THE PRIVILEGE OF CANCELLATION OF CONTRACTS IN SCANDINAVIAN LAW

BY

PREBEN LYNGSØ

Professor of Law,
University of Aarhus

1. INTRODUCTION

According to Danish and Scandinavian law in general a promise or offer is binding once it has come to the knowledge of the addressee. In a number of cases, however, the promisor or tenderer will be able to free himself, wholly or in part, from the obligations imposed upon him by the promise or offer. Where it is possible for him to free himself, wholly or in part, from the obligations imposed upon him by the promise or offer, the promisor may be said to enjoy a privilege of cancellation. In what follows an attempt is made to elucidate in detail to what extent such a privilege of cancellation is recognized in Danish and Scandinavian law.

In the present study the term "privilege of cancellation" does not include cases where a contract contains *a stipulation concerning cancellation.* Also outside the scope of the study are cases where the party under contract is, wholly or partly, exempt from the duty of performance because the contract was *broken* by the other party. Further, I have left out cases where impossibility or *force majeure* (act of God) prevents a party from fulfilling his contractual obligations.

Generally, the privilege of cancellation can be invoked both by the party who has a *duty of payment* and by a party who has a *duty of performance in kind.* In cases of purchase and sale, for instance, it can be supposed that a privilege of cancellation is invoked either by the purchaser or by the seller. In fact, however, the important cases are those where the privilege of cancellation is invoked by the party who has the duty of payment. Thus, in purchase and sale the most typical cases are those where the purchaser wishes to cancel the contract. The main emphasis in the present study is laid on cases where the privilege of cancellation is invoked by the party upon whom is incumbent a duty of payment—in other words, on cases where the privilege of cancellation is invoked by a purchaser, an employer, a lessee, etc.

In Danish and Scandinavian law there is no general rule con-

cerning privilege of cancellation in the sense in which the term is used in this study. The thesis in the present study is that a number of special rules which do not directly concern privilege of cancellation may be interpreted in such a way that in certain cases they give a party under contract a privilege of cancellation.

2. REVOCATIONS OF OFFERS

The recognition of a rule of privilege of cancellation would seem to imply an exception from the general rule in Scandinavian law that promises and offers are binding, i.e. they cannot be withdrawn once they have come to the knowledge of the addressee. It is therefore natural to take as a point of departure the general principle that an offer is binding.

It is often assumed that the Danish Contracts Act of 1917, like the Contracts Acts of the other Scandinavian countries, is based on the so-called *principle of objective interpretation of promises.* The principle is this: a promise or an offer is binding because it arouses expectations in the addressee, and it is binding as soon as his expectations are aroused. Therefore a promise or offer is binding the moment it has come to the knowledge of the addressee.

In support of the assumption that a promise or an offer is binding as soon as it has come to the knowledge of the addressee and cannot later be withdrawn, the Contracts Act, sec. 7,[1] is invoked. However, this provision does not expressly state that a promise or an offer is binding once it has come to the knowledge of the addressee and cannot later be withdrawn. It only states that a promise can be withdrawn before it has come to the knowledge of the addressee. And the provision does not imply, inversely, that a promise can never be withdrawn once it has come to the knowledge of the addressee. On the contrary, it appears clearly from the legislative history[2] that the wording of sec. 7 was chosen in order to allow withdrawals of a promise or an offer in

[1] Sec. 7 has the following tenor: "Offers or acceptances which are revoked shall be null and void where the revocation reaches the person to whom the offer or acceptance is directed before or at the same time as he has taken cognizance of the offer or of the acceptance."

[2] *Udkast til Lov om Aftaler og andre Retshandler paa Formuerettens Omraade,* Copenhagen 1914, pp. 29 f.

exceptional cases even *after* it has come to the knowledge of the addressee.

The Contracts Act, sec. 7, does not state when a promise or an offer can exceptionally be withdrawn. On this point the Contracts Act, sec. 39,[3] is pertinent.

The Contracts Act, sec. 39, subsec. 1, says that in cases where a promise or an offer is valid because the addressee of the promise or the offer is in good faith, the addressee must have been in good faith at the time when the promise or the offer came to his knowledge. Assume that A, with intent to defraud, induced B to give a promise to C: then B's promise is valid if C was in good faith at the time when the promise came to C's knowledge.

However, the time when the promise came to the knowledge of the addressee is not always the crucial one. Where certain circumstances are present and the promise has not yet decisively influenced the addressee's way of action, the promise can be declared invalid according to the Contracts Act, sec. 39, subsec. 2, even if the addressee was in good faith at the time when the promise came to his knowledge.

The drafters of the Contracts Act held that sec. 39, subsec. 2, should be applied analogously to the withdrawal of promises and offers.[4] Thus a promise can be withdrawn even at a later time than the time when it came to the knowledge of the addressee, provided that special circumstances were present and that the promise had not yet decisively influenced the conduct of the addressee.

The Act does not specify the meaning of the term "special circumstances". However, legislative history and court decisions indicate certain groups of cases in which promises may, to a very great extent, be withdrawn. For instance, according to the opinion prevailing among scholars the law is less strict with regard to promises *which form part of non-commercial legal transactions.*

[3] Sec. 39 runs as follows: "Where, according to this Act, the validity of a contract or an other legal act is dependent upon the fact that the one who became a party to the Act did not have or should not have had knowledge regarding a certain circumstance or otherwise acted in good faith, consideration shall be given to what he realized or should have realized at the time when the act became known to him. Yet, where special circumstances account for it, consideration shall likewise be given to the knowledge he gained or should have gained after the time mentioned, but before the Act decisively affected his way of action."

[4] *Udkast til Lov om Aftaler og andre Retshandler paa Formuerettens Omraade,* Copenhagen 1914, pp. 91 f.

Moreover, there are particularly wide possibilities of withdrawing *oral promises* and also *declarations of a notice of discharge* of a contract of employment. It should also be mentioned that the courts have often recognized withdrawals of *promises which are made to salesmen* who have made unsolicited approaches to private persons with a view to inducing them to enter into contracts of sale or subscription.

As a practical example of the application of the above-mentioned rule the case 1948 U.f.R. 748 (Maritime and Commerical Court) can be adduced. In this case a wholesale dealer signed a contract concerning the purchase of a large number of lamps shown to him by the seller's agent during a visit to his home. When the agent had left, the wholesale dealer wrote to the firm and cancelled the contract. The letter of cancellation was received by the seller after the contract with his signature had come to the seller's knowledge, i.e. after the time when the contract would normally have become binding upon the wholesale dealer. However, the court decided that in view of the special circumstances existing the wholesale dealer was entitled to withdraw his signature.

3. THE DOCTRINE OF ASSUMPTIONS

When applying the exemption clause in sec. 39, subsec. 2, the courts have attached decisive importance to the promptness with which the promisor acted when withdrawing his promise. This implies that the right of cancellation is forfeited when an unspecified short period has elapsed since the promise was given. However, there are certain other possibilities of cancellation, too. Thus, a party to a contract who wants to withdraw his promise may rely upon the *doctrine of underlying assumptions* or implied conditions.

Before a contract party can invoke the privilege of cancellation he must be able to prove that the particular assumption which has not been borne out was substantial. Whether an assumption is substantial or not depends on whether a normal promisor in the situation of the promisor concerned would have given the promise if he had foreseen that the assumption was wrong. The

assumption may be deemed material if an ordinary man in the position of the promisor concerned would not have given the promise if he had foreseen a certain event, for instance war, or, in other words, had foreseen that his assumption that peace would prevail was wrong.

Secondly, it is a condition that the assumption shall have been apparent to the other party ; he must have had actual or constructive notice of the existence of the assumption and of its substantial importance to the other party.

That the assumption is substantial to the promisor, and this is apparent to the promisee, is not sufficient. The assumption must be relevant, too, which means that it should be legally operative. The court should come to an opinion as to which solution, cancellation or not, would be best suited for application in cases of the kind in question.

The decision in the Supreme Court 1970 U.f.R. 298 may be referred to as one of many cases in which Danish courts have applied the doctrine of underlying assumptions. In the case in question the plaintiff, A/S Scandinavian Bowling, had rented some premises from the defendant, A/S Rødovre Centrum, which they intended to use as a bowling alley, etc. The lease stipulated that the lessee had to be a member of a shopping centre affiliated to the defendant. The plaintiff wished to be released from this obligation, pointing to the fact that several other tenants had been released from their obligations in that respect and maintaining that it had been a substantial assumption for him that all tenants were members of the centre. The court found for the defendant on the ground that although it was true that it had been an assumption for the plaintiff that all tenants should be members of the shopping centre, this assumption had not been substantial. This reasoning indicated that the action would have been sustained if the plaintiff had been able to convince the court that his assumption was substantial.

The decision of the Supreme Court 1963 U.f.R 101 concerned the following case. The municipal authorities had sold a site to an entrepreneur. After having signed the contract, however, they were informed that the entrepreneur intended to build on the site industrial premises for rent. The municipal authorities now wanted to cancel the contract and pleaded that it had been a substantial assumption that the site should not be let but should be used by the purchaser as premises for one of his own factories which was going to be moved to the site from its present premises

in another municipality. The court found that there was an assumption by the seller that the site should not be let, but this assumption had not been apparent to the buyer.[5]

4. THE GENERAL PRINCIPLE

There is a general principle in Scandinavian law according to which contractual obligations may be limited if their enforcement would lead to obviously unfair results. This principle may provide a remedy to a party who wishes to cancel an agreement from which he cannot be released by virtue of the doctrine of underlying assumptions.

The recognition of such a general principle may be based, in the first place, on sec. 37, subsec. 1,[6] and sec. 36[7] of the Contracts Act. Literally, it is true that these provisions only authorize the reversal of an agreement to the effect that a party either forfeits his right to reclaim what he has paid or must perform his part, even in cases where the other party to the contract is released from his duties. However, the courts have extended these provisions to apply to cases where there is no clause of forfeiture in the contract and where the other party performs his part.

The decision 1927 U.f.R. 440 (Court of Appeal) provides an illustration of the law as applied by Danish courts. The defendant had entered into a contract with an advertising agency to rent a poster hoarding for a period of five years. The defendant wanted to cancel this agreement. The advertising agency rejected this proposal. In spite of the fact that the defendant had not

[5] Among other cases in which the doctrine of assumption has been applied mention should be made of 1967 U.f.R. 568 (Court of Appeal) and 1970 U.f.R. 314 (Supreme Court).

[6] The Contracts Act, sec. 37, subsec. 1: "Where anyone, in case a contract entered into by him should be treated as repudiated on account of non-fulfilment on his part, has engaged himself notwithstanding the repudiation of the contract to pay what he has promised or permit the other to keep that which has been paid, the provisions of sec. 36 regarding a penalty shall have corresponding application."

[7] The Contracts Act, sec. 36: "A penalty in money or in another form, which anyone has undertaken to pay in case he should not fulfil an obligation incumbent upon him, or should otherwise do or refrain from doing anything, may be reduced to what is deemed to be reasonable, in case the exacting of what has been promised is found to be manifestly unjust. . . ."

paid the rent and so was in breach of contract, the advertising agency did not annul the agreement; on the contrary it asked the defendant several times to submit advertising copy and still offered to put up the hoarding which the defendant had ordered. Although the advertising agency had in no way annulled the contract, but had claimed its performance, and although for that reason the facts at issue were not within the framework of the wording of the Contracts Act, sec. 37, subsec. 1, the Court reduced the defendant's obligation to pay on the basis of the principle embodied in that provision.[8]

On the statute book there are a number of other provisions which indicate the existence of a general principle limiting the enforcement of contractual obligations. Among these are the Conditional Sales Act, 1953, sec. 8, subsec. 3, the Insurance Contracts Act, 1930, sec. 34, the Tenancy Contracts Act, 1967, sec. 37, and the Instruments of Debt Act, 1938, sec. 8. According to these provisions a contract may be cancelled, wholly or in part, when strict enforcement would manifestly be contrary to business ethics.[9]

5. IMPOSSIBILITY AND "FORCE MAJEURE"

In Danish and Scandinavian law it is a general principle that a party in a contractual relationship cannot be ordered to perform his promise when he is prevented from doing so by obstacles in the nature of what is generally called impossibility or *force majeure.*

It cannot be concluded from this rule, however, that a party is debarred from withdrawing, when impossibility or *force majeure* prevents, not the fulfilment of his obligation, but the exercise of his right. However, it seems to be the rule that impossibility or *force majeure* entitles a party to withdraw. Whether the obstacle in question prevents the fulfilment of an obligation or

[8] See 1921 U.f.R. 896 (Court of Appeal) and 1960 U.f.R. 289 (Court of Appeal), too.

[9] All these provisions have similar wordings. The Instruments of Debt Act, sec. 8, runs as follows: "Should the enforcement of a condition in an instrument be obviously inconsistent with good business manners or otherwise improper, such condition may be modified or held null and void."

the exercise of a right is immaterial. In these cases, too, a party may be said to enjoy a privilege of cancellation.

As regards charterparties, the Maritime Code, 1937, sec. 31, subsec. 1,[1] contains explicit rules to this effect, saying that the charterer shall be exempt from paying freight or compensation for freight where impossibility or *force majeure* prevents the delivery of goods for loading and the charterer is therefore unable to exercise his right to have the goods carried by the shipowner. The rules of the Maritime Code seem to express a principle which could also be applied to other types of contracts, for instance building contracts.

6. REFUSAL TO ACCEPT PERFORMANCE

The crucial problem is whether one party to a contract is free to withdraw, wholly or in part, from the contract, or, more precisely, whether one party can declare that he does not want to accept the performance of the other party's contractual obligations, thereby exempting himself wholly or partially from his own obligations.

There can hardly be any doubt that a party has a right to declare that he does not want to accept the other party's performance. In most cases this follows from an interpretation of the contract or from statutory provisions dealing with the type of contract concerned. Thus, as regards contracts on sale of goods, the buyer has actually no obligation to receive the goods, and as regards contracts concerning leases the lessee has no obligation to take possession of the premises.

The fact that a party has a right to object to the other party performing his contractual obligations does not, however, necessarily imply that he will wholly or partially be exempt from his own. The basic principle *pacta sunt servanda* still applies. However, a party does not necessarily have to pay exactly the amount

[1] The Maritime Code, sec. 131, subsec. 1: "The charterer shall be free from his duty ... if the possibility of delivering ... the goods ... may be deemed prevented by circumstances ... such as prohibitions of export or import or other measure by authorities, accidental destruction of all goods of the kind to which the contract relates, or similar circumstances. ..."

of money that he has committed himself to pay. The principle *pacta sunt servanda* does not require the parties to perform the contract specifically; the principle may be upheld by giving *compensation* to one of the parties when the other has refused to receive the subject matter of the contract. And a rule that a party has to be compensated is compatible with the idea that the party upon whom the duty to compensate is incumbent is under no obligation to pay in full what he was contractually bound to pay.

Where one party declares that he will not accept the other party's performance of his contractual obligations, this may constitute a breach of contract, and the party not in breach may then obtain a right to cancel the contract and claim damages. In this case damages to be paid by the party in breach will, in typical cases, be less than the amount which would have been paid if the contract had been fulfilled to the letter. The basis of this calculation is probably that the damages should correspond to the amount originally agreed upon, less, however, the amount which the claimant saves or is able to save by being exempt from performance of his own contractual obligations and less the amount which he may recover by having the free disposal of his contribution.

As an instance of this principle of calculation the Tenancy Contract Act, 1967, sec. 64,[2] may be cited. In this provision the rule is laid down that if the lessor annuls the lease owing to the lessee's breach of contract, the lessee shall pay damages corresponding to the rent, less, however, any amount that the lessor recovers or is able to obtain by renting the premises elsewhere.

Assume that a party A objects to the other party B's performance of his contractual obligations, with the effect that party B will have a right to cancel the contract and claim damages. In this situation party B, if he exercises his right, will as a rule obtain damages which are smaller than the amount which party A was obliged to pay according to the letter of the contract. For

[2] The Tenancy Contracts Act, sec. 64: "Where a lease is cancelled ... (by the lessor) ... the lessee shall be liable to pay rent and any other consideration payable by him under the contract for the period until the expiration of the usual period of notice on a regular moving day, and to compensate the lessor for any loss inflicted on him through the breach of the contract, including expenses involved for eviction of the lessee" (subsec. 1). —"The lessor shall be bound to make normal efforts to re-let the premises at a suitable rent. What the lessor recovers or ought to have recovered through utilization of the premises within the period referred to in subsec. 1 shall be deducted from his claim according to the said subsection" (subsec. 2).

this reason it may be said that party A enjoyed a limited privilege of cancellation.

Assume that party B either cannot or does not want to cancel the contract and claim damages, and therefore offers to perform his contractual obligations, claiming that party A should perform his, in spite of the fact that A has declared that he will not accept performance. In this situation B is probably in no better position than if he had cancelled the contract and claimed damages. The fact is that even if B offers to perform his contract and claims the same from the other party in return, it must be assumed that his claim must be reduced by what he saves or is able to save by not performing the contract, and by what he recovers or should be able to recover by having the free disposal of his own contribution.

These principles seem to be accepted by Danish courts, as will be demonstrated by the following examples.

1877 U.f.R. 693 (District Court). A man who had rented an apartment refused to use it. The lessor did not rescind the tenancy contract, but claimed the agreed rent from the lessee. The lessee pleaded that he was not obliged to pay rent for the time in which the lessor had rented the apartment to another party, and the court upheld his contention.

1951 U.f.R. 805 (Court of Appeal). In this case the court said that a lessor, although he had not cancelled the contract and had not claimed damages, but had offered to perform his contractual obligations, claiming that the lessee should perform his obligations, was not allowed to sue for compensation from the lessee for what he should have been able to recover by renting the premises elsewhere.

In the case of a *contract of employment* the rule applies that the employer may at any time inform the employee that he does not want to make use of his services any longer.[3] Then the employee is entitled to payment for the agreed period of notice of dismissal, but the employee has to deduct from his claim what he earns or is able to earn by working for another employer.

1970 U.f.R. 314 (Supreme Court). An employee in a managerial position who was entitled to a two-years period of notice was summarily discharged. He sued his employer for two years'

[3] In a number of cases special rules apply. Thus the Danish Salaried Employees Act and Seamen's Act prescribe that in case of dismissal the employee is entitled to his salary for a certain period without deductions.

salary. The court found that this claim should be reduced by the amount which the employee was assumed to be able to earn by working elsewhere during those two years.

In cases of *building and engineering contracts* the builder will be able to invoke a privilege of cancellation by forbidding the contractor to start or continue the work. The builder then has to pay the contractor the agreed payment, but with the deduction of the sum which the contractor saves or is able to save by being released from carrying out the work, and with the deduction of the sum which the contractor earns or is able to earn by utilizing his potential elsewhere.

The above-mentioned principles show that no matter whether party B cancels the contract and claims damages or offers to perform his part and claims that party A shall perform, too, party A may, by refusing to accept performance, obtain the advantage of having to pay a smaller amount than he would have had to pay if the contract had been fulfilled to the letter. In this way one party may in principle always obtain a limited privilege of cancellation by refusing to accept the other party's contribution.

7. SPECIAL PRIVILEGES OF CANCELLATION

The privilege of cancellation described above usually implies that the party against whom it is exercised is actually compelled to try to indemnify himself, wholly or partially, by utilizing his own contribution. It must be borne in mind, however, that normally cancellation of contracts take place only when the performance of the contract in question has not yet taken effect. It is a matter of course that a party to a contract who has performed his obligations cannot ordinarily be compelled to indemnify himself, wholly or partially, by utilizing his own contribution; a party to a contract who has performed is under no obligation to take back his contribution.

However, there has recently been discussed in the Scandinavian countries the possibility of introducing a special rule concerning the privilege of cancellation, namely that in certain situations a party to a contract should be obliged to take back his contribution. Such a rule for a specific situation has been put on the

statute book in Norway and in Sweden, but not in Denmark. The rule concerns a privilege of cancellation in cases where a contract on sale or subscription was signed by the prospective buyer at a place other than the seller's business premises. The buyer is then free to withdraw from the contract by serving the seller a notice of cancellation within one week.[4]

[4] Cf. the English Hire Purchase Act, 1965, sec. 11. According to this provision a person who signs a document which constitutes a hire purchase agreement, a credit-sale agreement or a conditional-sale agreement under certain conditions may within a period of four days serve a notice of cancellation on the seller and so release himself from his obligation to fulfil the contract.