

Pro-active Comparative Law: The Case of Nordic Law¹

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1 Introduction

For the past fifty years, the *Scandinavian Studies in Law* have been a shining example of pro-active comparative law. What is pro-active comparative law? In this paper I will use this newly coined term to denote the phenomenon of making accessible one's own legal system to a foreign audience. The 'mere' description of one legal system is often somewhat disparagingly referred to as *Auslandsrechtskunde*. Usually, what one then has in mind is the description of a *foreign* legal system - hence the *Ausland* - for an audience in one's own legal system. In the case of pro-active comparative law, the notion of *Inlandsrechtskunde* would perhaps be a better description for the reverse process. 'Pro-active comparative law' however seems to be preferable because it does convey a sense that in order to get across to a foreign audience, a real comparative effort must be made.

In this paper, I want to explore the aims and means of pro-active comparative law, from a Scandinavian point of view. It seems highly appropriate for this issue of *Scandinavian Studies in Law*, because it is precisely by engaging in pro-active comparative law that Scandinavians have contributed to adding a dimension to comparative law. I will briefly set out this central theme in Nr. 2 below. I will then explore the aims of pro-active comparative law (Nr. 3) and by way of example look into § 36 *Avtalslagen* (Nr. 4) and the Nordic *grupptalan* or class action (Nr. 5). The Scandinavian languages are generally not readily understandable for a foreign audience, which makes a linguistic effort indispensable in order to get them across abroad. Not all small nations³ have to cope with this problem, witness the linguistic free riders which have a 'big' language as native tongue (Nr. 6). This brings us to the means of pro-active comparative law and the question who bears the responsibility for this effort (Nr. 7). I will end this paper with some conclusions (Nr. 8).

Although my argument is supposed to be valid for all of Scandinavia, I am aware of the fact that my knowledge is basically founded on Swedish law.

The paper builds in part upon an earlier essay written for a Scandinavian *Festschrift*.⁴ The adjective 'pro-active' has to my knowledge not been used with regard to comparative law before. However, it is not novel in legal circles. Actually, the word has recently been introduced for what until some time ago was and still is called 'preventive law'. It was used more especially in a workshop which was held in

3 It would never have occurred to me to consider Sweden, with its large chunk of land, as a 'small nation', but actually I was once invited to a colloquium organised by the University of Stockholm precisely on 'Legal problems of small states' (1979). Jan Hellner explained the idea of the colloquium in the following words: 'Small states have legal problems which are not found - at least not to a comparable extent - in bigger states. Most conspicuous is perhaps the scarcity of precedents, which makes development through case law much slower and more uncertain than in countries like the United States, England, France or Germany. Legal science is also limited by the comparatively small number of academic lawyers (...). For legislation, harmonization with the laws of other countries is often desirable, both because of the practical need of having rules similar to those of important business partners and for the purpose of getting impulses from other countries' (p. 1).

4 Hondius, Ewoud, *Legal transplants: the case of Sweden*, in: Essays in honour of Bill Dufwa, Jure, Stockholm 2006, p. 575-579.

Stockholm in 2005, the proceedings of which have been published in *Scandinavian Studies in Law 2005*⁵.

2 What is Special About Scandinavian or Nordic Law?

What is special about Scandinavian law?⁶ Within Scandinavia there are various views. Ole Lando sees neighbourhood, nature, history, languages, religion and the special Nordic mentality and common legal habits as a ground on the basis of which it is possible to say that Nordic law is a legal family in the true sense of the word.⁷ Some argue that Scandinavian law occupies a special place between civil and common law.⁸ Jacob Sundberg has firmly refuted this idea.⁹ Scandinavian law, whether it is because of the influence of Roman law,¹⁰ the influence of French and German doctrine, or its codification, does belong to the civilian tradition, according to him. An intermediate position is taken by Zweigert and Kötz who are of the opinion 'that it would be right to attribute the Nordic law to Civil Law, even though, by reason of their close relationship and their common "stylistic" hallmarks, they must undoubtedly be seen to form a special legal family, alongside the Romanistic and German legal families'.¹¹

It is on the other hand correct to assume that because of their knowledge of the English language and the close co-operation between Scandinavian and English-

5 Wahlgren, Peter (Ed.), *A Proactive approach Scandinavian Studies in Law*, Stockholm University, Stockholm 2006, p. 465.

6 See Andersen, Camilla Baasch, *Scandinavian law in legal traditions of the world*, *Journal of Comparative Law* 2006, 140-141; Bogdan, Michael, *Comparative law*, 1994; Husa, Jukka, Kimmo Nuotio & Heikki Pihlajamäki (Eds) *Nordic Law – Between Tradition and Dynamism*, Intersentia, Mortsel 2007, p. 178.

7 Lando, Ole, *Nordic countries, a legal family? A diagnosis and a prognosis*, *Global Jurist Advances* 2001/2, p. 10-11.

8 Malmström, Åke, *The system of legal systems/Notes on a problem of classification in comparative law*, 13 *Scandinavian Studies in Law* 127 ff. (1969). According to the website of the Finnish project 'Nordic law and legal thinking in comparative perspective', 'Nordic law is positioned somewhere in between the worlds major legal families. It has a mixture of features typical to both Roman-German and common law. For instance, while the traditional Nordic lay-based judicial system bears a clear functional resemblance to the Anglo-American jury courts, the "scientific" legal thinking in the Nordic countries has its roots in the German legal thinking of the early modern period and the 19th century'.

9 Sundberg, Jacob, *Civil law and the Scandinavians*, 13 *Scandinavian Studies in Law* 179 ff (1969).

10 Strömholm however observes 'that an element that was extremely important in most of medieval Europe - a body of university-trained lawyers, whose thinking was permeated by Roman models and who came to hold increasingly influential positions on various levels from Naples to Lubeck, from Prague to Nantes - was almost entirely lacking in Sweden until the late 16th century' - Strömholm, Stig (Ed.), *An introduction to Swedish law*, Kluwer, Deventer 1981, I, p. 30.

11 Zweigert, Konrad & Hein Kötz, *Introduction to Comparative Law*, third ed., Oxford: University Press, 1998, p. 277.

speaking academics, there is perhaps more influence of ideas expressed in the English language in Scandinavia than is the case elsewhere in Europe.¹² Another reason may be that the paucity of legal literature - as compared to that in other European nations - forces Scandinavian academics to look for sources in jurisdictions, the language of which is most familiar to them. It is standard practice for explanatory reports accompanying bills to refer to the law in force in the other Scandinavian countries.

There is reason to group together the Scandinavian legal systems in one group or sub-group, because at least in the past they have been active in King-sharing; their languages - with the exception of Finnish - are close; their non-legal cultures are also similar. They all are small jurisdictions which makes it useful to share the development of new statutes, the thinking going into cases (hence the *Nordisk Domsamling*), in legal theory and in doctrinal works and the practice of business codes and the *lex mercatoria*.¹³ Some examples to demonstrate Scandinavian co-operation are in private law: the *allemansrätt*, the consumer complaints tribunals,¹⁴ consumer protection in general,¹⁵ the *lofte* (promise), patient insurance, the *Avtalslag*, and in public law: public access to information, and the ombud(sman). At the institutional level there is the close co-operation within the Nordic Council and the ease - mentioned above - in expressing ideas in English.

At the same time it cannot be denied that the special character of Scandinavian law is diminishing. No longer are Danish, Norwegian and Swedish the only languages spoken in meetings of the Nordic Council. Occasionally English is used, especially when the Finnish participants claim that they cannot understand the Danes. If the trend of using English spreads, other nations - such as the Baltic states - could also participate. The membership of Denmark, Finland and Sweden in the European Union, and the fact that Norway is under an obligation to take over the *acquis communautaire*, also makes Scandinavia less special (as has been the case with Benelux) in the present era than say a decade ago. Even the use of Art. 92 of the Convention on the International Sale of Goods, declaring that Denmark, Finland, Norway and Sweden are not foreign states in the sense of the CISG has

12 Ulf Bernitz also advocates the idea that 'there is probably cause to distinguish, within the continental European family of law, between subgroups, such as a French-Latin legal subfamily and a German, and in doing so it seems correct to regard Nordic law as another such independent subgroup' - Bernitz, Ulf, *European law in Sweden*, Faculty of Law, Stockholm 2002, p. 20.

13 A useful method to analyse where a legal system stands has recently been suggested by Cees van Dam in his paper *European tort law and the many cultures of Europe*, to be published in Thomas Wilhelmsson, Thomas (Ed.), *European private law and the many cultures of Europe*, Kluwer, Alphen aan den Rijn 2007. Van Dam uses the distinction of five cultural dimensions introduced by Hofstede, Geert, *Culture's consequences*, 2d ed. Sage, London 2001: power distance, individualism v collectivism, masculinity v femininity, uncertainty avoidance and long v short term orientation.

14 See *Out-of-Court Dispute Resolution/A Description of the Systems in the Nordic Countries and Spain*, TemaNord 2001:601, Nordic Council of Ministers, Copenhagen 2000, p. 87.

15 See Deichsel, Jan Valentin, *Verbraucherschutz im Lauterkeitsrecht in Skandinavien und Deutschland/Der verhältnismäßige Verbraucherschutz als Eingriffsmaßstab im nationalen und europäischen Lauterkeitsrecht*, PhD Greifswald 2005, Nomos, Baden-Baden, 2006, p. 484.

recently been criticised.¹⁶

And yet the Scandinavians have some legal inventions or experiences which stand on their own and which they are happy to share with others. These include § 36 *Avtalslag* and the *grupptalan*, which by way of example I will look into in the following. But before doing so, the aims of pro-active comparative law will be explored.

3 The Aims of Pro-active Comparative Law

Why is it that countries and their lawyers present their ideas in other languages to foreign audiences? One reason for this, it is sometimes submitted, is purely commercial. London, Stockholm and Zürich all like to have their share in the international arbitration business and in order to get this, there must be a trust that arbitral awards may be executed. In the United States various states have tried to lure corporations to have their domicile on their territory, with the State of Delaware as the well-known winner. However, what has struck me personally is the missionary zeal of many of my Scandinavian - especially Swedish - colleagues. Often they seem truly concerned that the blessings of their national legal system are brought to the knowledge of the international forum. This is well expressed in the missionary statement of the *Scandinavian Studies in Law*;

‘if these studies should succeed in giving the impression that the legal principles, institutions and theory of the small Scandinavian countries are of some interest in themselves, then this yearbook will have fulfilled its purpose’.¹⁷

Missionaries rarely act only for altruistic reasons. This is also acknowledged in Nordic legal writing. As to getting a place on the map, Folke Schmidt writes: ‘The Scandinavian who writes in his own language remains perforce outside the general exchange of ideas, and any contribution which he may claim to have made will neither get the salutary testing which international scrutiny alone can give nor receive attention in subsequent international discussion’.¹⁸ This is also necessary, because when left to outside forces, Nordic law does not always receive a prominent position. The recent *Oxford Handbook of Comparative Law* contains chapters on the development of comparative law in France, in Germany, Switzerland and Austria, in Italy, in Great Britain, in the United States, in Central and Eastern Europe, in East Asia, in Latin America, and on Islamic (Middle Eastern) legal culture and African customary law, but nothing on Nordic law - nor for that matter on the Benelux countries, China, other common law jurisdictions, or the Iberian peninsula, to be fair.¹⁹

16 See Lookofsky, Joseph, in: Franco Ferrari (Ed.), *The 1980 Uniform Sales Law/Old issues revisited in the light of recent experiences*, Sellier, München/Giuffrè, Milano 2003, p. 95-127.

17 Schmidt, Folke, Preface *Scandinavian Studies in Law 1957*, Stockholm Institute for Scandinavian Studies, Stockholm 1957, p. 6.

18 Folke Schmidt, *o.c.*, p. 5-6.

19 Reimann, Mathias and Reinhard Zimmermann (Eds.), *The Oxford Handbook of Comparative*

I would suggest that in between purely commercial reasons and altruistic motives there are other arguments for making one's law known abroad. An argument related to the altruism is the scientific point. If legal science is indeed a science, legal scientists owe it to their science that they report on their findings and their sources, the latter including legislation, cases and doctrinal works from their own jurisdiction. They owe this also to the regional community to which they belong: in the case of Sweden the Nordic Council and the European Union, but also to broader and perhaps less intensive efforts at co-operation such as the Council of Europe, the International Labour Office, the United Nations and their various Agencies, the World Health Association and the World Trade Office. The availability of materials from jurisdictions with a 'small' language will enable such international organisations to take heed of such materials. This can become important when directives, regulations, recommendations or treaties are being prepared. The availability of English-language materials will enhance the influence of small jurisdictions.

4 By Way of Example: § 36 Avtalslagen

The Nordic countries may not have a Civil Code, but they do have statutes, often common in substance. A fine example is the Nordic Contracts Act, which entered into force in Sweden (1915), Denmark (1916), Norway (1918) and Finland (1929). At the occasion of the nineteenth birthday of its first enactment,²⁰ a volume containing 37 essays - plus one added essay, by Kåre Lilleholt - was published.²¹ The essays have in common that they deal with one particular question from the point of view of a particular case. Four parts of the Contracts Act are discussed: scope of application and offer and acceptance, agency, illegal juristic acts and general provisions. These four parts are preceded by an essay by Ole Lando on the *Principles of European Contract Law* and followed by a sixth part on interpretation and a notion which was developed outside the Contracts Act, the *förutsättningslära* (frustration). In this paper I will only mention the essays dealing with § 36 *Avtalslagen*. This provision is one of very few added later, but at the same time a very important addition, empowering the court to intervene in a contractual relationship. When some thirty years ago § 36 was introduced, some feared it would undermine *pacta sunt servanda*,²² but in academic circles it was widely expected to play only a minor role. This latter expectation has proven incorrect. There is by now quite some case law, which has also attracted doctrinal attention. At the end of this paragraph I

Law, Oxford: University Press, 2006, p.1430.

20 The Scandinavians have some notoriety for their choice of dates to celebrate, such as ninety years of existence of a statute or one hundred years for a tribute to an esteemed jurist: *Festskrift till Gösta Walin/på ethundraårsdagen den 30 november 2002*, Norstedts Juridik, Stockholm, 2002 (the addressee did not live to see the book, but he was shown the proofs in time).

21 Flodgren, Boel *et al.* (Eds.), *Avtalslagen 90 År/Aktuell nordisk rättspraxis*, Norstedts Juridik, Stockholm 2005, p. 498.

22 Norlén, A., *Oskälighet och 36 § avtalslagen*, Acta iuris Lincopensis, Linköping 2004.

will set out why the Scandinavian experience with a general clause such as this may be of interest in a European - and perhaps global - context. I have opted for discussing § 36 *Avtalslagen* on the basis of a single book rather than on a full-fledged research, assuming that the cases dealt with in the book are representative of the case-law at hand.²³

Two essays in the *Festskrift* deal with exemption clauses. Vibe Ulfbeck²⁴ discusses the exemption clause in a contract with a parachute jumping company.²⁵ For his thirtieth birthday, friends had given A a parachute jump. In the jump, the instructor who jumped in tandem committed an error which cost the instructor his life; A was injured. Before the jump, A had to sign a contract which exempted the jumping company from any liability. His claim was rejected. According to the Danish court, this was not a consumer case but a sporting case. Also it is well known that parachute jumping may be dangerous. The exemption was therefore considered valid.

Dan Lindmark²⁶ returns to a Swedish *cause célèbre*, the Bergman & Beving case,²⁷ in which a filling station claimed economic damages from the supplier of defective petrol pumps.²⁸ The pumps showed prices which were too low. In a well reasoned decision the claim was denied, among others upon the ground that the exemption clause was part of allegedly bilateral standard contract terms. The *Högsta Domstolen* also pointed out that a clause such as this one is allowed under the Swedish Consumer Sales Act, so why should it not be valid vis-à-vis a small enterprise?

Three of the essays deal with insurance cases. Bertil Bengtsson analyses a Swedish case from 1992.²⁹ A hotel owner had insured his premises against the risk of fire. According to the policy, no coverage was given during the period when the premium remained unpaid. While the payment of the premium was underway, the hotel burnt down. The insurance company denied the owner's claim of SEK 20 million, but in the highest instance the hotel owner was awarded this amount.³⁰ However, it was a neck to neck race, the owner collecting 3 out of the 5 votes in the Swedish Supreme Court. The commentator raises the question whether or not an

23 For an academic discussion of § 36 *Avtalslagen* in the various Nordic countries see Bernitz, Ulf, *European Law in Sweden*, University of Stockholm, 2002, p. 241-272, with further references, to be supplemented by Alessi, Dario *Unfair contractual advantage in Finnish and Italian law/A comparative analysis*, in: 5 TLJ 3-33 (2003).

24 Ulfbeck, Vibe, *Fortolkning af ansvarsfraskrivelser/Eksempler fra traditionel og utraditionel transportret*, in: *Avtalslagen 90 år*, p. 481-498.

25 U 2003.500 O.

26 Lindmark, Dan, *Om jämkning av kommersiella avtal*, in: *Avtalslagen 90 år*, p. 281-294.

27 *NJA* 1979, p. 483. See also Bernitz, *o.c.*, at p. 258-260.

28 The case was already discussed by Hellner, Jan, *Consequential loss and exemption clauses*, 1 *Oxford Journal of Legal Studies* 13, 34 (1981).

29 Bengtsson, Bertil, *Försäkringsavtalet och 36 § Avtalslagen*, in: *Avtalslagen 90 år*, p. 155-163.

30 *NJA* 1992, p. 782. See Ramberg, Christina, 4 *European Review of Contract Law* 506, 510-511 (2006).

injunction against the use of clauses as the one in question would not be more effective. Thomas Wilhelmsson³¹ analyses a Finnish case³² where a globetrotter claimed damages from his travel insurance company. In Kenya, the traveler suffered an accident for which he needed hospital treatment. He then wanted to return home but in the absence of flights he continued his tour according to schedule to the Seychelles. Upon return he claimed compensation for the days spent in hospital as well as the days after the failed return journey. In first and second instance, the traveler was put in the right, but in final instance the Finnish Supreme Court overturned this verdict and denied the claim.³³ Wilhelmsson thinks the reasoning of the high court absurd, but apart from the case at hand he considers it fitting that the court gives a more thorough motivation when applying a general clause such as § 36. Ola Svensson also discusses an insurance case.³⁴ After a musical rehearsal, Mats E. and a friend rode home with the car of Mats. When unloading the friend's musical equipment, the car was left unattended for some 15-20 minutes. During this period, Mats' musical equipment was stolen. The policy was not entirely unequivocal as to the question whether or not it did cover objects which could be observed from outside the car. In both the first and second instance, Mats' claim for compensation under the policy was rejected, but before the Swedish *Högsta Domstolen*, Mats prevailed and the insurance company had to pay.³⁵

Bernhard Gomard³⁶ discusses a Danish case from 1991 about a provision in the statutes of an association of home owners.³⁷ Jesper Lau Hansen³⁸ also analyses a Danish case, this one from 1998. It involves the applicability of § 36 to the protection of minority shareholders.³⁹ Gunnar Karnell⁴⁰ discusses a Swedish case from 1976 as to the disentanglement of the cooperation between the artist Lars Carlsson and the publisher Axel Eliasson AB.⁴¹ Hannu Honka⁴² deals with a Finnish transport case.⁴³ Sacharias Votinius⁴⁴ discusses a reported case,⁴⁵ but in fact deals

31 Wilhelmsson, Thomas, *Jämknings av försäkringsavtal - inte lätt att hitta rätt*, in: *Avtalslagen 90 år*, p. 349-361.

32 *HD* 1993:18.

33 *HD* 1993:18.

34 Svensson, Ola, *Tolkning och bristande finhet*, in: *Avtalslagen 90 år*, 461-479.

35 *NJA* 1988, p. 408.

36 Gomard, Bernard, *Rimelighed og god skik? Bunden eller fri retsdannelse og fortolkning?*, in: *Avtalslagen 90 år*, p. 205-227.

37 *U* 1991.4H.

38 Hansen, Jesper Lau, *Anvendelsen af aftalelovens § 36 på vedtaegter*, in: *Avtalslagen 90 år*, p. 267-279.

39 *U* 1998.281 H.

40 Karnell, Gunnar, *Svea Hovrätts dom den 24 april 1989, NIR 1989 S 394*, in: *Avtalslagen 90 år*, p. 261-265.

41 *NIR* 1989, p. 394.

42 Honka, Hannu, *Transporträtt - avtalsrätt*, in: *Avtalslagen 90 år*, p. 233-241.

43 *HD* 1993:166.

with the battle between two notions of contract: contract as promise ('löfte') and contract as cooperation ('vänskap'). Finally, the volume contains two essays on the relation between § 36 and the *förutsättningslära*, the Nordic version of the *clausula rebus sic stantibus*: Boel Flodgren⁴⁶ and Bert Lehrberg⁴⁷ engage in a battle in this regard. What is remarkable in a number of cases is that they involve the protection of small and medium businesses, which in Western Europe often fall outside the protective provisions which are usually limited to consumer protection.

This brings me to the point what Europe's non-Nordic nations may learn from the Nordic experience with § 36 *Avtalslagen*. All EU member states and prospective member states have legislation in force as to unfair terms in consumer contracts. The directive on unfair contract terms clearly belongs to the *acquis communautaire*. Carefully left outside the judicial control mentioned in this directive are 'the definition of the main subject matter of the contract' and 'the adequacy of the price and remuneration, on the one hand' as against 'the services or goods supplied in exchange, on the other' (Article 4 (2)). There is a contradiction between on the one hand the continental European outcry over the British for their reluctance to accept these legal irritants, the general norms, and on the other hand their own fear for the *iustum pretium* doctrine, which would simply extend the assessment of the unfair nature of contract terms to the main subject matter.⁴⁸ The Nordic experience may help continental Europeans in assessing the risks involved in opening the floodgates of good faith.

5 The Nordic Class Action

Another phenomenon in which the Nordic nations may pave the way for Europe is that of class actions. Long feared in Europe for their allegedly devastating effects, class actions are now becoming more popular as a means to solve mass problems in the only effective way, by mass solutions.⁴⁹

Finland and Sweden are the first continental European countries to have introduced a real *class action*. In the *Svensk Juristtidning*, Per Henrik Lindblom, the pioneer of the Swedish Act, discusses the experiences with the *grupptalan* over the first two years.⁵⁰ In this period no more than five such actions were instituted, so

44 Votinius, Sacharias, *Avtalslagens generalklausul och den rättvisebaserade kontraktsuppfattningen*, in: *Avtalslagen 90 år*, p. 335-347.

45 *NJA* 1987, p. 639.

46 Flodgren, Boel, *Förutsättningsläran - ett viktigt komplement till avtalslagen*, in: *Avtalslagen 90 år*, p. 385-401, as to *NJA* 1985, 178.

47 Lehrberg, Bert, *Förutsättningsläran då och nu*, in: *Avtalslagen 90 år*, p. 417-435, as to *NJA* 1981, p. 269.

48 See Nebbia, Paolisa, *Unfair contract terms in European law/A study in comparative and EC law*, Hart, Oxford 2007, p. 225.

49 Micklitz, Hans W. and Astrid Stadler, *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft*, Landwirtschaftsverlag, Münster 2005, p. 1500.

50 Lindblom, Per Henrik, *Lagen om grupprättegång - bakgrund och framtid*, *Svensk Juristtidning*

the floodgates argument against their introduction appears to be unfounded at least so far. Four out of these actions were undertaken by private parties, one by the *Konsumentombudsman*.

As is the case with § 36 *Avtalslagen*, the lesson which continental Europeans can learn from their Scandinavian colleagues is that an apparently perilous institution such as the class action in the hands of a talented judiciary and supported by high quality commentaries⁵¹ can function.

6 Linguistic Free Riders

Although most European jurisdictions do have their own special language or even more than one, this is not always the case. *German* is also the or one of the languages of Austria and Switzerland. *French* is also spoken in Belgium and Switzerland. *English* is the language of the Irish Republic, Scotland and outside Europe in the United States, Canada, Australia and New Zealand, as well as much of Africa and Asia. Not always is it the majority language, for instance in South Africa where English ranks only fourth, after Xhosa, Zulu and Afrikaans. *Portuguese* and *Spanish* likewise serve as the language for most of Latin America. What does this mean for the ideas expressed above? It means that for the jurists in countries with a language which is also spoken in a large jurisdiction, at least the linguistic burden of the translation process is far smaller than for the Danes, the Estonians and the Slovenes. Smaller but not absent. Even countries which share a language sometimes have different legal cultures. A Belgian writer addressing the Dutch forum should be aware of the fact that constitutional review of legislation by the courts is virtually absent in the Netherlands. Even at the level of terminology, there may be differences. ‘Rechtsgeschäft’ in Germany is what the Austrians call ‘Rechtshandlung’. Although I would not go as far as Bernhard Grossfeld in his ‘Macht und Ohnmacht der Rechtsvergleichung’⁵² or Pierre Legrand in his various publications, who both stress the difficulties of comparing to such an extent that this serves as disincentive to engage in it, still some caution is needed.

7 Means of Pro-active Comparative Law

How may the actors in the legal arena contribute to pro-active comparative law? The various actors may be distinguished in several ways, but the most useful distinction seems to be to look at the source of law to which they contribute. A good example of pro-active comparative law in legislation is the way in which Swedish legislation is translated into English⁵³ and in which the Swedish reports

2005, p. 129-191.

51 Here I am especially thinking of the many other publications of Per Henrik Lindblom.

52 Grossfeld, Bernhard, *Macht und Ohnmacht der Rechtsvergleichung*, Mohr, Tübingen 1984, p. 227.

53 See *Swedish Commercial Legislation*, Norstedt, Stockholm, looseleaf with chapters on

preceding government bills are (almost?) always accompanied by English language summaries. This is by no means a simple exercise. If we accept the idea that Nordic law basically is a classical civil law system - and not something in between the civil and the common law - the translation of Nordic notions into English will be a difficult task. It is not just a question of terminology and grammar: style, the referral to precedents⁵⁴ and to parliamentary proceedings⁵⁵ may also be stumbling blocks. It is for this reason that good training in translation is indispensable.⁵⁶

It is a mistake to think that only nations with 'small languages' are in need of such English language summaries. Of the two other European nations with great traditional languages and a powerful legal culture, Germany has been the first to realise that German is no longer at a par with English and that therefore English translations of its legislation may be useful.⁵⁷ France has only recently been woken up by Bénédicte Fauvarque-Cosson who has warned that not translating French law will result in its losing ground in the European legal discourse.⁵⁸ Before one now proclaims that the French *language* is going to lose ground, it may be useful to see this in historical perspective: at the time of the French revolution out of a population of 25 million 6 million spoke no French at all, 6 million had only a basic notion, 10 million spoke it reasonably well and not more than 3 million fluently.⁵⁹ And what about the English-language jurisdictions? They too might engage in pro-active law, either by focusing on the Chinese or on recipient nations which share the common law without always following what is coming to London from the EU.

So far I have been focusing on the text of the law. As we have just seen, it is also the parliamentary history which in countries such as the Nordic nations is of primary importance when interpreting the law. This has even been recognised by the European Court of Justice, when it did not condemn Sweden for failure to transpose the Unfair contract terms directive, because it had taken up the directive's

Company Law, Contract Law, Consumer and Sales Law, Credit and Secured Interests, Price, Competition and Marketing, Finance and Securities Law, and Miscellaneous. See also the translated legislation on the Government home page "www.sweden.gov.se".

54 See my report 'Precedent and the law', in: Boele-Woelki, Katharina and Sjef van Erp (Eds.), *General reports of the XVIIth congress of the international academy of comparative law*, Bruylant, Brussel/Eleven, Utrecht 2007, p. 31-50.

55 See my paper '*Looking at Hansard's: should courts be allowed to switch on the light?/some observations on constructing statutes in the light of their parliamentary history*', in: Brzozowski, Adam, Wojciech Kocot, Katarzyna Michalowska (Eds.), *W kierunku europeizacji prawa prywatnego/Księga pamiatkowa dedykowana profesorowi Jerzemu Rajskiemu - Towards Europeanization of private law/Essays in honour of Professor Jerzy Rajski*, Beck, Warschau 2007, p. 111-118.

56 Pommer, Sieglinde, *Rechtsübersetzung und Rechtsvergleichung*, PhD thesis Vienna 2003, Lang, Frankfurt 2006, p. 172.

57 The 5,000 statutes and decrees translated on the website "www.gesetze-im-internet.de" include the *Bürgerliches Gesetzbuch* (Civil Code).

58 Fauvarque-Cosson, Bénédicte and Sara Patris-Godechet, *Le Code civil face à son destin*, La documentation française, Paris 2006, p. 262.

59 Mattila, Heikki E.S., *Comparative legal linguistics*, Aldershot: Ashgate, 2006, p. 189 (translated from the Finnish).

black list of clauses in the *travaux préparatoires*.⁶⁰

Something which is perhaps lacking even more is rendering case-law accessible through translation. Because Nordic cases usually are rather short, this should be no major problem. Fortunately, specific volumes such as the Yearbooks on Tort Law published by ECTIL⁶¹ and recently the Digest of European Tort Law⁶² do provide us with summaries in English on Nordic tort law cases. But occasionally, unabridged cases will also be welcome. The importance of this can be demonstrated by developments in England, where the House of Lords over the past decade has taken the lead as among Europe's high courts in taking on comparative law. This has been made possible among others by the translations of German case-law by Basil Markesinis.⁶³

What about doctrinal works? Here we see that Nordic authors do quite well. First, they have profited from annual publications such as the *Scandinavian Studies in Law* and yearbooks in more specific areas such as European Law,⁶⁴ which offer the possibility of English-language translations.⁶⁵ Second, many present-generation Nordic academics are so fluent in English, that they have no problem in using that language for writing purposes.

A fourth source of law is made up of customs, usages, standard form contracts, and the like. Here, commercial insight dictates that English translations should be available, or else parties will simply not refer to Stockholm for arbitration or to Swedish law as the relevant law.

So far, I have referred to English language texts - translations and otherwise - about Nordic law. Another, less costly but also less effective means is making available an overview of publications on Nordic law written in other languages, especially English, French and German. Such were the overviews of publications on Danish,⁶⁶ Finnish,⁶⁷ Norwegian and Swedish⁶⁸ law, which *Scandinavian Studies*

60 ECJ 7 May 2002, C-478/99. It is a pity that in this case Sweden was not supported by a country such as the Netherlands, where parliamentary history also plays a major role on legislative interpretation.

61 The last one published before this paper went into the press was Helmut Koziol and Barbara Steininger (Eds.), *European tort law 2005/Tort and insurance law yearbook*, Springer, Vienna, 2006, p. 707.

62 Winiger, Bénédicte, Helmut Koziol, Bernhard Koch, Reinhard Zimmermann (Eds.), *Digest of European Tort Law, I: Essential cases on natural causation*, Springer, Vienna, 2007, p. 632.

63 Markesinis, Basil S., Hannes Unberath, Angus Johnston, *The German law of contract/A comparative treatise*, 2d ed., Hart, Oxford, 2006, 979 p.; Basil S. Markesinis, Hannes Unberath, *The German Law of Torts*, 4th ed., Hart, Oxford, 2002, p. 1050.

64 See the *Swedish Studies in European Law*, edited by Wahl, Nils and Per Cramér (Hart, Oxford, volume 1, 2006-).

65 See also Bogdan, Michael, *Swedish Law in the New Millennium*.

66 Haukaas, Kaare, *Norwegian legal publications in English, French and German (1884-1965)*, *Scandinavian Studies in Law* 1966, p. 239-342, and (1966-1976), *Scandinavian Studies in Law* 1977, p. 257-293.

67 Schaumann, Henrik, *Finnish legal publications in English, French and German (1957-1977)*, *Scandinavian Studies in Law* 1980, p. 233-286. See for the preceding period Reinikainen,

in Law carried until 1980, when it unfortunately abandoned this service. Fortunately, reverse publications are now available, which quote all publications on foreign law in a particular language such as German.⁶⁹

What may also be useful is a guide how to translate certain legal and institutional terms into English and other languages.⁷⁰ An example is the Dutch pin yin report. The idea was born when it was found that the lowest law court in the Netherlands was varyingly referred to as cantonal court, *juge de la paix*, magistrate's court and sub-district court. It was feared that foreign readers might mistake these names standing for different courts. The result has been a publication of the Netherlands Association for Comparative Law, which is now widely used by legal translators.⁷¹

8 Conclusion: Towards a Pro-active Comparative Test

European draft directives nowadays always are accompanied by a statement of the costs. One sometimes fears that this is the result of a fad of a decade ago, which still requires an extensive effort without anyone really bothering. I do not share this fear: I think it is useful that the lawmaker reflects upon the possible costs to society of the contemplated legislation. Likewise, national legislators would be wise to include in their bills a paragraph dealing with the comparative law aspects: the place the bill occupies within the European circle of legal systems, the use which the legislature has made of comparative law and the prospects for this piece of legislation of serving as a model for other jurisdictions, including that of the European Union, and the ways the government will follow to actively promote this. Scandinavians, as so often in pro-active comparative law, may take the lead.

Veikko, *English, French and German literature on Finnish law in 1860-1956*, Library of Parliament, Helsinki 1957, 179 p.

68 Frykholm, Lars, *Swedish legal publications in English, French and German 1935-1960*, *Scandinavian Studies in Law* 1961, p. 155-217, and (1961-1971), *Scandinavian Studies in Law* 1974, p. 235-309.

69 Von Bar, Christian (Ed.), *Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache*, 2006, 607 p., with over 25,000 references to German language doctrinal works, cases and expert opinions about over 300 jurisdictions (the three major ones are Private international law, property law and civil procedure).

70 Apart from the traditional legal dictionaries such as Lindberg, Ernst, *Fyrspråkig juridiskordbok*, Juridik & Samhälle 1995, p. 622.

71 Van Erp, J.H.M. (ed.), *Nederlandse rechtsbegrippen vertaald/Frans-Engels-Duits*, third ed., The Hague, 2006, p. 89.