AUTONOMY OF CONTRACT AND NON-MANDATORY LAW

BY

JAN RAMBERG

© Stockholm Institute for Scandianvian Law 1957-2009

> The common law evolves not
> merely by breeding new
> principles but also, when they
> are fully grown, by burying
> their ancestors.
> Lord Diplock in Hong Kong Fir [1961] 2
> Lloyd's Rep. 478 on p. 494.

In the area where freedom of contract prevails, it is at least theoretically possible to create a contract independent of the rules of law and that stands entirely upon its own feet.

Thus far, then, contract autonomy exists. For this reason it is of the greatest importance first to delimit correctly the "free area" against special legislation or general over-riding norms of contract law that set mandatory limits to the parties' freedom to arrange matters as they wish.

THE SHIFT OF PERSPECTIVE IN CONTRACT LAW

We normally imagine that the principle of freedom of contract is predominant, but there is reason to question whether this assumption is really justified. [1] Rapidly growing politically influenced ad hoc legislation, collectivised and standardised contract techniques, the realisation of the need of protection for weaker parties in consumer law and also the otherwise increased opportunities for general adjustment of unreasonable contract terms have contributed to severely limiting the latitude for freedom of contract. This has also made it more difficult to draw an exact line between non-mandatory and mandatory law. A fairly fresh example is sec. 6 of the Competition Act which prohibits such collaboration as can be considered to counteract generally desirable competition. Since only vague criteria can be set for judging such undesirable collaboration, large sections of contract law have undergone a shift in perspect-

[1] See P.S.Atiyah, *The Rise and Fall of Freedom of Contract,* Oxford 1979.

© Stockholm Institute for Scandianvian Law 1957-2009

ive. Here it is no longer possible to assume that the partners can arrange their contract entirely as they like: instead, they must reckon with a limitation of their contractual freedom. To avoid drastic consequences in the form of fines for restricting competition, and a general liability to pay damages, the contracting parties must carefully consider whether their planned collaboration can be questioned from the point of view of competition. Where there is the least doubt about this, they must request a non-interventional ruling ("negative clearance") from the Swedish Competition Authority.

Legal concepts and structures are indispensable for correct decision-making and for achieving a reasonable degree of predictability and safeguards against arbitrariness. However, continual alertness is necessary to prevent legal thinking from being enslaved by concepts and structures. Note must be taken of the relevant circumstances and when these change as society changes, as compared with the circumstances prevailing when the concepts were formulated, it is easy to reach a state where the concepts, at least as originally formulated, no longer fulfil their purpose. At best, the concepts then become harmless, e.g. when they can be used as labels for the results arrived at on other grounds with scant help from the actual concepts. At worst, the concepts are detrimental by not allowing regard to or blurring the relevant circumstances that should affect the decision. No harm is caused by continuing to use the concepts in a different sense than the original as long as one is clear about what one is doing. The concept "force majeure", for example, can be used as a general term of exoneration in contract law even though the real core of the concept – that the exonerating circumstance must derive from a "higher power" – has been diluted.[2] The doctrine of underlying assumptions can be expanded to include such cases in which assumptions in the true sense do not exist: the assessment has become depersonalised and shifted to a pure type assessment (type assumptions).[3] In the same way it is still possible to attach importance to the parties' free will though not necessarily as a phenomenon giving rise to legal effects but as a circumstance that together with others is ascribed considerable weight in deter-

[2] As an example of this, see O Mestad, *Om force majeure og risikofordeling i kontrakt.* (On force majeure and the distribution of risk in contracts), academic thesis, Oslo 1991 p. 96 ff.

[3] See L.Vahlén, *Avtal och tolkning,* (Contract and Interpretation), Stockholm 1960 p.36 f and B.Lehrberg, *Förutsättningsläran* (The Doctrine of underlying Assumptions) academic thesis, Uppsala 1989, and his summary p.570 which illustrates teleologically the Doctrine of Underlying Assumptions in this respect also.

© Stockholm Institute for Scandianvian Law 1957-2009

mining whether a contract has arisen and in the interpretation and application of contracts.[4]

It has already been hinted that the division of legal rules into mandatory and non-mandatory is far from sufficient to clearly define the "free area". The degree of precision becomes somewhat better where interventions have been made by ad hoc legislation – for example in consumer protection – but the uncertainty becomes considerable when it is necessary to apply general formulæ (sec. 33 and particularly sec. 36 of the Contracts Act) or general invalidity rules as in sec. 7 compared with sec. 6 of the Competition Act. If on the other hand the parties have been able to clearly establish the "free area" it would, at least theoretically, be possible for them to produce an autonomous contract. A prerequisite, however, is that the contract regulates their dealings unambiguously and fully; otherwise the non-mandatory rules come into play and clarify or supplement the ambiguous or incomplete contract. In practice contracts are seldom masterpieces of completeness, clarity and precision. Hence what would be theoretically possible hardly ever becomes practical reality.

CONTRACT TECHNIQUES

The parties' desire to achieve an autonomous contract varies from case to case.[5] It is true that by standardising and collectivising contract terms fairly large areas are subjected to contractual conditions ready-made for

[4] See from the legal debate on the meaning and effect of a declaration of intent on the creation of legal rights and obligations S.Eng, "Hva er en viljeserklæring?" (What is a declaration of intent?), *SvJT* 1993 pp.1-42. Eng's conclusion is that is is not – as maintained by Axel Hägerström and others – logically impossible to find intent as a criterion of disposition (p.38, see also p.42) but Eng also maintains, and this seems to me to be most important, that the *legal significance* one wishes to ascribe to intent is an empirical question of the content of existing legal sources. The same view is given in my textbook *Allmän avtalsrätt* (General Contract Law), Stockholm 1991 p.39: "If and how far, declarations of intent and other expressions of intent give rise to legal effects is, however, determined not by intent or expressions of intent itself but by the norms society develops for different typical situations and ultimately by the rules of law."

[5] Particularly in the case of company acquisition this ambition is appreciable. See e.g. C.Hultmark, *Kontraktsbrott vid köp av aktie, särskilt om fel* (Breach of Contract in the Purchase of Shares, with particular reference to non-conformity) academic thesis, Stockholm 1992, p.41 ff and also S.Lindskog, Något om köprättsligt fel i rörelsedrivande aktiebolag (On non-conformity in the business of share-corporations) *Volume in honour of G.Calissendorff*, Stockholm 1990, pp.129-143.

© Stockholm Institute for Scandianvian Law 1957-2009

various typical contract situations.[6] Standard contracts presuppose that the parties in the individual case agree upon the main ingredients of the contract. It is often imagined that the standard contract linked with such individual contract terms will constitute a completely autonomous contract but subject to the limitation due to mandatory rules and the overriding principle of reasonableness permitting contract adjustment. However, when parties do intend to produce an autonomous contract it is hard for them to predict everything that it should regulate, and even contracts involving large values often demonstrate remarkable shortcomings in respect of clarity and stringency. It is easy to see that contract practice in Sweden diverges sharply from that in England and the USA. One cause of this may be that in Sweden the parties actually trust the power of rules to supplement incomplete contracts appropriately. It may possibly be true that parties to the majority of individually framed contracts concentrate on what might be termed the "what, how, when and where questions" of contract law.[7] In English law on the other hand there is, at least traditionally, a prohibition against supplementing contracts except where this is required to give the contract "business efficacy".[8]

SHOULD THE INTENT TO CREATE LEGAL EFFECTS STILL REMAIN IN FOCUS?

The issue of intent to create legal effects was stressed in earlier legal debate, and this discussion has influenced the structure of, particularly, Chapter 3 of the Contracts Act on invalidity. The balance between the intent to create legal effects and the other party's reliance on declarations of intent and other expressions of the intent to create legal effects, was considered as the most important problem. Now, however, a trend can be discerned towards "objectivisation and simplification" and away from "dogmatic superstructures in the form of special and mutually very

[6] See e.g. NL 92, AB 92 and NSAB 85 and for comments on some of these S.Hedberg, *Kommentarer till AB 92* (Comments on AB 92), Stockholm 1992, and also J.Ramberg, *Kommentarer till NSAB 85* (Comments on NSAB 85), Stockholm 1984 and *idem, NSAB 75 år* (NSAB 75 years), Stockholm 1994.

[7] See J.Ramberg *op.cit.*, note 4, p.26.

[8] According to the principle expounded in the Moorcock case (1889) 14 P.D. 64; see also J.Ramberg *op.cit.* note 4, p.119.

© Stockholm Institute for Scandianvian Law 1957-2009

inconsistent ideologies".[9] What, rather, is decisive is the practical evaluation as such. This development has brought into question some of our dogmatic principles and their effects generally within the field of contract law.

If decisive importance is ascribed to the parties' intent as expressed in their statements or behaviour, it is natural to concentrate interpretation of the contract upon such circumstances. Circumstances other than those stemming from the parties themselves are not in this case "true" data for interpretation. The "real" content of the contract is then only what emerges from the contracting parties themselves, while in other respects the contract is supplemented, if necessary, with the application of appropriate norms and legal rules.[10] In this way a distinction is made between the true content of the contract and its supplementation ("tolkning och utfyllning"). This makes it easier for anyone who is to interpret and apply the contract to understand what he is actually doing. The distinction between interpretation and supplementation is doubtless of great value but it can be queried whether it is suitable or even possible to apply in practice.[11]

An initial difficulty is to decide what is really covered by the intent to create legal relations. If for example one imagines a sales contract being concluded with no price expressly agreed, one must nevertheless assume that the vendor had at least considered some payment for the goods he is selling. If the vendor has really intended that his pricelist will apply, since it contains only reasonable prices, and that therefore no mention of price is necessary, the issue becomes one of interpretation. If on the other hand he has left the whole issue of reasonable price to the non-mandatory rule in the Sales Act (formerly sec. 5 of the 1905 Act and now sec. 45), then the issue is one of supplementation. In the same way one must, for each non-mandatory rule, ask whether the parties have actually intended the same result as expressed by the rule; in which case it is in essence a matter of contract interpretation. If the parties have not so intended, then it is a matter of supplementation. The difficulty of clearly delimiting contract interpretation in the true sense from supplementation is also illuminated by the difference between the incorporation of

[9] K.Grönfors, *Avtalsgrundande rättsfakta* (Foundation of Contracts), Stockholm 1993, p.24 f.

[10] On this point see specially L.Vahlén, *op.cit.*, note 3 p.187 ff.; A.Adlercreutz, *Avtalsrätt* II, (The Law of Contract), Lund 1991, p.42, and also B.Lehrberg *op.cit.*, note 3, p.120 ff. with comprehensive references to Nordic legal writing.

[11] The difficulty of maintaining the distinction is emphasized by many authors. See e.g. A.Adlercreutz *op.cit.* note 10, p.42.

© Stockholm Institute for Scandianvian Law 1957-2009

custom of the trade in the contract according to Swedish law and the International Sales Convention. According to Swedish Law the contract is supplemented with custom of the trade under the express regulation in sec. 3 of the Sales Act, while according to the International Sales Convention article 9.2 custom of trade is incorporated in the contract through what is at least claimed to be contract interpretation. It is therefore queried here whether it is possible to make a distinction between the "real" content of the contract ("det egentliga avtalsinnehållet") and the contract as a whole and to break off, so to speak, when one considers one has established the parties' common intent to create legal relations and thus the "real" contract, before continuing with supplementation as required.[12] In addition, it is hard to teach people that the content of a contract is anything other than the contract in its entirety.[13] Yet another disadvantage of focusing on what the contracting parties may have jointly intended arises when a person not familiar with the environment from which the contract derives is tempted to simplify the procedure of contract interpretation. It is not hard to produce horror examples of incorrect contract interpretation where the judge has first, as a rule unsuccessfully, attempted, by hearing the parties to the contract, to establish whether there is any common intent to create legal effects, and then vainly attempted to find supplementary rules of law and norms. The judge then fills the "vacuum" so arising with an almost desperate application of the *contra proferentem* rule (i.e. choosing the alternative least favourable to the contract drafter). The unclarity the judge discovers – often incorrectly because of incomplete or even careless interpretation of the contract – is then applied to the detriment of the party that may happen to have drafted the contract.[14] Such incorrect application of law could probably be avoided if the actual point of departure

[12] The inconveniences of applying such a "stepwise interpretation method" may, however, be partly avoided if one starts with the "supplementation" instead and then moves on to investigating the individual circumstances. See on this point A.Adlercreutz, *SvJT 1990* p.582 in reviewing K.Grönfors, Tolkning av fraktavtal (Interpretation of Contracts of Carriage), Gothenburg 1989 and J.Ramberg op.cit., note 4 p.92.

[13] For this reason the present author has in his textbook *Allmän avtalsrätt* (General Contract Law) avoided using the term "content of contract" in any narrow sense; see *op.cit.* note 4, p.77.

[14] As an illustration of this may be mentioned decisions of the lower courts in NJA 1990 p.24 in which the District Court in a dispute concerning a building contract somewhat uncritically applied the *contra proferentem* rule to the disadvantage of the purchaser, while the Court of Appeal considered that the builder – even though the purchaser had written the disputed contract clause – was the one to bear the risk for the unclarity. The Supreme Court however applied a pure linguistically-oriented method of interpretation. See on the case J.Ramberg, Avtalstolkningsmetoder (Methods of Interpreting Contracts), *JT* 90/91 p.76.

© Stockholm Institute for Scandianvian Law 1957-2009

were altered and primary emphasis on the parties' intent avoided. Instead one should focus on the *entirety of the contract* with no intermediate step between establishing the "real" content of the contract and subsequent attempts to supplement it. Instead, it should be borne in mind that the contract nearly always depends on some *interplay* between non-mandatory law and other norms and individual contractual terms, modified as appropriate through mandatory rules and the general principle-of-reasonableness rule in sec. 36 of the Contract Act. [15]

The shift in perspective indicated above does not of course mean that the parties' intent and the justified reliance a contracting party may have placed in the other party's statements and behaviour should be overlooked. If there is a written contract, however, its text as such is normally decisive, since there is here a firm point of departure for its interpretation in the form of data possible to interpret objectively.[16] The text of the contract frequently speaks for itself and the hearing of the contracting parties regarding their intent then seldom leads to anything other than establishing that they had different views. True, it is often the case that the party who considers the wording of the contract disadvantageous claims to have intended something different from what follows from the text when interpreted objectively. If so, one could establish a lack of correspondence between the "objective" content of the declaration and what the party claims to have been his intention. According to the first paragraph of sec. 32 of the Contracts Act, being held to the incorrect statement can be avoided if the other party acted in bad faith (i.e. must have been aware of the other party's mistake). Nothing is said in the legal text regarding the case of good faith but, *e contrario*, this section of the Act is also considered to express the reliance principle.[17] When the other party has not been aware of the mistake, then, the party guilty of the erroneous statement must accept being bound by it. In the case of bad faith the section according to its wording leads, so to speak, to zero – no obligation exists – and the question of whether an obligation has arisen conforming with the mistaken party's intent, when the other party is

[15] See J.Ramberg in Hellner-Ramberg, *Speciell avtalsrätt* I. Köprätt (Special Contract Law I. Sales Law) Stockholm 1991, p.36.

[16] The case mentioned in note 14, NJA 1990 p.24, is a good example of this. A.Adlercreutz *op.cit.* note 10 p.119 wishes to see in this case the expression of a "new trend". In fact, however, the objectivisation of contract interpretation methods has been going on for quite some time.

[17] But cf. K.Grönfors, *Avtalslagen* (The Contracts Act), Stockholm 1989 p.40, who maintains that neither the doctrine of intention nor the doctrine of reliance necessarily follows from the *text* of the Contracts Act.

© Stockholm Institute for Scandianvian Law 1957-2009

aware of it, is left unanswered.[18] It is not a necessary conclusion that the party aware of the other party's mistake must also be considered to have accepted a contract in accordance with the real intent of that party. However, it should normally be possible to require of the person aware of the other party's mistake that he assist in *clarifying* the position before a contract is concluded, and that his neglect in this respect is given considerable weight in determining the contractual obligations. This emerges in other respects from article 8.1 of the International Sales Convention which expressly determines that a party's awareness of the other party's intent shall be accorded decisive importance when interpreting a contract.[19]

THE EXTENSIVE METHOD OF INTERPRETING CONTRACTS REDUCES THE NEED FOR ALTERNATIVE LEGAL GROUNDS

The problem of drawing a borderline between contract interpretation and supplementation recurs when a decision is to be made as to whether in the case of a sales contract the goods conform with the contract (secs. 17-18 of the Sales Act). To begin with, the preamble to sec. 17 states that the goods shall conform with the contract. In applying this it is possible through *extensive contract interpretation* to determine the conformity of the goods. The 1905 Act gave no guidance on determining the conformity of the goods. Sec. 42 of that Act presupposed that it was possible on the basis of the sales contract and associated circumstances to establish whether there was any non-conformity ("should there be any non-conformity of the goods ..."). In sec. 17, para 2.2, it is now declared that the goods shall be suitable for the particular purpose for which they were intended by the buyer to be used if the seller when selling the goods must have understood what this particular purpose was and the buyer had had fair reason to rely upon "the seller's skill and judgement". According to article 8.1 of the International Sales Convention, however, it would have been entirely possible to use the latter circumstances as a basis for the

[18] This becomes particularly troublesome when the contract, at the time the erroneous declaration is revealed, has been entirely or partly fulfilled. One cannot, as so strikingly expressed in English doctrine, "unscramble the eggs". This has given rise to the understandable preference for the assumption that there is a valid contract, what is termed the validity rule. See J.Ramberg *op.cit.*, note 4 p.117 f.

[19] Article 8.1 runs: "For the purpose of this convention, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was".

© Stockholm Institute for Scandianvian Law 1957-2009

actual contract interpretation and, without support from article 35, para 2.2 (corresponding to sec. 17, para 2.2 of the Swedish Act), to find that it follows from the contract itself that the goods in such a case must meet the buyer's particular purpose when understood by the seller. In the same way it could be maintained that the seller's incorrect marketing information – regardless of whether this originates from the seller himself or from someone else "on his side" – could be used as a basis for the interpretation of the contract even if the information cannot be associated with the seller's intent to create legal effects. The marketing information can equally be of importance in contract interpretation when it has demonstrably formed a basis for the buyer's decision to buy the goods. Extensive contract interpretation of this kind would have made sec. 18 of the Sales Act with the special provision on the seller's marketing liability superfluous. Not for this reason only, it may be asked whether the provisions of secs. 18-19 of the Sales Act on the seller's marketing liability and the clause "as is" in fact merit their place in a *non-mandatory* law. It is another matter that such provisions may do good service in mandatory consumer protection legislation. There is a risk that the very existence of such provisions in a non-mandatory statute may encourage attempts to use freedom of contract to defeat the protection that the legislator wished to create for the buyer. The third paragraph of sec 18 specifies how liability may be avoided and establishes as a condition that "the information has been corrected in a clear and timely manner". This creates confusion concerning the relationship between sec. 18 and the general freedom-of-contract provision in sec. 3. According to the latter provision it would be possible to state quite frankly that "sec. 18 of the Sales Act shall not apply" or as a possible alternative to decide that the contract in its entirety shall be governed by the 1905 Act and not the 1990 Act, or in a contract between, for example, a Swedish seller and a Norwegian buyer according to the International Sales Convention, which has no counterpart to secs. 18-19 of the Sales Act. In the same way one could imagine eliminating sec. 19 on the "as is"-clause with the supplement "I am selling the goods as is and I really mean it".[20] Naturally, however, there is a risk that such almost scornful attempts to

[20] See on this point J.Ramberg *op.cit.* note 4 p. 106 and NJA 1975 p.545 in which the Supreme Court in principle rejects the idea that a seller of real estate is prevented from modifying what is essentially non-mandatory liability according to JB 4:19 (the Land Book). This section must not in the Court's view be understood as "semi-mandatory" and it ought therefore to be possible to avoid the non-mandatory rule with a *general* declaration without specificity of the kind that was proposed by the Minister in the government bill concerning this provision of the law.

© Stockholm Institute for Scandianvian Law 1957-2009

evade the effect of the legislator's ambitions might be met with contract adjustment under sec. 36 of the Contracts Act. In practice, therefore, we shall probably see different – rather more sophisticated – ways of evading the effect, for the seller, of secs. 18-19 of the Sales Act. The frequency of clauses in which the seller instead declares that the written contract is to represent the whole content of the contract and that no other circumstances shall form bases for contract interpretation (what are called integration or entire agreement clauses) will probably increase.[21] Sec. 18 of the Sales Act is probably causing sellers increasingly to strive for contract autonomy and hence can in fact have the opposite effect to what the legislator intended.

The method of extensive contract interpretation, however, has considerable disadvantages. This is because if one does not choose only such circumstances as are based upon the parties' intent to create legal effects and use them as the basis, then it becomes hard to determine what other circumstances will have the same – or at least a similar – effect as clear expressions of contractual intent. This may be illustrated with the phenomenon of "comfort letters". The background here is commonly that a creditor requires of another party – often the parent company of a borrowing subsidiary – a guarantee or other security for the credit, but the intended guarantor does not wish to accede to this requirement.[22] With this, strictly speaking, the possibility of obtaining a binding undertaking that corresponds to the rejected proposal would disappear. Neither the theory of a declaration of intent as the expression of an assumed intention to create legal effects, nor the alleged reliance on something which has been expressly rejected, suffices to establish legal effects by using the traditional concepts of the intention of the contracting parties or the doctrine of detrimental reliance.

If there is a wish to establish the existence of anything other than merely a moral obligation, other legal grounds must be sought. In case NJA 1994 p.204 this emerges not only in the grounds given by the

[21] See e.g. IML 92, point 1: "These general delivery conditions shall apply as far as they are not modified through written agreement between the parties. In the absence of written confirmation in connection with conclusion of the contract, statements and particulars shall not set aside or override what is stipulated in the delivery conditions nor carry weight in determining the content of the contract." Cf also the regulation of the requirement that agreements shall be in writing for the purposes of alteration of contract in article 29 of the International Sales Convention.

[22] See on this point the monographs by E.Røsæg, *Garantier eller fattigmans trøst – støtteerklæringer* (Guarantees or poor man's comfort – "comfort letters"), academic thesis Oslo 1992, T.Iversen, *Støtteerklæringer*, Copenhagen 1994 and J.Ramberg, Medveten otydlighet som avtalsrättsligt problem (Deliberate Unclarity as a Problem in Contract Law), *JT* 92/93 p.362, and *ibid*, Tolkning av stödförklaringar ("Comfort letters"), *JT* 94/95 p.131.

© Stockholm Institute for Scandianvian Law 1957-2009

Supreme Court but also in a comparison with the alternative chosen by the Court of Appeal.

> The background to the case was that a Swedish purchasing company (Ljusne Kätting) had run into liquidity problems and a French vendor wished for security from the parties holding principal equity in the purchasing company. The request for a payment guarantee was turned down, but instead a declaration was given that the purchasing company had already received extensive economic support from its principals, and that this support would be continued. This, however, was not the case, the purchasing company being obliged to file its petition in bankruptcy on the same day as the goods arrived, and the suppliers hence lost the possibility of covering themselves by exercising their right of stoppage in transitu. If one considers the factual circumstances there is reason to note that the purchasing company's principals – albeit unintentionally – had encouraged the vendor to deliver even though there was no obligation to do so in the light of the purchasing company's feared insolvency. The legal qualification of this situation cannot be grounded in fraud (*dolus in contrahendo*) unless the principal making the supporting declaration has *intentionally* misled the vendor into delivering to the insolvent purchasing company. Instead it must be assessed whether the principal has acted negligently through his declaration of support which has encouraged the vendor to deliver, i.e. *culpa in contrahendo.* The Court of Appeal clearly chooses this alternative. The Supreme Court, however, starts with the possibility of distinguishing between "direct" undertakings – by which may probably be understood statements expressing an intent to create legal effects in the traditional sense – and undertakings of a weaker type. In the present case, these are based not so much upon the actual intent as on an *assessment of circumstances.* The Supreme Court also imagines the possibility of allowing such undertakings a weaker effect than those that are based on the traditional components of contract law, e.g. expressions of intent to create legal effects and the addressee's justified reliance on these.[23] The comfort letter, in this case, is considered by the Supreme Court, in view of the circumstances, to have at least the legal force that an obligation in damages arises if the support does not materialize, as long as the circumstances when the "comfort" is needed do not decisively differ from those prevailing when the comfort letter was issued. The comfort letter, therefore, is an undertaking sanctioned with damages, but with an implied *clausula rebus sic stantibus.*

In NJA 1993 p.436 the Supreme Court establishes that what is said in a preamble to a contract, without constituting contract terms in the true

[23] Cf. the circumstances in NJA 1985 p.178 in which the Supreme Court, instead, granted the supplier a right of recovering the goods from the company's bankruptcy estate because the prevailing circumstances had given rise to a mutual underlying assumption, namely that the purchaser – a shipyard – as stated by the purchaser was to receive state support. Since this support did not materialize the supply contract became invalid according to the doctrine of underlying assumptions. See on this case J.Ramberg op.cit. note 4 p.201 ff with further references.

© Stockholm Institute for Scandianvian Law 1957-2009

sense, can nevertheless involve the seller in liability. This view is compatible with the innovation mentioned above in sec. 17, para 2.2 of the 1990 Sales Act (the buyer's "particular purpose") and sec. 18 (the seller's responsibility for information given during the marketing or "otherwise prior to purchase").

Grönfors' assumption in his monograph on the foundation of contract, [24] that we are moving towards a more pragmatic application of justice liberated from "dogmatic superstructures" (expression of the intent to create legal effects and the addressee's acceptance of the declaration in precisely that sense as the foundation of contract) is undeniably confirmed by the Supreme Court decisions in e.g. NJA 1993 p.436 and NJA 1994 p.204.

DO AUTONOMOUS CONTRACTS EXIST ONLY IN THEORY?

How to answer, on the basis of the foregoing, the introductory question concerning the parties' possibilities of achieving autonomous contracts within the framework of non-mandatory law? Developments in the law of contract have certainly not made it easy to give an unequivocal answer to this question. The traditional concepts of contract law, with distinctions between "real" contractual promises in the form of declarations of intent as expressions of the intention to create legal effects and the other contracting party's acceptance of or justified reliance upon this, on the one hand, and on the other statements (enunciations) entailing a responsibility – corresponding to the legal concept of *culpa in contrahendo* – appear at least partly to yield to innovative juridical thinking. But this also means that the, at least theoretically, clear boundary between the "real" content of the contract and the supplementary content derived from other norms, and between mandatory and non-mandatory law, can no longer be maintained in practice. Instead, there is emerging more and more in recent court practice the method of using a broader assessment to establish what the contract contains on the basis of such circumstances which appear to merit relevance in the individual case.[25]

[24] See K.Grönfors, *Avtalsgrundande rättsfakta* (The Foundation of Contract), Stockholm 1993, p.24 f: cf. ibid. Löftesprincipen, tillitsteorin och avtalslagen (The Principle of the Promise, the Theory of Reliance and the Contract Act) *JT* 92/93 pp.267-272.

[25] Cf. in this respect also NJA 1993 p.403, in which the Supreme Court clearly expresses what is termed the system-oriented method of contract interpretation, which is based on a holistic analysis of the contract.

© Stockholm Institute for Scandianvian Law 1957-2009

One may indeed deplore the fact that such a method may – as may any juridical shift in perspective – increase the risks of an application of justice that is inconsistent and hard to predict. Yet to cling obstinately to traditional juridical concepts and structures, when changed conditions in the form of standardised and collectivised contract techniques and demands for differentiation in an increasingly complicated society have eroded their functions, is not a suitable solution. Instead we must, probably for a fairly long transitional period, await the creation of suitable solutions for different typical situations. It will have to be a task for legal science, using a multiplicity of different solutions of this kind, to find suitable new juridical concepts, structures and classifications.[26] Meanwhile we must be content with what was hinted at by way of introduction: that within the framwork of non-mandatory law it is indeed theoretically possible to achieve contract autonomy but that it is hardly feasible in practice.

[26] See B.Bengtsson, Om civilrättens splittring (On Fragmentation within Private Law), *Volume in honour of K.Grönfors*, Stockholm 1990, p.29 also published in *36 Sc.St.L.* (1992). There will certainly be many differences of opinion concerning the choice of juridical methods for coping with the tendencies to fragmentation within private law. See for example the debate between T.Wilhelmsson and C.Sandgren following Wilhelmsson's launching of the concept of "social private law", Helsinki 1987, Sandgren's debate articles in *JT* 92/93 p.458-486 and 643-688, see also this volume pp.153 ff., and Wilhelmsson's comments in *JT* 93/94 p.499-508.

© Stockholm Institute for Scandianvian Law 1957-2009