

Direct and Indirect Loss Under “Catch-22” in the Nordic Law of Sales

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Abstract

This paper provides an overview of the differentiation in the basis of liability in damages between direct and indirect loss under the harmonized Nordic sale of goods Acts. Under these Acts the seller has a strict so-called “control liability” for the buyer’s direct losses, while liability for indirect losses requires fault on the part of the seller or warranty. The statutory definition of indirect losses is explained, as well as the motives for introducing the differentiation between direct and indirect loss in the Nordic sale of goods Acts. The paper also analyzes the leading cases dealing with the differentiation together with an analysis of the problems that arise when the differentiation is applied.

1 Introduction

At first glance, it is easy to distinguish the main outlines of the seller’s liability in damages for delay and non-conformity under the harmonized Nordic laws on sale of goods, as to Finland the Sale of Goods Act 355/87 (SGA). The seller has a strict so called “control liability” for the buyer’s direct losses (sec. 27(1)-(2) and sec. 40(1)).¹ Liability for indirect losses, on the other hand, requires fault on the part of the seller or warranty (sec. 27(3)-(4) and sec. 40(2)-(3)). In so providing the indirect losses are defined in sec. 67.² It is likely not an overstatement to

¹ Art. 79 of the UN Convention on Contracts for the International Sale of Goods of 1980 served as a model for the control liability in the Nordic SGA:s. See further on the interpretation of the control liability *infra* at ns 20-21 and accompanying text.

² As to case law, see the following Finnish Supreme Court decisions: *HD 1992:86*: Latent crack in the motor of a boat sold was not negligently caused by the seller. Therefore the buyer was not awarded damages for indirect loss on the ground that he could not use the boat during three summer months (see further *infra* at 3.2.). *HD 1994:98*: Due to an error in design, fish had escaped from nets which a pisciculture establishment had purchased. The consequential drop in the production of the establishment was an indirect loss. The establishment was awarded damages for that loss. The non-conformity was held to be

assert, that this differentiation in the basis of liability between direct and indirect loss constitutes the point at which SGA perhaps most significantly differs from the former state of law.

Prior to SGA entered into force on 1 January 1988 the law of sales was largely uncodified in Finland.³ Under such circumstances it was natural that guidance was sought in the other Nordic countries' former laws on sale of goods (the Scandinavian laws on sale of goods).⁴ In the course of time a usage developed particularly on the basis of the former Swedish Sale and Barter of Goods Act (1905:38 s. 1).⁵

A fundamental distinction was here made between sales of generic goods ("genusköp") and sales of specific goods ("speciesköp"). The seller in a generic sale had a strict liability for delay as well as for non-conformity, with the exception of a rather complicated interplay between objective impossibility ("objektiv omöjlighet") and *force majeure* as defenses (sec. 24 and sec. 43(2)).⁶ As regards sales of specific goods, on the other hand, an exculpatory fault liability applied. Furthermore, in specific sales the seller's exculpatory fault liability for delay (sec. 23) followed other prerequisites than his liability for non-conformity (sec. 42(2)), which was limited to fault only *after* the conclusion of the contract. In other respects liability in damages for non-conformity required either warranty (implied or express) or fraud.⁷

negligently caused by the enterprise which the seller had engaged to manufacture the nets, and thereby by fault on the part of the seller. *HD 1997:61*: Cost of averting the risk of loss of profit due to a defective component in manufactured products was indirect loss for which damages were not awarded (see further *infra* at 3.2.). See also *HD 1991:153* (*infra* at n. 54).

- ³ Prior to SGA no comprehensive sale of goods legislation existed in Finland. Apart from a few, antiquated provisions on sale of goods in the Commercial Code of 1734 that still were in force, the legislation covered only special domains. In practice the most important legislation in this respect were the provisions on consumer sales in chap. 5 of the Consumer Protection Act of 1978.
- ⁴ On the basis of joint law-drafting harmonized laws on sale of goods were enacted in Sweden 1905, in Denmark 1906, in Norway 1907 and in Iceland 1911. Both the Danish Act and the Icelandic Act are still in force.
- ⁵ So according to P. Wetterstein, *Säljarens garantiutfästelser vid lösöreköp* (1982) 17, 222. E. Routamo, *Kaupen lait I* (1996) 4 regard the former Swedish law on sale of goods as "almost equal to Finnish law" (my translation).
- ⁶ K. Rodhe, *Obligationens rätt* (1956) 360 f. states that in this respect the Act was a result of a compromise between the German tradition with impossibility under *Bürgerliches Gesetzbuch* on one hand, and the French tradition with *force majeure* under the *Code Civil* on the other hand. But according to J. Hellner, *Speciell avtalsrätt I* (1988) 103 f. mainly German law inspired the drafters, although the statutory language as such perhaps pointed to a compromise.
- ⁷ There exists an extensive body of literature on the liability provisions. Further references may here be made, e.g., to T. Almén, *Om köp och byte av lös egendom* (1960) 270 ff., 594 ff., K. Andersen, "*Kjøpsrett*" (1962) 124 ff., 189 ff., J. Hellner, *op. cit.*, *supra* n. 6 at 98 ff., 176 ff., O. Mestad, *Om force majeure og risikofordeling i kontrakt* (1991) 60 ff., J. Nørager-Nielsen and S. Theilgaard, *Købeloven med kommentar* (1993) 304 ff., 780 ff., K. Rodhe, *op. cit.*, *supra* n. 6 at 348 ff., H. Ussing (ved A. Vinding Kruse), *Køb* (1985) 87 f., 134 ff., A. Vinding Kruse, *Købsretten* (1992) 88 ff., 107 ff., Winroth (utg. K. Lamm), *Köp av lös egendom* (1917) 102 ff., 252 ff.

Even though the state of law was partly unclear it was largely agreed that the same principles, at least as a fundamental starting-point, applied also in Finnish law.⁸ However, in Finnish law the exculpatory fault liability for non-conformity has not been limited only to fault *after* the conclusion of the contract.⁹

The differentiation between direct and indirect loss in the Nordic SGA:s has been subject of a great deal of debate. The views on it are divided. Critics of the differentiation commonly contend that it may be difficult to attain a suitable and consistent distinction between direct and indirect losses in practice. The supporters of the differentiation have commonly referred, *inter alia*, to the strict control liability, the desire to harmonize the sale of goods legislation with contract practice and, in more general terms, insurance aspects.

For my own part, however, I am prepared to call in question whether the motives that have been referred to in support of the differentiation really are strong enough to justify that it remains in force. Not only is the differentiation abstruse, but it may even result - and indeed has resulted - in seemingly unmotivated losses of the buyer's rights. The differentiation contains all elements necessary to appear as a variety of "catch-22"¹⁰ in the law of sales.

2 The Differentiation and the Underlying Motives

The starting-point in SGA sec. 67(1) is the principle of full compensation within the limits of the general principle of adequate causation ("*adekvansläran*").¹¹ The differentiation between direct and indirect loss is made by defining indirect losses in sec. 67(2). Losses that cannot be considered included in this statutory definition are to be regarded as direct ones. SGA sec. 67 reads as follows (my translation):

⁸ See, e.g., A. Aaltonen, *Tavarán virheistä* (1959) 156 ff., especially 161 ff., B. Godenhielm, *Om säljarens bundenhet under ändrade förhållanden* (1954) 38 ff. and *Lärobok i kontraktsrätt I* (1977) 61 f., G. Palmgren, *Om påföljderna av säljarens mora* (1936) 174 ff., 188 ff., H. Raninen, "Eräitä myyjän toimituksen viivästystä koskevia näkökohtia lähinnä ylivoimaista estettä silmälläpitäen" (1942) 40 *Lakimies* 232 ff., E. Routamo, *Om olika typer av lösöreköp och deras betydelse för rättsföljderna* (1973) 109 *Tidskrift utgiven av Juridiska Föreningen i Finland* 277 ff., L. E. Taxell, *Om förutsättningarna för säljarens skadeståndsskyldighet när godset har fel* (1956) 92 *Tidskrift utgiven av Juridiska Föreningen i Finland* 80 ff., V. Vihma, *Suorituksen mahdottomuus varallisuusuoikeudellisessa sopimus-suhteessa* (1957) 59 ff.

⁹ Reference may here be made to following more recent Supreme Court decisions. In *HD 1982 II 187* it was held that an unsuitably designed fuel tap in an aircraft constituted non-conformity for which the seller was liable in damages on the basis of fault. In *HD 1991:162* damages were awarded on the basis of fault when sold animals had been unusually susceptible to an infection already when the contract was concluded, as a result of which the animals fell ill shortly afterwards. Cf. *HD 1988:30*.

¹⁰ Everyone who has read J. Heller's famous novel *Catch-22* knows well what that means.

¹¹ Reg. prop. 1986:93 pp. 115 ff. Sec. 67(1) remains unaltered as the provision read in NU 1984:5 in which proposal, however, the control liability applied to both direct and indirect losses. For some critical remarks against the decision to uphold sec. 67(1) unaltered in spite of the differentiation at issue, see especially E. Hoppu, *vahingonkorvausvastuusta kauppalain mukaan* (1988) 86 *Lakimies* at 53 ff.

“Damages for breach of contract consist of compensation for expenditures, price difference, loss of profit, and other direct or indirect loss as a consequence of the breach.

Indirect losses consists of

- 1) loss as a consequence of reduced or lost production or turnover,
- 2) other loss as a consequence of the fact that the goods cannot be used for the intended purpose,
- 3) loss of profit as a consequence of a contract with a third party having been canceled or not duly performed,
- 4) loss as a consequence of damage to other property than the goods sold,
- 5) other similar loss which is difficult to foresee.

Indirect loss under paragraph 2 is not such a loss which the injured party has suffered in order to mitigate a loss of other kind than those referred to in paragraph 2.”

The differentiation is formulated in similar terms in both the Norwegian and the Swedish sale of goods Acts, even though there are discrepancies regarding detail. For example, in contrast to sec. 67(2), subpara. 4 of the Finnish SGA, the Swedish SGA (1990:931) lacks reference to property damage caused by the goods.¹² The Norwegian SGA (13 May. No. 27, 1988), on the other hand, lacks reference to “other similar loss which is difficult to foresee”.¹³

It may be further noted also that even prior to SGA a corresponding but differently formulated differentiation between different categories of losses existed in Finnish law in the Consumer Protection Act 38/78 (CPA).¹⁴ When CPA was amended in 1994 by Law 16/94 its provisions on damages in consumer transactions were harmonized with SGA.¹⁵ Reference may also be made to the provisions on damages in the Sale of Housing Act 843/94 (SHA).¹⁶ (See further on CPA and SHA *infra* at 3.2. *in fine*.)

Efforts to introduce a differentiation in the basis of liability between direct and indirect loss were made even at earlier stages during the prolonged process of drafting the Nordic sale of goods legislation. The stance taken in the Swedish proposal for a new sale of goods legislation of 1976 constituted a prelude in this respect.¹⁷ Although that proposal did not as such result in further legislation

¹² Such damage is compensated under the product liability legislation. The reasons for this solution is explained in Prop. 1988/89:76 at 50 ff., 198, 234, 236. See further also, e.g., J. Hellner and J. Ramberg *Speciell avtalsrätt I* (1989) 125 ff., T. Håstad, *Den nya köprätten* (1990) 150 ff.

¹³ For further details, see Ot prp nr 80 (1986-87) 120 ff. See also, e.g., J. E. Bergem and S. Rognlien, *Kjøpsloven* (1991) 367, E. Selvig, *Innføring i kjøpsrett* (1977) 120, C. Fr. Wyller, *Kjøpsretten i et nøtteskall* (1988) 88 f.

¹⁴ See chap. 5, sec. 9. See further on the provision *infra* at ns. 49, 87-88 and accompanying text.

¹⁵ See, i.a., chap. 5, sec. 10, and sec. 20. See further also Reg.prop. 1992:360 at 10 ff., 54, 65.

¹⁶ See, e.g., chap. 4, sec. 11, and sec. 26. See further also Reg.prop. 1994:14 at 87 ff., 105 ff.

¹⁷ See SOU 1976:66 at 157 f., 170 ff., 314 ff. As regards non-conformity the seller was according to this proposal strictly liable (except for *force majeure*) for the buyer's direct losses and, as a separate category, his disbursements (“*utlägg*”). Damages for various

measures, the Nordic working party for the sale of goods legislation continued the discussion in the 1980's. The working party came to the conclusion, however, that a division between different kinds of losses could not be made in a consistent and suitable way.¹⁸ Therefore, the control liability in the joint Nordic proposal (NU 1984:5) applied to the expectation loss (“*positivt avtalsintresse*”), including direct losses as well as loss of profit and other consequential losses within the limits of the doctrine of adequacy, adjustment of unreasonable damages (“*jämkning av skadestånd*”) and similar considerations.¹⁹

The stance taken in NU 1984:5 was heavily criticized in the subsequent considerations of that proposal. In particular, the industry sector called attention to the fact that sellers are not easily exempted from liability in damages under the control liability.²⁰ (Note, however, that the precise interpretation of the control liability is somewhat unclear).²¹ Consequently, it was emphasized that the

consequential losses required fault or warranty. (Cf. also as regards the terminology Kom.bet. 1973:12 at 79 ff.)

¹⁸ However, sec. 71(2) of the Norwegian SGA draft in NU 1984:5 included a statutory definition of indirect loss. Nevertheless, the purpose of that provision was only to provide guidance for interpretation of contract clauses exempting from liability for “indirect loss” without such losses having been defined in the contract itself. See NU 1984:5 at 359 f.

¹⁹ *Id.* 357 ff.

²⁰ See OLJ 1985:18 at 72 ff., 91 ff.

²¹ It is a matter of interpretation how the “neutral” control liability should be understood in relation to defenses to strict liability in national law such as *force majeure*, frustration, impossibility, impracticability, or *Wegfall der Geschäftsgrundlage*. (From the viewpoint of Nordic law it is rather clear that the control liability is not based on fault). In this context I restrict my self to references. See, e.g., E. Aurejärvi, *Velvoiteoikeuden oppikirja* (1988) 142, J. Hellner, *Kontrollansvaret*, in *Festskrift till Curt Olsson* (1989) 114 ff., J. Hellner and J. Ramberg, *op. cit.*, *supra* n. 12 at 157 f., J. M. Lookofsky, *Fault and No-Fault in Danish, American and International Sales Law. The Reception of the 1980 United Nations Sales Convention*, (1983) 27 *Scandinavian Studies in Law* 109 ff., B. Sandvik, *Säljarens kontrollansvar* (1994) 92 ff., especially 112 ff., 142 ff., L. E. Taxell, *Köplagen* (1991) 20, 101, 108 f., and *Avtalsersättning och culpa* (1987) 100 *Tidsskrift for Rettsvitenskap* at 353, T. Wilhelmsson, *Ny ansvarsgrund i köprätten*, in *Festskrift till Curt Olsson* (1989) 407 ff. Cf. also with regard to the similar discussion on art. 79 of the UN Convention on Contracts for the International Sales of Goods of 1980 (CISG) (which provision served as a model for the control liability in the Nordic sales laws; see *supra* n. 1), e.g., H. Bernstein and J. Lookofsky, *Understanding the CISG in Europe* (1997) 106 ff., 123 ff., G. Eörsi, *A propose the 1980 Vienna Convention on Contracts for the International Sale of Goods* (1983) 31 *The American Journal of Comparative Law* at 355, J. Honnold, *Uniform Law for International Sales* (1989) paras. 423 ff. U. Huber, *Der UNCITRAL Entwurf eines Übereinkommens über internationale Warenkaufverträge* (1979) 43 *Rabels Zeitschrift für ausl. und int. Privatrecht* at 495 ff., B. Nicholas, *Force Majeure and Frustration* (1979) 27 *The American Journal of Comparative Law* 231 ff. and *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, in N. M. Galston and H. Smit (eds.), *International Sales* (1984) at § 5, P. Schlechtreim, *Uniform Sales Law* (1986) 101, H. Stoll, *Schadenersatz*, in: E. Von Caemmer and P. Schlechtreim (hrsg.), *Kommentar zum Einheitlichen UN-Kaufrecht* (1990) at 648 ff., D. Tallon, *Exemptions*, in C. M. Bianca and M. J. Bonell (eds.), *Commentary on the International Sales Law* (1987) 572 ff., G. H. Treitel, *Frustration and Force Majeure* (1994) 279, 535 ff.

seller's liability in damages for indirect loss ought to be conditioned upon fault or warranty.²²

The differentiation - lacking parallels not only in the UN Convention on Contracts for the International Sale of Goods of 1980 (CISG),²³ but to a large extent also in a broader comparative context²⁴ - was eventually included in the government bill to the Act.²⁵

It is relatively easy to summarize the motives underlying the chosen differentiation. First, it is often held that the proper amount of damages should not be regarded as a matter distinct from the basis of liability. It is commonly advocated in Nordic law that the stricter the liability, the stronger the argument for also considering the liable party's interests when determining the amount of damages.²⁶ The control liability is undeniably a strict form of liability.²⁷ Also, for example, insurance aspects are relevant. The significance of existing insurance coverage, and possibilities to insure against losses, are, as regards adjustment of damages, often emphasized in literature,²⁸ special legislation,²⁹ as well as in case

²² See OLJ 1985:18 at 72 ff., 91 ff.

²³ See art. 74-77, and art. 79-80.

²⁴ However, it may be recalled that under art. 1645-1646 of the French *Code Civil* liability in damages for *non-conformity* (but not for delay) is linked to the seller's good or bad faith. But it must be noted also that there is an irrevocable presumption of professional seller's knowledge of latent non-conformities, in which case all foreseeable losses are compensated (art. 1150). Although the amount of damages in cases of good faith has been partly unclear, a common interpretation is that liability for loss of profit is excluded. See further, e.g., E. Rabel, *Das Recht des Warenkaufs* (Bd. 2, 1958) 266 ff. with further references. In Austrian and Prussian law a distinction between direct and indirect losses was made already under nineteenth century legislation. However, this distinction, become rapidly criticized as inconsistent with modern trends in contract law. See J. Hellner "The Limits of Contractual Damages in the Scandinavian Law of Sales" (1966) 10 *Scandinavian Studies in Law* at 44 with further references. The fact that an irrevocable presumption of knowledge of latent non-conformity is upheld in French case law as regards professional sellers also points to the inconsistency of the French differentiation. As regards direct and indirect losses under, e.g., Swiss contract law, see the critical discussion referred to by J. Cuendet, *La faute contractuelle et ses effets* (1970) 68 ff.

²⁵ See Reg.prop. 1986:93 at 115 ff.

²⁶ See in particular L. E. Taxell, *Avtal och rättsskydd* (1972) 363, 366 ff. See also, e.g., K. Krüger, *Norsk kontraktsret* (1989) 820, and for a comparative approach J. Hellner, *Beräkning och begränsning av skadestånd vid köp* (1966) 81 *Tidsskrift for Rettsvitenskap* 290 ff., and *op. cit.*, *supra* n. 24 at 39 ff.

²⁷ Cf. the references *supra* at n. 21 and accompanying text.

²⁸ See, e.g., B. Bengtsson, *Om jämkning av skadestånd* (1982), 262 ff., 292, J. E. Bergem and S. Rognlien, *op. cit.*, *supra* n. 13 at 387, M. Hemmo, *Sopimusoiikeus II* (1997) 308 f., J. Ramberg, *Inledning till köprätten* (1993) 81, E. Routamo and P. Ståhlberg, *Suomen vahingonkorvausoiikeus* (1995) 303, B. Sandvik, *op. cit.*, *supra* n. 21 at 160 f., L. Sevón, T. Wilhelmsson and P. Koskelo, *Huvudpunkter i köplagen* (1987) 92, L. E. Taxell, *Skadestånd vid avtalsbrott* (1993) 194 f.

²⁹ See, e.g., sec. 39 of the Act on Contracts of Carriage by Road (345/79), and sec. 15(5) of the former Tenancy Agreement Act (653/87).

law.³⁰ Insurance aspects are also relevant with regard to the differentiation between direct and indirect loss: Usually, it is the buyer who is in the better position both to foresee typical indirect losses and to insure against them. For these reasons a moderated liability in damages for the buyer's indirect losses may seem as a justified solution.

Moreover, an express purpose of the differentiation was also to harmonize the sale of goods legislation with standard contract terms which exempt sellers from liability in damages for indirect loss. A further object of the differentiation in this respect was also to attain an authoritative interpretation of the notion of "indirect loss" in instances when such losses have not been defined in the contract itself.³¹

As regards standard contract terms which exempt from liability in damages for indirect losses reference may in this context be made, for example, to the former Nordic NL 79.³² Under NL 79 gross negligence was required to award damages for indirect losses due to non-conformity (clauses 21-31).³³ This form of exemption clauses has been accepted as a reasonable and balanced solution. The holding in the classic Swedish Supreme Court decision *NJA 1979.483* is illustrative:

In this case a large-scale enterprise had undertaken to deliver counters for petrol pumps to a smaller enterprise. The counters were defective and could not be repaired at reasonable costs. The buyer claimed damages for all loss - also indirect loss - as a consequence of the defect. The seller referred to a clause in his standard terms (IM 72, clause 30) according to which the seller, who was not guilty of gross negligence, was exempted from liability in damages for indirect loss due to non-conformity.

The Supreme Court laid down that the seller was liable for the defect. But since the seller was not guilty of gross negligence, and since the exemption clause could not be regarded unreasonable, the seller was held liable in damages only for the buyer's direct loss. Further, it was emphasized that the old Scandinavian laws on sale of goods were out of keeping with modern industrial relations in several respects. It was further held that exemption clauses of the kind in question with

³⁰ As to Finnish case law reference may be made, e.g., to the following Supreme Court decisions: *HD 1998:15*, *HD 1991:176*, *HD 1991:65*, *HD 1988:21*, *HD 1984 II 182*, and *HD 1982 II 139*.

³¹ Reg.prop. 1986:93 at 14.

³² *Allmänna leveransbestämmelser för leverans av maskiner samt annan mekanisk, teknisk och elektronisk utrustning inom och mellan Danmark, Finland, Norge och Sverige*. Published in 1979 by Hovedorganisationen Dansk Industri, Denmark, Metalliteollisuuskeskusliitto -- Metallindustrins Centralförbund r.y., Finland, Teknologibedriftens Landsforening, Norway, and Sveriges Verkstadsindustrier, Sweden. The terms were first published in 1957, and have subsequently been amended several times.

³³ Cf. also, e.g., *TYSE Suomi-SEV* (the standard terms for trade between Finland and the SEV countries) in which it is expressly agreed that indirect losses due to non-conformity are not compensated unless the seller is guilty of gross negligence. See chap. 17 sec 1(1) and sec. 1(4) of the terms. However, the contract technique here is that the *direct* losses are defined in a detailed enumeration (see chap. 17, sec. 1(2)). See further R. Erma, E. Hoppu, and E. von Herten, *Tavarakaupan yleiset sopimusehdot (TYSE Suomi-SEV)* (1980) 232 ff.

some minor divergences could also be found both in ECE 18834 and NL 70 (the predecessor to NL 79). Moreover, the importance of being able to foresee the risks of warranties concerning often complicated industrial products was emphasized, as was the buyer's often better possibilities to insure against indirect losses.

The holding in *NJA 1979.483* has been referred to in illustrating the just need for attaining a reasonable and balanced risk allocation between the parties by an exemption from liability in damages for indirect losses. It has particularly been stressed that the buyer has often better possibilities to protect against indirect losses by insurance, and that exemption clauses of the kind in question -- in comparison with non-mandatory law -- often correspond better to modern business practice.³⁵ And furthermore, neither the fact that the buyer also has resort to other remedies than damages should be disregarded.

In practice, however, exemption clauses of the kind in question only exist with regard to seller's liability for *non-conformity*, while contracts commonly provide for penalties, or liquidated damages, in respect of late delivery.³⁶ In addition, several important standard contracts do not exempt sellers from liability for only indirect loss due to non-conformity.³⁷

In this context reference may, for example, be made to ECE 188.³⁸ This standard form has commonly been interpreted to exempt the seller from *any liability in damages* -- that is, also from direct loss -- unless he is guilty of gross negligence. The exemption clauses in ECE 188 are, however, somewhat equivocal.³⁹ But see

³⁴ However, see also *infra* at ns 38-40 and accompanying text as regards such an interpretation of ECE 188.

³⁵ See, e.g., J. Hellner, *Consequential Loss and Exemption Clauses* (1981) Oxford Journal of Legal Studies at 34 ff. and *Speciell avtalsrätt II* (1993) 225 f., and *op. cit.*, *supra* n. 6 at 182, J. Herre, *Ersättningar i köprätten* (1966) 420 at n. 33, T. Håstad, *op. cit.*, *supra* n. 12 at 72, 84, J. M. Lookofsky, *Consequential Damages in Comparative Context* (1989) 214 f., L. Olsen, *Borgenärens val vid kontraktsbrott* (1997) at 79, L. Sisula-Tulokas, *Dröjsmålskador vid passagerartransport* (1985) 306, P. Wetterstein, *op. cit.*, *supra* n. 5 at 231 ff.

³⁶ As regards penalty clauses and liquidated damages from a Nordic point of view, see further especially L. Olsen's study *Ersättningsklausuler* (1986). See also *infra* at n. 43.

³⁷ Cf. further also, e.g., J. Herre, *op. cit.*, *supra* n. 35 at 684 ff.

³⁸ *General Conditions for the Supply of Plant and Machinery for Export*. Prepared Under the Auspices of the United Nations Economic Commission for Europe, Geneva, March 1953.

³⁹ Sometimes ECE 188 has also been interpreted to exempt sellers from only indirect loss (see, e.g., *NJA 1979.483*, *supra*). ECE 188, clause 9(16) is not entirely clear in this respect. On the one hand it is laid down that "[s]ave as in this Clause expressed, the Vendor shall be under no liability in respect of defects". On the other hand, it is also "expressly agreed that the Purchaser shall have no claim in respect of personal injury or of damages to property not the subject matter of the Contract or loss of profit" unless the seller has been guilty of gross misconduct. However, the addition in clause 9(16) according to which the seller expressly is not liable for indirect losses should not *e contrario* give rise to liability for direct losses. See also, e.g., B. Godenhjelm, *Om ersättning för avbrottskada vid säljarens dröjsmål* (1970) 106 Tidskrift utgiven av Juridiska Föreningen i Finland at 45, and T. Håstad in *Förhandlingar vid det 31 nordiska juristmötet* (del II, 1988) at 356. It may also be observed that under clause 9(16) of the Nordic addendum to ECE 188 it is expressly agreed that "the Purchaser shall

also the Norwegian arbitration award in *ND 1979.231* (the so-called *Wingull case*):

A contract for delivery of machinery to a ship (M/T *Wingull*) was concluded on the basis of ECE 188. The machinery was marred by a defect which the seller failed to repair. The buyer declared the contract avoided and claimed damages for the expectation loss. The arbitration tribunal concluded that ECE 188 clause 9(16) exempted the seller from liability in damages for both direct and indirect loss. However, it was eventually held that the seller could not apply clause 9(16) because he did not succeed in his efforts to repair the defect and all reparation efforts were given up after 1½ years.

--- This case has been referred to⁴⁰ in illustrating the notion of fundamental breach of contract, and in illustrating that an exemption clause at issue may be disregarded in instances of failure to repair, though under normal circumstances such a clause may be regarded as a reasonable allocation of risks.⁴¹

In fact, as early as 1987 when SGA was enacted, NL 85 required that the buyer, to claim damages for non-conformity, had to have declared the contract avoided.⁴² The amount of compensation was limited to 15 percent of the contract sum.⁴² Within this limit both direct and indirect losses are included.⁴³ The principles at issue under NL 85 are subsequently affirmed also in NL 92.⁴⁴

It must be recognized that exemption clauses in standard forms are miscellaneous.⁴⁵ Consequently, it is somewhat difficult to regard the differentiation between direct and indirect loss under SGA as the intended harmonization with “established standard contract practice”. And the fact that

have no claim in respect of any loss or damage caused by the defect, *including but not limited to* (emph. added) damage to property, loss of production, loss of profit or any other consequential damage and indirect loss” unless the seller has been guilty of gross misconduct. The addendum was published in 1980 and it contains information called for in the appendix of ECE 188 and certain amendments and supplementary conditions of agreement between the parties to the contract.

⁴⁰ See, e.g., T. Håstad, *op. cit.*, *supra* n. 12 at 92, B. Sandvik, *op. cit.*, *supra* n. 21 at 32, and E. Selvig’s comment on the case in the preface to *ND 1979* at X f.

⁴¹ As to Finnish case law on clauses exempting from liability in damages for both direct and indirect losses, c.f. e.g., *HD 1988:11* (reparation succeeded and damages were not awarded), *HD 1982 II 195* (the seller was held to be guilty of gross negligence and damages were awarded), and *HD 1959 II 42* (damages were not awarded).

⁴² See NL 85, clause 31.

⁴³ In this context it may also be added that the right to damages in excess of the amount payable under penalty clauses is somewhat controversial in Finnish law. Case law does not give an entirely clear picture of the matter (see, e.g., *HD 1926 I 58*, *HD 1929 II 408*, *HD 1940 II 219*, *HD 1944 II 262*, *HD 1951 I 16* and *HD 1986 II 97*), and partly divergent views have been expressed in the literature. See, e.g., E. Aurejärvi, *op. cit.*, *supra* n. 21 at 151 f., B. Godenhjelm (1977), *op. cit.*, *supra* n. 8 at 98, T. M. Kivimäki and M. Ylöstalo, *Suomen siviilioikeuden oppikirja* (1981) 399 ff., L. E. Taxell, *op. cit.*, *supra* n. 26 at 448 ff., V. Vihma, *Sopimussakko* (1950) 233 ff. The outcome of the matter depends probably on a judgement *in casu* of the situation as a whole. However, *in dubio* the penalty clause should likely be regarded as exclusive (cf. also *HD 1982 II 59*).

⁴⁴ See NL 92, clause 31.

⁴⁵ See *supra* at n. 37 and accompanying text. See further also, e.g., T. Wilhelmsson, in *Förhandlingar vid det 31 nordiska juristmötet* (del II, 1988) at 368 ff.

damages are limited to compensation for only direct loss under a few standard contract terms does not necessarily motivate the differentiation under SGA.⁴⁶

3 The Differentiation in Practice

3.1 Which Losses are Direct?

It is distinctive of indirect losses that they are commonly regarded as substantial and dependent on individual conditions of the injured party, and therefore difficult to assess in estimations of risks. Direct losses, on the other hand, have traditionally been regarded to comprise smaller items.⁴⁷ Usually, it is explained that direct losses are losses which regularly incur as an immediate consequence of a breach; not as a consequence of the injured party's intended, future purpose of the contract matter.⁴⁸ Extra items of expenditures due to a breach, and costs that have been paid in advance but have become unnecessary due to the same reason, are often referred to as the most common direct losses.⁴⁹

In the Swedish SGA proposal of 1976, "the difference between the value the conforming goods would have had for the buyer and the value of the goods delivered"⁵⁰ (my translation) was regarded as direct loss. And since the buyer may also claim, *inter alia*, the cost required to cure the defect and price reduction for non-conformity, the right to damages for direct loss consequently becomes important in particular as regards the price difference when the buyer has avoided the contract and bought goods in replacement.⁵¹

The drafters of the bill to SGA did not regard it sufficient enough to clarify only the indirect losses that are defined in sec. 67. The differentiation between the losses is further clarified by a number of examples of the direct losses that are compensated under the strict control liability.⁵² If we wish to summarize

⁴⁶ See also, e.g., B. Gomard, *Obligationsret 2* (1990) 190 at n. 82. See further also *infra* at n. 122-123 and accompanying text.

⁴⁷ See, e.g., M. H. Andenæs, *Kontraktvillkår* (1989) 41, J. Hellner and J. Ramberg, *op. cit.*, *supra* n. 12 at 236 f., L. Sisula-Tulokas, *op. cit.*, *supra* n. 35 at 305 f., L. E. Taxell, *Köplagen* (1991) 114. See also, e.g., SOU 1976:66 at 171 f.

⁴⁸ See, e.g., Y. J. Hakulinen, *Obligationsrätt I* (1962) 344, T. M. Kivimäki and M. Ylöstalo, *op. cit.*, *supra* n. 43 at 491, K. Rodhe, *Lärobok i obligationsrätt* (1986) 210.

⁴⁹ See, e.g., F. Grauers, *Fastighetsköp* (1993) 114, L. Olsen, *op. cit.*, *supra* n. 36 at 32. See also the former chap. 5, sec. 9 of CPA. Under this provision the seller was strictly liable for "necessary measures" and "unnecessary expenditures" due to the breach (my translations). A prerequisite for awarding damages for also other losses was that the seller had not been able to prove that he had "acted with due care" (my translation). See further on this provision, e.g., Reg.prop. 1977:8 at 50, and A. Kivivuori, C. G. af Schultén, L. Sevón and J. Tala, *Kuluttajansuoja* (1978) 155 ff., P. Wetterstein, *op. cit.*, *supra* n. 5 at 235 ff.

⁵⁰ SOU 1976:66 at 315.

⁵¹ *Id.* at 314 ff.

⁵² Reg.prop. 1986:93 at 117 ff. See also E Hoppu, *op. cit.*, *supra* n. 11 at 56 ff. for some critical remarks with regard to this method.

these examples in the bill – including the direct loss category under sec. 67(3) - direct losses under SGA may be ranged in five major categories as follows:⁵³

- 1) *Expenditures due to the breach.* This category includes cost of investigating the breach such as telephone and traveling costs and cost of localizing defects in the goods, costs that have become unnecessary due to the breach as well as extra transport and similar costs.⁵⁴
- 2) *Costs of repairs and re-delivery* when such costs by way of exception are not compensated under sec. 34.⁵⁵
- 3) *Costs due to the buyer's effort to procure a substitute* for the performance pending delivery or for the non-conformity. This category may include compensation for the price difference when the buyer has bought goods in replacement (sec. 68-69), rent of substitute goods, remunerations for third parties, and cost of keeping the own personnel at overtime work, as well as cost of other internal measures due to the breach.⁵⁶
- 4) *The buyer's claim for recourse* as a result of the buyer having been obliged to reduce price or pay damages for direct loss to his contract party due to the breach, as well as the buyer's cost of curing a defect upon complainment of delivery by his party.⁵⁷
- 5) Finally, indirect loss as a consequence of a direct loss having been mitigated is as a direct loss under sec. 67(3); (the so-called *conversion rule*).⁵⁸

⁵³ See also Sandvik, *op. cit.*, *supra* n. 21 at 188 f. Cf. also somewhat similar enumerations of direct losses, e.g., by J. Hellner and J. Ramberg, *Speciall avtalsrätt I* (1991) 243, and by Håstad, *op. cit.*, *supra* n. 12 at 146.

⁵⁴ See further *infra* at 3.2. *in fine*. In *HD 1991:153* damages were awarded for costs of removal of filling soil that was not fit for the purpose made known to the seller at the time of the conclusion of the contract. However, in this case the Supreme Court based its holding on a fault reasoning. Notwithstanding that the loss was direct. See further on the case B. Sandvik, *op. cit.*, *supra* n. 21 at 77 f.

⁵⁵ According to the bill that may be the case when "with regard to the individual state of the seller curing the defect would cause him unreasonable costs or troubles even if it would be both possible and rational to do so from a technical and economic viewpoint" (my translation). Reg.prop. 1986:93 at 118.

⁵⁶ Cf. also sec. 67(3)(a) of the Norwegian SGA under which "normal measures taken to procure a substitute for late delivery or for non-conforming goods" (my translation) is expressly mentioned as direct loss.

⁵⁷ However, as regards claims for recourse a distinction is made in the bill between buyer's claims for recourse regarding penalties and other claims for recourse. According to the bill a claim for recourse in respect of paid penalty is an indirect loss, even if the penalty covers direct loss. See Reg.prop. 1986:93 at 119. This distinction has been criticized. One interpretation is that claims for recourse in respect of direct loss should be regarded as a direct loss also in relation to the primary seller, irrespective of whether that claim is based on penalty clauses or not. See, e.g., E. Hoppu, *op. cit.*, *supra* n. 11 at 58, and B. Sandvik, *op. cit.*, *supra* n. 21 at 194 ff. with further references. On the other hand, it has also been emphasized that it may be difficult to distinguish between the various kinds of losses in practice, and that such an interpretation would have detrimental effects on the dispute solving function of penalty clauses. With this in view it has also been asserted that, as a general rule, all claims for recourse should rather be regarded as indirect loss. See, e.g., J. Herre, *op. cit.*, *supra* n. 35 at 446 ff., J. Ramberg (under medverkan av J. Herre) *Köplagen* (1995) 671 ff., and T. Håstad, *op. cit.*, *supra* n. 12 at 148.

⁵⁸ See further *infra* at ns. 67-70, 95 and accompanying text.

With regard to how the differentiation is upheld in practice, and the consequences it brings about, the interest focuses in particular on *the interplay between 3) and 5) above*. But of further interest in this respect is also the interpretation of the expression “*other similiar loss which is difficult to foresee*” in the enumeration of indirect losses in sec. 67(2).

3.2 Is the Differentiation Upheld in Practice and What Consequences Does it Have?

The differentiation between direct and indirect loss implies that efforts in order to procure a substitute for the contracted performance should be the buyer’s primary measures due to the breach. In most instances such efforts also have the effect of either reducing or completely avoiding indirect losses. Thus, efforts to procure a substitute for the seller’s performance are in the greater number of cases best in conformity with party’s duty under sec. 70(1) to take reasonable measures to mitigate his loss. In the light of this, the solution that losses as a consequence of the measures in question are direct might even be regarded as natural. However, it does not follow from this reasoning that the differentiation would have no inconsistencies.

Inconsequences arise in particular when the buyer is forced to incur substantial indirect loss - typically loss of profit - on the mere ground that, from a practical point of view, he lacks the possibility to choose a more favorable course of action both for him and for the seller which causes direct losses. A frequently cited⁵⁹ example of this has been given by E. Routamo.⁶⁰ The example shows that the question whether the loss should be regarded as direct or indirect is completely independent of the seller’s breach. The buyer’s possibilities to act rationally in order to suffer direct rather than indirect losses becomes the only conclusive factor for the distinction.

Furthermore, the differentiation seems dubious when cost of procuring a substitute in exceptional cases becomes higher than the case would have been had the buyer chosen to suffer an indirect loss. Then, shall the buyer still have the right to regard the costs of the measures at issue as direct losses?⁶¹

Against such an interpretation it could be objected that that would invite speculation at the seller’s expense, and that the interpretation therefore would appear unacceptable.⁶² Also, the *interplay between direct losses and the buyer’s*

⁵⁹ See, e.g., T. Lindholm, *Om friskrivningsklausuler avseende indirekt skada* (1983) 119 Tidskrift utgiven av Juridiska Föreningen i Finland at 433 f., B. Sandvik, *op. cit.*, *supra* n. 21 at 190 f., and E. Åslund, *Säljarens skadeståndsansvar vid fel avseende indirekta skador enligt nya köplagen* (1991) 44 f.

⁶⁰ E. Routamo, *Säljarens ansvar för indirekta skador vid köp av lös egendom*, in *Förhandlingar vid det 31 nordiska juristmötet* (del I, 1987) at 219 f.

⁶¹ That is perhaps the interpretation by E. Routamo, *op. cit.*, *supra* n. 60 at 220, in predicting that the differentiation will lead to the buyer endeavouring to avoid indirect losses, even if the direct losses consequently becomes higher. Cf. also T. Lindholm, *op. cit.*, *supra* n. 59 at 434.

⁶² Cf. thus also, e.g., SOU 1976:66 at 371 in which proposal rent of substitute goods was not always regarded as direct losses (disbursements): “According to the report, disbursements primarily include smaller expenditures that are regularly incurred as a result of non-confor-

duty to mitigate his loss is expressly stressed in the legislative history to SGA. Thus, with regard to rent of substitute goods the following passage in the bill to SGA is worth quoting:

“If the buyer can mitigate his loss in this way (emphasis added) ... then that is a measure that may compare to a situation when the buyer has bought goods in replacement, and the cost of the measure (i.e., the rent of substitute goods) shall be compensated on the same basis as the buyer’s costs when he has bought goods in replacement”⁶³ (my translation).

The quoted passage seems to imply that a loss cannot be regarded as direct if that loss would be inconsistent with party’s duty under sec. 70(1) to take reasonable measures to mitigate his loss. Under that provision, however, the buyer is himself always responsible for the part of the loss which could reasonably have been mitigated. Consequently, since the actually compensable “indirect losses” are not higher than the “direct losses” in many cases, it is doubtful whether the premises behind the distinction are valid even in this particular respect.

The state of affairs may be illustrated by a hypothetical example based on the Finnish Supreme Court decision *HD 1992:86*. This case, *inter alia*, concerned the seller’s liability in damages for a latent crack in the engine of a sold pleasure boat. The buyer claimed FIM 6,000 in damages under SGA sec. 67(2), subpara. 2) for standstill loss (“*stilleståndsförlust*”) on the ground that he had not been able to use the boat during three summer months. The Supreme Court stated that the loss was compensable,⁶⁴ although damages were not awarded in the present case since the indirect loss was not caused by fault on the part of the seller.

Water in the radiator of the boat engine had frozen during the winter before the sale, thereby causing a latent crack in it. The crack was not discovered until the boat was taken into use in the summer. Both the District Court and the Court of Appeals disallowed the buyer’s claim for damages on the ground that he had not suffered any economic loss. The Supreme Court held that the non-economic loss

mity, or other breach, while more individual and substantial losses should be regarded as consequential losses. If, for example, a sailing boat is marred by non-conformity and the buyer, due to his particular way to use it, finds himself forced to charter a boat in replacement for the entire sailing season, then the charter may be regarded as a consequential loss, not as a disbursement” (my translation).

⁶³ Reg.prop. 1986:93 at 119, cf. 121. Cf. also Prop. 1988/89:76 at 201.

⁶⁴ Cf. also Swedish case law, e.g., *NJA 1979.120* in which damages were awarded for lost use of a pleasure boat. Cf. further also, e.g., *NJA 1992.213* in which a car and a caravan had been damaged and damages were awarded for loss of recreation, *NJA 1960.208* in which damages were awarded for lost possibilities to use a car, and *NJA 1945.440* holding that damages for lost possibilities to use property for recreation may be regarded as compensation for costs that have become unnecessary due to the damage (cf. *supra* at n. 54 and accompanying text as regards direct losses under SGA). See further also on compensation for lost recreation under Swedish contract law, e.g., L. Olsen, *Skadestånd vid förlust av semester och annan rekreation*, in *Studier i arbetsrätt tillägnade Tore Sigeman* (1993) at 315 ff., especially 327 ff. with further references.

was compensable under sec. 67(2), subpara. 2), although the claim eventually was disallowed on the ground that the crack was not negligently caused by the seller.

However, suppose now that the buyer, rather than suffering an indirect standstill loss of FIM 6,000, had managed to rent a boat in replacement at the cost of FIM 7,000. According to the passage in the bill to SGA cited above⁶⁵ the rent would then - and in the very opposite of the general rule⁶⁶ - seemingly be regarded as an *indirect* loss; not as a direct one. But under SGA sec. 70(1) the FIM 1,000 that the buyer could have mitigated by suffering a standstill loss of FIM 6,000 ought to have been deducted from the rent. And since the *actually* compensable loss is FIM 6,000 in both instances it is doubtful whether the distinction at issue is justified or well-reasoned. To this must, of course, also be added that claims for damages in similar instances are often assessed exactly with reference to what the costs of procuring substitute goods would have been.

Correspondingly, the Supreme Court decision *HD 1992:86* may be related also to the so-called *conversion rule* (*konverteringsregeln*) under sec. 67(3).⁶⁷ The *ratio* of that provision is that the buyer must not be placed in “a worse position on the ground that he, to mitigate a direct loss, chooses a course of action that causes such a loss which is referred to in paragraph 2”⁶⁸ (my translation). One can hardly raise any objections to that reasoning as such. Yet, by reason of sec. 67(3) nothing else is brought about but the distinction between direct and indirect loss waters down even more.

Let us then assume that the buyer, with reference to sec. 67(3), in *HD 1992:86* had claimed that he by suffering the standstill loss of FIM 6,000 had *hypothetically* mitigated a larger loss concerning rent of a boat in replacement at the cost of FIM 7,000 (of which cost, however, FIM 6,000 is the *actually* compensable loss under sec. 70(1)). Quite clearly then, the buyer ought to have had right to damages for the standstill as a direct loss compensable under the strict control liability.⁶⁹ The facts in the case were hardly such that the seller would have been exempted from liability for the defect under the control liability (sec. 40(1)).⁷⁰ In view of this, however, the way in which the buyer has presented his claim, and his awareness of the anything but easily comprehensible differentiation, are the only factors decisive to whether the loss should be regarded as direct or indirect. In the light of the above-mentioned, *the differentiation cannot be regarded in any other way but as having ended in an unmotivated loss of the buyer's rights in HD 1992:86.*

⁶⁵ *Supra* at n. 63 and accompanying text.

⁶⁶ See *supra* at n. 56 and accompanying text.

⁶⁷ See *supra* at n. 58 and accompanying text.

⁶⁸ See Reg.prop. 1986:93 at 121.

⁶⁹ It should be noted also that there is no requirement under sec. 67(3) that the loss at issue must be economic to convert indirect losses into direct losses. See, e.g., the discussion in Ot prp nr 80 (1986-87) at 125.

⁷⁰ See also B. Sandvik, *op. cit.*, *supra* n. 21 at 116 ff., 192.

It remains to be seen, however, how far such a conversion of indirect losses into direct losses under sec. 67(3) will be allowed in practice. It is an open question, for example, whether a purpose *ex ante* to mitigate the loss really is required, or whether all measures which according to a judgement *ex poste* have *de facto* reduced a direct loss should be compensated under the control liability. Although the latter interpretation is more likely in line with the *ratio* underlying the provision,⁷¹ there is a great deal of uncertainty awaiting guiding precedents.

Nevertheless, the fears that the differentiation poses a risk of depriving the buyer of his justified rights are seemingly also affirmed by the more recent Finnish Supreme Court decision *HD 1997:61*.

In this case a manufacturer had undertaken measures to avert the risk of his customers suffering loss of profit due to defective components in products manufactured by him. The manufacturer sought to recover the costs of the measures from the importer from which he had bought the defective components. The Supreme Court held that the costs at issue were an indirect loss under sec. 67(2), subpara. 4). And since the defect was not caused by fault on the part of the importer, and since the components were not subject of warranty, the manufacturer's claim was disallowed:

The defect was discovered when it resulted in a short circuit, as a result of which the production stopped in an enterprise to which the manufactured products had been sold. The enterprise's repair costs and its loss of profit (which added together amounted to FIM 146,000) was compensated by the importer. In order to avert the risk of similar losses the manufacturer launched, on his own initiative, inspections of the products delivered to other customers, and replaced the defective components thus found at the total cost of FIM 145,000. The claim concerned these particular costs only.

The District Court found that the costs at issue constituted a direct loss for which damages were awarded. In so stating the Court also stressed that such a holding was not unreasonable, having regard to the fact that the importer had right to recourse on the basis of strict product liability against his supplier of the components.

On appeal the Court of Appeals affirmed.

The Supreme Court, however, reversed, the majority in the Supreme Court (three Justices) holding that the costs at issue were an indirect loss under SGA sec. 67(2), subpara. 4).⁷² Alternatively, the majority stated, the costs also could have been interpreted as "other similar loss which is difficult to foresee" under sec. 67(2), subpara. 5).⁷³ -- The two dissenting Justices would have allowed the manufacturer's claim as damages for direct loss for which loss the importer was liable under the strict control liability (sec. 40(1)).

⁷¹ See also, e.g., J. Ramberg (under medverkan av J. Herre), *op. cit.*, *supra* n. 57 at 678 ff., E. Routamo and J. Ramberg, *Kauppalain kommentaari* (1997) 517 ff., B. Sandvik, *op. cit.*, *supra* n. 21 at 193 f., and E. Åslund, *op. cit.*, *supra* n. 59 at 43.

⁷² In this context the Supreme Court referred to the views expressed by T. Wilhelmsson, *Köprätten och produktansvaret* (1994) 130 *Tidskrift utgiven av Juridiska Föreningen i Finland* at 628-631, 636, and 639-640. (But see also *infra* at ns. 79, 81 and accompanying text.) Cf. also T. Wilhelmsson and M. Rudanko, *Tuotevastuu* (1991) 57 f.

⁷³ But see also *infra* at ns. 80-82 and accompanying text.

However, in this context it must be emphasized that the differentiation between direct and indirect loss is designed for the liability in damages only. It is not intended to extend to other remedies available under SGA.⁷⁴ Nonetheless, by interpreting sec. 67(2), subpara. 4) in the most extensive possible, and -- at best -- questionable way, the Supreme Court in *HD 1997:61* in fact extended the differentiation also to the non-fault liability for reasonable cost of repairs under sec. 34 and 36.⁷⁵

Another possible interpretation could have been to hold that only loss of profit and other typical indirect losses referred to in sec. 67(2), subparas 1)-3) qualify as “loss as a consequence of damage to other property than the goods sold” under subpara. 4).⁷⁶ This interpretation would have been better in line with the ratio of the differentiation as well as in conformity with a systematic interpretation of the set of remedies available under SGA. But no such losses were claimed in *HD 1997:61*. Here the claim concerned the manufacturer’s cost of repairs to avert the risk of the manufacturer’s customers suffering loss of profit (“repair in anticipation”).⁷⁷ In all but few cases of rather limited practical importance cost of repairs are compensable under sec. 34 or 36, irrespective of the damages provisions. And even if cost of repairs by way of exception are not compensable under sec. 34 or 36, and therefore claimed as damages, an award for such cost is, quite logically, regarded as damages for *direct* loss in the bill to SGA.⁷⁸ Sec. 67(2), subpara. 4) should not end in a different rule in this respect. In fact, it could even be called in question whether the damage in *HD 1997:61* at all met the statutory language in sec. 67(2), subpara. 4), requiring “damage to *other property than the goods sold*” (emphasis added).⁷⁹

With regard to how the differentiation is upheld in practice also the proper interpretation of “other similar loss which is difficult to foresee” under subpara. 5) becomes of further interest. Considering that the underlying purpose of the

⁷⁴ See also, e.g., Reg.prop. 1986:93 at 115 ff., E. Routamo and J Ramberg, *op. cit., supra* n. 70 at 487.

⁷⁵ See also further on sec. 34 and 36, e.g., Reg.prop. 1986:93 at 80 ff., E. Routamo, *op. cit., supra* n. 5 at 118 ff., 126 ff., E. Routamo and J. Ramberg, *op. cit., supra* n. 71 at 257 ff., L. Sevón, T. Wilhelmsson and P. Koskelo, *op. cit., supra* n. 28 at 112 ff., and J. Hellner and J. Ramberg, *op. cit., supra* n. 53 at 172 ff., 178 f.

⁷⁶ Cf. also Reg.prop. 1992:360 at 66 as regards similar indirect loss under CPA chap. 5, sec. 21.

⁷⁷ For comparative views on compensation for cost of repairs in anticipation, see, e.g., S. W. Hewitt, *Manufacturers’ Liability for Defective Goods* (1987) 151 ff. with further references.

⁷⁸ Reg. prop. 1986:93 at 118. See also *supra* at n. 55 and accompanying text, and, e.g., E. Routamo and J. Ramberg, *op. cit., supra* n. 71 at 503 f.

⁷⁹ See also M. Savola, *Havainnot ja sen soveltamiskäytännöstä* (1997) 78 Defensor Legis at 868 ff. Cf. also T. Wilhelmsson, *op. cit., supra* n. 72 at 639 f., who states with regard to both damage caused by ingredients and by components (*de lege lata*): “...it could, in fact, be asserted - contrary to the legislative history, however, - that the damage not at all constitutes any (physical) damage to the final product in the sense of the notion of damage caused by products. There has merely been produced a different final product than the intended one, which has resulted in loss. Thus, it would not be a matter of such a ‘damage to other property’ in the meaning of SGA sec. 67(2), subpara 4)” (my translation). See further also *infra* at n. 81 and accompanying text.

differentiation is to draw as sharp and clear a distinction as possible between direct and indirect losses, sec. 67(2), subpara. 5) should be interpreted in a restrictive way. In *HD 1997:61* the Supreme Court held that the costs claimed could alternatively also have been interpreted as such a loss.⁸⁰ But also the very opposite interpretation could have been framed.⁸¹ However, according to a commonly advocated interpretation in the literature which seemingly was adopted in *HD 1997:61*, in particular *the magnitude of the loss* in relation to the value of the goods sold should be regarded as the conclusive factor.⁸²

Nevertheless, the approach in the preparatory documents to SGA seems to be rather different from that view. Both *loss of interest on advance payment* due to the seller's delay, and *loss of income from work* when the buyer has bought goods for his personal use and having had to use his working hours to investigate the breach, are referred to in the bill as examples of the application of sec. 67(2), subpara. 5).⁸³ Yet, it is doubtful whether any of those losses really should be regarded as indirect under provision.⁸⁴

As regards advance payment it must be assumed that the seller is well aware of such having been made, and the loss of interest on that payment (interest on yields, "*avkastningsränta*") is hardly difficult to calculate.⁸⁵ To this must also be added, that the recommended interpretation in the bill would end in the kind of conflict between SGA and the interest legislation that the legislator has otherwise explicitly strived to avoid.⁸⁶ Such a conflict was neither upheld in *HD*

⁸⁰ See *supra* at n. 73 and accompanying text.

⁸¹ See *supra* at ns. 74-79 and accompanying text. See also, e.g., T. Wilhelmsson, *op. cit., supra* n. 72 at 639, stating (*de lege ferenda*): It could be called in question on good grounds whether the rule under SGA is motivated in every respect. At least some of the immediate damages caused by products are so normal and foreseeable consequences of any defect that it might well be argued that they ought to be considered as direct losses ..." (my translation).

⁸² Sec. 67(2), subpara. 5) can hardly be interpreted to the meaning that the losses under sec. 67(2) - e.g., loss of profit - may generally be regarded as difficult to foresee. The provision should rather be interpreted to the effect that the loss, to be indirect, must be equal in kind to the indirect losses referred to and in addition difficult to foresee. See, e.g., J. Hellner and J. Ramberg, *op. cit., supra* n. 12 at 237, E. Routamo, *op. cit., supra* n. 5 at 232, T. Håstad, *op. cit., supra* n. 12 at 146.

⁸³ Reg.prop. 1986:93 at 121. In this context it may be noted, however, that, e.g., the Swedish bill lacks reference to corresponding examples on the application of the provision. See Prop. 1988/89:76 at 200.

⁸⁴ As to the following, see also the discussion by B. Sandvik in *Direkt- och indirekt förlust enligt 'moment-22' i köprätten (1997) 133 Tidskrift utgiven av Juridiska Föreningen i Finland* at 271 f.

⁸⁵ Interest on advance payment is compensated as interest on yields, the rate of which corresponds to the Bank of Finland's base lending rate. See further, e.g., T. Wilhelmsson and L. Sevón, *Räntelag och dröjsmålsränta* (1983) 9 f., 18 f. Cf. with regard to Swedish law, e.g., G. Walin, *Lagen om skuldebrev m.m.* (1997) 281 f.

⁸⁶ Thus, as regards the buyer's liability for arrears under sec. 57(1) the legislator has deviated from the control liability and settled for a *force majeure* exemption which is co-ordinated with sec. 10 of the Interest Act (633/82). The underlying purpose was to avoid a conflict between SGA and the interest legislation. See Reg.prop. 1986:93 at 105 f.

1992:86 in which the Finnish Supreme Court awarded interest on yields, notwithstanding the fact that the seller was not held to be guilty of fault.

Cf. also as regards the former differentiation between direct and indirect loss under CPA chap. 5, sec. 9,⁸⁷ for example, *HD 1991:4* in which loss of interest on advance payment was awarded without the Supreme Court basing its holding on a fault reasoning.

In this case, the buyer had paid for a suite of furniture partly in cash, and partly by assigning a second-hand suite of furniture to the seller. The buyer declared the contract avoided due to non-conformity. The seller was obliged to reimburse the buyer's cash payment and the value of the second-hand furniture. The interest on that debt was to be paid from the day the cash payment and the second-hand suite of furniture had been received. For the time before maturity of the debt the seller was to pay interest on yields corresponding to the Bank of Finland's base lending rate and from the day the writ was served upon the seller an 16 percent penal interest on arrears.

A loss of the kind in question should rather be referred to the direct loss category regarding costs that have been paid in advance and that have become unnecessary due to the breach.⁸⁸

As regards the loss of income from work, on the other hand, it must be noted the the interpretation expressed in the bill to SGA has subsequently been embodied in the statutory language of both CPA⁸⁹ and SHA.⁹⁰ Nevertheless, the basis for that solution is likely a rather dubious parallel to loss of profit. Quite contrary to loss of profit, loss of income from work is not, as a rule, incurred as a consequence of the buyer's intended, future purpose of the contract matter.⁹¹ Rather, loss of income from work is usually incurred -- as indicated also in the bill to SGA⁹² -- as a result of the buyer having had to use his working hours to investigate the breach. But is not the cost of investigating the breach a direct loss?⁹³ In any case, the buyer can avoid loss of income from work by engaging a third party to investigate the breach and thereafter claim that those costs should be compensated as direct losses.⁹⁴ If, on the other hand, the cost of engaging a third party would exceed the loss of income from work, the buyer may choose to suffer the income loss and in reference to SGA (sec. 67(3)), CPA (chap. 5, sec.

⁸⁷ See *supra* at ns. 14, 49 and accompanying text on the former CPA chap. 5, sec. 9.

⁸⁸ See *supra* at ns. 49, 54 and accompanying text. See also B. Sandvik, *op. cit.*, *supra* n. 21 at 185 f., especially at n. 182.

⁸⁹ See chap. 5, sec. 10(3), subpara. 1), and sec. 20(1). See also *supra* at n. 14 and accompanying text. See further also on indirect losses under CPA, e.g., T. Ämmälä, *Uudistunut Kuluttajansuoja* (1996) 128 f.

⁹⁰ See chap. 4, sec. 11(3), subpara. 1), and sec. 26(1). See also *supra* at n. 16 and accompanying text.

⁹¹ Cf. also the discussion *supra* at ns. 47-48 and accompanying text with further references.

⁹² See *supra* at n. 83 and accompanying text.

⁹³ See also *supra* at n. 54 and accompanying text.

⁹⁴ See also *supra* at ns. 54, 56 and accompanying text.

10(4)), as well as SHA (chap. 4, sec. 11(4)), assert that that loss has converted into a direct one.⁹⁵

But why, then, make a roundabout via this complicated rule? It may be noted in this context also that no distinction is made between direct and indirect loss in the Swedish legislation on consumer sales and services.⁹⁶

4 Is the Differentiation Motivated?

The list of the inconsequences of upholding a differentiation in the basis of liability between direct and indirect loss could be made even longer. In this context it is sufficient, however, to point out that it causes considerable difficulties to find someone who is entirely satisfied with the present rule under SGA.⁹⁷ Thus, for example, J. Kleineman has concluded that “much would be gained if the conceptual exercises under sec. 67 were completely abandoned”, a provision which according to him may be regarded as a “form of an *intellectual core meltdown*”⁹⁸ (my translation, emphasis in original). For my own part I have earlier concluded that “room should be made for the differentiation in the museum of history of law as an example of a rather unsuccessful solution in Nordic legislation”⁹⁹ (my translation). Some authors have, nevertheless, found the differentiation motivated.¹⁰⁰

⁹⁵ See also *supra* at ns. 58, 67-70 and accompanying text.

⁹⁶ Here all compensable loss is covered by strict liability. See the Consumer Sales Act, sec. 14 and 41, and the the Consumer Services Act, sec. 31. See further, e.g., J. Ramberg, *Den nya konsumentkyddslagstiftningen* (1990) 38, J. Herre, *Den nya konsumentköplagen* (1991) 38, and P. Gerhard, *Köprättens grunder och konsumenttjänstelagen* (1992) 89 ff.

⁹⁷ Thus, reference may in this context be made to the views expressed, e.g., by B. Gomard, *op. cit.*, *supra* n. 46 at 190, J. Hellner and J. Ramberg, *op. cit.*, *supra* n. 53 at 243 f., M. Hemmo, *Vahingonkorvauksen määrittymisestä sopimussuhteissa* (1994) at 146 f., 287 ff. and *op. cit.*, *supra* n. 28 at 273, 284 ff., J. Herre, *op. cit.*, *supra* n. 35 at 411 ff., 682 ff., E. Hoppu, *op. cit.*, *supra* n. 11 at 51 ff., T. Håstad, *op. cit.*, *supra* n. 12 at 148 ff., J. M. Lookofsky, *op. cit.*, *supra* n. 35 at 195 ff., J. Nørager-Nielsen and S. Theilgaard, *op. cit.*, *supra* n. 7 at 318, J. Ramberg (under medverkan av J. Herre), *op. cit.*, *supra* n. 57 at 652 ff., J. Ramberg, *op. cit.*, *supra* at n. 28 at 89 and *Den nya köplagen - Nytt Wien i gamla läglar?*, in *Festskrift till Gotthard Calissendorff* (1990) 278 ff., E. Routamo, *op. cit.*, *supra* n. 5 at 230 and *op. cit.*, *supra* n. 60 at 211 ff., E. Routamo and J. Ramberg, *op. cit.*, *supra* n. 71 at 495 ff., 500 ff., M. Savola, *op. cit.*, *supra* n. 79 at 862 ff., L. E. Taxell, *op. cit.*, *supra* n. 28 at 181 f., A. Vinding Kruse, *op. cit.*, *supra* n. 7 at 141, P. Wetterstein, *Säljarens ansvar för utfästelser*, in *Festskrift till Jan Ramberg* (1996) 485 f., T. Wilhelmsson, *op. cit.*, *supra* n. 21 at 409 and *op. cit.*, *supra* n. 72 at 639 f., E. Åslund, *op. cit.*, *supra* n. 59 at 40 ff. See further also, e.g., the criticism expressed in *Förhandlingar vid det 31 nordiska juristmötet* (del II, 1988) at 353 ff.

⁹⁸ J. Kleineman, *Indirekt skada och frågan om behovet av en köplagsreform*, in *Festskrift till Jan Ramberg* (1996) 307 ff., especially 315, 318.

⁹⁹ B. Sandvik, *op. cit.*, *supra* n. 21 at 202 and *op. cit.*, *supra* n. 84 at 277.

¹⁰⁰ See, e.g., the statements by H. Saxén and L. Sevón in *Förhandlingar vid det 31 nordiska juristmötet* (del II, 1988) 362 ff., 370 f., and, e.g., the discussion on the differentiation by T. Saarinen in *Sopimusoikeudellisesta vahingonkorvausvastuusta erityisesti kauppalain valossa* (1996), in particular 75 ff.

In particular H. Saxén may be regarded as the perhaps foremost spokesman for upholding the present differentiation.¹⁰¹ Realizing the difficulties associated with the differentiation in practice, he even poses the question that would not even liability in damages for *every direct loss* sometimes end in an unreasonable result. That would, according to him, be the case if the seller (without being guilty of fault and without warranting the goods) misrepresents. H. Saxén states (my translation): “If the seller has in good faith sold a work of art as original, notwithstanding the fact that it is afterwards proved to be an imitation, he should, in many cases, not be liable for a substitute transaction or for the current price, but it ought to be sufficient that he pays compensation for the buyer’s reliance loss”¹⁰² (“*negativt avtalsintresse*”).

- However, against this it can be objected, *inter alia*, that the provisions on substitute transactions (SGA sec. 68 and 69) do not apply to unique goods.¹⁰³ and that a balance between price and performance can be achieved also by the non-fault remedy price reduction (sec. 37 and 38).¹⁰⁴ The losses thus remaining to be captured by an award for damages are likely rather modest in instances at question. Notwithstanding the differentiation between direct and indirect loss. And if the losses would be exceptionally more substantial, it may be asked whether not the threshold for adjusting the damages (sec. 70(2)) would be rather low.¹⁰⁵

No doubt, it is motivated to protect the seller against a too far-reaching and burdensome liability in damages. Reference may, for example, be made to an example of a small business delivering goods to be used in the production of a large-scale industry, and when (perhaps even trifling) non-conformity in those goods causes a considerable stoppage of production resulting in substantial loss. (Cf., e.g., *HD 1997:61*, *supra* 3.2.)

However, in this respect SGA sec. 67 must be regarded as a rather unsuccessful and dubious method. The provision is difficult to interpret, it invites speculations, and its underlying premises are not supported by practical reasons. In the grossest instances the provision may even -- as seemingly in both *HD 1992:86*¹⁰⁶ and *HD 1997:61*¹⁰⁷ -- end in the buyer being deprived of his justified rights.

SGA sec. 67(2)-(3) may nearest be regarded as *a variety of “catch-22” in the law of sales from both the seller’s and the buyer’s viewpoints*.¹⁰⁸ For example, it must come as some surprise for the seller that the buyer may claim damages for typical indirect loss under the control liability on the plea that he, by suffering

101 See in particular H. Saxén, *Skadestånd vid avtalsbrott* (1995) 62 f., 194 ff.

102 *Id.* at 201. Cf. also as regards the stated example H. Saxén, *Skadeståndsrätt* (1983) 281.

103 See also Reg.prop. 1986:93 at 122 f.

104 Price reduction and its relation to other remedies (in particular damages) has been analyzed in greater detail by L. Sisula-Tulokas, *Felpåföljden prisavdrag* (1990).

105 Cf. further also *infra* at ns. 125-132, in particular 129 and accompanying text.

106 *Supra* at ns. 64-71 and accompanying text.

107 *Supra* at ns. 71-81 and accompanying text.

108 See also B. Sandvik, *op. cit.*, *supra* n. 21 at 202 f.

that loss, has *hypothetically* mitigated a larger direct loss (SGA sec. 67(3)).¹⁰⁹ Correspondingly, the buyer is likely to be puzzled over not being allowed damages under the control liability in cases when he -- unaware of the differentiation, or for other reasons -- has suffered an indirect loss: In many cases, the *actually* compensable loss will not, after all, be higher than an award for direct loss (SGA sec. 70(1)).¹¹⁰

Moreover, it seems somewhat misleading to refer to the differentiation as a limitation of the seller's liability in damages for "indirect" loss. *In practice*, the differentiation mainly implies that *the buyer may always invoke the control liability for all losses that are consistent with his general duty under sec. 70(1) to take reasonable measures to mitigate his loss.*¹¹¹ Whether the concrete loss is "direct" or "indirect" is quite irrelevant in this respect. Furthermore, since the buyer according to sec. 70(1) must himself bear the part of the loss that could have been reasonably mitigated, it may be asked why the contemplated "direct" losses in SGA should be treated differently from the "indirect" losses. The actually compensable loss is in many instances just as large irrespective of whether the loss is to be regarded as "direct" or "indirect".¹¹² Where that is not the case it may be assumed principally to be due to two reasons: Either that no substitute is available by which the loss could be mitigated, or that the seller's breach occurs at such a late stage that it is impossible for the buyer to procure a substitute for the seller's performance in time.¹¹³

It is not difficult as such to criticize the differentiation between direct and indirect loss. But if rejected, then with what may the differentiation be replaced? Or is it necessary at all to replace it?

Sometimes it has been suggested that it is quite possible to set the inconsequences right by an altered interpretation of the existing differentiation.¹¹⁴ In my view, however, there is in SGA a sufficient limitation of the seller's liability in damages even without any distinction between different kinds of losses: Would not adequacy and similar doctrines,¹¹⁵ the general duty to take

¹⁰⁹ See *supra* at ns. 67-71. Cf. further also the example on loss of profit as a *direct* loss under sec. 67(3) stated in the bill to SGA; Reg.prop. 1986:93 at 121. Cf. also, e.g., C. Hultmark, *Kontraktsbrott vid köp av aktie* (1992) 73, and B. Sandvik, *op. cit.*, *supra* n. 21 at 193.

¹¹⁰ Cf. also *supra* at ns. 64-67 and accompanying text.

¹¹¹ See *supra* at ns 67-71 and accompanying text.

¹¹² See *supra* at ns. 61-67 and accompanying text.

¹¹³ In both instances it is thus the buyer who runs the market risk. See also B. Sandvik, *op. cit.*, *supra* n. 21 at 194.

¹¹⁴ See further in particular T. Håstad, *op. cit.*, *supra* n. 12 at 149 f. For criticism against such an approach, see also B. Sandvik, *op. cit.*, *supra* n. 21 at 203 f.

¹¹⁵ In this context further reference may be made also to the discussion in Finnish law on the Supreme Court decisions *HD 1927 II 446* and *HD 1977 II 74*: In *HD 1927 II 446* A had failed to deliver the contracted quantity of wood to B who on his part had undertaken, under the threat of penalty, to deliver that wood further to C. Due to A's breach B had to pay the penalty to C which B sought to recover from A. The Supreme Court, however, disallowed the claim, holding that A could not have reasonably foreseen that B had undertaken to deliver the wood further to C under the threat of penalty. -- H. Saxén, *Adekvans och skada* (1962) 163 regards the decision as an expression of the criteria of

reasonable measures to mitigate the loss (sec. 70(1)) and similar considerations, in combination with the possibility under sec. 70(2) to adjust unreasonable damages constitute sufficient protection for the seller against too remote and burdensome damage awards?

It may be noted also, that the Danish decision not to enact a new sale of goods legislation on the basis of the joint Nordic law-drafting (NU 1984:5)¹¹⁶ was influenced by the subsequent differentiation between direct and indirect loss.¹¹⁷ In my opinion also this constitutes a rather high price for the differentiation.¹¹⁸ Moreover, to apply the control liability in respect of the expectation loss would be better in line with the stated aim to harmonize the Nordic sale of goods legislation with CISG.119 (See CISG art. 74-77, and art. 79-80.)

Against the above-mentioned it might perhaps be objected that the liability would thereby become too strict for the non-negligent seller, in particular with

foreseeability in the judgement of adequacy. L. E. Taxell, *op. cit.*, *supra* n. 26 at 367, on the other hand, refers to the case in illustrating the meaning of the so-called "doctrine of normal compensation" ("*normalersättningsläran*"). In *HD 1977 II 74 A* had undertaken to deliver goods to B, but the delivery failed. B launched a claim for recourse against A for penalty paid to his contract party C due to A's breach. The Supreme Court found that A as a special business ought to have known that B might have undertaken to deliver the goods further to C under the threat of penalty. And since awarding full compensation was not proved unreasonable, A was obliged to compensate B for his loss. -- The decision has been commented by L. Sisula-Tulokas, *op. cit.*, *supra* n. 35 at 232 f., stating that, contrary to *HD 1927 II 446*, this case concerned a commonly used penalty clause in the line of business which A as a special business ought to have known. According to the author the decision illustrates "the many-sidedness of the considerations involved in the judgement of adequacy" (my translation). Cf. also, e.g., H. Saxén, *op. cit.*, *supra* n. 101 at 147. But, e.g., L. E. Taxell, *op. cit.*, *supra* n. 28 at 180 regards also this decision as an example of the doctrine of normal compensation.

¹¹⁶ See *supra* at ns. 4, 18-19 and accompanying text.

¹¹⁷ See, e.g., J. Nørager-Nielsen and S. Theilgaard, *op. cit.*, *supra* n. 7 at 464, and H. Bernstein & J. Lookofsky, *op.cit.*, *supra* n. 21 at 141 f. Cf. further also on the discussion on the differentiation in Danish law J. Kleineman, *op. cit.*, *supra* n. 98 at 318 with further references.

¹¹⁸ It is another matter in this context whether the old Danish sale of goods law of 1906 (see *supra* at n. 3) meets the criteria for reservation to the application of CISG under art. 94(1); a reservation the Nordic countries made when ratifying CISG. For my own part, however, I am prepared to call in question whether the old Danish law of 1906 really may be regarded "the same" as, or "closely related" to, the new Nordic SGA:s as required under CISG art. 94(1). See also H. Bernstein and J. Lookofsky, *op cit.*, *supra* n. 21 at 141 f. Note also that the underlying premise for applying art. 94(1) was that also Denmark would enact new sale of goods legislation on the basis of NU 1984:5.

¹¹⁹ See Reg.prop. 1986:93 at 27, and NU 1984:5 at 183. See also, e.g. L. Sevón, *Kauppalaki ja YK:n yleissopimus kansainvälistä tavaran kauppaa koskevistä sopimuksista* (1988) 86 Lakimies 1 ff. For criticism against this harmonization, see in particular L. Hjermer, *Om köp av bestämt gods och leveransavtal. Några reflektioner inför en ny köplag*, in *Festskrift till Jan Hellner* (1984) 277 ff., especially 308 f.

regard to non-conforming specific goods.¹²⁰ However, such an argument is not particularly convincing.¹²¹ In any case, if a less strict liability in damages is strived for, then it is primarily up to the seller -- and not to the non-mandatory legislation -- to adapt himself to established contract practice. Harmonization of non-mandatory legislation with exemption clauses in standard contract terms¹²² (terms that in practice are rather miscellaneous¹²³) should not be made an end in itself. And it can hardly be asserted that the need for well elaborated exemption clauses has decreased as a result of the present liability regime under SGA.

Further, in stressing that the liability in damages for indirect loss ought to be conditioned upon fault or warranty,¹²⁴ seemingly no or little attention was paid to the possibilities of attaining a reasonable and balanced allocation of the risk provided for in sec. 70(2). This provision is said to be directed typically towards indirect losses,¹²⁵ albeit adjustment of unreasonable damages is often undertaken with regard to the total amount of damages in practice.

Nevertheless, the starting-point must, of course, still be the principle of full compensation within the doctrine of adequacy as the upper limit (*de lege ferenda* perhaps expressed by a provision corresponding to CISG art. 74¹²⁶).¹²⁷ Only if the

¹²⁰ See also *supra* at ns. 6-9, 17, 20-22 and accompanying text. Cf. also *supra* n. 24 with regard to the seller's liability in damages for non-conformity under the French *Code Civil* art. 1645-1646.

¹²¹ See also B. Sandvik, *op. cit.*, *supra* n. 84 at 276 and *op. cit.*, *supra* n. 21 at 115, 200 f.

¹²² See *supra* at n. 31 and accompanying text.

¹²³ See *supra* at ns. 37, 45-46 and accompanying text.

¹²⁴ Note also that the broader the interpretation of the notion of warranty under SGA sec. 40(3), the lesser significance of the distinction between direct and indirect loss. P. Wetterstein, *op. cit.*, *supra* n. 97 at 475 ff. recommends a broad interpretation in this respect.

¹²⁵ See Reg.prop. 1986:93 at 124.

¹²⁶ Cf. also, e.g., UNIDROIT *Principles of International Commercial Contracts* (1994) art. 7.4.4 and *The Principles of European Contract Law* (1996) art. 9:503.

¹²⁷ See also, e.g., J. Hellner and J. Ramberg, *op. cit.*, *supra* n. 53 at 244, M. Hemmo, *op. cit.*, *supra* n. 28 at 273 n. 57, J. Kleineman, *op. cit.*, *supra* n. 98 at 318, B. Sandvik, *op. cit.*, *supra* n. 21 at 205. CISG art. 74 expresses a more generous judgement for the liable party than the doctrine of adequacy as understood in Nordic and German law. The difference is most notably that while foreseeability of the loss *at the time of the breach of the contract* is decisive under the doctrine of adequacy, CISG art. 74 starts from foreseeability of the loss *at the time of the conclusion of the contract*. In this respect the French *Code Civil* art. 1150 - which as a result of *Hadley v. Baxendale* (1854) 9 Ex. 341 then also inspired the development in English (SGA 1979 sec. 50(2)) and American law (UCC § 2-715(2)) - has served as a model for CISG. See further on CISG art. 74, e.g., H. Bernstein and J. Lookofsky, *op. cit.*, *supra* n. 21 at 98 ff., J. Honnold, *op. cit.*, *supra* n. 21 at paras 403 ff., H. Stoll, *op. cit.*, *supra* n. 21 at 608 ff., J. S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in N. M. Galston and H. Smit (eds), *op. cit.*, *supra* n. 21 at § 9-37 ff. (On the development in English law, see, e.g., P. S. Atiyah, *The Sale of Goods* (1995) 496 ff., M. P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (1996) 607 ff., A. G. Guest, *Anson's Law of Contract* (1979) 554 ff., G. H. Treitel, *The Law of Contract* (1995) 870 ff.) On the other hand, considering the possibility to adjust unreasonable damages under SGA sec. 70(2) -- a possibility CISG lacks -- the need to moderate the foreseeability test is somewhat reduced. But in this context it may be

threshold for unreasonableness is exceeded may the damages be adjusted. A number of particulars may be taken into consideration in this matter of which most, at least in part, have underlain also the differentiation between direct and indirect loss:¹²⁸ The seller's capacity as a private party, a small-scale business, or an expert in the field, the value of the goods in proportion to the magnitude of the loss,¹²⁹ insurance aspects,¹³⁰ the gravity of fault,¹³¹ the party's financial position,¹³² etc.

The opinions on the differentiation in the basis of liability between direct and indirect losses under SGA are for the most part negative. Such a view is also supported by the so far few precedents on the differentiation (see *HD 1992:86*¹³³ and *HD 1997:61*¹³⁴). It is another matter, however, how many cases affirming the inconsequences of upholding the differentiation it takes for the legislator to find it necessary to abrogate it.¹³⁵ Nevertheless, in my view the differentiation should be reconsidered (preferably within Nordic cooperation in the field¹³⁶). The sooner the better.

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noted that J. Herre, *op. cit.*, *supra* n. 35 at 679, 703 ff., is prepared to abrogate also SGA sec. 70(2) in favour of a provision corresponding to CISG art. 74.

128 See also B. Sandvik, *op. cit.*, *supra* n. 84 at 277.

129 See, e.g., Finnish Supreme Court decisions *HD 1985 II 51* and *HD 1948 II 3*. Cf. also the dissenting opinion in *HD 1977 II 74* (*supra* at n. 115).

130 See, e.g., the cases referred to *supra* at n. 30. See also, e.g., *HD 1998:15*.

131 See, e.g., Finnish Supreme Court decisions *HD 1981 II 30*, and *HD 1982 II 141*.

132 See in particular the discussion by T. Wilhelmsson, *Social civilrätt* (1987) 205 ff.

133 *Supra* at ns. 64-71, 106 and accompanying text.

134 *Supra* at ns. 71-81, 107 and accompanying text.

135 M. Hemmo, *op. cit.*, *supra* n. 28 at 274 notes that the fact that the Nordic SGA:s are harmonized may form an obstacle for amending the Finnish SGA in the near future. But such a reasoning is not relevant in respect of either CPA or SHA. See also *supra* at n. 96 and accompanying text.

136 See *supra* at ns. 18-19, 116-119, 135 and accompanying text.

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