

Specific Performance in Swedish Contract Law

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Introduction

The notion of specific performance as a remedy in the law of contracts is complex. It covers a great number of remedies, some of which have little in common. Sometimes it is even unclear whether a certain remedy should be regarded as one of specific performance or not. The importance of clarity in this field appears when we compare legal systems that, like the Anglo-American ones, regard a claim for damages as the normal remedy for a breach of contract but make a claim for specific performance subject to special conditions, with Continental European systems, under which a claim for specific performance is regarded as perhaps the primary remedy of an aggrieved party, whereas damages are subject to special conditions.

However, in all systems it is necessary to make distinctions between a number of situations that must be judged on their own merits. In my opinion it is precarious, from an intellectual point of view, to believe that all, or even a great number of, questions can be answered by the simple application of a general principle, whatever it may be. Particularly ill-advised is the reference to the principle that promises should be binding, *pacta sunt servanda*. It is of course possible that special rules can be explained by a legislature holding a belief in such a general idea, or that legal writers have tried to justify rules by invoking a general idea. But this is quite different from stating and explaining the substance of the rules.

There are considerable differences among legal systems, even those that on the whole are similar. I shall confine myself to the Swedish system and will not even venture into other Scandinavian systems. There are in these other systems some differences from Swedish law of which I am aware and probably others of which I am unaware.

Some General Remarks

Swedish sales law has been reformed recently by a new Sale of Goods Act (1990:931), which entered into force on the 1st of January 1991.¹ This fact is important in two ways. On the one hand, we have the advantage of fresh decisions by the legislature. On the other hand, there is considerable uncertainty due to the fact that the new legislation has not yet been applied by the courts on any question relating to the present subject, and its consequences are therefore open to doubt.

One main difficulty with relation to specific performance is distinguishing between the various stages at which a claim for performance can be made successfully.²

An aggrieved party may claim performance, when a breach by the other party occurs, from that party. This will be called a “private claim” here. Such a claim may be relevant, as will appear later, according to the principles of private law. The relevance may follow from special statutory rules relating to such a claim. It may also lead to consequences, regardless of the existence of any statutory rule, when damages are assessed. Distinctions may be made according to whether the aggrieved party actively asserted his claim to performance, or was passive, or perhaps stated that he did not claim performance. In some cases, on the other hand, even the fact that the aggrieved party made a claim for performance will be irrelevant. All these possibilities must be taken into account. The details will appear in the following.

What I will call (for lack of a better term) a “court claim” for specific performance should be distinguished from a private claim. Such a claim entitles a plaintiff to obtain a judgment for performance by a court, even if the judgment may be subject to the court’s discretion. A private claim may be relevant even if it is not supplemented by a court claim.

Finally there is the remedy of specific performance as enforced by the authorities that handle the execution of judgments. I shall call this “executory specific performance”. It is not necessary that a court claim is accompanied by

¹ Köplag (1990:931). The bill to the *Riksdag* is *Proposition 1988/89:76: Ny köplag*.

² The history of legislation on international sales is of some interest in this connection. The 1963 draft of a Uniform Law on International Sales contained a number of provisions, referring to specific performance, which prescribed such performance subject to the condition that it was “permitted by the municipal law of the jurisdiction seized”; see, e.g., para. (1) Art. 27 of the draft (*Records and Documents of the Conference*, Vol. 2, Hague 1966, p. 216). In the Uniform Law as adopted by the Diplomatic Conference, these various references to municipal law were replaced by a general provision in Art. 16 of the Law and Art. VII of the Convention, to the effect that a court was not bound to enter or enforce a judgment providing for specific performance unless it would do so under its law in respect of similar cases not governed by the Uniform Law. This provision must be understood to concern court claims and not affect the validity of private claims, which might be made without any knowledge of which court would adjudicate a lawsuit if one would eventually occur. Cf. H. Dölle-G. Reinhart, *Einheitskaufrecht*, München 1976, Art. 16. Rdnr. 21, 22 but O. Lando in C. M. Bianca-M. J. Bonell, *Commentary on the International Sales Law*, Milano 1987, p. 239. The U.N. Convention on International Sales, Art. 28, contains a provision that is similar to that of the Uniform Law and should presumably be understood in the same way.

an executory claim. Under Anglo-American law (if I have understood it correctly), failure to fulfill a judgment for specific performance by a court may lead to punishment for contempt of court, but the person entitled to performance by a judgment may not require e.g. a bailiff to take possession of goods physically and hand them over to him.

There are some distinctions that should be made in order to discuss the various rules further. It is necessary to distinguish among various contracts.

Within the law of sales, there are differences between the sale of goods and the sale of real property. Within the field of contracts for services, we should distinguish between impersonal services, such as repairing goods or building a house, and personal services, such as writing a book or painting a picture.

There is also a distinction between obligations that are fulfilled by a single action, like a sale that is performed by “delivery” of the goods, and those that are fulfilled by prolonged performance, like a lease of a house or a labour contract.

Sale of Goods: The Seller’s Breach of Contract

The admissibility of a claim for *specific performance in case of a seller’s failure to deliver the goods at the time agreed* is the best-known point of divergence regarding specific performance between Anglo-American and Continental European law. In Anglo-American law a claim for specific performance is a secondary remedy, subject to principles of equity. Although the expositions of the principle mainly concern court claims, there can hardly be any doubt that the principle to a great extent concerns private claims as well. If a seller does not deliver the goods in time, the buyer is expected to cancel the sale and make a cover transaction, on the basis of which he claims damages.³ In Continental law, the right to specific performance is often considered to be a remedy which almost logically follows from the character of the seller’s undertaking.⁴

The new Swedish Sale of Goods Act adheres to the Continental tradition by mentioning the right to claim performance as a primary remedy for the failure to perform (Secs. 22, 23). There is, however, something that can be considered to be a concession to the Anglo-American standpoint. Performance cannot be claimed if it is impossible, or if it would require sacrifices that are not reasonable with regard to the buyer’s interest in receiving the seller’s performance (para. (1) Sec. 23). A situation that is envisaged is that it is fairly easy for a professional buyer to make a cover transaction, whereas it would be difficult for a non-professional seller to procure goods with which he could perform the contract. However, if the difficulties are about equal for seller and buyer, the main rule prevails and the seller is bound to specific performance. Another situation where specific performance cannot be required is where manufactured goods perish, no other goods are available and it would require extraordinary costs to produce new goods. It is assumed that in the cases mentioned a claim for damages will generally have to suffice for the buyer. If the seller is not liable to pay damages

³ See, e.g., A. Farnsworth, *Contracts*, Boston & Toronto 1982, pp. 826 ff.

⁴ Regarding “Fixgeschäfte”, which form an exception, see e.g. German Commercial Code (1897), Sec. 376.

either, he is released from his obligation entirely. Underlying this rule are notions akin to the German concept of *Opfergrenze*, a term which is often cited in Scandinavian legal writings.⁵

However, if the obstacle to performance disappears within a reasonable time, the obligation to perform is revived (para. (2) Sec. 23).

Even if the buyer is entitled to specific performance, he cannot claim it if he waits an unreasonably long time to put his claim forward (para. (3) Sec. 23).

From the short survey above it can be deduced that the rules are principally concerned with private claims. The rule that the claim is lost if it is not exercised within a reasonable time clearly refers to a private claim. The aim of the rule is not to cause the buyer to institute court proceedings within a limited time, since most claims are settled out of court.

However, the rules can be applied to court claims as well. If a claim for specific performance is presented to a court, the court will deliver judgment accordingly, unless one of the exceptions is applicable. In practice, it is rare that a buyer claims performance in court. When things have gone so far as to lead to litigation, a buyer will usually find it more convenient to convert his claim into one for damages. The reason is that a money claim is generally more easily executed, but not more valuable to the buyer, than the claim for specific performance. The case may be different with regard to unique goods or in special circumstances.

A judgment for specific performance may be combined with the court's setting a penalty if it is not followed. If the judgment does not contain any such clause, it can be enforced by the executory authorities ordering the defendant to deliver the goods, together with the setting of a penalty if the order is not obeyed.⁶ However, this should not be done if it is known that the defendant cannot follow the order, either because the goods have perished or because they are not in his possession.⁷ If the order is not obeyed, the executory authorities or the public prosecutor can bring a suit for the payment of the penalty. The court then has a certain amount of discretion in deciding whether the amount of the penalty was reasonable. In exceptional cases, a judgment for specific performance can be enforced by the authorities physically seizing the goods, and if necessary by breaking into the defendant's house. But the circumstances must be very special, mostly occurring in private rather than business relations, in order for such a procedure to be resorted to.

It follows from what has emerged now that the main importance of the rules on specific performance does not lie in the possibility of a right to such performance leading to physical action by the authorities. In the greatest majority of cases by far, the right is converted into a right of another type, which will exact a compulsion on the seller and provide money compensation to the buyer.

⁵ See, e.g., J. Ramberg, *Allmän avtalsrätt*, Stockholm 1989, p. 209.

⁶ See Code of Execution, Chapter 16, Sec 12. Cf. G. Walin, T. Gregow & P. Löfmarck, *Utsökningsbalken*, Stockholm 1987, pp. 577 ff.

⁷ See Walin, Gregow & Löfmarck, *op. cit.* p. 578.

The significance of the rules on specific performance thus lies in their indirect consequences, principally their influence on the assessment of damages. When goods sold rise in price after the agreed time of delivery, whether this is the result of short term price fluctuations or long term inflation, through a private claim for performance the buyer can gain a right to damages based on the increased price. Conversely, the restrictions on claims for performance have the consequence that damages will be computed as if no such claim had been made, even if the buyer in fact made a claim. The buyer who insists on a claim for performance even when he, more easily than the seller, could have procured goods by a cover transaction, will not be entitled to higher damages than if he had made a cover action immediately. The rule restricting the right to claim performance when the claim is not made within a reasonable time is intended to prevent the buyer who has been passive, from declaring the contract avoided after a long time and claiming damages on the basis of an increased price at the time of the declaration. Altogether, the importance of the rule regarding specific performance depends only to a small extent on the possibility of enforcing a claim through the courts and the executory authorities, and much more on its influence on the application of other private law rules.

With regard to *non-conformity of goods*, it is somewhat uncertain as to what should be regarded as specific performance. A claim for repair can perhaps be regarded as such,⁸ although the Swedish Sale of Goods Act provides such a claim without explicitly calling it specific performance. A condition for the buyer being entitled to this remedy is that it can be undertaken without unreasonable cost and inconvenience to the seller (para. (1) Sec. 34). For certain types of goods, especially those manufactured by the seller, this remedy can be considered to be the primary one. The importance of repair is further brought out by the fact that the seller is entitled to repair a defect even if the buyer does not explicitly require it but resorts to another remedy, if such repairs can be undertaken without substantial inconvenience to the buyer and without any risk that the buyer will not have his costs indemnified by the seller (para. (1) Sec. 36).

In this case, as with failure to deliver the goods in time, a private claim can be followed by a claim in court. In principle executory specific performance is also available, by the same means as for failure to deliver the goods. But in practice there are a number of other remedies to which the buyer can, and will in all probability, resort if the seller does not repair the defect. He can have the goods repaired himself and claim indemnity for reasonable costs (para. (3) Sec. 34). An important consequence of the right to repair is thus that it provides the buyer with an independent basis to claim indemnity for the costs of repair, regardless of whether or not he is entitled to damages. The buyer can also claim a reduction of the price if the seller does not repair the goods when he is bound to do so. (Secs. 37, 38). He can also, if the breach of contract is of fundamental

⁸ Paras. (2) and (3) Art. 46 of the U.N. Convention, which deal with delivery of substitute goods and remedy by repair respectively, systematically appear as instances of specific performance. They have in the literature been explicitly described as such; see, e.g., M. Will in C. M. Bianca-M. J. Bonell, *Commentary on the International Sales Law*, Milano 1987, pp. 336 ff.

importance to him, either declare the contract avoided (Sec. 39) or claim substitute goods (see *infra*). He may also be entitled to damages, according to the rules that apply to this remedy (Sec. 40). However, the right to claim damages is of less importance as a secondary remedy connected with the repair, since there is, as just mentioned, a special rule permitting the buyer to have the goods repaired at the seller's expense.

Another remedy for non-conformity that can perhaps also be considered to constitute specific performance (although this terminology is not used in the Swedish statute) is delivery of substitute goods (para. (2) Sec. 34).⁹ The breach must be of fundamental importance to the buyer, and the seller should have known of this. The buyer further is not entitled to claim substitute performance if the circumstances are such as were mentioned with regard to the seller's failure to deliver goods in time, i.e. performance is impossible or would require sacrifices that are not reasonable with regard to the buyer's interest in receiving the seller's performance. The example referring to goods manufactured by the seller and no other goods being available, whereas the buyer can easily procure other goods from other sources, may be recalled. Furthermore, no claim for substitute goods can be made with regard to goods that existed at the time of the sale and that, with regard to their qualities and to what the parties must be presumed to have intended, cannot be substituted by any other goods (Sec. 34 (2)). The last, complicated and cumbrous, expression seems to mean simply that substitute performance cannot be claimed in a sale of specific goods.

If the seller does not deliver substitute goods, in spite of the buyer's demand, executory specific performance is in principle available, but, as with the remedy of repair, it is much more likely that the buyer will resort to another remedy, in this case perhaps declaring the contract avoided and claiming damages. If the price has risen, the buyer cannot claim damages based on the higher price unless he has requested substitute delivery within a reasonable time (Sec. 35).

The foregoing can now be summarized. The seller's breach of contract in principle gives the buyer the right to claim specific performance of one kind or another, although there are numerous exceptions. But particularly because of the inconvenience of enforcing such a claim, the indirect effects of a specific performance claim are much more important than being entitled to a judgment and execution. In many cases the private claim for specific performance, if it does not have the intended effect, functions as a means of getting the buyer into a more favourable position with regard to the exercise of other remedies. Altogether the remedies are intertwined in a complicated way, the details of which have not all been described here. There are, e.g., a number of rules relating to the notice that is to be given by the buyer of how he wants to avail himself of the remedies that are at his disposal. The technical perfection of the rules is not complete; the total effects may not be exactly those desired by the legislature. But the function of the rules relating to specific performance is clear: to enhance the general system of remedies.

With regard to the buyer's breach of contract, it is particularly difficult to decide what remedies can be considered to belong to the sphere of specific

⁹ Cf. *supra* n. 8.

performance. To some extent the discussion regarding the U.N. Convention on International Sales gives an indication of points that might be worth considering.

Having the *buyer pay the price for goods that have been delivered* will not in itself be considered to belong to the sphere of specific performance, in so far as this is payment of money. But to the extent that a *compulsion to pay the price is also available for forcing the buyer to take delivery of the goods*, it can be seen from the point of view of specific performance.¹⁰

If the buyer, when delivery is due, refuses to accept the goods and pay the price, the question may arise whether the seller can force him to do so, rather than declaring the contract avoided and claiming damages based on a resale. According to the Swedish Sale of Goods Act - which does not distinguish between this situation and the one in which the buyer has already accepted the goods and the claim is simply one for payment of goods accepted - the seller has such a right (para. (1) Sec. 52). As in the corresponding case of the seller's failure to deliver the goods in time, the seller loses the right to claim performance if he waits an unreasonably long time to assert his claim (para. (3) Sec. 52). Whereas this rule refers to payment of the price and does not force the buyer to literally accept the goods - he can presumably order the seller or a carrier to dump the goods in the sea provided that he pays the price agreed - it exerts a strong pressure on the buyer to accept the goods in order to get some value out of them, whether or not he wants them for his original purpose.

There is an exception to the main principle with regard to goods that are to be manufactured or procured by the seller specially for the buyer. The latter can *countermand* the production and other preparation for delivery and payment (para. (2) Sec 52 (2)). An exception from the exception is made for cases in which the breaking off of production would lead to substantial inconvenience for the seller or to a risk that his loss because of breaking off would not be indemnified.

With regard to the buyer countermanding his order, there is, just as in the cases mentioned previously, a considerable difference between what the statute says and what is important in practice. Under earlier law, when no such right of countermand existed, it was extremely rare for a seller who had received a countermand to complete production and, when the product was ready, claim for the whole price. In practice, he would break off production and claim damages. The new rule can be said to give explicit support for what was earlier the dominant practice. The main importance of the new rule is that it is now clear that the indemnity must be assessed on the basis that the manufacturing process is broken off.

The new Swedish Sale of Goods Act also contains rules regarding the buyer's contribution (*medverkan*) to the execution of the contract, which have no counterpart in earlier law and whose significance seems somewhat uncertain. They have been strongly influenced by the U.N. Convention on International

¹⁰ Cf. on the one hand J. Honnold, *Uniform Law for International Sales*, Deventer 1982, pp. 225 ff. (who seems to regard the action for price as a claim for specific performance), and on the other hand A. Farnsworth, *Damages and Specific Relief*, Am. J. Comp. L. 1979, 247 at pp. 249 f., who appears to take the opposite view.

Sales, but they differ both in substance and in terminology. There are two duties: to contribute to the execution of the contract in such a way as can be reasonably expected from the buyer in order to let the seller perform the contract, and to fetch or receive the goods (Sec. 50). These duties differ with regard to the remedies applicable.

With regard to the duty of *contributing to the execution of the contract in order to let the seller perform the contract*, the rules correspond to those regarding the seller's failure to deliver the goods at the agreed time (see *supra*). The seller can demand that the buyer contributes to the execution of the contract, unless there is an obstacle that he cannot overcome or the contribution would require sacrifices that are unreasonable with regard to the seller's interest in the buyer's contribution (para. (1) Sec. 52). The rule is probably intended for a private claim, but it can be transformed into a court claim and may even be subject to executory performance. It can thus be imagined that the seller sues the buyer with the claim that he should be compelled by a penalty to deliver, e.g., drawings that the seller needs to complete the manufacture of the goods purchased. However, it does not seem very likely that such a lawsuit would occur in practice.

It is therefore more likely that there is an aim of achieving results with regard to damages. However, it seems likely that even without such statutory support a right to indemnity would arise if the seller requires instructions from the buyer, e.g. in the form of drawings necessary for the manufacture of goods, and the buyer does not provide them. As a consequence, if the seller has extra costs because of the buyer's failure to provide instructions, he is entitled to compensation for them. Whether any more is intended by the new provision cannot be judged with any certainty.

With regard to the duty of *fetching or receiving the goods*, there are no provisions for a claim for specific performance.¹¹ A seller therefore cannot sue in court for such an action by the buyer. The seller's remedies are confined to declaring the contract avoided under special circumstances, if the buyer does not fetch or receive the goods (para. (2) Sec. 55), or claiming damages, also under special circumstances (para. (2) Sec. 57). However, it seems likely that if the buyer fails to fetch or receive the goods, the seller can privately demand that he does so. It also seems likely that the amount of damages can be affected by the fact that such a demand has been made, instead of the seller letting his losses accumulate and at a late stage demanding that the buyer fetch or receive the goods.

The provisions relating to the buyer's breach of contract on the one hand demonstrate the importance of distinguishing between private claims and court claims and on the other show that the practical importance of having such statutory provisions is dubious. It can hardly be said that the Swedish legislature has succeeded in making the legal position clear.

¹¹ The remedies for failure to fetch or receive the goods are limited to declaring the contract avoided and claiming damages, but only for the case that the seller has a special interest in getting rid of the goods; para. (2) Sec. 55 and paras. (2), (3) and (4) Sec. 57.

Sale of Real Property

With regard to real property, the situation is in some ways similar to, and in other ways different from, that of the sale of goods.

If the seller *does not deliver the property in time*, the buyer cannot rely on any explicit provisions in the pertinent statute (which is Ch. 4 of the Code of Real Property) to the effect that the seller must give up possession to him. But it is universally admitted that such a claim can be enforced by a court. The claim can also be executed by the same procedure as with a corresponding claim for personal goods. The indirect consequences are less important than with regard to the sale of goods, as real property seldom varies in price in the same way as goods and a cover transaction is generally not feasible.

As for *real property being non-conforming*, there is no provision relating either to delivery of substitute property or to repair of defects. Delivery of substitute property would not fit in with a sale of real property always being one for specific property. A claim for repair might in principle seem justified for houses that have been constructed by the seller, but such sales were not contemplated by the legislature when the relevant rules were passed (in 1970). When the seller is not himself a constructor, it would generally seem unreasonable to require the seller to repair a defect. Even if repair by the seller is in practice feasible, the buyer often prefers to have the defect remedied himself and claim compensation from the seller. However, the lack of a rule conferring a right to the buyer to have the defect remedied has the indirect consequence that the buyer has no right to compensation for repairs that he has undertaken himself. He can only require compensation for such repairs to the extent that the costs are covered by a reduction of the price, computed according to the rule relating to such reduction. Only if the buyer is entitled to damages from the seller, which in principle presupposes negligence, can he demand full compensation for the cost of repair.

There is no doubt as to the seller's right to demand that the *buyer pay the price* agreed upon, but there is no provision in Ch. 4 of the Code of Real Property that explicitly says so. Creating a buyer's duty to contribute to the seller's performance - which may have practical importance when the sale of real property is combined with the construction of a house, for which instructions by the buyer are needed - does not seem to have interested the legislature.

Contracts for Services

As indicated above, there are a number of rules relating to sales contracts, the consequences of which may be rather uncertain but which all the same provide a fairly firm basis for understanding the legislature's attitude to specific performance. These rules can probably be applied *ex analogia* to other contracts relating to personal property. The situation is entirely different with regard to contracts for services.

For a long time, it was generally stated that no claim for specific performance of services could be enforced judicially, and accordingly a court could not order

a defendant to perform services. However, the authority for such statements was scarce.¹² Now the situation has changed. It seems necessary to distinguish between a number of questions.

With regard to some contracts of an enduring character, the principle seems to be that they may be cancelled by any party at will, at any time and without giving previous notice. The rules relating to commission agency (Commission Agency Act 1914) are based on such a principle (Sec. 46). When this rule prevails, a claim for specific performance could hardly succeed, as it might immediately be met by the defence that the contract was cancelled. However, it can be agreed, or it can be implied from the circumstances, that a party may not bring the contract to an end before an agreed time or unless notice is given some time in advance (Sec. 50 of the Commission Agency Act). The statutory principle is that even for such contracts, neither party can require specific performance by the other party. A breach of contract will generally give rise to a claim for damages, and this is the only remedy. If the contract is only for a single action, the same principle would apply. It seems uncertain whether a private claim for performance or for continued performance when a breach occurs, would influence the amount of damages.

The principle mentioned now can be explained by the fact that the contract refers to services, in accordance with the view just mentioned. In this case it can be assumed to have a general character and be applicable even to contracts for material work, say the painting of a house. But it is also possible that the reason for the rule lies in the fact that the contract of commission agency is assumed to have a more personal character, since it relates to immaterial services. If this provides a correct understanding, the principle need not be applied to contracts for material services of a normal kind. There is also the possibility that the prolonged performance, which is assumed for contracts of commission agency, may have some influence on the contents of the rules.

The same question can be raised with regard to contracts of transportation. The earlier view was that such contracts were not enforceable by court claims.¹³ It is, however, possible that a private claim for performance can affect the amount of damages. There is some limited support for such a rule.¹⁴

Recently, new rules relating to executory specific performance have been introduced by the Code of Execution 1981. In the *travaux préparatoires* - to which traditionally much importance is attached in Swedish law - it is stated that the measures for enforcing claims for performance that relate to goods (and which were mentioned before, with reference to the sale of goods) should be applied as well to contracts for services, with an exception for those of a personal character.¹⁵ Thus, if executory specific performance is accepted, it seems reasonable that court claims should be accepted. It does not make sense to restrain the courts from issuing orders that, if they are issued, can be executed by

¹² See, e.g., K. Grönfors, *Tidsfaktorn vid transportavtal*, Göteborg 1974, p. 65, with numerous references to earlier literature.

¹³ See Grönfors, *loc. cit.*

¹⁴ As for Swedish law, the main support is one case, *Nytt Juridiskt Arkiv* 1922, p. 205.

¹⁵ See Proposition 1980/81:8, p. 799.

the executory authorities. If court claims are accepted, it also seems reasonable that private claims should be relevant.

However, the very fact that there is so much uncertainty on this point and that there are practically no decisions, indicates that specific performance is not very important in regard to contracts for services.

As mentioned, *the travaux préparatoires* make an exception for contracts of a personal character. This agrees with what was mentioned with regard to contracts of commission agency. It seems well established that, unless such a contract contains a special clause regarding sanctions, a claim for specific performance will not be allowed, and the only remedy is to claim damages.

However, this principle admits the possibility that a party that undertakes a personal obligation promises in the contract to pay a penalty if the duty is not performed. There are no rules in Swedish law that make penalty clauses void generally. On the contrary a penalty clause is recognized as a means of turning what would otherwise be an unenforceable moral duty into a legally binding one. However, the courts have a general power to set unfair contract terms aside, according to Sec. 36 of the Contracts Act, and this provision might be applied in order to limit the effects of a penalty clause.

With regard to services of an artistic or similar character, such as the painting of a picture, the writing of a book (not necessarily of fiction but also a scientific or similar work), it is possible that a penalty clause would even be held invalid *per se*. According to this view, compulsion should not be exercised in order to force the production of such works.¹⁶ It remains, however, a moot point whether the penalty clause should be held invalid *per se* or if it should be subject to an ordinary examination of whether or not it is unfair. It is a somewhat curious fact that, whereas the right to enforce specific performance by a court action and subsequent executory action does not seem to have much practical interest, because monetary compensation will generally provide an equal or better remedy, the opposite is the case with contracts for personal services. The explanation is simply that contracts for personal services are in fact similar to sales of unique goods. No one can provide the absolute equivalent to the writing of a scientific work by a special writer or the painting of a portrait by a particular artist.

Labour Law

Labour law is subject to special principles laid down by statute (Employment Security Act 1982). The main result seems, however, to be about the same as applies to personal services in general. An employee cannot be compelled by a penalty to stay in his job, and an employer cannot be forced by a penalty to let an employee perform the work for which he was employed. Various rules

¹⁶ I have discussed the question briefly in *Speciell avtalsrätt II, Kontraktsrätt*, Stockholm 1984, p. 290 ff, with references to earlier literature. See further J. Rosén, *Förlagsrätt*, Stockholm 1989, pp. 188 ff.

imposing liability for damages serve as sanctions.¹⁷ The damages are sometimes specified by the statute. The details need not be mentioned here.

Conclusions

The preceding survey will show, I believe, that the difference between Anglo-American law and Swedish law is on the whole not very great. Even if a claim for specific performance can in principle be enforced by a court, the rules relating to execution and the availability of alternative remedies for an aggrieved party will in general make the latter resort to these other alternatives, rather than pursue the claim in court. Even if the court orders specific performance, it is possible that the parties will afterwards agree on monetary compensation. The main importance of the availability of a specific performance remedy will lie in the indirect effects, particularly in the influence on the assessment of damages.

With regard to personal services, there is a clear policy that no coercion should be exercised in order to force a person to perform the services even when damages based on the loss of the aggrieved party would not be sufficient. However, the details are uncertain. The same seems to be the position with regard to labour law, with the exception that there is less uncertainty, as there are statutory provisions.

The Swedish experience may be of some interest internationally, by demonstrating the difficulty of estimating the practical effects of statutory provisions. It also demonstrates that such provisions must be formed with a view to their indirect effects, not only to the effects that ensue when a claim is presented to a court and when, afterwards, the judgment is to be enforced by the executory authorities.

¹⁷ Employment Security Act 1982, in particular Secs. 28, 39.