, ethical issues are transferred to the level of corporate management and the leeway for moral decisions in individual cases disappears. However, compliance systems rarely deal with contract adherence (Schuhmann and Eichhorn 2017, p. 86 f.), and Haran (2013) shows that companies are primarily guided by considerations of economic expediency when deciding whether and how to fulfill a contract, in contrast to consumers, who generally feel obliged to keep their word. Finally, with automation there is no longer a human counterpart to whom word could be given or loyalty broken.

By pointing out that the pact is in its own best interest, Faust is aiming at the core of enlightened self-realisation. In individualistic societies with their neo-liberal economic order, party interests are already of high legal relevance, which will continue to increase in some fields. Many legal systems grant the consumer the right to withdraw from the contract concluded electronically within a certain period of time at their own free will and without extra costs. In addition, entire industries allow a cancellation as a gesture of goodwill, so that the persistence of the consumer's interest in the transaction becomes relevant for the continued validity of the contract. On the other hand, the advancing standardisation of services and processes is increasingly limiting the possibilities for realising the individual will. This is significant insofar as there is empirical evidence that a party's involvement in the preparatory phase of the contract corresponds to its performance efforts (Eigen 2012, p. 19).

All in all, it becomes apparent that some of the concepts discussed by Faust and Mephistopheles will remain important, albeit in a different form and with a different relevance. External sanctioning (Faust and Mephistopheles) and the interests of the parties (Faust) will continue to play an important role. In a contest between Faust

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<sup>21</sup>Accordingly, many manifestations of breach of contract will disappear; cf. Savelyev (2017, p. 118 ff.).

and Mephistopheles over the future of the binding effect of the contract, the score would therefore be 2:1. For the ritual (Mephistopheles) and the given word (Faust), on the other hand, a decline in significance is to be expected, although this will be less pronounced for the word given in everyday transactions, so that here too the advantage lies on Faust's side. But what none of them – not even Goethe – foresaw was that external enforceability would shift from authoritative to social institutions and that the issue of contractual loyalty would become partially obsolete due to technological development. All in all, it is astonishing that even after more than 500 years, no fundamentally new binding mechanisms are in sight.

### A Conclusion, but no End

It remains to be seen how the parties will be bound by their promises in the future. For the devil's pact and thus the past, *Faust II* offers the test by example. Whether Mephistopheles has won or lost his bet – a fiercely debated issue<sup>22</sup> –, in the end he is left empty-handed and laments in the second-last scene (l. 11829-11835):

They've stolen a great, a unique treasure:  
That noble soul, mortgaged to my pleasure,  
They've snatched it away, with cunning even.  
But whom could I complain to, anyway?  
Who'd grant me my well-earned right?  
You've been swindled in your old age,  
You've deserved it, this wretched slight.

This complaint is triggered by the fact that the angels have carried Faust's soul away and removed it from Mephistopheles' grasp. Despite Faust's numerous transgressions, God has liberated it through an act of mercy and thus, as the highest authority, has put “mercy before justice”. Allegedly, Goethe also wanted Faust's ending to be understood in this way (Weber 2005, p. 133), thus departing from the traditional adaptations of the Faust material and provoking considerable opposition at the time (Göschel 1824, p. 108 ff.). He hereby answers the aforementioned legal and compositional question regarding the order that binds both man and hell, on which it depends for Faust whether an effective contract with the devil is possible. When Mephistopheles laments in lines 11832 and 11833 to whom he should now complain and who will do him justice, this is not really convincing: he knows very well that the highest authority for humans and hell – God – has made his decision. In the present context, this act of mercy allows an interesting sideways glance at the question of whether the sovereign is bound by contracts too, because in Faust's case, God also decides on his own behalf, as there is still the framework bet. While the ideas of the Middle Ages allowed this in principle, with natural law the view became established that even God must keep his promises (Casas 2020, p. 4).

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<sup>22</sup>Weber (2005, p. 133). Hohlfeld (1991, p. 404) sees a growing consensus that Mephistopheles has lost the bet.

With Faust's end, Goethe's drama has come to its conclusion. What has not come to an end is the story of the ideas of commitment to the contract which are linked to its form. They raise the fundamental issue of social coordination, which is as important for the future as it was for the past. What will be important in the future is the perpetuation – albeit in digitalised form – for external enforceability, the given word for everyday business, the ritualised act for the special business and the party interest for the consumer as well as for companies. The mechanisms negotiated in the Devil's Pact scene thus prove to be fundamental and long-lasting, even if their appearance changes under the conditions of digitalisation and automation. In this respect, *Faust* stretches out from the Middle Ages to today's future.

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