

# The Duty to Notify with Respect to Adviser Liability

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## 1 Introduction

The structure of the rules on notifications concerning defects in the Swedish 1990 Sale of Goods Act is unsatisfactory.<sup>1</sup> The act not only contains a series of different provisions concerning notifications of defect that in certain cases are cumulative and in others almost parallel, and also not entirely logical. The complexity of these regulations decreases predictability in an area in which predictability is of the greatest significance, as the risk for legal losses is palpable in the event of a late notification of defect. That parties in commercial relationships attempt to create their own contractual regulations that are viewed as more manageable than the gap-filling statutory regulations is therefore understandable. However, there is risk that the party taking the “lead” in drafting any agreement may create regulations that are simpler to apply than the act’s regulations but perhaps may also increase the risk for legal losses.

As the 1990 Sale of Goods Act often is seen as analogous legal source for types of contracts other than the sale of goods and intangible property, the question then becomes whether such a complicated regulative framework as that existing in the act’s provisions concerning notifications of defect can and ought to be treated analogously,<sup>2</sup> particularly as the provisions concerning notifications of defect, in the same manner as the regulations concerning the statute of limitations, ought to be interpreted restrictively.

A legal area receiving increased practical significance in recent years is the provision of professional advice. The absence of a general Swedish civil code and the uncertainty with respect to the general significance that sales law can be assumed to have as a legal source in the field of property law, however, have here the consequence that – despite the fact that the provision of professional advice in many ways differs from a purchase transaction – the provisions in the Sale of Goods Act concerning notifications of defect in many ways become normative. One must, however, take into consideration that a commission to provide advisory services often has consumers as purchasers, entailing reason to also take into consideration the specific consumer protection legislation.

## 2 The General Principle

That a general principle exists as to an obligation to notify as to a defect in the event of a breach of contract ought to be undisputed.<sup>3</sup> How far this duty to notify extends, and in which situations it has legal consequences, however, are aspects that are disputed. When it comes to the liability of professional advisers, added to this must be that this field was entirely unregulated for a long time and the case law is sparse. Consequently, whether any duty to notify

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1 See, for example, Håstad, T. *Köprätt – och annan kontraktsrätt*, 6th ed. 2009, p. 105.

2 Håstad, among others, questions whether – and in such a case, to what extent – the Sale of Goods Act is normative within the “unregulated areas of contract law.”

3 See Rodhe, K., *Obligationsrätt*, 1956, p. 204.

within such contractual relationships actually exists could be questioned. As developed more closely below, there are statements in the case law today that cannot be interpreted in any manner other than that the Swedish Supreme Court must be seen as having completely accepted the idea that a duty to notify exists on general legal contractual grounds.

However, it is not simply the absence of explicit statutory provisions in the area of adviser liability that renders making a more precise statement as to the rules concerning notifications of defect more difficult, but also the issue of which method of legal interpretation ought to be invoked when discussing a client's duty to notify a professional adviser. Here, according to my view, it is suitable to begin from the same point as with the statute of limitations.

The provisions concerning notifications of defect are namely related to the regulations governing the statute of limitations to the extent that they both, at their outermost, concern – as noted initially – principles resulting in the loss of the right to bring a lawsuit. Such regulations normally are interpreted restrictively. Justice Stefan Lindskog is of the opinion that when it comes to the regulations governing the statute of limitations, “statutory interpretation ought not to be carried farther than that the interpreted provision is given a substantive content for which there is semantic support”. Lindskog stops here, citing that which the Swedish Supreme Court stated in NJA 1987 p. 243 as to the question of the starting point for the statute of limitations of a certain type of claim, which was not the date of the execution of the contract where there was not “sufficient” reason for this from a purposive interpretation of the statute of limitations.

Such reasoning, Lindskog determined, could include an “altogether too free legal interpretation”,<sup>4</sup> arguing instead that one first had to attempt through customary semantic statutory interpretation to determine the provision's content in a certain case and thereafter “with the determination of the legal rule (in contrast to the statutory rule) be corrected if sufficient reasons thereto exist.” Lindskog maintained that if well thought-out legislation is in place, there should be greater room for “purposive” methods of statutory interpretation.

No general legislation as to notification of defect exists, and the disparate legal regulations that can be contemplated as objects for an analogous interpretation consequently leave a certain room for purposive assessments. However, they still ought to be applied with certain restrictiveness when it comes to the unwritten rules as to any absolute bar of the right to bring a lawsuit. Against that stated, however, another phenomenon appears when it comes to the interpretation of the rules concerning the loss of the right to bring a lawsuit.

When making an advance assessment of how far these regulations could be thought to stretch, for example, a risk management perspective needs to be taken into consideration. As an incorrect interpretation of the rules, with the accompanying loss of the right to bring a lawsuit, leads to a very great harm, in practice one often begins with the premise that these regulations have

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4 See Lindskog, S. *Preskription*, 3rd ed. 2011, p. 28.

applications broader than those which actually may be the case – as shown afterwards. However, already this uncertainty can result in a general understanding being established as to a rule's broader application, contributing to the rule actually being given a wider application than that which should have been the case with a normal application.

An illustrative example of that stated, and where the state of the law currently still appears in some respects unclear, is the interpretation in arbitration law of the requirement of double objections when a party has objections against arbitration proceedings. The focus here is on the question of whether a party not only must object before the procedural decision is taken “but also immediately after the decision has been issued.”<sup>5</sup> With support in the legislative preparatory works,<sup>6</sup> Prof. Lars Heuman consequently draws the conclusion that “a party must present its objection upon two occasions in order to retain its right to appeal.” According to Heuman, this entails that a “party must consequently reiterate a future objection as to authority after the arbitrators have declared themselves to be legally competent.”

Lindskog has proffered criticism against this view, stating that the idea that a party would, through its passivity, have forfeited its right to appeal if it did not submit double objections would be unnecessary if the party made it clear that it “under no circumstances would accept a negative decision”.<sup>7</sup> The reason for this, according to Lindskog, is that otherwise it would be difficult to “see any good reason for such an order”. Personally, I completely share Lindskog's view, but despite this, however, scarcely anyone – aware of this odd question – would dare to rely on Lindskog's wise analysis, as an omission to submit double objections could result in the loss of the right to bring a lawsuit, a risk to which no one wishes to be exposed. The risk of losing the right to bring a lawsuit perhaps clearly leads to the growth of a system of rules in which the “fear” of a loss of rights is the driving force, and not rationality.

The practical effect of this problem is that after the arbitrators have tried a certain question, issued their decision and thereafter stated that the proceedings are to continue, the arbitration board receives an objection against the decision that normally lacks any significance in the arbitration proceedings. This becomes an empty message but has the objective of guaranteeing that a party's right to appeal is not forfeited. As a message to the arbitration panel, the information in the second objection lacks interest. One already knows the party's stance. Despite this, a system of double “protests” in practice always ought to be applied.

This given example demonstrates several of the difficulties that consequently exist in a legal prognosis concerning the unwritten rules as to notifications. Despite the fact that these rules ought to be interpreted restrictively based on strict purposive assessments, they often however are applied extensively in practice so as to avoid forfeiting the right to bring a lawsuit.

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5 See Heuman, L. *Skiljemannarätt*, 1999, p. 293.

6 See SOU 1994:81, at p. 106.

7 See Lindskog, S. *Skiljeförfarande*, 2005, p. 983 note 257.

### 3 Legal Rules as to a Duty to Give Notice

There are a number of statutory provisions as to notification that can be suitably taken as starting points for an assessment of the unwritten timeframes as to notification. Traditionally – as noted in the introduction – the Swedish Sale of Goods Act has been considered a suitable starting point for analogies as to contract law assessments in the absence of a general private law codification.

Section 32 of the 1990 Sale of Goods Act appears here in the foreground. It states that a buyer who wishes to cite a defect in the goods is to give the seller a notice thereof “within a reasonable time” and this after the party “noted or ought to have noted the defect”. This action is legally defined as a notification of defect. It is stated consequently that the buyer – as a minimum measure – must designate the defect that the buyer wishes to assert.

Professors Jan Ramberg and Jonny Herre state in their commentary to the act that it is not “sufficient that the buyer generally presents complaints of the type that he is anything other than satisfied with the goods and that it does not correspond to his expectations.”<sup>8</sup> This does not mean – these authors further argue – that the buyer is obligated to state in detail what the defect consists of, as often at the relevant point of time the buyer lacks sufficient knowledge to be able to give such a specification. Consequently, it would be sufficient to state “in which manner the defect manifests itself”, since the main objective is to clearly inform the seller as to “what the defect primarily consists of, how it in itself or in which aspect the goods according to the buyer’s understanding deviate from the contracted standard stated”. Professor Håstad, then Justice of the Supreme Court, has stated that from the notice it must be “evident that the buyer believes that the defect exists in a certain determined aspect or, which well is the same thing, that the buyer thinks to hold the seller liable as to certain characteristics of goods”.<sup>9</sup> This can be compared with Article 39 of the CISG (the International Sale of Goods Act) stating that the buyer is to send a notice “specifying the nature of the lack of conformity”.

The explanation for the requirement of a somewhat clear specification or explanation of the defect is that the buyer, through the notice of defect “at least must identify those measures which can come in question in order to inspect or remedy the defect”. It is important that the requirement as to specification is not considered to include an obligation to state at the same time which remedy can come into question. The latter is something that can be postponed until the buyer has received more detailed knowledge as to the measures “that the seller intends to take in order to eventually remedy the defect or redeliver the goods”.<sup>10</sup>

The notification of defect in such cases consequently is usually designated as a “neutral notice” of defect, as when it is given, the buyer does not yet need

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8 See Ramberg, J. (in collaboration with Herre, J.) *Köplagen*, 1995, p. 387.

9 See Håstad, T. *Köprätt – och annan kontraktsrätt*, p. 100. In note 73, Håstad makes an interesting comparison to older case law (NJA 1919 p. 294).

10 See Ramberg, J. *Köplagen*, p. 387.

to state in detail the desired remedy. However, the Sale of Goods Act contains a bothersome complication – particularly if it is to be used as a basis for analogous conclusions – namely that it can become a question of notifying as to a defect up to not less than three times. After the neutral notice of defect, a specific cure notification of defect can follow, or if such does not come into question, a notice of contract termination.

There previously was under § 23 of the Consumer Sale of Goods Act also a corresponding notification rule where the buyer was a consumer, but it was noted in the legislative preparatory works that a “reasonable time according to § 32 of the Sale of Goods Act” generally was not the same according to § 23 of the Consumer Sale of Goods Act, as the time namely ought “to be longer with a consumer purchase than with a purchase between two commercial actors”.<sup>11</sup>

The need for a consumer particularly to consider whether a defect exists and whether it actually could be cited, as well as even the party’s personal circumstances such as temporary impediments like sickness, and according to the legislative preparatory works, even circumstances of a personal character can be attributed “relatively greater significance”.<sup>12</sup> Through a legislative amendment, initiated based on an EC-directive in 2002, nowadays one deems that notice “that is given within two months after that the buyer noted the defect is always to be seen as having been left in the right time.” The uncertainty always united with reasonable time periods consequently therewith has been removed in the consumer arena to a considerable extent.

A requirement as to notification of defect of a corresponding nature can also be found in § 20 of the 1914 Act on Commercial Agents. According to this act, a principal “alleging” that the commercial agent “has demonstrated neglect with the execution of the assignment” has the obligation to “without unreasonable delay” after being noticed as to the proceedings in question giving rise to the neglect, give the commercial agent notice in the event the agent wishes to refute the charge. If the principal misses this deadline, the principal will lose the right to bring a lawsuit on this basis. In the new Act on Commercial Agents that entered into force on 1 October 2009, there is a provision that is tangibly more explicit than that in the 1990 Sale of Goods Act.<sup>13</sup>

The provisions in the Sale of Goods Act, the Consumer Sale of Goods Act, CISG and Act on Commercial Agents consequently are fairly similar. In the context of the liability of professional advisers, however, one also needs to compare the notification rule in § 7 of the Act on Consumer Financial Advisory Services. Despite the fact that this act is mandatory only in relation to consumers, and in addition does not include advisory services other than those

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11 See Herre, J. (in collaboration with Ramberg, J.) *Konsumentköplagen*, 2nd ed. 2009, p. 289.

12 See Legislative Bill 1989/90:89, p. 115.

13 Section 45 states: “An agent or the principal who according to § 35 wishes to terminate the commission agency agreement with immediate effect or according to § 43 requests damages is to notify the other party of this within a reasonable time and at the latest by two years after that he or she has realized or ought to have realized the circumstances that are the basis for the termination or the demand. This is however not applicable in the event that the other party has acted recklessly or contrary to faith and honour.”

defined as financial advisory services, it is fairly self-evident that one may also consider this act when more closely attempting to analyse the general liability as incurred when providing advice.

However, the requirement as to notice here also concerns a duty to submit a neutral notice, as it is stated that the consumer is to “inform the commercial actor if [the financial advice] has caused him or her pure economic losses” within a reasonable time after he or she noted or ought to have noted that the loss had occurred”.

Even though the legislative preparatory works state that a consumer is not to be able to view entirely passively a course of events resulting in the invested capital afterwards decreasing or that unexpected expenses are created or increase, it also appears uncertain here how this period is to be interpreted. The consumer according to the legislative preparatory works is to be “given time for reflection and possibilities to discuss the question with a legal expert.”<sup>14</sup>

As noted in one legal treatise,<sup>15</sup> the length of the notice period must be assessed from case to case. The authors of this treatise appear however to mean that it may not be possible or appropriate to draw an analogy from the two-month period that nowadays exists for other consumers according to the Consumer Sale of Goods Act, against the background of that prices for financial instruments “often are victims of market fluctuations, which makes the service of providing financial advice special”.<sup>16</sup> I do not share, however, these authors’ view that this circumstance renders it uncertain whether guidance for the assessment can be found in the Consumer Sale of Goods Act.

The provision of professional advising expertise is a very qualified service, making it often very difficult for a consumer to evaluate the quality of such, and the idea in the legislative preparatory works that consumers are to be given the possibility to consider these questions as well as consult legal expertise when their own ability is limited to include a true evaluation of the state of the law means that they should be given considerable time for contemplation with this type of consumer service. I have difficulty understanding why this type of consumer does not need at least as much time for contemplation as a corresponding category is considered to need with a consumer purchase. It can take time to first reflect over that which actually has happened, thereafter analyse the significance the adviser has had in this course of events and last, make a legal evaluation.

The natural course then is to conduct discussions with the adviser’s own representatives before invoking the possibility to check with one’s own legal experts. These questions normally are more complex than assessments as to non-conformity with the purchase of goods. Naturally, one first discusses the matter with the party commissioned before hiring additional consultants in the same matter. There certainly is a considerable amount of resistance by

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14 See Legislative Bill 2002/03:133, at pp. 34 and 55, as well as SOU 2002:41, p. 148 and p. 188.

15 See Swahn, M. and Wendleby, B. *Lagen om finansiell rådgivning till konsumenter*, 2005, p. 88.

16 Ibid., p. 89.

consumers against first hiring one consultant and afterwards, when one begins to suspect that the first one did not do that which he ought to have done, hiring an additional adviser for the sake of giving a “second opinion”.

## **4 How Concretely should the “Defect” Noticed be Described to fulfil the Requirements of a Legally Effective Notice?**

### **4.1 Neutral Notices**

When assessing the duty to give notice, a starting point within contract law with respect to the level of detail should be the above-described neutral notice. The absence of a neutral notice results in the loss of the right to bring a lawsuit. The issue then is how concrete this neutral notice must be. If the only remedy that the client can claim is an award of damages, many of the arguments usually raised as support for the duty to give notice with respect to a purchase, for example, the possibility of a cure, etc., are absent. However, it is doubtful whether one can see the matter simply thus.

It certainly is possible that the client’s interest is limited to receiving an award of damages, but a quite early notice can be thought to serve a purpose to the adviser, not simply as a way to better be able to safeguard evidence as to that which has taken place, but also to be able to resort to measures that could minimize the client’s harm in different aspects. This leads to the conclusion, according to my view, that the question of how concrete and detailed the client’s description of any defects in the performed advising is to be should primarily occur from the adviser’s perspective.

However, this cannot be interpreted so that the adviser is to have the right to receive a legally correct description of why the advice deviates from that which the client with reason expected in order for a neutral notice to be seen as correctly performed. As little as the adviser would have an obligation to be satisfied with general complaints or other similar declarations of dissatisfaction as a starting point for the notice period’s calculation, the adviser cannot have reason to expect a legal analysis of by which manner the client is dissatisfied with the quality of the performed assignment. It ought to be sufficient, according to my view, that the adviser understands that the client’s complaint must be seen as a notice, for example, by being related to effects that are triggered and which ought not to have been triggered.<sup>17</sup>

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17 Here a case concerning the tolling of the statute of limitation can also be noted that could be deemed to have an analogous application with notices, namely NJA 2007 p. 9. The case concerned the legal effect of an application for execution in a party’s own name but made by a party other than the creditor. The majority, under the leadership of Justice Håstad, states that in order for a tolling of the statute of limitations to be seen as commenced with respect to a legal action taken by a party other than the creditor, the legal act must have been taken under the commission of the creditor. If such a commission is absent, the creditor must have consented to the measure before the “debtor questioned the authority”. If the party taking the legal act was closely-related to the creditor or if the creditor was prevented from itself guarding its rights, however, this requirement can be waived. The minority – Justice Blomstrand – states in that “accordance with that which the Justice



## 4.2 *Guarantees*

In this context, it must be noted that the now indicated notice requirement ought not to be applicable if the adviser – which certainly is rare but nevertheless can occur – has given some type of guarantee with respect to effect or otherwise has promised some result through the advice which has not been triggered and which neither will arise. As time limited guarantees scarcely ought to come into question with respect to the effects of advice in the meaning that “we guarantee a certain tax effect up to 2 April of 2011 as a result of our assistance with your tax planning”, it appears that guarantees of the type that something should occur during a certain period on the other hand can be made.

However, one can also ask as to defects covered under any guarantees what is applicable according to general principles as to the injured party’s obligation to limit the harm. It therefore can be stated that as an expression of a contractual duty of loyalty, the client should always give notice if the notice can limit the harm. Once again, here we have a fairly unclear and not fully researched issue.

## 4.3 *Criminal Acts and other more Serious Cases of Disloyalty*

The requirement of loyalty that consequently would be applied with guarantees ought not to be maintained according to the principle of the injured party’s obligation to limit the scope of the harm if the adviser has committed an act that is criminal or otherwise in conflict with faith and honour. According to my view, instead that which is prescribed in § 33 of the Sale of Goods Act should have an analogous application with professional advice. There the following is stated:

“Without any impediment of §§ 31 and 32, the buyer may cite that the goods are defective, if the seller has acted recklessly or in conflict with faith and honour”.

Here it should be a question of an unacceptable disloyalty by the adviser, and the behaviour in this respect may be assumed to have a correlation to the deficiencies in performance of the provision of professional advice for which the notice time period can otherwise be assumed to have had.<sup>18</sup> With respect to

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writing for the majority has recommended in his doctoral thesis”, one ought not to require that the legal action also had been taken with the creditor’s commission in order for the legal action to be able to be applicable to the benefit for the creditor, as the latter “almost always” considers the legal action beneficial. An exception can however exist as to such intended main rule. The question that ought to be discussed is whether a tolling of the statute of limitations or notice measure by a third party taken without a commission and which then is presented for the creditor as a business proposition in order to share the economic results of the measure should be accepted. Perhaps it would be best that the measure be taken even if assuming that the creditor forfeited its rights against the debtor to the benefit of the party that has taken the measure, but that this agreement as to such a concession is to be seen as unreasonable if the terminating party hereby may substantially gain higher compensation than that corresponding to the costs for the measure.

18 Compare Ramberg, J. *Köplagen*, p. 400.

the question of content in the requirement as to recklessness, according to my view here one ought not to be able to apply as high a requirement of insight as to the risk for harm that otherwise ought to be applied, for example, within commercial contract law. Professional advice to a high degree is a commission based on confidence, and in accordance with the principle *uberrimae fidae*, I am of the view that recklessness can exist without as high a requirement of insight as to the risk for harm by the party causing the harm as the requirements must be higher with liability for advice than with purchases.<sup>19</sup>

Whether the removal of the requirement of notice within a reasonable time would entail that no notice period can be applied or if general principles as to passivity would be applied, has been the subject of discussion. In the legislative bill to the 1990 Sale of Goods Act, it is hinted that general principles as to the legal effect of passivity then would be applied,<sup>20</sup> however against this Ramberg has stated that according to “Swedish law ...[there] exists traditionally limited possibilities to cite general principles as to passivity as to the loss of rights of different types”.<sup>21</sup> He means that both the terms “recklessness” and “in conflict with faith and honour” may be viewed as giving expression for a serious disloyalty and therefore that it would be reasonable to allow the buyer to bring a lawsuit during the entire ten-year statute of limitations when the question concerns a latent defect, but on the other hand, one would be able to require that the buyer give notice “within a reasonable time” after he has received actual knowledge as to the defect that he wishes to assert.

We have here once again a question in which considerable uncertainty exists as to the state of the law. Personally I do not think that the stance as argued by Ramberg has support in a plain language interpretation of § 33, which states that the notice time period is not applicable with these aggravated cases of disloyalty. In such a situation, to simply shift the same with actual knowledge from “within a fair time” to “within a reasonable time” appears to give the grossly disloyal party a considerable advantage without any support in the legal text. Håstad for his part has noted that “recklessness ... scarcely is the same as disloyalty”.<sup>22</sup>

Personally, I am of the opinion that the question as to notice in the event of an adviser’s recklessness or disloyal behaviour may be rather seen as a question of the victim’s obligation to limit the scope of the harm rather than an obligation to be loyal in this respect against the party who demonstrated recklessness or disloyalty against the party seeking advice. The state of the law is as previously noted however to a considerable degree uncertain. In the event the adviser actually knew of deficiencies in the advice, it appears that any

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19 See as to the term, “recklessness” with professional advice, Kleineman, J. *Grov oaktsamhet som privaträttsligt principproblem*, in Festskrift till Lars Heuman, 2008, p. 271.

20 See Legislative Bill 1988/89:76, p.125.

21 See Ramberg, J. *Köplagen*, p. 401.

22 See Håstad, T. *Köprätt – och annan kontraktsrätt* at p. 104. Håstad states that it would be unreasonable “if the seller would avoid being liable for a defect, because the buyer, for example, committed mild negligence with the inspection of the goods, where the seller has been reckless in the construction or the manufacturing of the goods”.

requirements as to notice consequently according to my opinion ought not to be applied.

#### **4.4 Relationship with other Types of Contracts**

Professional advice often arises in connection with other legal circumstances, for example, such as credit approvals by financial institutions, brokerages, purchases, etc. There is here an interesting statement in the legislative bill to the Act on Consumer Financial Advisory Services,<sup>23</sup> namely that the provisions in the act concerning notice are to be applied “regardless of which notice period is applicable with respect to any actual transaction in connection with the advice” and that therefore the act’s mandatory regulations are to be applied regardless of that which is applicable for the actual type of contract – for example, according to the Act on Commercial Agents – or as follows from the contract executed by the parties.

It ought here first to be noted that outside of the scope of application for the mandatory legislation’s consumer protection area, the parties consequently can enter into a contract regulating the notice time period and also that which is required to constitute a correct notice. Furthermore, one may here ascertain the presence of the same problem applicable with the assessment of issues concerning the statute of limitations, for example, according to the Commerce Code § 18:9, namely that “combined” legal relationships outside of the area of the mandatory legislation can give rise to considerable application problems with respect to the question of whether the advice is to be considered as a part of the other contractual relationship or is to be seen as a specific relationship or even follow some type of principle of main performance.

The state of the law here is uncertain and my personal opinion – consistent with the question, for example, of the significance of the Commerce Code § 18:9 – is that the advice even if it occurred in connection with another commission is to be considered an independent issue and therewith that the notice is to concern a concrete complaint as to the actual advice and rather follows an analogy from the reasoning presented in the legislative preparatory works to the Act on Consumer Financial Advisory Services, and not the type of contract that has been at hand in connection with the advice. If the parties have the right to contract as to notice according to the specific type of contract, but it does not follow from customary contract interpretation that one may also be assumed to have contracted the same with respect to liability for the advice, according to my opinion general principles should be applied, since the parties’ contract as to notice, in accordance with that stated above, is to be interpreted restrictively.

There is a peculiar statement in the legislative bill to the Act on Consumer Financial Advisory Services. It is stated that the act’s regulations concerning notice may not “be understood so that the right to an award of damages for pure economic loss due to the financial advisory services is generally forfeited”

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23 See Legislative Bill 2002/03:133, p. 56.

with the setting aside of the duty to give notice but rather “as regarding the financial advisory services that fall outside of the proposed act’s area of application”, it can be thought that if harm arises, one would then be able to demand an award of damages “on grounds other than this proposed damage provision and independent of any obligation to give notice”.

It appears as if the statement does not focus on guarantees and criminal actions but rather on all other cases where the act is not applicable. If this diffuse statement is to be so understood, that a requirement is absent as to giving notice with professional advisory services that are not regulated by law, it appears that this understanding is not based on a review of the case law, as the same, according to my opinion, recognizes the presence of such a general duty to notify.

## **5 Legal Support for a Duty to Notify as to Adviser Liability**

Against the background of that noted in the conclusion above under section three, and that stated there as to the absence of rules concerning notifications of contractual breaches on general grounds, it ought to be noted that there actually exists clear support for the presence of such a duty to notify in the modern case law. In the case, NJA 1994 p. 532, in my view, the issue was squarely presented.

The dispute in the case concerned the liability of *Statens provningsanstalt* (“SP”, Technical Research Institute of Sweden) in its capacity as a private consultant. SP agreed to test the light tolerance of a fabric, providing information as to the qualification scale used in the testing. This information was incomplete and presented in a way likely to cause misunderstanding. Liability for the harm suffered by the principal that misunderstood the information was imposed on SP. The Swedish Supreme Court found that SP had, with the incomplete reporting of the result of the analysis, through carelessness caused the principal “to choose a fabric with insufficient light tolerance” by which harm had arisen to the principal.

It can first be of value to identify the basis for the liability. It was not the case that SP had committed a direct mistake with the performance of the assignment, but rather it was the manner of reporting the result that had been misleading. This cannot be said to constitute true adviser liability, but still may be viewed as being a question of an information liability that lies close to the liability of professional advisers. SP had caused the client “to choose a fabric with insufficient light tolerance”. The commission was for the purpose of giving the client a basis for a decision, and SP also knew that a decision would be made on the basis of the information it provided to the client.

The Swedish Supreme Court noted thereafter that “this stated incompleteness in the information as to the result of the analysis was noticed by a telephone conversation” and by letter dated 18 June 1985. Reference was made therein to the tests done on 18 October 1984 and the difficulty in interpreting the summary of results as drafted. Furthermore, it was maintained that any uncertainty could not be viewed as existing with respect to that intended by the notice. It is important to note that despite the fact that the

notice was consequently given tangibly late in relation to the point of time for the drafting of the summary of the results, the Swedish Supreme Court particularly noted the fact that the notice “occurred shortly after [SP] had received reason to highlight the Czech fabric’s deficiencies and therefore also must have occurred in the correct time”.

This information or adviser liability, which is not codified, that here was placed on SP consequently lacked any explicit regulations as to notice but the Swedish Supreme Court tried the objection as to whether the notice was given too late, finding that the notice had occurred in time. Also significant to note here is the fact that the notice appears to have been given by the wrong party, but here the Swedish Supreme Court also intervenes to the notifying party’s protection by stating that despite the fact that the letter of notification “came” from a company other than the client, the “close ties” between the companies were considered to not “rob the notice of its legal effect”.

Professor Christina Ramberg has criticized this reasoning as to the close ties, arguing that the Swedish Supreme Court ought to have in this respect based its reasoning either on agency or clarified that the breaching party in and with the notice was clear on “that a breach of contract existed that the affected party was not prepared to accept”.<sup>24</sup>

In this context, the discussion as to the duty to inspect - which at times usually affects the question of how quickly notices ought to occur, i.e., when the purchaser ought to have realized the defect and therewith the point of time from which the notice time period ought to be calculated, should also be noted. As noted by Ramberg, SP could scarcely have expected that the “party receiving the information checked the results in immediate connection to receiving it, as such a check would require exactly the same expertise that SP offered for sale.”<sup>25</sup>

According to my view, however, the actual motivation behind the commission to provide advice would be that the addressee of the advice (the client) should be able to rely upon the advice without being forced to first examine or otherwise question the advice’s reliability. This lies in the confidence that typically a client believes they have the right to give when turning to a professional adviser or other information broker. To the extent the defect therewith ought to have been discovered with a review of the advice, more closely when one received it, perhaps through some type of visual inspection of the same, a duty to notify therewith could be thought to arise calculated from the point of time when the party ought to have performed such a review and then could have detected the defect in question.

Generally, however, it can be ascertained that if a duty to notify would have been absent with this form of commission as present in NJA 1994 p. 532, the Swedish Supreme Court did not have any reason to try the objection independently. According to the principle *jura novit curia* an allegation by the party causing the harm as to that notice was given too late could not have been tried without the rule existing. The Swedish Supreme Court, regardless of

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24 See Ramberg, C. formerly Hultmark, C. *Reklamation vid kontraktsbrott*, 1996, p. 119 f.

25 Ibid., p. 86.

whether the plaintiff objects that a duty to notify is absent (even as a subsidiary objection) and scarcely would have been able to try the question of the content of the duty to give notice if a legal rule as to its content had been absent. In any event, the Swedish Supreme Court then ought to have as well noted – if the Court meant that such regulations as to notice were absent – that such regulations did not exist to turn to on general legal contractual grounds.

## **6 Is a Neutral Notice within the Stated Time Sufficient or are Additional Notice Measures Required as to Certain Claims?**

Evidently, the party obligated to give notice can choose to immediately present a demand for an award of damages in connection with the neutral notice, or clearly, immediately request damages – if lawyers were present when formulating the proposal – perhaps in an amount to be more closely defined after an opportunity to more closely assess the loss.

It naturally is possible with the commission to provide advisory services, as well as with other contractual relationships, to allow for making a claim as to a remedy other than an award of damages. Here, for example, a price deduction – often in the form of repayment of consulting fees – with respect to the performed commission can come into question, however, damages ought to be the most common remedy and considerably more common in this context than with, for example, a sale of goods agreement, and be the issue that also has the greater economic significance. The reason hereto naturally is that the provision of professional advice often includes entering into transactions in reliance on the advice and that therewith compensation for – to use a sales term – consequential damages, these are the most interesting avenues for the client.

An interesting but difficult to assess question is whether the client can request a “cure” by the commission being redone or that another commission is to be performed for the purpose of “correcting” that which was done incorrectly. The absence of legislation ought to render this question particularly difficult to assess from a more general perspective. The adviser, on the other hand, can scarcely request that the client be forced to accept another order under the assumption of that this can mitigate the harm. In any event, if the transaction is combined with risk, this must be ruled out.

If now the presentation of a neutral notice is a necessary requisite in order to not be affected by a loss of the right to bring a lawsuit, this does not mean herewith that it could be decided that such a neutral notice would even be able to be viewed as being a sufficient notice and that the client could then be satisfied by presenting the actual damage claim as long as the claim is not time-barred. Normally, the statute of limitations of ten years after that the harm or injuring document arose, enters into place unless a specific statute of limitations could be cited, for example, according to the Code of Commerce § 18:9. Regardless of which statute of limitations rule is relevant, the issue of taking a stance as to how long a party has after giving the neutral notice to present this claim or if this right is simply limited by the statute of limitations consequently remains.

If one looks first at the Sale of Goods Act, it contains a complicated and inaccessible system of most closely successively invoked rules concerning notifications. A demand for cure or redelivery must be presented “in connection with that [the buyer] gives notice or within a reasonable time thereafter” as stated in § 35 of the Sale of Goods Act. To this should be added that according to § 37 of the same act, if neither cure nor redelivery comes into question – or do not occur within a reasonable time after notice – the buyer instead can request a price deduction or terminate the contract, and then according to § 39, the claim as to contract termination must be presented within a reasonable time “after the time for cure or redelivery that can follow of § 37”.

As can be seen, the Sale of Goods Act consequently works with not less than three with each other consecutive “within a reasonable time” periods, but none of these are tied to a damage claim outside of the duty to give a neutral notice. The issue then is whether such an intricate system as that in the Sale of Goods Act can be seen to constitute general contract law principles or if it should be viewed as *lex specialis*. To that stated must be added that according to § 29 of the Sale of Goods Act, there is an obligation for a buyer who wishes to terminate the contract or request damages due to the seller’s delay, to within a reasonable time after being informed as to the delivery notify the seller of this. Even § 59 of the Sale of Goods Act provides a notification rule tied to damages that gives rise to misgivings with analogies. We have here a general problem with the “new” Sale of Goods Act from 1990. If a certain rule appears as “odd”, less well-thought out or clearly unsuitable, should the rule despite this be seen as an expression of the act’s general central status within private property law, for example, outcompeting more rational or clearly substantially better legal solutions?

Perhaps such a case as that which the Swedish Supreme Court addressed in NJA 1992 p. 728 concerning a leasing agreement would be a more relevant and probably better starting point for general contract law conclusions. The Swedish Supreme Court stated there that in certain cases, it can be evident that a contract “for one or another reason will not come to be performed”. In such a case, the Swedish Supreme Court found that what otherwise was applicable – the requirement for explicit notice of contract termination – could then not be viewed as necessary to observe. In such a situation, one party does not wish to be satisfied with the contract ceasing to be valid “but rather wishes to request damages based on that breach of contract giving rise to the termination, he may then be viewed as obligated to give notice of this to the opposing party”.

With respect to the statute of limitations, the Swedish Supreme Court in the actual case states that it may often

“be accepted that a party waits with clarifying its view in this respect until the economic results of the opposing party’s actions can more closely be reviewed, that which here can be required of party must depend on the circumstances in the individual case”.

It was already clear in September 1984 that the leasing agreement would not be fulfilled, but it was not until January 1985 that the party requesting damages

gave notice according to a certain contractual term. With respect to this circumstance, the Swedish Supreme Court stated the following:

“It has however under the existing circumstances appeared natural that the company waited to take up the issue of damages until the winding up of both leasing agreements had been carried out in the manner as intended and the Company therewith garnered a basis with which to calculate its damage claim for the combined transactions ...”

As this was found to have occurred first in December 1984, the Company preserved its rights to damages through its notice in January 1985.

It has been stated that the reason for “a specific notice in the event the party which has suffered a breach of contract wishes to request damages” is motivated by the fact that the breaching party must be able to gain clarity as to which demands result from the breach of contract, so that the party can adjust its actions thereafter.<sup>26</sup> At the same time, however, it has been stated that this cannot be applicable to “an interest that places requirements as to a particularly quick notice of damages”.<sup>27</sup>

It is maintained particularly that one must always with the assessment of opposing interests and the requirements for speed that could be applied take specific consideration of that a party who has suffered a breach of contract has a need “for a certain amount of time in which to get advice”.<sup>28</sup>

Personally, I perhaps would particularly stress that against the interest of the party who has been subject to a breach of contract and who is citing a need for time in which to consult in order to be able to calmly consider its demands, must always be weighed the need of the party causing the harm to insure that a demand against it is presented within a time period in which it reasonably can protect itself against liability through insurances. That specific requirements for notice when the party causing the harm has committed actions that are criminal or otherwise in conflict with good practices therefore ought not to be applied is completely consistent with the requirements for protection through insurance that the party causing the harm can raise. In the event the injured party waits too long with notice, the party causing the harm can plausibly during the interim lose its insurance coverage.

Even if the majority of arguments presented as support for a requirement of a specific notice of damages are related to the area of sales law, in any event the “insurance argument” by the party causing the harm can be deemed particularly strong in the area of the liability of professional advisers. Against this background, it appears to be a reasonable conclusion that if the injured party presents a neutral notice within a reasonable time, the requirement of a specific notice of damages thereafter is applicable and it would then not be sufficient to present this requirement within the framework for the statute of limitations time period but rather, this requirement must be submitted after the

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26 *Ibid.*, p. 69.

27 *Ibid.*, p. 70.

28 *Ibid.*, p. 35.



injured party received a reasonable time in which to consult and consider its losses and make assessments as to the size thereof.

However, the Swedish Supreme Court recently in the case NJA 2007 p. 909 has expressed its opinion so that the assessment made in NJA 1992 p. 728 can be understood as a special case. The Swedish Supreme Court namely states in the 2007 judgment that the principle that had come to expression in the 1992 judgment was not “applicable when a notice of contract termination has been met with a neutral notice within a reasonable time from its receipt”.

However, this statement in the 2007 judgment appears to be an expression for an entirely different type of specific case as it is stated that an “obligation for a party, which in a contractual relationship claims to have been the victim of a breach of contract, to present within a certain shorter period of time a statement as to damages that are to be asserted, which could be motivated by that the breaching party is to receive knowledge that the claim can come to be placed on him, so that he may have the possibility to correct himself after this”, but that this principle was not applicable under the circumstances in the 2007 case.

As the neutral notice was considered to constitute “a sufficient warning” in order to claim damages that could follow if the contract was not fulfilled by the opposing party, the latter then did not make a correction and the notice was never rescinded, the party who had given the neutral notice was considered to have a continuing right to damages. The question then becomes when should the contractual main rule that the Swedish Supreme Court nevertheless finds support for in § 29 of the Sale of Goods Act – entailing a specific duty to notify with damages – be applicable? Could it not be argued that the party who received a neutral notice always has reason to rely a claim for damages being presented unless the counter party in question through its conduct gives the opposite impression?

## **7 When should the Notice Time Period be Viewed as Commenced?**

With the assessment of the question of when the notice time period may be viewed as beginning to run, one ought to take into consideration the fact that § 7 of the Act on Consumer Financial Advisory Services states that the starting point, according to the legislation, is that the time period is to be calculated from the date that the consumer “realized or ought to have realized that harm has arisen.” The purpose of this is that it is this time that is to be given to the consumer for reflection and even the possibility to seek advice or legal expertise.<sup>29</sup> It appears reasonable, even overlooking this specific legislation, to take the point of time from when the client realized or ought to have realized the effect of the incorrect advice as a starting point.<sup>30</sup>

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29 See Legislative Bill 2002/23:133, p. 34 and p. 55, and Swahn, M. and Wendleby, B. *Lagen om finansiell rådgivning till konsumenter*, p. 88.

30 This conclusion appears to be well in line with that which the Swedish Supreme Court concluded in its judgment Ö 4308-07 of 9 December 2008 where the Court among other

However, according to my view, to this ought to be added that it may not always be the case that the client has reason to tie the effect of the incorrect advice to the adviser's negligent behaviour. This consequently leads me to the conclusion that if the client could have noted that the effect of the advice was not that which the client had reason to assume should have been the case if the advice were followed, one cannot – simply from this circumstance – immediately draw the conclusion that any deviation must have depended on negligence by the adviser, then the time period still has not yet begun to run.

That the client ought to have realized both that the adviser has been careless such as to trigger also a harmful effect according to my view are two necessary requisites that must be fulfilled in order for the notice time period to begin to run.

The concrete content of these requirements may certainly be assumed to vary from case to case depending upon whether the principal is commercially active or is a consumer. The ability to analyse the connection between the nonconformity and a possible negligent behaviour by the adviser may be assumed to be simpler for a commercially active client than for a consumer, but business persons also often lack such insights into a professional's competence that they cannot make a legal assessment as to carelessness without the assistance of another competent adviser.<sup>31</sup> This question is treated more closely below in connection with two concrete "practical examples".

## **8 Two "Practical Examples" to Illustrate this Reasoning**

### **8.1 A Commission to an Attorney**

Assume that an attorney has received a commission to assist a client who in addition is a private individual (consumer). The commission is to file a claim for insurance compensation with an insurance company. Here the attorney misses the three-year statute of limitations period in § 7:4 of the 2005 Swedish Insurance Contracts Act, something that unfortunately occurs altogether too

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things stated the following: "Even if it first with the inspection on 22 June 2004 became clear that it was the entryway stairs that were the cause of the mildew damage, the purchasers through that which came forth with the inspection on 26 May 2004 must have realized that there was a defect in the real estate and of which the defect primarily consisted. The notice time period therefore began to run from the last named date."

31 Even this conclusion (compare the preceding footnote) lies well in line with that which the Swedish Supreme Court stated in its decision of 9 December 2008 in Ö 4308-07. There the court stated among other things the following: "The time within which notice of a defect ought to be provided after it appeared can according to the legislative preparatory works vary depending among other things on who is the buyer. The rule that notice is to be provided within a reasonable time consequently entails an assessment taking into consideration the circumstances in the specific case. As a rule, the assessment ought to be stricter if the buyer is a commercial actor than if the buyer is a private person. What degree of expertise the buyer has is also a circumstance that ought to be taken into consideration. A buyer can need the assistance of an expert in order to assess whether a defect exists that can be asserted against the seller. It furthermore can be necessary to make a specific inspection of the real estate. ([previously cited] Legislative Bill at p. 62)."

often according to that which I have been told by representatives of the insurance industry. The insurance company contests the claim on the basis of being barred by the statute of limitations. The attorney informs the client of the insurance company's objection. The client in this hypothetical is not informed that this could be due to an oversight by the attorney that has entailed that the statute of limitations has been triggered or that in any other manner the client has received information that could entail that the client already at that point of time ought to deduce that such could be the case. The consumer's ability to analyse such questions may – as already touched upon above – be limited.

The attorney files a complaint against the insurance company stating – almost as an objective circumstance – that the state of the law in the question is disputed. If the state of the law actually was disputed, the attorney's omission to take into consideration the risk of the statute of limitations – when he did not monitor the time period – does not then appear as evidently negligent. However, it certainly rested on the attorney – before recommending a decision as to commencing litigation against the insurance company – to inform the client as to that the state of the law can be uncertain, as well as that the attorney himself failed to note the risk for the three-year rule when representing the client to the insurance company.

The presence of an uncertain state of the law that can affect the legal outcome of a dispute must be something that attorneys and other professional advisers inform their clients of so that their clients later on can make decisions to litigate with somewhat correct information concerning the risks of litigation. Attorneys who have not given clients such risk assessments may consequently be assumed to be negligent even in this respect. Here clients cannot be expected to be obligated to retry or “investigate” on their own initiative an attorney's advice and information. To give an exaggerated depiction as to the possibilities for success is also something that can constitute liability, and for which the client's possibilities to realize that the adviser has been negligent normally is first revealed at a very late stage.

That the attorney does not always conduct a correct dialogue with the client as to these questions, by which the client in a correct manner is able to assess both whether the client should present a claim against the attorney and whether the client should actually commence litigation, which in addition may be psychologically understandable. Against this background, according to my view, the consumer still did not have reason either for assuming that he had suffered harm or that the attorney had been careless in the performance of his work task. The flow of information emanates from the attorney who presumably gets to highlight circumstances other than his own plausible carelessness even if the latter would be the most correct behaviour.

In contrast to that applicable with a normal purchase, the client often consequently lacks the possibility to on his own examine the attorney's assessments, whether a non-consumer or consumer, and only in very special cases can a commercially active client be assumed to have reason to request a second opinion. The client in actuality has a far-reaching right to rely upon the professional adviser according to the principle *uberrimae fidae*. Even if a commercial client has access to its own legal expertise, normally it cannot be expected that the client brings it in and retries an attorney's assistance. The

requirement of legal insight, which despite all of this is often required, is absent often even with commercial parties. This would entail that the client would have double legal costs and in addition, one has chosen external expertise initially often because the company's "in house lawyer" perhaps does not have time for the case or lacks that particular expertise.

Not uncommonly, the client receives perhaps reports as to on-going appeals and as may be the case, not until after the attorney notifies the client that available legal means have been exhausted does it begin to become evident for the client that something happened that the client has not to a sufficient degree been informed of by the overoptimistic legal counsel. After the highest instance decides to not grant leave to appeal in the matter, the issues in my view become transformed.

Perhaps the client is forced to "reassess" the proceedings in their own case and chooses then to direct comments against the attorney, consequently first when receiving knowledge of the decision that a grant of leave to appeal was not given. That before this, the fact that the client has not presented any criticism or cited any mistakes or any deficiencies in the performed commission, according to my view in itself cannot be used as a basis for an assertion that the client due to passivity in relation to the above sketched rules concerning notifications is bound.

Only if and when the attorney has given the client such information that the client has reason to suspect negligence by the attorney can this perspective come into question.

In summary, my assessment therefore is the following. For clients seeking advice – and then for both consumers as for other clients such as companies and public legal subjects – it appears that the time for the notice time period to begin to run or as it also can be described "starts" is when harm according to the party's assessment can be assumed to have occurred. However, I am of the opinion that in addition, it should be required that the client then realized or ought to have realized that the attorney may have been negligent.

Here, according to my view, the question of the notice period's "start day" consequently depends on what information the client then had received, and in such a case, how the client with reason could and therewith even ought to have interpreted the same.

## **8.2 *An Accountant as a Tax Adviser***

Accountants are a professional group which all the more often appears in adviser liability cases before both the Swedish lower courts and the Supreme Court. Licensed public accountants in the capacity as tax advisers assisting clients with "planning" advice for the purpose of decreasing taxes particularly have been found liable. The case law of the Swedish Supreme Court demonstrates that the starting point is often that the client is seen as having two different tax effects by choosing two alternative courses of action in its operations. In one case, taxes would be increased while in the other case, taxes would be decreased. Accountants often give advice entailing that companies act in accordance with the latter alternative.

Assume that an accountant through carelessness has misinterpreted a tax provision – a not uncommon situation according to insurance company representatives – and that this mistake leads to that the principal instead receives a tax effect that is double so costly due to that it resulted from the careless advice, in other words, that the client chose the “worse” alternative. After the tax assessment, a tax decision is issued that means that the favourable tax consequences did not occur but rather that the taxes became double as high as that which would have been the case if the adviser had given less careless advice, which consequently would have been to act according to the first alternative.

Not uncommonly, clients change advisers in such situations and in addition, accountants often bring in lawyers in more complicated tax litigation arising due to a tax outcome. If the new agent (attorney) appeals the tax decision to the administrative trial court, and thereafter, to the appellant court and ultimately is denied a grant of leave to appeal to the Swedish Supreme Administrative Court, the situation suddenly becomes more acute for the client. This is reminiscent psychologically of the situation of the client who has suffered from the statute of limitations in the above example.

The first issue consequently is – as in the preceding example – not whether the tax outcome was higher than that which the accountant obviously had predicted respectively the attorney indicated, but rather when should the client have been aware of that the advice respectively the proceedings had been negligent. According to my opinion, a starting point here ought to be whether the new adviser brought the company’s attention to that the accountant respectively legal counsel in the dispute against the insurance company could have been negligent. In the event the new legal counsel has done this, and even stated what this negligence consisted of, the commencement day can be assumed to begin to “run”.

However, if the client not even at this point of time is notified as to the possibility that the original consultant committed some type of carelessness, the omission to take up the question cannot be considered as the “start day” for the notice time period. If the client, however, is notified that the accountant was negligent with the advice, but at the same time the client is encouraged to appeal the tax decision by the attorney, the client must reasonably have had the belief that the decision was not irrevocable and that there with the harm that later could be established still then had not existed. The same perspective can certainly be taken in the example concerning the statute of limitations.

As noted already with the review of the first example, the starting point for a notice must be that the client realized or ought to have realized that the adviser had been negligent, which not uncommonly can take time, particularly if this concerns complicated legal assessments when the adviser has not informed the client personally as to this circumstance, or in any event not described that which occurred in such a manner that the client has had warranted reason to deduce such a wrongful behaviour with the agent.<sup>32</sup> However, added to the

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<sup>32</sup> Compare here the preceding footnote as well as in addition thereto that which the Swedish Supreme Court stated in the same decision of the 9 December 2008: “It must be viewed as that for a buyer who is a private individual without specific expertise in the area, that in

assessment of relevant “start day” with respect to the notice time period, that if the harm is tinged by a court decision and that the content in this judgment can be amended on appeal, the client often lacks a basis for an assertion as to harm being triggered until the highest court denies a petition for leave to appeal. Consequently even here any objective indications as to the effect are lacking until the petition for a grant of leave to appeal is denied.

One may namely assume that the new adviser has had an objective basis as a starting point, that there existed reasons to assume that despite all this, there was a chance to obtain the more advantageous tax consequences; otherwise, an investment in the actual tax litigation appears rather meaningless. In any event, the client at this point of time lacks a subjective basis for an assessment as the client has the right to assume that the new adviser’s proposal to try to amend the decision is well-founded.

Of the different courses of action that here have been sketched, consequently two plausible “start days” appear, namely either when the question is completely and certainly finally determined, in other words, when the decision to not grant leave to appeal is issued, or when in any other manner it becomes entirely clear that the already taken decision will stand and cannot be amended through appeal.

Personally, I am of the opinion that the latter point of time is difficult to assess. If the attorney actually had reason to advise an appeal of the decision and commence tax litigation, one must reasonably have some possibility to have a change come about. If such was not the case, it is rather the attorney that then misled the company into continuing a fruitless process rather than that the client has been passive in relation to the accountant’s careless behaviour. If the accountant truly had been negligent, in addition presumably possibilities for the client to independent of the attorney’s advice assess even this question are absent. The burden of proof for that such was not the case ought according to my view in any event to be placed on the party alleging that a too late notice was given.

Assume instead that the client decides to not prosecute an appeal of the tax decision. Then one can on good grounds rely on that the adviser’s insurer would object that compensation cannot be paid because the case should have been pursued until a non-appealable decision was in place. The failure to “exhaust” the legal avenues would then be turned against the client.

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many cases it is more difficult with the purchase of real estate than with the purchase of personal property to assess whether a defect exists that can be asserted against the seller. It may therefore to a greater extent be accepted that a real estate purchaser before giving notice is to have had the possibility to hire assistance of an expert individual in order to inspect the defect and in order to make assessments. Furthermore, with the purchase of real estate, the possibility to present demands against an inspector conducting the inspection with the transfer instead of against the seller exists. Certain, if not limited, temporal space in order to consider the matter ought to be able to exist before the seller is given notice. In exceptional cases, sickness and similar circumstances of a personal nature on the buyer’s side ought also to be able to be taken into consideration when the notice time period is determined. (Compare with respect to a consumer purchase, Legislative Bill 1989/90:89 p. 114).”

The idea that it can be shown (“proven”) that the decision could not be disturbed entails rather that criticism is directed against the legal counsel choosing to carry out a fruitless process than the client who allows itself to be convinced to pursue the matter further. This consequently is of the outermost difficulty, when the question is whether a “procedurally viable” lawsuit existed, criticising a non-legally experienced party – following its adviser’s advice to try the preceding decision’s correctness – in order for it instead not to choose to direct damage claims against the first adviser and therewith, this situation appears less suitable to take as a starting point for the notice period’s “start day” as against the first adviser.

In summary, consequently one can scarcely criticise a client who on the advice of a new adviser chooses to first try the question of whether the decision can be amended, instead of concentrating on directing a claim for damages against the first adviser. One can also rely on that if such a claim would be presented, the client would be met with the objection that it still cannot prove any harm, as the legal assessment still has not been finally determined.

In the same manner as the client ought to seek to limit its harm by if possible requesting an appeal of the tax decision, the adviser can, if the client fails to do this, attack the client in part for insufficient mitigation of harm, in part allege that evidence of that the harm arisen has been finally determined is lacking failing an appeal. At times, I have even faced the argument that the client is obligated to resort to extraordinary legal means, but for that to be the case I am of the opinion that the adviser has to demonstrate that the decision truly would be able to be successfully attacked by these means, which appears improbable if it has not been possible to have an amendment come into existence the ordinary way.

Only if the client ought to have realized, in part that the first tax adviser had been negligent, in part that the harm was impossible to adjust by pursuing tax litigation against the earlier decision, according to my view can the point of time for the notice period’s “start day” be calculated at the date of the tax decision. Decidedly speaking against such a view is that the new tax adviser, who in addition has been assumed in this example to be an attorney, advised the client as to initiating tax litigation. This strongly speaks against that the company ought to have realized that already at this point of time there existed a final harm.

My conclusion becomes that a client, and then even a commercially active client, cannot be seen as having ought to have realized that a harm has been triggered until the decision to not grant the petition for a grant of leave to appeal has been issued, and this becomes the point of time that ought to constitute the starting point for the calculation of the notice time period.

### **8.3 *Are there Different “Start Days” with Price Deductions and Damages, Respectively?***

As seen above, the Sale of Goods Act is based on a complicated structure with successively invoked rules concerning notifications stacked upon one another. With the starting point for the assessment I gave above for the establishment of

the relevant “start day” for notice with respect to damages, it can be stated that even if the question of whether there truly is a harmful effect triggered that consequently was demonstrated at a late stage, perhaps the client already during the time the case is before a lower instance has been informed by the accountant that he has been negligent. The question of the right to a price deduction does not assume that one demonstrates an arisen harm, but simply that one has paid monetary compensation and the goods are not of the value actually paid.

Translated from the sales law context – in which such an example normally belongs – to the area of the liability of professional advisers, this would mean that when the client realized or ought to have realized that the advice it received was negligent, this therewith is also from the same point of time that the notice time period with respect to requirement of deductions as to the fees ought to be calculated and consequently not when the harmful effect exists, which often is substantially later.

This means that after the neutral notice that normally may be assumed to be given within a reasonable time after the client ought to have realized that the advice did fulfil the quality requirements that reasonably ought to be able to be applied to the same, the client after an additional “reasonable time” ought to notify that he wishes to receive a repayment of the fees, or in any event, a reduction of the same.

Here the question of any harmful effect of the advice lacks significance. The question of when the client ought to have realized that the advice was negligent, however, has not been answered with this analysis as it is dependent upon that which the new tax adviser gave for information to the client when he immediately after the tax decision took over the commission. If the attorney has not disclosed his view in this respect, but simply concentrated on the attempt to remedy the defect by proposing tax litigation, it appears uncertain that the client at that point of time still has realized or ought to have realized that the accountant had acted negligently.

In summary, an analogy from sales law appears to be indicative of that the question as to the client’s insight in that the accountant has been negligent (has realized or ought to have realized) independently ought to govern the assessment as to when the “start day” for the notice time period enters into place for a price deduction while that which the client has realized or ought to have realized in the negligence question in combination with the party’s corresponding insight (has realized or ought to have realized) into when the harm occurred ought to govern the “start day” for when the notice time period for requirement of damages can be assumed to arise.

#### **8.4 *The Relationship between the “Start Day” for Commencing the Notice Period and the Comparable “Start Day” with Respect to a Duty to Mitigate Harm***

As pointed out previously, it appears that the question of the duty to notify can be seen as akin to the question of the duty to mitigate harm and the latter may be assumed in its turn to be an expression of an overarching contractual duty of



loyalty. This review of notification issues in connection with professional adviser liability demonstrates that there are a number of functions tied to the notice requirement. To these may be included the function of securing the evidence, combating speculation, avoidance of inconsistent legal relationships, the presumption of approval through passivity, and not in the least, the argument as to minimizing damages.<sup>33</sup>

One may, however, take into consideration that in individual cases, the notice requirement appears at its outermost as a formally characterized rule which in itself has a considerable degree of rigidity. My review of the case law demonstrates that the Swedish Supreme Court often appears to also choose interpretive alternatives that limit the rigidity of the duty to give notice and therewith are closest to a restrictive interpretation of such rules as touched upon in the introduction to this essay.

In practice, it appears that the notice period's length ought to be related to whether notification of defect can be assumed to have a mitigating effect on the harm so that greater demands would be able to be placed on the injured party if it has realized, or in any event, ought to have realized that notice in the individual case would facilitate the taking of measures by the party causing the harm in order to limit the scope of the harm. It becomes consequently most closely a question of taking into consideration the possibility of mitigating harm within the framework for the "reasonable time" that in each individual case must be related to existing circumstances.

One must take into consideration the entire time, however, that the duty of loyalty that here may be assumed to give rise to a duty to notify for the purpose of limiting the scope of the harm, and therewith that which the adviser ultimately is to pay to the principal, must be related so that the latter can request to "during a certain period assess the situation and 'assess the consequences of different conceivable courses of action'."<sup>34</sup>

## 9 Concluding Final Words

Even if sales law assumes a traditionally strong status as an analogous legal source for contract law assessments, and in addition includes a number of rules concerning notifications, one must take into consideration that the liability premises in the area of sales law are not the same as those for liability of professional advisers. Liability under sales law is often strict and based, for example, on the event of a defect often with strict liability related control liability, while adviser liability as a general rule begins from a negligence liability. Additionally, a difference must be noted here, namely that while defects under sales law are often easier to detect even for non-experts, it is often difficult for a non-expert to assess whether a professional has provided advice negligently.

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33 See Hultmark, C. *Reklamation vid kontraktsbrott*, p. 27 ff.

34 See Ramberg, J. *Köplagen*, at p. 696, citing Legislative Bill 1988/89:76 p. 206.

In addition, one may take into consideration the fact that where advice is bad, this is not necessarily the same thing as if the advice had been given in a negligent manner or otherwise included negligent behaviour by the adviser. Investment advice can have been given with care, taking into consideration that which was known at the point of time when it was provided, but due to circumstances that the adviser had not been able to take into consideration when it was given, it can lead to a less successful result. Furthermore, there often is a duty to inspect in the area of sales law. On the other hand, any obligation for a client to retry advice as provided<sup>35</sup> by requesting second opinions normally cannot be seen to exist, either for consumers or commercial actors.

As a first important premise for the “start day” to begin to run with professional advice is according to my view that the client has realized or ought to have realized that the adviser provided negligent advice. After this, additional time must be permitted in order for the client’s suspicions in this respect to be able to be reviewed by another expert.

However, neither is it sufficient that the “start day” is to begin to run at the point of time for the negligence by the adviser as this does not necessarily have to coincide with the point of time at which the harm arose. As concerns the question of a claim as to damages, it consequently appears that the starting point in addition ought to be when the client has realized or ought to have realized that a harmful effect has been triggered as a result of the careless advice. First when both these circumstances exist, I am of the opinion that the notice time period begins to run. Only if the client does not intend to claim damages but simply deductions as to the fees can carelessness in itself be sufficient. This point of time then can be asserted as a starting point for the duty to submit a neutral notice even if the claim eventually will concern damages.

The legislator, however, has not taken such a perspective according to § 7 of the Act on Consumer Financial Advisory Services and according to my view, no reason exists to outside of the act’s scope of application choose a more complicated method and not even in non-consumer circumstances. Such a notice would by its nature simply be a general complaint that often would lack due concretization.

According to my opinion – regardless of the different perspectives here that could be argued – it would not be consistent that the rules concerning the loss of the right to bring a lawsuit are to be interpreted restrictively and particularly as these are unwritten such rules. An entirely different matter is whether the client would have another type of duty to notify before the harm arose, namely a duty that follows from the injured party’s obligation to limit the harm.

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35 Compare hereto that *supra* in footnotes 30 and 31 as to the discussed decision Ö 4308-07; the Swedish Supreme Court’s decision dated 9 December 2008 in which it stated the following: “Furthermore, the starting point for the notice time period is the point of time when the buyer noticed or ought to have noticed the defect. Since it does not prescribe any duty to inspect for the buyer after the purchase, the seller consequently cannot disregard that he, until the § 4:19 b of the Land Code mentioned ten year statute of limitations has begun, can be exposed to a demand based on a defect in the real estate.”

A duty to limit the harm can very well mean that the client has to contact the adviser so that it can be given an opportunity to take measures in order for harm not to arise or that it in any event can be held in abeyance. On the other hand, if the premise for such a measure includes that clients be forced to expose themselves to new risks, no such obligation – according to the Swedish Supreme Court’s case law – exists to take such mitigating measures.

With respect to the notice period’s length, however, that it can vary and may be assumed to be longer for consumers than for professional actors must be taken into consideration, but that the complexity in advice and the actual transaction can render that the assessment must be individual and that the notice time period at times therefore can be significant even for commercial clients.<sup>36</sup>

However, it appears that the requirement of a neutral notice means that when the client has realized or ought to have realized that the adviser has been careless and a harm arose, a neutral notice is to be given where after there ought to be support for that the client thereafter has to submit a more precise notice when the client has acquired a basis for calculating the harm.

The misgivings that can arise based on that which the Swedish Supreme Court appears to have stated in NJA 2007 p. 909 in contrast towards that stated in NJA 1992 p. 728 are not sufficient according to my view to warrant abandoning the requirement for specific notice of damages if the injured party first has given a neutral notice.

Against this consequently could be stated that a client would have to submit a neutral notice already when it ought to have realized that the adviser has been careless, but according to my view an analogy from § 7 of the Act on Consumer Financial Advisory Services can be considered to be more suitable, taking into respect that this is a question of an uncodified loss of a right to bring a lawsuit. This means that the duty to give notice enters into place when the injured party ought to have realized that the adviser can have been careless as well as when the harmful effect has been triggered.

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36 Compare hereto that stated *supra* under footnote 31 as well as that which the Swedish Supreme Court in addition thereto stated in the same decision: “The buyers acquired the actual real estate as private parties without specific expert knowledge in building construction questions. Even if they through the inspection of 26 May 2004 became aware of the fact as to the defects and of what these primarily consisted, it may be accepted that they before they gave notice hired additional technical assistance in order to assess defects. It may also be considered reasonable that the purchasers, who prior to the purchase had allowed an inspection to be performed with the transfer, made certain investigations of the possibility to make claims with respect to the defects against the inspector. As far as can be seen, the purchasers took these measures without unreasonable delay; that it due to vacation took a somewhat longer time to be able to get answers by the company conducting the inspection ought not therewith to be held against the purchasers. Taking into consideration the now mentioned circumstances, it may be viewed as that the notice that occurred approximately 4.5 months after the notice time period began to run, has occurred within a reasonable time. The presented question is to be answered in accordance herewith.”

