The Hidden Secrets of Scandinavian Contract Law

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1 Introduction

"There is something rotten in the state of Denmark."[2] And in the states of Finland, Norway and Sweden.

The rotten smell derives from their common century old Contract Act. The Contract Act in practice became outdated already some forty-fifty years ago. Instead of burying the corpse and allow new green grass to thrive on its grave, it was put on lit de parade. Lawyers have ever since carefully analyzed how the cadaver could be best used. The nauseating stench from the deteriorating remains has blurred the lawyers' minds and prevented them from facing the truth: The body is dead.

In this short paper I will describe some of the Scandinavian Contract Act's shortcomings and show how lawyers use detrimental analysis to overcome them. I will furthermore make some remarks as to this situation with respect to democracy and business needs. Finally, I will briefly outline a suggestion how to solve the present unfortunate situation.

2 The Shortcomings of the Scandinavian Contract Act

The Contract Act is short, fragmentary and does not address modern contractual problems.

1. There is no other model for the formation of contracts than the offer-acceptance-model, which – as is known all over the world – is very problematic to apply in practice.
2. There is no provision on the liability in connection with negotiating a contract (culpa in contrahendo).
3. There is no provision on the consequences of an invalid contract, c.f. on restitution or on to what extent a liability of economic compensation exists.
4. There is no provision on illegal or immoral contracts.
5. There is no provision on how to determine the content of the contract, i.e. no provision on interpretation or on standard terms (apart from the very general Art. 36 on unfair contract terms).
6. There is no provision on the consequences of breach of contract.

From this short inventory, it is clear that the Contract Act in practice is unable to provide solutions to almost all present practical problems related to contract law.

2 Shakespare, *Hamlet*.

3 The Misleading Structure of the Contract Act

The Contract Act was written in a totally different time. Business practice has gradually changed and lawyers have tried to extend the meaning of the fragmentary Contract Act provisions to fit the new business concepts. Doing so involves quite creative analytical work by courts and academics. I will here provide some examples of how the structure of the Contract Act leads the thought in wrong directions.

3.1 The Interpretation of Incomplete Ccontracts

As said, there are no rules on interpretation of contracts in Swedish legislation. Swedish contracts are often rather short, at least compared to Anglo-American contracts. There is a clear tendency towards more detailed and longer contracts, but still most contracts contain gaps leading to uncertainty as to what the parties' common intention was. In search of the parties' common intention Swedish lawyers are surprisingly ill-equipped to apply "simple" interpretation. An explanation may be that nothing in legislation guides them towards using the concept of interpretation. Instead of seeing the gap in the contract as a case of interpretation of implied terms, Swedish lawyers often jump to the dead end theory called Förutsättningsläran. This is a theory invented by doctrine, influenced by old German scholars (Wegfall vom Geschäftsgrundlage). The theory is difficult to apply and rarely leads to the desired effect since it only provides for avoidance and not for a dynamic interpretation. The Swedish Supreme Court has – in vain - tried to limit its application.[3]

Förutsättningsläran has regrettably come to serve as a special kind of interpretation of contracts. The theory is not at all suited to fulfil such a function and the efforts by doctrine to save this peculiar function has lead to a very strained application and development.

If a new Swedish Contract Act contained a chapter similar to the UNIDROIT Principles of International Commercial Contracts Chapter 4 and the Principles of European Contract Law Chapter 5, I am confident that Swedish lawyers would more easily find the appropriate means of addressing the problems related to contractual gaps.

3.2 The Formation of Contracts - Standard Terms

Another negative aspect of the lack of express legislation on interpretation of contract is that the rules on formation of contracts are used to determine the content of the contract. Of course the formation of contracts is closely related to the content of the contract, but to use the offer-and-acceptance-model for interpretation necessarily requires detrimental fictions.

In NJA 1980 s 46 the crucial question was whether standard terms had become part of a contract. The lawyers put enormous emphasis on the exact point in time when the contract was concluded; during the oral meeting, when a following letter was sent or when one party started to perform the contract. The

3 NJA 1981 s. 269, NJA 1985 s. 178, NJA 1989 s 614, NJA 1996 s 410, NJA 1997 s 5, NJA 1999 s 575.

idea was that by determining the exact time for formation and to see whether the reference to the standard terms was made before or after this exact point in time, it would automatically follow whether the standard terms were incorporated. The Swedish Supreme Court refrained from such reasoning and instead generally stated that a contract containing the standard terms was deemed to have been concluded due to the parties' behaviour. Despite the Supreme Court's wise reasoning, there is still a widespread misunderstanding among practising lawyers as to the importance of the exact point in time of formation of contracts.

I claim that a reason for this misunderstanding is the lack of legislative guidance to practitioners. It would be most useful to direct the lawyers' attention to chapters in legislation on interpretation of contracts and incorporation of standard terms instead of only providing the present rudimentary chapter on formation of contracts by means of offer and acceptance.

4 The Scandinavian Method of Inventing General Contract Law Principles

The Contract Act leaves us with many gaps, i.e. problems not solved by legislation. For some of these areas, fictions cannot be elaborated (or at least have not so far been elaborated…). The gaps in Scandinavian contract law legislation are often filled out with "general principles of contract law".

It is one thing to extrapolate from a general article in legislation (such as Treu und Glauben in German law). But since Scandinavia lacks general provisions of that kind, the source of general principles are only to be found in academic writings. Since academics often disagree and due to scarce case law, we are left with a high degree of uncertainty.

I will here give some examples of uncertainty in Scandinavian contract law.

4.1 Liability for Damages in Case of Breach of Contract

As stated above, there is no legislation on the effects of breach of contracts (apart from legislation on a few special contracts). It is uncertain in Swedish law whether negligence (culpa) is a prerequisite for damages in contract law or whether the liability for damages is strict and applies irrespective of negligence.[4] It is of course unsatisfactory that such a fundamental question does not have a clear answer in Swedish law. It would be desirable that legislation provided express guidance.

4.2 Dolus and Culpa in Contrahendo

There is no express legislation on the liability for negotiations in bad faith. The Tort Act stipulates that damages for pure economic loss are granted if caused by

4 J Hellner, *Speciell Avtalsrätt*, 2a häftet, 1996 s 196 (who is very well respected) states that firm principles hardly can be established. J Ramberg & C Ramberg, *Allmän avtalsrätt*, 7e ed 2007 p 235, claim, with some precaution, that the general principle is that damages does not require negligence.

a criminal act. This provision is, however, not exhaustive.[5] In case law we may vaguely trace a liability for negotiations in bad faith (dolus) and even - maybe - a liability for negligent bad faith (culpa).[6] In doctrine there seems to be general consensus that there is a general principle in Swedish law that negotiations in bad faith may constitute liability for damages.[7] The exact contours of this liability are, however, uncertain. It would be most desirable for legislation to provide more certainty.

5 The Present Situation from a Democratic Point of View

After the experimental 20th century concerning different political models, there seems to be general consensus in Scandinavia that market economy is preferred to plan economy. The most important tool to accomplish market economy is contracts and consequently contract law has become increasingly important.

It is surprising that the Scandinavian countries have not demonstrated any interest in modernizing their Contract Act despite its shortcomings and despite the increased societal importance of contracts. It is as if the Contract Act is holy and untouchable. An explanation may be that its drafters honoured the idea of market economy and that they deserve to be sanctified since they turned out to be right. If 'legal sanctification' is deemed necessary (which I put into question) I would, however, prefer to sanctify the drafters personally and not to let this sanctification cover also the undeveloped product of their ideas. It could in some cases be meaningful to worship dead persons, but hardly their bones…

As explained above, the consequence of the insufficient Contract Act is that it must be supplemented. Most of this supplementation is being made by academics. In the Scandinavian democratic systems, academics have no formal position. I claim that the contract law professors in Sweden (including myself) exercise too much power. I do not say that we are ill willed and greedily grabbing for power. Rather, we appear to try to be responsible and develop the law in appropriate ways. Still, I am amazed that the Scandinavian Parliament is willing to give away power with respect to the most important tool in a market economy - the contract – to professors not being authorized by democratic means.

Another democratic problem with the Scandinavian contract law is that nobody can be certain about its content. This is the reason for the title of this paper; the hidden secrets of Scandinavian contract law. A practicing lawyer or a citizen cannot get access to contract law by studying legislation. He must read academic writings and these writings do not always concur. Furthermore, the

5 J Kleineman, *Ren förmögenhetsskada särskilt vid vilseledande av annan än kontraktspart.* Stockholm 1987.

6 NJA 1963 s 105, NJA 1973 s 175, NJA 1978 s 147, NJA 1990 s 745.

7 A Adlercreutz, *Avtalsrätt I*, 12 uppl 2002, p 113 ff; Hj Karlgren, *Avtalsrättsliga spörsmål*, 2 uppl 1954, s 83 ff; J Hellner, *Kommersiell avtalsrätt*, 4 uppl 1993 p 38; J Kleineman, *Skadeståndsgrundande uppträdande vid avtalsförhandlingar*, JT 1991–92 s 132, J Ramberg & C Ramberg, *Allmän avtalsrätt*, 7 uppl 2007, ch 4.1.

academic writings accumulated over the last century are quite extensive. Consequently, he must read a lot of academic writings and finally assess by himself the probable content of present contract law. The inaccessibility of law is a democratic problem. Of course it is impossible to cover by legislation all problems that may occur in a democratic state, but I argue that increased transparency is vital for the important area of contract law.

6 The Present Situation from a Business Point of View

Due to the uncertain content of Scandinavian contract law many contracting parties in international contracts choose other national law as the applicable law. This trend is reinforced by many states now modernising their contract law and making it more attractive (c.f. The Netherlands, Germany, France and the many former East European states). Thereby Scandinavian businessmen may be in a detrimental situation when a conflict occurs, i.e. not being able to rely on their own law.

The reluctance to choose Scandinavian law as the applicable law leads to fewer disputes being solved in Scandinavia. This in turn causes Scandinavian providers of legal services (mainly advocates and arbitrators) to loose opportunities. If Scandinavia wishes to be attractive for dispute settlement (arbitration) and to develop international legal competence and a strong sector for legal services, it is necessary to establish better certainty about the content of Scandinavian contract law.

The structure of legislation has a great influence on lawyers' way of thinking. The old fragmentary Contract Act detrimentally steers the problem solving analysis of academics and practitioners. Instead of providing useful tools for problem solving, the Contract Act gives rise to strained ways of reasoning that are foreign to modern business practices. Swedish contract law is not serving its most fundamental function; to facilitating contractual transactions. Instead it has a detrimental adverse effect.

7 The Way Forward

Since I began this paper with Shakespeare, I will end with Shakespeare. I have chosen a scene were Brutus urges his men to take action. The addressed men obviously symbolize the Scandinavian legislators. The action referred to is the translation, minor modifications and legislation of the Principles of European Contract Law.[8] These Principles address all the current problems in modern contract law in a straight forward, easy accessible manner.

8 O Lando & H Beale, *Principles Of Eureopan Contract Law*, Parts I and II, 2000.

> There is a tide in the affairs of men,
> Which taken at the flood, leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and miseries.
> On such a full sea are we now afloat;
> And we must take the current when it serves,
> Or lose our ventures.[9]

Reading this quote makes me forget the rotten smell of death as I breathe the fresh sea breeze and see the hope of a prosperous future for Scandinavian democracy, business and law.

9 Shakespeare, *Julius Caesar*, Act 4, Sc. 3.