

## 1 „Demand'st thou, Pedant, too, a document?" – Past and 2 Future of the Contract in the Light of Goethe's "Faust" 3

4 *The Devil's Pact scene is one of the most famous passages from Goethe's*  
5 *"Faust". Until now, little attention has been paid to its underlying theme:*  
6 *the self-binding of the free, enlightened human being through the contract.*  
7 *With this, "Faust" takes up a turning point in Western contract theory. Due*  
8 *to the digitalisation and automation of contract handling, today we are*  
9 *facing a paradigm shift for the contract once again. Using the premises and*  
10 *methodology of Law and Literature research, this paper examines the*  
11 *mechanisms of contractual binding negotiated between Faust and*  
12 *Mephistopheles and what predictions about interpersonal binding through*  
13 *contracts in the future can be drawn from them. The overall result is that*  
14 *Mephistopheles' ideas based on the written word and ritual are not*  
15 *particularly sustainable, while some of the concepts advanced by Faust,*  
16 *authoritative enforceability and party interests, seem to be much more in*  
17 *line with the trend.*

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19 **Keywords:** *Devil's Pact scene, Law and Literature, contractual binding*  
20 *mechanisms; future of the contract.*  
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### 23 „Faust“ and the Future of the Contract? 24

25 „Demand'st thou, Pedant, too, a document?"<sup>1</sup> Faust replies in *Johann*  
26 *Wolfgang von Goethe's "Faust. First Part"*<sup>2</sup> to Mephistopheles' wish to record in  
27 writing the pact they have just concluded orally. He considers this small-  
28 minded and superfluous because, after all, "Man's word" should be enough to  
29 bind him. The dispute that arises from this echoes the paradigm shift from the  
30 contract that comes into being through form to the contract that comes into  
31 being through will, and thus also orally, that has taken place at the end of the  
32 18th century. It followed from the emergence of the Western concept of the  
33 free, autonomously acting individual and was still alien to the Middle Ages,  
34 when people perceived themselves as inclusive, i.e. belonging to a certain  
35 genus – class, guild, family etc.<sup>3</sup> The discussion of free will and its realization  
36 through contracts did not gain significant momentum in Europe until the 16th  
37 century. So, when Faust and Mephistopheles argue about how to set up their  
38 pact, it is about far more than legal niceties; it is about the idea of the world  
39 and the human being.

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

<sup>2</sup>Hereafter briefly „Faust I“.

<sup>3</sup>Mersch (2019) at 1324.

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 function, content and form<sup>4</sup>. This also includes the issue of contractual binding of individuals, a topic that touches on the very foundations of social coordination in modern society, which according to *Max Weber*<sup>5</sup> is a contractual society.

What can a work of literature that is more than 200 years old and, moreover, set in the Middle Ages contribute to this discussion? This will be explored below under the premises and with the methodology of *Law and Literature* research.<sup>6</sup> Although postulated as interdisciplinary, it turns out that it predominantly seeks to make works of art usable for the discussion of legal issues with the instruments of the humanities.<sup>7</sup> Great writers such as *Shakespeare* or *Goethe* often address in their works the changes which the law imposes on society as well as changes which are required in the law itself.<sup>8</sup> One of the approaches of *Law and Literature* research therefore aims to discuss issues of legal policy or legal philosophy with reference to the hypotheses put forward in a work of art.<sup>9</sup> This path is also taken here for the Devil's Pact scene<sup>10</sup> in "Faust I". As far as can be seen, this has not yet been done, although the subject matter and the fact that *Goethe* is a so-called poet-lawyer certainly suggest this.

The second methodological starting point is an analysis of the Devil's Pact scene in terms of the history of law and ideas, because in "Faust",<sup>11</sup> pact, contract, promise, blood, written form, etc. do not or not only mean what is understood by them today. In the context of *Law and Literature* research, legal history usually only plays a role when it comes to gaining legal insights using literary works,<sup>12</sup> but not in the opposite direction. Accordingly, *Mölk*<sup>13</sup> deplors the striking reticence of literary scholars in acquiring legal and especially legal historical knowledge. For "Faust", the legal historical approach proves to be fruitful because it brings to light the historical dimensions of the subject of contractual binding and thereby a hitherto unnoticed theme. *Goethe* inserted

<sup>4</sup>For an overview see Schuhmann (2000).

<sup>5</sup>Weber (1978) at ii, 669.

<sup>6</sup>The *Law and Literature Movement* has developed considerably since its beginnings in the 1970s and now also includes other areas besides literature, such as music, film, and popular art; see the overview in Olson (2015) at 37 et seq. However, the connections between law and literature go back much further, especially to *Wigmore* and *Cardozo*; cf. Posner (1986) at 1352.

<sup>7</sup>Mölk (1996) at 7.

<sup>8</sup>Morant (1998) at 19.

<sup>9</sup>Malloy (2017) at 3.

<sup>10</sup>"Faust I" is divided into scenes. Striking passages from such scenes are usually also called scenes, such as the Devil's Pact scene, the Logos scene or the Student scene.

<sup>11</sup>"Faust" refers here to the entire work consisting of "Faust I" and "Faust II". "Faust II" is used briefly for "Faust. The Second Part of the Tragedy".

<sup>12</sup>See e.g. Scheel (2020).

<sup>13</sup>Mölk (1996) at 8.

the Devil's Pact scene into "Faust I" between 1797 and 1803,<sup>14</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 AD and thus at the beginning of this process. In this way, "Faust" allows us to look from the present day at the ideas of an author of the late Enlightenment as well as at those of two figures of the late Middle Ages, which brings out both the timelessness of the problem of contractual binding and the changeability of the ideas associated with it.

By highlighting the historical conditionality of the ideas and concepts under consideration, "Faust" challenges us to reflect on the future of the contract and, more generally, of interpersonal economic and legal interaction. The aim of such an endeavour cannot, of course, be the differentiated analysis, since law and literature, as *Posner*<sup>15</sup> also notes, belong to different spheres. But what "Faust" can achieve in this context is, to use *Andruszkiewicz's* words,<sup>16</sup> 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. In addition, the dramatic and aesthetic pleasure "Faust" provides stimulates a reflection on the subject and challenges habits of thought, which is particularly valuable for questions about the future, as they are concerned with the uncertain, the unfamiliar and the unknown. For this reason, Faust and Mephistopheles will have their say on several occasions on the pages that follow.

### The Contractual Binding from Faust to Goethe

"Faust" is a work of the Enlightenment era and revolves around the central theme of how the human being, emancipating itself from the constraints of religion, can develop its abilities to the fullest possible extent, what limitations it encounters, and what moral entanglements it gets itself into in the process.<sup>17</sup> At the core of "Faust I" are the tragedy of the scholar and the tragedy of the Gretchen, both linked by two parallel bets. In the first of these, Mephistopheles bets God that he will lead Faust astray, and in the second, known as the devil's pact, he bets 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 conclusion of the devil's pact is of no importance, but on closer reading it reveals a substantial statement and will therefore be examined in more detail below.

<sup>14</sup>Gaier (2011) at 834. *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 the "Faust. Ein Fragment", published in 1790, the devil's pact was not yet developed. On the genesis of "Faust", cf. Gaier (2018) at 811 et seq.

<sup>15</sup>Posner (1986) at 1359 et seq.

<sup>16</sup>Andruszkiewicz (2021) at 619.

<sup>17</sup>Cf. Bauer (2018) at XII.

1       The Faust saga has been occupying European literature since the 16th  
 2 century like hardly any other material,<sup>18</sup> with works almost always focusing on  
 3 the aftermath of the pact. Its effective conclusion by signature or consent is  
 4 always presupposed without further ado, and the story then develops around  
 5 how the human character can evade the pact and outwit the devil. What sets  
 6 *Goethe's "Faust"* apart from these works is that it deals with the conclusion of  
 7 the contract itself and thus with the very process of binding oneself, which  
 8 leads to dependence on evil. By questioning the reasons for Faust's  
 9 commitment to his promise, the work underpins its central theme, the struggle  
 10 of the self-liberated, enlightened human being for an ultimate fulfilment of  
 11 being and meaning, with the salient aspect of autonomous self-binding and thus  
 12 the voluntary limitation of the freedom just gained. In doing so, it delves  
 13 deeply into the social fabric of the contract made up of autonomy and  
 14 responsibility, individual and community, morality and religion, and tradition  
 15 and progress.

16       For today's readers, the Devil's Pact scene is hardly comprehensible if  
 17 they are not familiar with the development of the history of ideas of the  
 18 contract from the Middle Ages to modern times. The legal views of the Middle  
 19 Ages were still strongly influenced by Roman law. Accordingly, a person's  
 20 obligation at that time arose solely from his or her promise, a unilateral act  
 21 which did not require acceptance by the other party.<sup>19</sup> In "Faust", too, the legal  
 22 acts are unilateral, as can be seen from the fact that the Devil's Pact scene is  
 23 only about Faust's signature, not Mephistopheles'. However, for the legal  
 24 validity of a promise, as a rule, a positive action had to be added, an act, either  
 25 as a solemn, ritual declaration, as the surrender of an object or as a written  
 26 act.<sup>20</sup> Aspects of these Roman legal concepts continue to have an effect up to  
 27 the present day, most clearly in the Anglo-American jurisdictions in the  
 28 concept of *consideration*, the giving of a value as a prerequisite for the legally  
 29 valid conclusion of a contract, and in the deed, a document which replaces such  
 30 giving, an act, in an abstracting manner, hence the name. The mere legal will of  
 31 a person, on the other hand, was of no significance for the conclusion of the  
 32 contract,<sup>21</sup> and until the end of the 15th century oral contracts, so-called *pacta*  
 33 *nuda*, were considered morally binding, but were not actionable under secular  
 34 law. Unlike the contract (*contractus*), the pact (*pactum*) was thus not  
 35 enforceable in court in the Middle Ages.<sup>22</sup>

36       With the rise of natural law and the law of reason in the wake of the  
 37 Enlightenment, the ideas about the formation of an interpersonal bond through  
 38 a legal transaction also changed. It was *Hugo Grotius* in particular who, with

<sup>18</sup>Bauer speaks of a "flood of Faust adaptations" even before the publication of "Faust. A Tragedy" from 1806; Bauer (2018) at XI. Russell 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"; Russell (1986) at 56.

<sup>19</sup>Weller (2012) at 444 et seq.

<sup>20</sup>Puntschart, P. (2020) at 281; Heinrich (2000) at 20.

<sup>21</sup>For this and the following cf. Heinrich (2000) at 23 et seq.

<sup>22</sup>Pierer (1861) at 549. Canon law, ecclesiastical law, recognised oral contracts as legally effective as early as the 13th century; cf. Heinrich (2000) at 25.

his seminal work "De Iure Belli ac Pacis" of 1625, helped the concept of autonomy of the will to achieve a breakthrough, i.e. the idea that contractual binding is the product of an autonomous decision of the human will.<sup>23</sup> He also argues there that a legally valid promise requires acceptance by the promisee,<sup>24</sup> a significant step towards the modern concepts of contractual obligation.<sup>25</sup> This development did not finally take hold until the end of the 18th century, when the doctrine of contract found the characteristics that are essentially valid today.<sup>26</sup> This has brought us to the time of *Goethe*, who, with the problem of contractual binding, thus takes up a legal and philosophical issue that was current for his contemporaries and reflects it back to the time of its beginnings, in which he places Faust and Mephistopheles.

### The Contract in Word and Act

The problem of the contractual binding is developed in the scene The Study 2. However, to understand the considerations made there, Faust's monologue at the beginning of the preceding scene, The Study 1, is of importance. It shows him 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 and thus in setting of the crucial starting point<sup>27</sup> (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!'"

This monologue provides insights into Faust's inner state, which eventually leads to the devil's pact he later concludes. It is usually interpreted

<sup>23</sup>Ehmann (2011) at 4; Weller (2012) at 436.

<sup>24</sup>Ehmann (2011) at 6; Weller (2012) at 444 et seq.

<sup>25</sup>On the development of the contract and consensus principles see Ehmann (2011) at 6; Weller (2012) at 440 et seq.

<sup>26</sup>Heinrich (2000) at 36.

<sup>27</sup>This passage is referred to as the Logos scene, although the Greek word *logos* does not appear in it.

1 as an expression of the change in attitude he has recently experienced.<sup>28</sup> the  
 2 scientist, committed to the Word and the meaning, out of frustration at the  
 3 futility of his efforts, decides to become a man of the world who is active and  
 4 enjoys himself and therefore attaches the highest value to Power and Act. The  
 5 variety of meanings of the word "Sinn" in the original can hardly be captured  
 6 in a single English word. *Kline* speaks of Mind, *Taylor* of Thought, but it also  
 7 includes what in English would be expressed by meaning, sense and purpose.  
 8 These terms, however, have a particular legal meaning, as they designate  
 9 central elements of the doctrine of contract: wording, meaning and purpose are  
 10 the decisive criteria for the interpretation of a contract; Act stands for the  
 11 execution of the agreement, whereby the contract and its implementation,  
 12 Word and Act, are very often in a pronounced state of tension.; finally, Act is  
 13 also – as has already been seen – the handing over of an object at the  
 14 conclusion of a contract, the drawing up of a contractual document or the  
 15 performative ritual<sup>29</sup>.

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

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 23

24 **„So you still have laws in Hell, in fact?“**

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26 After Faust and Mephistopheles have encountered each other for the first  
 27 time in Faust's study, a situation occurs that is as comical as it is indicative:  
 28 Mephistopheles finds himself prevented from leaving the room because a spell  
 29 sign on the doorstep, a pentagram, is blocking his way out. When asked why he  
 30 then does not take the window – apparently there was no fireplace – to leave  
 31 the room, he replies (l. 1410 -1412):

32

33 "To devils and ghosts the same laws appertain:  
 34 The same way they enter in, they must go out.  
 35 In the first we're free, in the second slaves to the act."

36

37 Hereupon Faust (l. 1413-1415):

38

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

42

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<sup>28</sup>Schmidt (1999) at 119 et seq.

<sup>29</sup>Performative means the 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) at 282.

On the one hand, these lines of verse indicate that, according to Faust's understanding, a contract between him and Mephistopheles could work if there were rules to bind the latter. So he obviously holds that a contract requires a binding mechanism and that the law is such an instrument. It is as *Hobbes*<sup>30</sup> 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 in some sense a civic norm addressee.

The tricky point is, of course, how a contract between a human being and the devil is to be effective. As we have seen, Mephistopheles is not omnipotent, and a system of order with corresponding enforcement mechanisms that is mandatory for both sides is nowhere to be seen. The pact can therefore only be a metaphysical one, a legal allegory. Since *Goethe* designed his "Faust" rationally in the spirit of the Enlightenment and also constructed it carefully from a legal point of view, it will now be interesting to see how he helps the pact to take effect according to the views of the time. And this is precisely what the negotiation between Faust and Mephistopheles in the scene The Study 2 is about.

### **Ties that bind**<sup>31</sup>

In contrast to traditional adaptations of the devil's pact legend, in "Faust" ultimately not a contract on the exchange of services is concluded, but rather 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 such 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 commit his soul to the devil in exchange for worldly pleasures and thereby, according to Christian understanding, forego his redemption in the afterlife. Soul, however, has not only this religious but also a secular meaning, insofar as it is considered the seat of the good and the true. Even today, if someone in contradiction to his or her ideals enters into an oppressive dependency for worldly pleasures, it is said that someone has "sold"

<sup>30</sup>Hobbes (1651) at 85.

<sup>31</sup>This is the very telling title of a work by Donaldson/Dunfee (1999), the content of which is not authoritative for what follows here, but shares with it the aim of reflecting on how human behaviour can be steered on the basis of contractarian concepts.

his soul. However, such contract on the exchange of services ultimately does not come into being because Faust simply doubts that Mephistopheles is capable of keeping his part of such an agreement. His mockery of the latter's actual possibilities culminates in the words (l. 1675):

“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 as well, Faust feels incited to bet that Mephistopheles will not succeed in satisfying him in this world (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. 1798<sup>32</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. On the one hand, Faust emphasises once again that he cannot be satisfied on earth. If Mephistopheles were to succeed in giving him a moment of supreme contentment, in which – 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 death. On the other hand, with the line “And quickly!” the passage takes up the topic of the conclusion of the contract again. Unfortunately, *Kline* does not accurately capture the “Schlag auf Schlag” of the original, which verbalises a handshake. In older German law, it was considered a form of *wadiation*, an obligation assumed and strengthened by oath, word of

<sup>32</sup> A counting error occurs here in both the German and English editions.

honour or handshake<sup>33</sup>. Since the bet is an aleatory contract, which is not valid under German law,<sup>34</sup> the handshake is still socially common in this context today and serves as a special affirmation of the awareness of being bound: "Betting debts are debts of honour", as the saying goes. The pact between Faust and Mephistopheles was thus concluded by word ("Done!") 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."

With this he indicates that he does not particularly trust Faust's word and therefore prefers legal security. Legally secure, however, is only the written contract, the observance of which can be enforced by court and execution.

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?  
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 question of how it can meaningfully

<sup>33</sup>Heusler (1886) at 245.

<sup>34</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.

capture an ever-changing world,<sup>35</sup> moving on to the issues of establishing effective binding and appropriate formal requirements, and ending with the widespread emotional resistance to written contracts. In doing so, he largely denies the contract any practical meaningfulness and reduces it – apart from the authoritative enforceability he has already considered – to illusion and crude formalism.

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 the traditional and the modern concepts of contractual binding and thus a variation on the central theme of "Faust": the nature and limitations of the autonomous, enlightened human being. Faust considers an oral contract, backed by honour ("Man's word") and good faith ("pure truth"), to be entirely sufficient. Even though both lack rational substance and are only an "illusion" in his eyes, he nevertheless pays them respect, which also becomes apparent in the fact that he uses words with positive connotations only in their context – "happy" and "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 is indifferent to the afterlife and therefore also to 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 to be more of a prop for a horror story than part of the reality of life, 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.<sup>36</sup> Blood was simply given a higher declaratory power than other writing materials, hence the phrase "blood is thicker than ink".

<sup>35</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>36</sup>For the following see Scheutz (2002) at 26.

Such a making of a document also had a religious significance, because according to biblical tradition, blood was considered the seat of the soul.<sup>37</sup> In the context of the devil's pacts of the Middle Ages, signing with blood was therefore a ritual and performative act that endowed the pact with indelible legal force and bound the one who gave his or her blood for eternal times;<sup>38</sup> it finds its secular counterpart in the blood brotherhood. A pledge in the legal sense cannot be meant by this in "Faust", even if Mephistopheles speaks at the end of "Faust II" in l. 11830 of the "noble soul" having "mortgaged" itself to him. Rather, 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. Moreover, the words for pledge and bet underwent a change of meaning in German in the Middle Ages and finally merged to a certain extent.<sup>39</sup> In any case, personal pledging, including self-pledging, had already largely disappeared in Central Europe in the early Middle Ages.<sup>40</sup> At the latest when Mephistopheles presents the "blood-signed title" after Faust's death, it becomes apparent that it fulfils no security function whatsoever.

By signing in blood, Mephistopheles strives for the highest binding power of the pact that he can achieve. Faust is not at all scared by this archaic ritual; to him it is "farce", 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."

When Faust and Mephistopheles quarrel about medieval and modern notions of contract, 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 through the spoken word, the "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 and done, not to the word but to the act. Beneath the negotiation of form issues lies yet another, almost neoliberal discourse on whether external, institutional constraints are decisive for the binding of a person to his or her promise, or internal constitutions, that is the individual will and the interests of the promisor. Faust rejects the externally mediated binding effect; he propagates the self-binding. In this respect, he is indeed liberal. It is not without irony that the word, which the frustrated scientist now holds in low esteem, becomes for him the crucial criterion for the conclusion of the pact, 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. Programmatically,

<sup>37</sup>Oschema (2017) at 111; Bleeker (1963) at 206.

<sup>38</sup>Bleeker (1963) at 206.

<sup>39</sup>Büter (2005) at 5; Puntchart (1896) at 133.

<sup>40</sup>Büter (2005) at 16.

therefore, his exclamation made elsewhere, but aiming at the same point (l. 1785):

“But, *I* will!”

How far away Faust is from Mephistopheles' world of imagination is finally illustrated by the fact that the latter's remark that blood is a quite special fluid is not even worth a reply to him. 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.”

This pointer is another manifestation of Faust's rational, enlightened views. They are consistent with a reasoning that only made its way into institutional economics in the 1960s with the concept of the self-enforcing contract,<sup>41</sup> which essentially holds that such contracts 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.

So how does the pact between Faust and Mephistopheles now take effect, and how is Faust bound? For Faust, this happens through his word (of honour) and his self-interest, although he considers the first to be an "illusion" and the second to be extremely volatile, as well as through external enforcement. Mephistopheles, on the other hand, trusts in material things: the signed document and the ritual.

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

The Devil's Pact scene discusses contract negotiation and contract conclusion at the interface of past and future. This subject is taken up again in "Faust II" for the implementation of the contract, the complementary piece to its conclusion, when Mephistopheles – to the lemurs, the spirits of the dead, of all things – outrages at modern times with their changed legal practice (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!

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<sup>41</sup> Cf. Scott (2003); Klein (1996).

1 Ancient right, traditional use,  
2 One can't rely on those much longer.”  
3

4 In these lines of verse, Mephistopheles laments the situation of "no more"  
5 and "not yet" and the resulting legal uncertainty. For the contractual binding  
6 mechanisms, we find ourselves in a similar situation today, which is why it  
7 seems worthwhile to look into the future guided by the ideas laid out in  
8 "Faust". Due to the chosen starting point – a work of art – as well as the  
9 complexity of the topic, only highlights can be thrown on the topic of interest.

10 In the near future, we will see contracts being digitalised and their  
11 processing automated – as far as this is not already the case today. Digitalised  
12 means that they are not only in a digital format, i.e. digitised, but can also be  
13 processed by machines or have even been written directly in code.<sup>42</sup> A contract  
14 is automated if it is managed on the part of at least one party without direct  
15 human intervention. Using artificial intelligence, contracts will be negotiated  
16 by machines, generated automatically from building blocks and in many cases  
17 also automatically processed on the basis blockchain technology. This is  
18 already a reality for mass business and will happen in the future for a large part  
19 of contracts, some even say for all.<sup>43</sup> Now, what does this mean in terms of the  
20 binding mechanisms negotiated in "Faust", i.e. enforceability, written form,  
21 loyalty, ritual and party interest?

22 When Mephistopheles asks Faust for "a few lines", he is concerned with  
23 the legal validity and provability of his claim under the pact and thus its  
24 enforceability. Even though authoritative enforcement is rarely used in  
25 practice, the very possibility of the other party making use of it or of social  
26 sanctioning taking place<sup>44</sup> often brings about compliance with the contract. The  
27 future role of legal and social sanctioning can only be predicted with great  
28 uncertainty and displays a highly heterogeneous picture: To name just a few of  
29 the expected developments: automation of contract processing will make many  
30 phenomena of breach of contract disappear;<sup>45</sup> conflict areas, prevention and  
31 resolution will change in the wake of new business models, changed  
32 behavioural patterns, a stronger privatisation of dispute resolution and the  
33 possibilities of scoring; technology-assisted or even fully automated Online  
34 Dispute Resolution (ODR) will make external conflict resolution cheaper,  
35 faster and thus much more attractive. Overall, it can be assumed that the  
36 phenomena of external enforcement will change in form but rather gain in  
37 importance.

38 Embedded in the topic of the written contract is the question of the future  
39 function and relevance of the word. The digitisation of contracts and the  
40 automation of their negotiation and processing deprive the word of a good part  
41 of its importance for business communication. While in analogue contracts it is

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<sup>42</sup>On this and in particular on the so-called computable contracts cf. Cummins/Clack (2020).

<sup>43</sup>So e.g. Breidenbach/Glatz (2020) at 244.

<sup>44</sup>On the relationship between the legal and social binding effect of contracts, cf. Collins (1999) at 127 et seq.

<sup>45</sup>Savelyev (2017) at 118 et seq.

the originary carrier of meaning, in the case of digitisation it only displays given data in natural language; in the beginning, there is no longer the word, but the data. Moreover, the word will increasingly be replaced by the icon in its labelling function. From a legal point of view, it is then no longer the word that expresses the will and thus triggers the legal binding but the act: the mouse click or the establishment of automated processes.

Faust juxtaposes the written word and its enforceability with loyalty and the man's word. These somewhat antiquated-sounding concepts would today be dressed up in the garb of ethics, which plays an increasingly prominent role in corporate governance. With the automation of contract processes and its implied standardisation of business and procedures, ethical issues are shifted to the level of corporate management and the leeway for moral decisions in individual cases disappears. Contractual loyalty also becomes less important to the extent that the use of blockchain technology technically rules out breach of contract. Ultimately, however, with automation there is no longer a human counterpart to whom word could be given or loyalty broken.

Mephistopheles, in turn, believes in signing with blood and thus in the ritualised and performative act. Rituals and traditions – even if not exactly in the form of a signature in blood – are still significant for the conclusion of contracts,<sup>46</sup> and even though their performative effect has faded considerably, they remain important for developing trust, social identity and the basis for cooperation.<sup>47</sup> In an automated contractual practice without human involvement, however, they will be deprived of their social and emotional function and disappear in their familiar forms.

By pointing out that the pact is in its own best interest, Faust is aiming at the core of liberal-enlightened self-realisation. In individualistic societies with their neo-liberal economic order, the interests of the individual are already of high legal relevance, which will continue to increase in some fields. In many countries, for example, a consumer can withdraw from a contract concluded electronically within two weeks at will and at no additional cost, so that the persistence of his or her interest in the transaction becomes relevant to the continued validity of the contract. On the other hand, the automation of contract handling and, as its prerequisite, the standardisation of transactions and processes will considerably reduce the weight of individual will.

All in all, it becomes apparent that Mephistopheles' idea of commitment based on signature and ritual is not particularly sustainable. For contracts, the written word will lose relevance in favour of the act – the establishment of automated processes and the mouse click – as will ritual in its known forms. In contrast, Faust's ideas are much more in line with modern trends. While oral contracting will become rare and individual contract loyalty will disappear behind anonymisation and be absorbed by corporate ethics, the external enforceability of an agreement and the interest of the parties will both continue to increase in relevance.

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<sup>46</sup>Think of the handshake and the ceremonial signing of a contract in German or for eating and drunkenness in Chinese business culture; for the latter see Szto (2013).

<sup>47</sup>Whitehouse/Lanman (2014).

## 1 A Conclusion and no End

2  
3 The story of "Faust" begins with the bet of God and Mephistopheles for  
4 Faust's soul, from which the devil's pact develops, which both, Mephistopheles  
5 and Faust, albeit for different reasons, regard as binding. Although  
6 Mephistopheles at least does not lose his bet with Faust,<sup>48</sup> he eventually comes  
7 up empty-handed and laments at the end of "Faust II" (l. 11829-11835):

8  
9 "They've stolen a great, a unique treasure:  
10 That noble soul, mortgaged to my pleasure,  
11 They've snatched it away, with cunning even.  
12 But whom could I complain to, anyway?  
13 Who'd grant me my well-earned right?  
14 You've been swindled in your old age,  
15 You've deserved it, this wretched slight."  
16

17 This is because the angels carried Faust's soul away. Despite his many  
18 transgressions, Faust found mercy in the eyes of God,<sup>49</sup> who made use of his  
19 right as sovereign: he granted "mercy before justice". This outcome differs  
20 from the traditional adaptations of the Faust material and was not at all met  
21 with undivided approval in *Goethe's* time.<sup>50</sup> With this, however, "Faust" finds  
22 a convincing conclusion, at least from a legal point of view.

23 Not at an end has come the story of the ideas of the contract negotiated in  
24 "Faust". With them, a fundamental question of social coordination is raised,  
25 one that is as relevant for today as it is for the future. A consideration of the  
26 various mechanisms discussed in "Faust" suggests that their importance will  
27 change in a world of automated and digitalised legal and economic activities,  
28 but that they will remain relevant as criteria for assessing interpersonal  
29 contractual ties. In this respect, "Faust" stretches out from the Middle Ages to  
30 today's future.

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<sup>48</sup>The question of who won the bet is highly controversial. According to Goethe, Mephistopheles should only half win his bet; cf. Weber (2005) at 133.

<sup>49</sup>*Goethe* spoke to *Schubarth* of the "old man's right to pardon"; cf. Weber (2005) at 133.

<sup>50</sup>See e.g. Göschel (1824) at 108 et seq.

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