Commercial Norms and Soft Law

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1 Introduction

In Sweden and the other Nordic countries soft law plays a very important role within the field of commercial norms. The aim of this article is to give an introductory presentation of some aspects of this broad field. The Nordic countries do not have a general civil code. However, there are important basic statutes in the core parts of private law that form an important legal framework. In particular may be mentioned the Contracts Act, the Sales Act, the Promissory Notes Act and the Commission Act. There are also some consumer law statutes of particular importance, such as the Consumer Sales Act, the Consumer Services Act and the Consumer Credit Act. Large areas of commercial law in Sweden remain unregulated by any detailed legislation or only incompletely regulated by statute. Commercial law, in other words, is partly non-codified. The legal position in this area rests primarily on the case law evolved through judicial practice, above all in the Supreme Court, partly on the basis of analogous application of existing statutory rules of law and influenced by opinions in legal literature (the doctrine). However, the amount of court decisions having the character of precedents is fairly limited in the commercial field. These circumstances open a wide spectrum for the development of norms in commercial practice of a soft law character.[1] The extensive body of internal norms in Swedish business life falls mainly into the following three main types, presented in greater detail below:

- commercial practice and other customs evolved in one or more areas of business or in the business sector generally,
- extra-judicial norm formation through business organizations and special assessment bodies in business life (codes, pronouncements of particular bodies etc.),
- norm formation through standard form agreements, known as the law of standard contracts.

Internal norm formation in business life is private in the sense of developing and changing the norms within the commercial sector itself, with essentially no State intervention. "Self regulation" *(Swedish: självreglering)* is the commonly used expression for this, a practice which has often come into being or been developed as an alternative to legislation. There are cases, however, of codes of conduct in the commercial sector coming about in close contact with national authorities or of public representatives being included in the assessment bodies.[2]

1 Bernitz, U., *What is Scandinavian Law?*, 50 Sc.St.L. p. 13 ff. (2007).

2 A general reference should be made to Strömholm, S., *"Public" Rule-Making, and "Private": The Swedish Experience*, 15 Sc. St. L., p. 219 ff. (1971). Although many years have elapsed, the general picture remains rather unchanged. Among Swedish literature, note in particular the report of the symposium *Lagstiftning eller självreglerng?* (Legislation or Self Regulation?), Svensk Juristtidning 2001 p. 205 ff. and the different contributions in this volume.

2 Commercial Practice and Other Custom

As regards the norm formation taking place within commercial life itself, a special position is occupied by commercial practice and other customs, because they are recognized by the judicial system as a legal source in their own right in the field of commercial law. *Custom* (usage) has been described in the *travaux preparatoires* of Chap. 10, sec. 2 of the Contracts Act of 1915 as "accepted conduct" or "prevalent understanding". The reference here is to patterns of action which are so widespread and have been observed for so long that they have been accepted as a normal and proper order of things, i.e. something which the parties in the market concerned naturally conform to. *Commercial practice* is such kind of custom which has attained a particularly high degree of permanence and stability and which refers to patterns of action within business life. Commercial practice can, for example, refer to the meaning of various expressions generally employed in business life. It can also refer to actual procedures, e.g. in connection with the weighing, measurement or labeling of goods or in connection with transport. But it can also involve matters with a more immediate legal connection, e.g. the requirements which goods or consignments usually have to satisfy in different fields if they are not to be deemed defective. Often a commercial practice is specific to a certain line of business. It can also be local, as, for example, with the customs of a certain port. The legal significance of commercial practice and other custom is expressed above all in Section 3 of the Swedish Sale of Goods Act of 1990, which under the heading "Freedom of contract" lays down:

> The provisions of this Act do not apply where otherwise indicated by the agreement, by practice which has been evolved between the parties or by commercial practice or other custom which must be deemed binding on the parties.

This is a portal provision of Swedish contract law which should be widely and analogously applied to other types of business agreement besides those for the sale of goods. It lays down the dispositive character of the Sale of Goods Act and the fundamental principle of freedom of contract. What is particularly interesting in the present context is that, in principle, the Sale of Goods Act also allows commercial practice and other custom to override its own provisions. Commercial practice and other custom also provides important guidance in connection with interpretation of contracts.[3]

It may be noted the Swedish legal position is somewhat different from the position taken by the CISG (the UN Convention on Contracts for the International Sale of Goods). The CISG states in Article 9.2:

3 *See* on commercial practice Bernitz, U., *Standardavtalsrätt* (Standard Contract Law), 8 ed., Stockholm 2013 p. 41 ff., Ramberg, J., *Köplagen* (The Sales Act), Stockholm 1995 p. 160 ff., Karlgren, H., *Kutym och rättsregel* (Usage and Legal Rules), Stockholm 1960.

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

In Swedish law commercial practice is regarded as a legal source in its own right and not only, as in the CISG, as impliedly agreed to by the contracting parties.[4] Similar rules are also encountered in other central private law enactments. For example, commercial practice and other custom can override the rules of Chap. l of the Contracts Act concerning the conclusion of agreements (Sec. l (2) of the Contracts Act) and, similarly, most of the rules of the Commission Act which do not relate to consumer contracts (sec. 2 of the Commission Act). Much the same applies to Chap. 14, sec. 2 of the Maritime Code, concerning the lading of ships. Another important example is Sec. 10 (2) of the Contracts Act, which lays down that it is primarily custom which decides the extent to which an employee, e.g. in a bank or in a shop, is authorized to act on his principal's behalf, e.g., in relation to receiving payment.

Thus, commercial practice and other custom are ascribed an important position as a legal source in Swedish private law. Having said this, however, there are a number of points which have to be made c1ear.

To begin with, mandatory rules of private law definitely override commercial practice. This applies both in the sphere of consumer law and in the case of peremptory statutory rules aimed at protecting the weaker party in contractual relations between business people, e.g. commercial agents. Furthermore, as has been pointed out in legal doctrine, it is not reasonable for carefully considered statutory rules or non-codified principles of law to defer automatically to commercial practice in a particular field. It can, for example, be hard to decide exactly how and for what purpose the commercial practice came into being, and sometimes one may suspect that the practice heavily reflects the commercial advantage of one side. The consensus view now appears to be that the courts can adjudicate for themselves whether a commercial practice should apply instead of non-mandatory law.[5]

The actual scope for the creation and development of commercial practice and such like custom has somewhat diminished within Sweden in recent years. Opportunities for the spontaneous development of customs in different branches of manufacture, trade or transport were greater in times gone by than they are today, in an age when more and more branches of activity have come to be dominated by large, often centrally controlled corporations. The increasing use of standard contracts (see part 4 *infra*) appears to operate in the

4 This view was developed in the early 20th century by the Swedish legal scholar and Supreme Court judge Tore Almén and has not been abandoned. *See*, especially, Grönfors, K., *Almén om handelsbruk* (Almén on Commercial Practice) , Rättsvetenskapliga studier till minnet av Tore Almén, 1999 p. 123 ff.

5 This view is taken in the travaux préparatoires to the Sales Act, Government Bill 1988/89:76 p. 66, *see* also Ramberg, J., *Köplagen* (The Sales Act), 1995 p. 160.

same direction, and so, to a certain extent, does the growth at increasing detail of governmental regulation.

Swedish law does also recognize international customs. Thus, the Incoterms, elaborated by the ICC (the International Chamber of Commerce) are considered to have the status of commercial practice. Pronouncements as to whether a commercial practice or custom has evolved in a certain respect can be obtained from business associations and other expert bodies. It is quite common for the Supreme Court to obtain opinions of this kind so as to be able to base its decision on more detailed information concerning commercial practice and the views taken of the legal position in the circles concerned. Pronouncements of the kind are usually reported in the judgments of the Supreme Court. Opinions may be obtained by other courts and authorities as well.

There may be scope for considering custom, or to use a more general term, business conduct *(Swedish: affärsskick)*, even when courts have to apply peremptory legislation. Here, however, there is no question of legal consequences being directly attached to the business conduct: instead it forms part of the basis of the court' s own assessment.

The best example is provided by application of the general c1ause in sec. 36 of the Contracts Act, concerning unfair terms of contract.[6] Under that provision, a term of a contract can be modified or disregarded if it is unfair, having regard to the content of the agreement, the circumstances attending the making of the agreement, subsequent developments and circumstances generally. Assessment of the question as to whether a term of a contract is unfair under this wide-ranging general clause refers to various yardsticks which can indicate what is to be deemed fair and accepted. One such yardstick is sound business conduct *(gott affärsskick)*, otherwise known as generally accepted business practice *(god affärssed).* The fact of a contract clause being common or even commonly accepted in a line of business does not prevent a court from deeming the c1ause to be unfair if it finds reason to break with a bad contracting practice. Often there can be strong reasons for finding a contract term unfair if it is contrary to generally accepted business practices. This may be the case, for example, with a term of contract applied by a certain businessman but not resorted to by serious dealers in the same line of business.[7] There may also be cause to investigate how the businessman himself applies corresponding conditions in relations to his other customers. It the businessman extensively refrains from asserting his full right in relation to those customers, it may be unfair of him to depart from his own practice in a particular case.

One case illuminating the importance of generally accepted business practices as a yardstick is the Supreme Court case NJA 1983, p. 332. That case

6 On that provision, Bernitz, U., *The General Clause of Unfair Contract Terms and the Protection of the Small Businessman*, European Law in Sweden, 2002 (Faculty of Law, Stockholm University Series of Publications No 70), p. 241 ff.

7 *See* Grönfors K., – Dotevall, R., *Avtalslagen. En kommentar* (The Contracts Act. A Commentary), 4 ed., Stockholm 2010 p. 273 f, Bernitz, U., *Standardavtalsrätt* (Standard Contract Law), 8 ed., 2013 p. 163 ff.

concerned a guarantee commitment in a letter of credit guarantee in favour of a bank. The bank amended the conditions of the letter of credit without consulting the creditor, and this was considered permissible as the terms of agreement had been framed by the bank. Opinions obtained in the case by the Supreme Court from the Bank Inspectorate and the Swedish Bankers' Association showed the bank's action to be contrary to the regular practice of other banks. With special reference to this latter point the Supreme Court found that the bank had acted unfairly under sec. 36 of the Contracts Act.

3 Codes of Good Conduct and Assessment Bodies

3.1 Extra-judicial Norm Formation and Self-regulation

The characteristic of commercial practice and other custom is that, as a rule, they are usages which are actually observed in the mercantile sphere and have evolved quite freely. The norm formation occurring in business life, however is to a great extent the result of a deliberate activity, usually impelled by one or more organizations. It is common for these organizations to draw up collections of rules, *codes,* setting, for example, standards of good conduct in a particular kind of business activity. Codes of this kind can have a great impact if they are considered authoritative.

It often happens that a special assessment body is set up with reference to a code and given the task of assessing in particular cases whether a procedure conforms to the code, and also supplementing this collection of rules through creation of precedent. Assessment bodies of this kind naturally vary in competence and authority. The most advanced of them, however, operate on a quasi-judicial basis, often with a qualified judge acting as chair. "Courts of honour" of this kind can have great authority. So is the case, e.g., in the field of sports.

The system of codes and assessment bodies of this kind has evolved a great deal in recent decades. It is often referred to in general terms as *extra-judicial norm formation,* a term showing that this is a matter of norm formation outside the national legal system and the structure of the courts. In practice, however, Government and Parliament have often deliberately left a question to be solved in this way. e.g. by referring in legislation to a general standard of accepted practice, and sometimes the public sector influences activities through representatives appointed by public bodies. Extra-judicial norm formation, however, is also part of the self-regulation of business life. The term "self-reforming" *(Swedish: självsanering)* is also used. One important purpose of many codes and assessment bodies is to help maintain such a high ethical standard in business life that special legislation will be unnecessary or at all events less far-reaching than might otherwise be the case.

The real-life situation in this sphere is immensely varied. I will illustrate the phenomenon by briefly considering important examples of codes of conduct and assessment bodies.

3.2 Media Law

Press ethics are one area in which the system of code and assessment body for purposes of self-regulation is very much present. This is because the safeguards for individual privacy conferred by the Freedom of the Press Ordinance (a part of the Swedish constitution) are weak and are confined to procedures for which there are penal sanctions, e.g. libel. The extra-judicial normative system rests on a collection of rules, *Etiska regler för press, TV och radio* (Rules of conduct for press, TV and radio), backed by the main press organizations and radio and television broadcasting entities.

Under the heading "Ethical rules for press, TV and radio", these rules of conduct, which are an elaboration of earlier professional codes, include rules of publicity. These rules deal with such matters as the checking of sources and the correct reporting of news, publication of corrections and objections, respect for personal privacy (e.g. in connection with custodial and other family disputes, suicide and victims of crime and accidents), arranged pictures, opportunity for responding to criticism and restraint in the matter of publishing the names or pictures of private persons. The rules express what are termed good principles of journalism.

A special organization, comprising the Office of the Press Ombudsman and the Press Council, exists to apply the ethical rules for the press. The activities of these bodies are neither governmental nor government-funded. The Press Ombudsman has the task, acting on his/her own initiative or in response to a complaint, of criticizing deviations from good publishing practice in periodical publication. The Press Ombudsman can make a direct request to the newspaper or magazine concerned for correction or the opportunity of reply. The Press Ombudsman can also issue a reprimand in less serious but clear cases of deviation from good standards of journalism. More important cases have to be referred by the Ombudsman to the Press Council, which is a court of honour in manners relating to good standards of journalism, and publishes its reasoned opinions. The Council is headed by a Supreme Court judge.

A newspaper reprimanded by the Press Council has to pay "handling charge" towards its activity, as weIl as publishing information about the pronouncement.

3.3 Intellectual Property Law and Marketing Practices Law

The Svensk Form Copyright Panel *(Föreningen Svensk Forms Opinions-nämnd)* is an impartial expert body within Svensk Form (the Swedish Society of Crafts and Design). Its task is to express an opinion regarding copyright protection for works of applied art and to assess whether a copyright-protected work of applied art has been plagiarized. The Panel has been active since the end of the 1920s. It only tries cases on the basis of a submitted application, the proceedings are normally verbal. The Panel has issued several hundred of reasoned opinions.[8] In a case in 2009 (NJA 2009 p 159), the Supreme Court

8 "www.svenskform.se" (information also in English).

found the design of the Mini Maglite torch to be copyright protected as a work of applied art. The Supreme Court largely followed the opinion issued by the Panel.

One of the basic rules of the 2008 Marketing Act is a general clause against unfair marketing practices. Under that provision, marketing should be in conformity with generally accepted marketing practices *(god marknads-föringssed)* (sec. 5 of the Marketing Act).When deciding what are generally accepted marketing practices the courts are to a great extent guided by ethical codes on the subject, above all by the basic Code on Advertising published by the International Chamber of Commerce (Consolidated ICC Code of Advertising and Marketing Communication Practice), latest ed. 2011.

Apart from national authorities and courts for the application of the marketing and advertising legislation, the business community has established and is funding a special foundation to further ethical standards in the field. Within the ambit of the foundation it has been established *Reklamom-budsmannen* (the Swedish Advertising Ombudsman) and *Reklamombuds-mannens Opinionsnämnd* (the Jury of the Advertising Ombudsman).[9] The decisions are based primarily on the rules of the ICC Code of Advertising which is a global agreement. In particular, but not only, the Ombudsman and the Jury assess marketing practices outside the scope of the Marketing Act, e.g., marketing involving sexually discriminatory advertising. Such advertising is normally found incompatible with good marketing practice.

The Swedish Anti-Corruption Institute (*Institutet Mot Mutor*, IMM), founded already in 1923, is a non-profit organization having the Confederation of Swedish Industries and other major business organizations as principals. Its mission is to promote ethical decision processes within business as well as within the rest of the community and to prevent the use of bribes and other types of corruption as a gain for affecting decision processes. As a compliment and clarification to the Swedish anti-bribery legislation, the Institute has issued a code of business conduct, The Code on Gifts, Rewards and other Benefits in Business, in force from 1 September 2012. It has replaced an earlier version. The Code covers all business obliged to maintain bookkeeping, including publicly owned companies. The Code is generally stricter than the Swedish Penal Code.[10]

9 "www.reklamombudsmannen.org" (information and Annual Report also in English). There are also more specialized self-regulatory bodies in a large number of industries. An important example is the Board for Assessment of Pharmaceutical Information (Nämnden för bedömning av läkemedelsinformation, LIF).

10 "www.institutetmotmutor.se" (information also in English).

3.4 Securities Market Law[11]

In the field of stock and securities trading, legislation is supplemented by extra-judicial norms and contractual provisions which fulfill a complementary function. There are basic conditions of contract, for example, connected with the registration of securities on the main Swedish stock exchange. *Stockholmsbörsen AB* (The Stockholm Stock Exchange, subsidiary of the Nasdaq OMX Nordic) concludes a special agreement, a registration contract, with every company to be registered with it. That agreement sets out demands which the public companies have to meet in various respect, e.g. as regards information to their shareholders and the stock exchange. If these requirements are not fulfilled by the company, the Stock Exchange will react, ultimately by deregistering the company.

The Swedish Securities Council *(Aktiemarknadsnämnden)* is part of the Association for Generally Accepted Principles in the Securities Market sponsored by a substantial number of Swedish business associations. The object of the Council is to promote good practices in the Swedish stock market through statements, advice and information. In particular, the Council issues statements in cases which have been brought to the Council by petition or by its own motion. The statements are reasoned and normally made public. Special consideration is given to issues that set a principle or are of practical importance to the stock market. The Council is chaired by a Supreme Court judge or a former judge. It started its operations in 1986 and there are a large number of important statements in specific cases issued by the Council.[12]

The Swedish Corporate Governance Board (*Kollegiet för svensk bolagsstyrning*) forms another part of the activities of the Association for Generally Accepted Principles in the Securities Market. Its main focus has been the creation of the Swedish Corporate Governance Code (*Svensk kod för bolagsstyrning*), a revised version of which came into force on 1 February 2010. This code is a set of guidelines for good corporate governance that all stock exchange listed companies in Sweden are obliged to apply. The mission of the Swedish Corporate Governance Board is primarily to manage and administrate the Code. Its work forms an integral part of the self-regulation system on the Swedish securities market.[13]

3.5 Codes of Professional Ethics

Codes of professional ethics, based on an accepted practice standard to which more exact norms can be successively added, are commonly associated with professional services of qualified nature.

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11 This survey does not cover the insurance market, another market where soft law plays an important role. *See* the article by Jessika van der Sluijs in this volume.

12 "www.aktiemarknadsnämnden.se" (information given also in English).

13 "www.bolagsstyrningskollegiet.se" (information given also in English).

In the legal profession, the concept of good professional principles (*god advokatsed)* is of central importance. The basic rules for practicing lawyers (*advokater*) are set out in Chap. 8 of the Code of Judicial Procedure. Chap. 8, sec. 4 of the Code of Judicial Procedure lays down that, in the practice of his/her profession, an attorney shall honestly and zealously discharge the tasks entrusted to him and in all things observe good professional principles *(god advokatsed).* The meaning of *god advokatsed* is indicated to some extent in the charter of the Swedish Bar Association on professional duties but above all in the *Vägledande regler om god advokatsed* (Code of Professional Conduct for Members of the Swedish Bar Association), adopted and issued in 2008. These rules define exactly what should be observed by a lawyer with regard to the organization of his/her business, the refusal and relinquishment of assignments and relations with the client, the opponent, the court, colleagues and the Swedish Bar Association. The Bar Association has also compiled book-keeping regulations for its members.

The basic rules concerning disciplinary measure against a lawyer neglecting his duties are contained in Chap. 8, sec. 7 of the Code of Judicial Procedure. These measures are exclusion (in serious cases), warning, possibly combined with the imposition of a penal charge payable to the Bar Association, and reprimand *(erinran).* Disciplinary matters are dealt with by the governing body of the Swedish Bar Association and by a special disciplinary board within the Association which also includes "public representatives" appointed by the Government. The Swedish Chancellor of Justice has certain supervisory powers and decisions concerning refusal of admission to and exclusion from the Bar Association can be appealed directly to the Supreme Court. On the whole, however, norms in the legal profession are formed and applied through the profession' s own administration of its professional ethics.

In the field of accounting and auditing one can distinguish between three different concepts of good professional practice: generally accepted auditing standards *(god revisionssed),* the code of professional ethics for accountants *(god revisorssed)* and generally accepted accounting principles *(god redovisningssed).*[14]

Chap. 9, sec. 3 of the Companies Act requires the annual report of the company to be examined by an auditor, together with the company's accounts and the administration of its affairs by the board of directors and the managing director "to the extent indicated by generally accepted auditing standards". In practice, this professional code derives much of its substance from the recommendations and opinions issued in auditing matters by FAR (the Swedish institute of authorised and approved public accountants). In addition, FAR carries on disciplinary activities and investigates alleged deviations from the rules of professional ethics for accountants. The disciplinary measures possible are reprimand *(erinran),* warning and as an ultimate resort, exclusion from FAR.

14 *See* Bjuvberg, J., *Soft Law in the Swedish Accounting Law System* in this volume.

Generally accepted accounting principles are the basic standard for the book-keeping and accounting sector. Chapter 4 sec. 2 of the Accounting Act requires the accounting liability of a businessman to be "discharged in a manner concordant with generally accepted accounting principles". This concept derives its content from the Accounting Act and the Companies Act, together with the directions issued by the Accounting Standards Board, but also from recommendation made by professional associations, and in particular by FAR. FAR' s recommendations are largely underpinned by EU-wide rules and codes of professional ethics adopted internationally. Thus in the book-keeping and accounting sector too, one finds an interplay between governmental norm-giving and extra-judicial codes.

To mention an example from another professional field, the 2011 Estate Agents Act contains the fundamental rule (sec. 8) that an estate agent shall discharge his assignment "carefully and in all things observe the principles generally accepted for estate agents". This latter point is concretized, for example, by the ethical rules of the Swedish associations of real estate brokers.

3.6 Tribunals for Setting Disputes

Outside the structure of the courts there are a large number of private or semi-official tribunals and such like bodies tasked with settling specific disputes between individual parties. These tribunals do not generally have sanctions at their disposal, but such, as a rule, is their authority that their decisions are respected and complied with all the same.

Special consumer complaints boards have developed to deal with disputes between consumers and businessmen concerning consumer purchase or consumer service agreements etc. However, most of these activities were brought together by the State in the 1970s within the National Board for Consumer Complaints, (*Allmänna Reklamationsnämnden*, ARN) which is a specialised governmental authority. The National Board for Consumer Complaints issues advisory opinions in disputes between businessmen and consumers. For this purpose the Board is chaired by a qualified judge and its other members represent, in equal numbers, consumers and business interests. The Board deals, for example, with disputes concerning the purchase and repair of cars and boats, installation work in houses and flats, package tours and entitlement to compensation from insurance companies. The Board's decisions are merely recommendations and as such are not legally enforceable. Disputes decided by the Board can be taken to adistrict/city court to seek a legally enforceable judgment, though this is quite rare. The Board handles 8000 - 9000 cases a year, and its decisions are an important guiding factor in the field of consumer law.

Some business sectors have private complaints boards. These usually operate in such a way that disputes, for example, concerning the extent to which goods sold or services performed are defective, are dealt with by a summary procedure resulting in a decision which takes the form of a

recommendation to the parties. Disputes concerning privately contracted insurance are to a certain extent settled by special tribunals, insurance tribunals *(försäkringsnämnder),* set up by the insurance companies.[15]

Contractual disputes between businessmen in Sweden are to a very great extent settled by *arbitration* instead of by court proceedings. Most of the standard contracts used in contractual relations between commercially active parties contain a special provision, an arbitration c1ause, to the effect that disputes are to be settled by arbitration, and this is also a common practice in individually written contracts. Arbitration c1auses are part of the reason why, in Sweden, court judgments relating to commercial contractual relations are fairly infrequent. Arbitrators in Sweden are usually qualified judges, experienced commercial lawyers or sometimes legal scholars, and so arbitrations awards often make very interesting legal material. They are hard to come by, however, because arbitration decisions, as a rule, are not made public, unless appealed to the Svea Court of Appeal. There are only very limited grounds for such appeal available. In fact, companies usually regard the absence of publicity, together with rapidity, as the main advantage of arbitration compared with litigation.

A specialized arbitration institute is located in Stockholm, The Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[16] The Institute has been particularly successful as an arbitration centre for international arbitration connected to East West trade disputes but has expanded its services to international commercial arbitration in general. Many of the disputes are decided on the basis of Swedish law.

4 Standard Contracts

Standard form agreements, shorter standard contracts, are, generally speaking, the most important instrument nowadays for norm creation in business. They have a long history, for example, in transport law, insurance law and credit law, but they have come to be more and more widely used in agreements both between businessmen themselves and in contractual relations between businessmen and consumers.[17]

It is typical of the system of standard contracts that, very often, the individual agreement is entered into in writing through the signing of a document in the form of a previously compiled, often printed form, in which the general terms of agreement are already set out. All that then has to be filled in is the conditions individually agreed on, e.g. concerning product, quantity and price (in contracts of sale), or amount, rate of interest and payment dates (in bank loans). The standardized terms of agreement are usually set out on the back of the forms. Another common technique is to gather the general terms of

15 The complaints procedure in the insurance sector is treated by Jessika van der Sluijs in her contribution in this volume.

16 "www.sccinstitute.com" (information in English).

17 Bernitz, U., *Standardavtalsrätt* (Standard Contract Law), 8 ed., 2013.

agreement in a special document which is available to both parties and is referred to in the individual agreement. These documents are often printed.

Standard form agreements, however, do not need to be lengthy. Standardized terms of agreement, for example in the form of just one or two clauses, standard clauses, can also occur on signs and notices, on tickets or on order slips and in order acknowledgements etc. Standard contracts can be defined as agreements which are partly or wholly entered into according to predefined, standardized conditions which are meant to be uniformly applied in a large number of individual contractual situations with different contracting parties on at least one side. Sometimes one speaks of "form law", *formulärrätten)* with reference to standard form agreements, and especially to the system of such agreements in a particular field.

Standard contracts serve as instruments for extensive autonomous law-making in business life. This is clearly apparent, not least, in "newer" fields like IT law, where practically all the norms have been created in this way. We may also recall other newer types of agreements such as leasing and franchising, which have evolved through the introduction of new structures of contract in business life. Group insurance is another such example.

As is well-known, standard contracts are anything but a uniform phenomenon. They include everything from documents which are the fruits of many years' work at international level, with eminent practitioners and legal theorists taking part, to common Nordic standard form agreements and contracts drafted within leading business organizations, standard form agreements reflecting more specifically sectorial interests, standard form agreements drafted by individual firms and, finally, an undergrowth of what are often very one-sided, badly constructed standardized conditions on the order slips, invoices etc. of some dealers, usually drawn up for disclaimer purposes.

As regards contracts in dealings between businessmen, one can, generally speaking, distinguish between those which are, respectively, jointly and unilaterally framed. Jointly framed standard form agreements, often known as *agreed documents*, have, as the name implies, been jointly drafted by organizations or parties on both sides and therefore can generally be presumed to be reasonably balanced. The wide use of agreed documents is a characteristic feature of Swedish and Nordic law on contracts.

One particularly well-known example is the widely distributed and much-used terms of delivery set out by Teknikföretagen (the Swedish Association of Engeneering Companies), the contract form *NL 09*, "General terms of delivery for machinery and other mechanical and electrical equipment within and between Denmark, Finland, Norway and Sweden". This form is closely related to the corresponding international contract forms by Orgalime, in particular Orgalime S 2012 (General Conditions for the Supply of Mechanical, Elecrtical and Electronic Products).

Quite fundamental in the field of building and works contracts (contracting law), for which practically no legislation exists in Sweden outside the consumer contracts field, is *AB 04*, General Conditions of Contract for Building and Civil Engineering Works and Building Services, drafted by the

Contracts Committee of the relevant business organizations. In the absence of legislation, the AB 04 functions as a sort of general code for the construction industry.

Unilaterally drafted standard contracts have, by definition, been framed by representatives of one party only and, consequently, are usually less even-handed in their apportionment of rights and obligations between parties. Standard contracts applying in relation to consumers used as a rule to be unilaterally framed. However, nowadays standard contracts of this kind are usually preceded by negotiations with the National Board for Consumer Policies/the Consumer Ombudsman, which can be said to represent consumer interests, so the outcome of the negotiations can to some extent be regarded as an equivalent of agreed documents in the business sector. Forms of this kind include the warranty forms applied by dealers to consumer sales, e.g., for the sale of cars, boats and electronic appliances.

It is in the nature of standardization that dealers and other should be reluctant to substitute standardized terms by negotiated terms. Especially where private individuals and other disadvantaged contracting parties are concerned, it can be difficult or quite impossible to obtain other than the standard conditions. If so, they simply have to "take it or leave it". The terms applying to utilities such as electricity and gas supplies, telephone or IT subscriptions, shopping on-line and public transport are as a rule completely inflexible.

This is not the place to go into any further detail concerning the contractual rules applying to standard form agreements, but it is worth pointing out that Swedish law is reluctant to treat standard contracts as manifestations of commercial practice. Also particularly well-established standard contracts like the NL 09 and the AB 04 are not considered to have reached the status of commercial practice. Thus, the terms of standard form agreements have to be incorporated in each individual agreement. For this purpose it is usually sufficient for the individual agreement to make express and distinct reference to the standard terms by using a reference clause, so long as those terms are easily available to the other party. Simplified contracting procedures are accepted in certain cases. For example, a person parking in a private parking lot where the conditions for parking are posted is deemed, by his action, to have accepted those conditions. On the other hand, unexpected or onerous conditions of standard form agreements usually have to be made quite clear to the other party. It is also a tendency in judicial practice to interpret onerous conditions of standard form agreements restrictively, to the detriment of the party who drafted them (contra proferentem): this is known in Swedish as the "unclarity rule". It is now codified, where consumer agreements are concerned, in Section 10 of the 1994 Act on Contract Terms in Consumer Relations.[18]

A large part of the private law legislation relating to contractual relations is above all aimed at overriding unilateral conditions of standard contracts by means by peremptory rules. As examples of this kind we can take the Consumer Sales Act, the Consumer Services Act, the Consumer Credit Act and important parts of the Real Property Code concerning rent and leasehold. The

18 Bernitz, U., *Swedish Standard Contracts Law and the EC Directive on Contract Terms*, 39 Sc.St.L. p. 13 ff (2000).

general clause in Section 36 of the Contracts Act, empowering courts to modify or set aside unfair contract conditions, is directed, not least, against onerous conditions of standard form agreements. The Market Court has been empowered to forbid a business man to make any further use of a certain type of condition if it has been found unfair.

5 Concluding Remarks

The presentation in this chapter of commercial norms in Swedish law has the character of a rather sketchy overview. Many of the aspects will be discussed more in depth in other chapters in this volume. As can be concluded from this presentation, Swedish law maintains a high degree of contractual freedom within commercial law and provides a wide scope for the development and application of soft law. The existing legislation, such as the 1990 Sales Act, is normally completely non-mandatory in commercial contractual relations and allows not only explicitly formulated contractual terms to override the provisions of the legislation but also commercial practice and other custom. Standard contracts play a very prominent role in Swedish business life. Companies are free to settle their disputes by arbitration instead of court proceedings and do so to a very large extent. Courts are open to accept commercial practice, whether termed *lex mercatoria* or not, as expressions of applicable norms.

Another expression of the generally non-interventionist Swedish legal approach to commercial law is the acceptance of extra-judicial norms formed as part of self-regulation of business life. As has been described, codes of professional ethics play an important role, as does self-regulation by assessment bodies established within the business community, e.g., the Press Ombudsman and the Press Council, the Advertising Ombudsman, The Anti-Corruption Institute and the Swedish Securities Council and the Corporate Governance Board.