Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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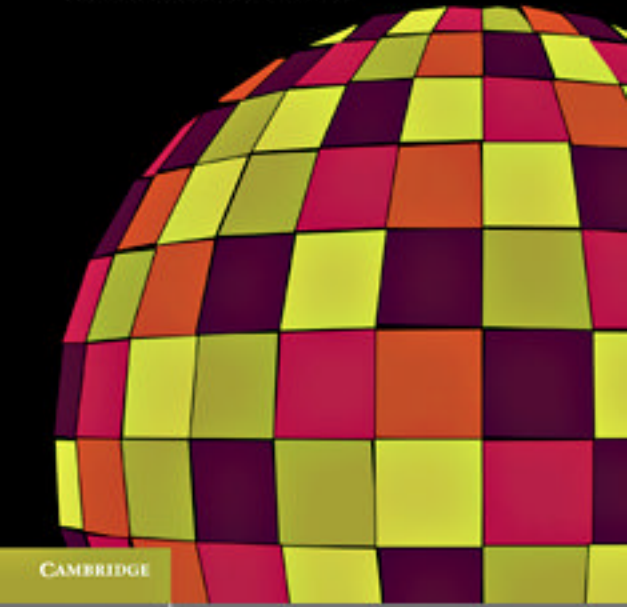

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The Nordic tradition: application of boilerplate clauses under Swedish law

LARS GORTON

1 General background

Scandinavian law is often regarded by comparative lawyers as one particular group under the civil law family. There is no common Scandinavian law, except for particular parts of contract law and the law of obligations. There is a common Scandinavian approach in several respects and there is thus some common legislation. This is particularly true within parts of private law, the particular area of law covered in this book.

Following Nordic legislative cooperation at the end of the nineteenth and the first half of the twentieth centuries, a substantial amount of private law legislation from this period is common or similar in the different Scandinavian countries. Thus, for example, the Maritime Codes from the 1890s, the Sales of Goods Acts from the early-twentieth century, the Contracts Acts from around 1915–1920 and the Acts on Promissory Notes from the end of the 1930s were more or less common.[1] Apart from the Maritime Codes of the 1990s, which are largely common for all the Nordic countries, the situation has partly changed. Thus, for example, in spite of all Nordic countries having adhered to the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (CISG), there are currently differences between the Nordic Sales of Goods Acts.[2] Some amendments have been made to the Contracts Acts, the most important amendment being that regarding §36, the

[1] The reason for not giving any exact dates is that the various pieces of legislation were introduced at different times in each of the Nordic countries.

[2] Particularly with respect to the National Sales of Goods Acts, there are differences between the solutions chosen. Denmark decided to maintain the old Sales of Goods Act from 1905. See, inter alia, J. Herre and J. Ramberg, *Allmän köprätt*, 5th edn (Norstedts Juridik, 2009), pp. 25ff.

so-called general clause. In Sweden, this amendment was made in 1976. This provision has given the courts in Scandinavia rather wide discretion to amend or set aside 'unreasonable' clauses or even contracts. In spite of the common legislation in the fields involved here, Scandinavian case law shows that there are certain differences in approach, and there also seem to be some differences in approach with respect to §36 of the Contracts Act in relation to commercial contracts.

The object of this book is to cover various contractual clauses, clauses related to negotiations before the contracting, as well as clauses related to the performance of the contract. Some of these clauses form part of the *boilerplate clauses* that evolved primarily in Anglo-American law.[3] Due to the impact of Anglo-American contract practice, such boilerplate clauses have also come to form part of contracts drafted by lawyers in the Nordic countries, where English or American law is not applicable to the contract. The impact of the Anglo-American contract tradition on contracts drafted by Scandinavian lawyers leads to a considerable increase in the text usually employed in a contract. Part of the explanation for this development is that English lawyers need to be more specific, since there is less legislation to fall back on. English and American law have become more important as applicable law when drafting international business contracts. The effect has been more lengthy contracts, where certain contractual clauses are not necessary when the contract is subject to another law. The contractual solution may even be in conflict with a corresponding regulation in the law chosen for the contract. On the whole, I think that there are some merits to the use of more comprehensive contracts, although there is also a risk that an Anglo-American clause might create difficulties when considered by a court in, say, Norway or Germany.

This chapter comments from a Swedish point of view on the clauses listed in the introduction to Part 3, but will cover some of them more extensively than others. The clauses that will be focused on are entire agreement, no oral amendments, material adverse change, liquidated damages and hardship. The reason for this choice is that these contractual provisions seem to be more frequently discussed in Swedish legal doctrine than the others. There is limited Swedish case law with respect to many of the clauses in question and to the various solutions in use. The various clauses are known and disputes are known, but case law from courts involving them is sparse.

[3] See, for example, L. Gorton, 'Boilerplateklausuler', *Erhvervsjuridisk Tidsskrift* (2009), 170–188, with references.

Although the similarities are considerable between different jurisdictions with respect to fundamental contract law principles, there are differences with respect to the principles on how and when a contract is entered into, when a contract is or is not enforceable, etc. The Nordic Contracts Acts have four chapters: Chapter 1, covering the formation of a contract; Chapter 2, dealing with authority; Chapter 3, concerning the invalidity of contracts; and Chapter 4, setting out certain general provisions. However, interpretation of contracts has developed entirely in case law and in the legal doctrine.

Again, it has to be underlined that Swedish contract law is not the same as, but is rather close to, other systems in the Scandinavian legal family. The Nordic Contracts Acts are more or less equal, but in case law certain differences appear.[4] That being said, it must also be borne in mind that in many areas, Swedish case law is not abundant and sometimes Swedish lawyers or courts may try to find guidelines from solutions arrived at in other Nordic legal systems.[5]

2 Contractual principles and contractual considerations

Certain general principles are still regarded as fundamental in contract law, although they have been gradually narrowed down. One of them is freedom of contract (the parties are free to contract with whomever they wish and on whichever terms that they want, etc.) and the other is the sanctity of contracts (meaning that the parties are bound by what they have agreed to).[6]

[4] It could, for example, be mentioned that §37 of the Contracts Acts has been completely deleted in Danish and Norwegian law, whereas in Swedish and Finnish law, the part concerning *lex commissoria* still remains.

[5] A particular phenomenon that is gradually becoming more obvious is that Swedish courts, at least to some degree, are more open to consider solutions developed in other jurisdictions with solutions adopted in various international or European collections of principles. In a recent judgment rendered 2010–01021 (No. T 9904–08), the Swedish Supreme Court used as part of its reasoning the solution chosen in the Draft Common Frame of Reference ('DCFR') with respect to the right to terminate a distributorship agreement. In Swedish law, there is no particular provision in this respect and there was no contractual solution. In the choice between making an analogy from other pieces of legislation or other contractual solutions, the Supreme Court, without much hesitation, adopted the solution developed in the DCFR.

[6] These principles also appear in the UNIDROIT Principles of International Commercial Contracts ('UPICC'), (International Institute for the Unification of Private Law, 2004), inter alia, Articles 1.1 and 1.3; the Principles of European Contract Law ('PECL'), Parts I and II; O. Lando and H. Beale, (eds.), *Principles of European Contract Law*, Parts I and II

Another important contractual principle which has developed is the *clausula rebus sic stantibus*, meaning that a contract should be performed in accordance with the conditions and circumstances that are prevailing at the time of the conclusion of the contract. However, it seems unlikely that a legal system would be based on this latter doctrine. This principle seems, rather, to have evolved in cases where, due to changed circumstances, a court may adjust the contractual undertaking of a party. A general loyalty (good faith) principle has also developed in some jurisdictions.[7]

Another general principle seems to be that only rarely is a particular form required in order to make a contract binding. For example, this is the case in all the Nordic legal systems.

The above principles mean that contractual parties, particularly in commercial relations, may have incentives to create by agreement a different or more precise contractual regulation than that provided by law.[8] Following the principle of freedom of contract, parties are generally (but within limits) allowed to set the contractual framework within which they carry out their negotiations and perform their contractual undertakings.

This also implies that rules set out in the legislation need to be filled out in various ways in order to determine when a contract has come into being, and also the principles to be applied for such determination. Sometimes and in different contexts, as well as in various ways, the parties themselves introduce one or more clauses, changing the pattern given in law. The parties may also introduce into their agreement particular clauses setting out agreed interpretation provisions.

Parties may thus agree on certain parameters which determine how and when a contract shall be regarded as entered into and binding upon the parties. Thus, in the contract, there may be various reservations or conditions precedent before the contract shall be regarded as

(Kluwer Law International, 2002), Article 1:102; as well as the DCFR, Study Group on a European Civil Code/Research Group on EC Private Law (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Sellier, 2009).

[7] Thus, German law seems to have gone furthest in establishing such principle in §242 of the Bürgerliches Gesetzbuch (BGB). English law does not recognise a general good faith principle. The Nordic countries have a rather broad provision in the Contracts Act through the general clause in §36, giving courts considerable discretion to meddle in contractual relations. There is also some recognition of a loyalty principle.

[8] In business-to-consumer relations, the situation is different in that the legislator, to a greater degree, has introduced contractual elements to protect the consumer.

finally binding on both parties.[9] However, in practice, it may be hard to determine whether at a certain point a binding agreement may have come into existence between the parties, not least for evidentiary reasons.

The research project upon which this book is based showed that there may be tensions between various legal rules and principles related to the contractual framework, but equally also with respect to business organisation and business efficacy. Various legal principles have developed gradually, not necessarily at the same time, following agreed contractual solutions. The legislator,[10] the courts and the contract draftsmen could therefore be seen as carrying forward the development of contract law together.

3 Different parameters

When discussing some of the points below, it may be useful to set them against a certain factual background. Contracts may differ in various ways depending on the particular parameters taken into consideration, and these different parameters (having some importance in Scandinavian law) may have as a consequence substantial variations in the contractual procedure when it comes to the determination of the obligations of the parties, as well as their liability. Some of these differences may be summed up in the following way:

a) Two connected principles in contract law have evolved, namely contractual freedom and the binding nature of the contract.
b) Another principle with different implications is the Roman law principle *clausula rebus sic stantibus*.
c) In some legal systems, the principle of good faith and fair dealing has fundamental roots. In a number of jurisdictions, contract clauses exempting the performing party from its liability are not enforceable in the event of intent or gross negligence.
d) Gradually, more rules and principles of a general character have been developed in order to protect weaker parties, in particular consumers/private persons, but also in, e.g., agency law and the law of carriage of goods.

[9] Such clauses are frequently used in commercial contracts and, particularly in loan agreements, conditions precedent clauses are used as requirements for a lender being bound to pay out the loan amount.

[10] In Scandinavian legal doctrine, 'legislator' seems to be the concept used instead of 'legislature' in this connection, 'legislature' being a more legal technical term.

e) A distinction could be made between spot contracts and cooperation contracts. Such distinctions are also often parallel to 'result oriented contracts' and contracts based on 'best efforts'.
f) To a growing extent, business is conducted in corporations and thus business organisation plays a growing role, affecting and also involving questions of representation and agency. From a contractual perspective, this has a bearing on such contractual uses as inserting clauses that subject the effectiveness of the contract to some form of approval (generally to the approval by the board of each of the parties), no oral amendments clauses, etc.
g) To a growing extent, contracts are made in an international environment.

Related questions also lead to various observations concerning contractual methods, the standardisation of contracts, the understanding and construction of contracts, and the relations in the contract.

Therefore, it may be important to see how these different parameters are treated by the legislator, the courts and the contract draftsmen in different jurisdictions. It may be that there are some different approaches applied in different jurisdictions. It is evident that the various parameters concerned have an impact on the development of the various clauses. In short, we may say that the different parameters discussed here concern the parties (who are they?), the time frame (short term or long term), the type of contract (type of business and type of functions) and the geographical area (local, regional, global).

4 The organisational/agency aspect – the use of representatives

There is thus an expected structure in many contracts, and there is also an expected structure in relations and in many business organisations with respect to decision making. To what extent will a decision actually be made by the board of a company? Will some decision powers follow from an organisation plan? To what extent will a certain position in an organisation entail power of decision (power of position, ostensible authority or apparent authority)? These questions have relevance for the particularities of an individual contract relation. A business organisation consists of many individuals and requires an organisational structure, and there is generally a need for instructions regarding who in the organisation may make what decision. These parameters may have

some legal impact when it comes to the question of power given and authority possible to act on and bind the business entity.

Will a person or a team negotiating for a company have a right to negotiate for, or sign for, and bind the company with respect to the final agreement? Some power will follow from law. Sometimes, such powers follow from particular acts (the giving of a power of attorney).

The relation between the contractual parameters and the organisational aspects becomes obvious when dealing with such clauses as subject to approval, no oral amendments and entire agreement, mainly because decision makers in a business organisation wish to maintain the decision-making power at certain levels. Such clauses mirror the efforts to maintain the decision power on a certain level or within a certain group of people in the organisation. Such practical control does not necessarily reflect the principles as developed by the legislator or the courts. The effect will, in practice, sometimes be that practices of business administration and legal frames of contract law do not always go hand in hand.

The various clauses used mirror different phases in the contracting, and some of the clauses are geared to a specific phase of negotiation such as the entering into the contract (conditions precedent, subject to approval, entire agreement), whereas others are geared towards the performance phase (no oral amendments, no waiver, impossibility, *force majeure*, hardship and material adverse change). Some of the latter clauses are related to changed circumstances.

The subject to approval clause is often drafted to create contractual asymmetry and binds one of the parties, while allowing the other party some time to consider before the subject is lifted. Such clauses are basically allowed and recognised in commercial relations, but they may generally be looked upon less favourably by courts in consumer relationships.

5 Contract phases

5.1 Some general points

The various clauses will be discussed below in relation to the particular contract phase to which they are most relevant. Do they mainly apply during the negotiation phase or rather during the performance phase? The clauses may often be geared to one or the other phase, but they may also have relevance to both phases. The various clauses may have an

implication with respect to where they appear in the contractual framework.

Disregarding the marketing phase, the borderlines between the negotiation phase and the contract performance phase will be addressed.

5.2 Negotiation phase

5.2.1 General remarks

A contract is often preceded by negotiations leading up to the binding agreement. Even in commercial contracts, there is not always a very clear point at which the borderline between the negotiation and the contracting is passed (due to evidentiary problems), but there is a principle borderline, which will often have to be established in hindsight, where there is either no contract at all or else there is a binding contract. Some legal systems recognise also a principle of *culpa in contrahendo*.

Once the parties have agreed, they are bound by that agreement. Normally there is no requirement of form. Depending upon the wide variety of situations, it may in practice turn out not to be so easy to determine if the borderline has been passed or not.

In hindsight, it is also often hard to determine the actual meaning of a contract when considering the circumstances. It may even be the case that one of the parties at a later stage comes to the conclusion that there was no binding contract. The parties may thus have agreed to use various measures to safeguard the contract being upheld in accordance with what was agreed by them.

The parties may, for different reasons, decide to set the frame for the binding nature of the contract by introducing clauses such as conditions precedent, subject to approval and entire agreement in order to create a more solid basis of predictability and to prevent a court from introducing its own approach in this respect. By using these contractual devices, the parties may agree that certain prerequisites should be fulfilled before the binding contract is settled. In connection with commercial contracts, it is not uncommon that the parties use letters of intent or letters of commitment as a step in the contractual negotiations. In Swedish law, there is little case law with respect to these various clauses.[11]

[11] Generally, there is a lack of Swedish case law with respect to commercial cases. This is mainly an effect of the choice of the parties to insert jurisdiction clauses into their contracts referring disputes to arbitration for settlement rather than to courts.

Another feature of practical importance is the use of standard form contracts, which have, over time, caused various legal considerations. Standard contracts may be of different kinds and may serve different purposes, either as a model form for negotiation or as a take-it-or-leave-it part of the contract package.

5.2.2 Conditions precedent and subject to approval

Conditions precedent seem to be used primarily in loan agreements and acquisition contracts (the purchase of businesses) setting out certain requirements to be reached before there is a binding contract (a distinction is made between resolutive conditions and suspensive conditions).[12] A seller of a business may have to provide certain financial statements, auditors' reports, etc., and there may be similar requirements on the borrower in a loan agreement (covering, for example, documentation to be presented, showing sufficient insurance, legal opinions, etc.).

Another related item is that the agreement may have a provision saying something along the lines of 'the contract is subject to board approval, which shall be lifted at the latest . . . failing which this contract shall be null and void'. This is a very common clause in many individually negotiated contracts and also in some standard contracts, and the different reservations may vary. In the legal doctrine, there is a discussion on the understanding and the application of such clauses, not least from a good faith point of view.[13]

5.2.3 No oral contracts

The question of written contracts is often discussed in the legal doctrine. Although there are few requirements in law for a contract to be in writing, in practice, parties often agree specifically that there will be a binding agreement only when both parties have signed the contract.[14]

[12] See in Swedish law, inter alia, A. Adlercreutz, *Avtalsrätt I,* 12th edn (Studentlitteratur, 2002), pp. 109ff.; K. Grönfors, *Avtalsgrundande rättsfakta* (Thomson Fakta, 1993), pp. 74ff.; and C. Ramberg and J. Ramberg, *Allmän avtalsrätt*, 8th edn (Norstedts Juridik, 2010), pp. 95ff.

[13] See NJA 1995, p. 437, where it was discussed whether a subject to board's approval clause would apply with respect to small companies with a small board of directors and few owners, when the particular physical person involved in the negotiation/contracting has a decisive influence on the company. Related questions are also connected with the use of letters of intent and (particularly in loan agreements) the use of letters of commitment.

[14] See, for instance, in Swedish contract law, A. Adlercreutz, 'Om den rättsliga betydelsen av avtalad skriftform och om integrationsklausuler', in U. Bernitz, K. Grönfors, J. Hellner, J. Kleinemann, J. Sandström and J. Herre, *Festskrift till Jan Ramberg*

The parties are free to agree to such a clause, but certain problems may arise when it comes to its application in the individual case.

It is important to note that there are different situations that are often related to questions of evidence. If it has been made clear between the parties that only a written contract between them shall be regarded as a binding contract, then that shall prevail. There may also be a custom between the parties or a custom of the trade to the same effect.

However, the situation in practice appears somewhat differently. If one of the parties sends over to the other the contract for signing to confirm their agreement, then there is already a binding agreement between the parties. For evidence reasons, one of the parties may wish to have a signed contract and if the other party does not respond and it later becomes clear that the failing party does not perform, then the question will arise as to whether there was already a binding contract and also what the terms of the contract were. If, after the contract has been concluded, one of the parties sends over a signed contract to be signed and returned by the party, this would be regarded as proof only of the contractual terms, not as a prerequisite for the contract coming into being.[15]

5.2.4 Entire agreement

5.2.4.1 Reasons for the use of entire agreement clauses Entire agreement clauses stem from English and American contract practice.[16] In English law, the doctrines of parol evidence and *stare decisis* have been recognised for a long time.[17] These are doctrines which are not applied in Scandinavian law. Entire agreement clauses were introduced in contracts subject to English law in order to persuade the courts to uphold the parol

(Juristförlaget, 1996), pp. 17–29.; Adlercreutz, *Avtalsrätt I,* pp. 85ff.; and Ramberg and Ramberg, *Allmän avtalsrätt*, p. 94. This is also a situation close to the discussion of incorporation of standard contracts; see, inter alia, NJA 2007, p. 562, referred to in Ramberg and Ramberg, *Allmän avtalsrätt*, p. 142 and in A. Adlercreutz and L. Gorton, *Avtalsrätt II*, 6th edn (Juridiska föreningen i Lund, 2010), p. 76, as well as in U. Bernitz, *Standardavtalsrätt* (Norstedts Juridik, 2008), pp. 52 and 58.

[15] See, for instance, the discussion in Adlercreutz, *Avtalsrätt*, pp. 78ff.; Adlercreutz, 'Om den rättsliga betydelsen', pp. 17ff.; and Adlercreutz and Gorton, *Avtalsrätt II*, pp. 89ff.

[16] These clauses are also known as merger clauses or integration clauses; see for example, L. Gorton, 'Merger Clauses in Business Contracts', *Erhversretslig Tidsskrift* (2008), 344–360, with references.

[17] C. Mitchell, *Interpretation of Contracts* (Routledge-Cavendish, 2007), pp. 35f. and 137f. See, from a Swedish perspective, J. Hellner, 'The parol evidence rule och tolkningen av skriftliga avtal', in A. Agell (ed.), *Festskrift till Bertil Bengtsson* (Stockholm Nerenius & Santérus, 1993), pp. 185–205.

evidence rule, namely that only what appears in the contract (within the four corners of the contract) shall be considered by the court. In Scandinavian law, also including Swedish law, there is instead a procedural principle to the effect that the courts are allowed to consider any evidence presented by the parties, including documents and statements preceding the final contract.

It has thus been discussed in Swedish law whether and to what extent a court would take an entire agreement clause into consideration. Therefore, some main principles collide, namely that of freedom of contract, the binding nature of a contract and the freedom of the courts to apply any evidence presented.

5.2.4.2 Entire agreement clauses – drafting and application Entire agreement clauses are now found fairly frequently in international business contracts, often in the standard form but also in individually negotiated contracts, a development which, in turn, led to a situation where the courts also had to interpret the particular clause.[18]

The fairly new contract form 'Newbuildcon'[19] contains the following provision in clause 47 under the heading 'sundry':

> This Contract constitutes the entire agreement between the Parties, and no promise, undertaking, representation, warranty or statement by either Party prior to the date of this Contract stated in Box 1 shall affect this Contract. Any modification of this Contract shall not be of any effect unless in writing signed by or on behalf of the Parties.

This particular provision deals with two aspects: the entire agreement aspect as well as the modification (no oral amendments) aspect. The two parameters are often dealt with in conjunction with each other. They deal with different aspects but are both connected with contractual stability.

As mentioned previously, Swedish procedural law is based on the idea that courts shall consider all evidence when judging a case. This means that there are basically no restrictions on how courts may deal with evidence. When it comes to the construction and interpretation of contracts, Swedish law has gradually moved towards a model where a court will not search for the subjective intention of the parties but rather will

[18] These questions have been discussed in depth by Mitchell, *Interpretation*, pp. 129ff. See also Hellner, 'The parol evidence rule', pp. 185f.

[19] This is a contract drafted by BIMCO in relation to shipbuilding and it is used here as an example not because shipbuilding is the most important business, but because it is an established international business.

determine its object from the contract. In connection with an entire agreement clause, there is an inherent conflict between the liberty of the court to consider evidence presented and the rights of the parties to make their own choice (within the freedom of contract framework) with respect to those parameters that the court should take into consideration.

5.2.4.3 Swedish case law As mentioned above, Swedish case law in this area is rather limited. The few cases reported that relate to entire agreement clauses where Swedish courts/arbitrators have been involved have been discussed by, among others, Erik Sjöman.[20]

In the first case there was an Entire Agreement clause stating:

> Complete regulation.
>
> This agreement is the complete agreement by the parties of all questions concerned by the Agreement. All written or oral covenants and representations preceding the agreement shall be substituted for by the contents of this agreement.

The dispute in the case concerned how the contract, lacking a clause on the right of termination, should be interpreted and applied.[21]

In the contract, there was a catalogue of representations and covenants, the breach of which would lead to a price reduction. The particular deficiency which the buyer referred to was not part of the catalogue but was mentioned in an information memorandum. The purchaser based its claim on the Swedish Sales of Goods Act and its rules. The seller referred to the entire agreement clause, alleging that the Sales of Goods Act should be disregarded. If the view of the seller prevailed, the buyer would have been cut off from a contractual remedy. Without discussing the applicability of the entire agreement clause, the arbitrators found that a price reduction would be allowed.

The second case is a case from the labour court, AD 2007, No. 86.[22] This case concerned whether an employer had a good reason for dismissal of an employee who had used the credit card of the employer for withdrawal of money for private use (this was only provisional as he was later going to reimburse and did reimburse the employer). The employer

[20] See E. Sjöman, 'Integrationsklausulen och dispositive rätt'(2002–2003) *Juridisk Tidskrift*, 935–941; and E. Sjöman, 'Ett rättsfall om integrationsklausuler' (2008) *Svensk Juristtidning*, 571–577.

[21] See Gorton, 'Boilerplateklausuler', 178ff.

[22] The labour court is a special court and its judgments have to be evaluated with some caution in civil law matters.

was of the opinion that the employee was not entitled to such use of the credit card, but the employee did not share this view. The written employment contract did not contain any particular provision to this effect. In this case, there had been a transfer of ownership and the contract had an entire agreement clause, which prescribed that the written agreement was the complete regulation of the contractual relations between the parties, that the agreement replaced all previous oral and written undertakings, agreements and arrangements, and that all amendments should be in writing. According to the employer, the clause meant that previous benefits which were not set out in the written agreement, such as the right to use the credit card, were no longer applicable.

In its judgment, the labour court noted that the typical aim of entire agreement clauses is to eliminate or at least reduce the importance of such oral or written statements, and to make sure that amendments to the agreement would have to be in writing in future. The labour court also noted that there is no authoritative case law available to illustrate the correct interpretation of such a clause. It also discussed the role of the entire agreement clause as a standard clause which had not been noticed by that party who had not drafted the agreement. The court did not delve further into that question but it found, instead, that the application of the clause was also dependent on the general principles of interpretation. Reference was made to the fact that the employee had actually used the credit card without any objection of the employer and also other benefits, although not specifically mentioned, had been maintained.

The employer had thus itself not upheld the entire agreement clause during the course of the employment. Under the circumstances in the case, the court found that the aim of the clause was not to extinguish all employment benefits which had not been set out in the employment agreement. The clause could therefore not be understood to mean that the employee would not be entitled to use the credit card as he had done.

5.2.4.4 Some final observations on the entire agreement clause To sum up, there are some differences between the Scandinavian approach and the original purpose of entire agreement clauses under English law, where, due to procedural rules, we may presume that Swedish courts will have to find a balance between the binding force of the contract and the wide scope of the court in procedural law to take all evidence into consideration when judging a dispute. It is hardly likely that Swedish courts/arbitrators would follow only the principle of freedom of contract.

A further point could also have importance, namely whether the entire agreement clause is a standard clause or whether it is an individually negotiated clause.

A final observation is that it is not unlikely that Swedish lawyers would, when considering an entire agreement clause, apply an approach similar to that expressed in Article II – 4:104 of the DCFR with respect to the understanding of a merger clause:

1) If a contract document contains an individually negotiated clause stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the documentation do not form part of the contract.
2) If the merger clause is not individually negotiated, it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.
3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.
4) A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.[23]

5.3 Performance phase

5.3.1 Some general remarks

Following the principle that a contract, once entered into by the parties, shall be binding upon them in accordance with what they agreed, the parties are regarded to be bound by the contract as it stands once it is entered into.

Law itself may prescribe certain deviations from this principle, due to, for example, impossibility, *force majeure* and frustration (in common law). In some legal systems, there may be provisions allowing for renegotiation in case of hardship.

In some legal systems, a principle of good faith (loyalty) may be used to prevent the parties from abusing subsequently arising events in order

[23] Similar solutions are found in Article 2:105 of the PECL and in Article 2.1.17 of the UPICC.

to maintain that the contract shall be performed as once agreed upon, irrespective of the circumstantial development, and in the Scandinavian countries, §36 of the Contracts Act may also be used.

5.3.2 No oral amendments

No oral amendments clauses are fairly frequent in commercial contracts. They are often – but by no means always – combined with modification clauses, i.e., where the parties have agreed that modifications of the contract shall be allowed but only on certain grounds. They are quite common in long-term contracts such as construction contracts and shipbuilding contracts.

The no oral amendments clause may set out that a change in the contract may only be made in accordance with certain formal requirements, for example, only in writing or when signed by a person duly authorised to do so or who is on the same level in the organisation hierarchy as the person originally signing the contract (organisational formality). As already mentioned, the no oral amendments clause is often combined with the entire agreement clause.[24]

The no oral amendments clause is thus one of the clauses which serve to create foreseeability in the contract relation. A party seeking to apply the clause too strictly in accordance with its wording may find that a Swedish court comes to the conclusion that such use of the clause would contravene good faith (or the court may interpret the clause to such effect or possibly use § 36 of the Contracts Act).

5.3.3 Change of circumstances

5.3.3.1 Generally It is also common that the parties, through various contract clauses related to changed circumstances, open up the possibility for changes to be taken into consideration. Such clauses may concern various matters and they may be geared to physical events, political events, financial events, etc. The contractual solutions may also be of a different nature, in some cases rather narrow and precise, and in other cases broader and of a more general nature.

Depending upon what the parties set out as their agreement, a contract may provide that under certain circumstances a court may modify certain provisions of the agreement, or the contract may instead open up the possibility for a particular right to deviate from the original text when the circumstances so demand. There are various contractual

[24] See, for example, the BIMCO clause above in Section 5.2.4.2.

solutions designed to serve as an object to achieve the effects when this particular doctrine is applied (under headings such as *force majeure*, hardship, indexing, escalation, etc.). The effects of such clauses may vary. Some clauses allow a court to set a certain provision in the contract aside, while other clauses allow a court to declare the whole contract void, and some clauses allow the adjustment of a contract.

The UPICC, the PECL and the DCFR have provisions concerning *force majeure* and hardship.[25]

5.3.3.2 Force majeure In most commercial contracts, there are *force majeure* clauses based either on a model that is rather close to the control provision of the CISG or on a broader traditional *force majeure* clause.[26]

Rather than delving into the variety of *force majeure* clauses in use, we instead refer to Article 79 of the CISG, which is based on control liability. Under Article 79, the seller is exempted from liability if an impediment occurs that is beyond the control of the seller and that was unforeseeable at the time of conclusion of the agreement. Some new *force majeure* clauses seem to adapt the pattern of the CISG provision, but there are also several *force majeure* clauses in use that are broader and allow for more events to be covered.

Swedish courts are likely to take into some consideration the solution appearing in §27 of the Swedish Sales of Goods Act (1990: 931) or §79 in the Swedish legislation based on the CISG (1987: 222) when judging *force majeure* clauses, although they will undoubtedly utilise the wording used in the particular clause as the starting point.

5.3.3.3 Cost increase and hardship Sometimes, the parties introduce particular clauses mirroring cost increases into their contracts. The price agreed is then the basic price, whereas the price that will actually be paid will depend on various factors. A particular question that could be discussed concerns whether Article 79 of the CISG is also applicable to hardship events, that is, price-related changes. There is German and Swiss case law showing that hardship events may be covered by Article 79, but to my knowledge there is, so far, no case where Swiss or German

[25] Articles 7.1.7 and 6.2.3 of the UPICC; see also DCFR III – 3:104 and III – 1:110 and Articles 3:108 and 6:111 of the PECL.

[26] In Swedish case law, there are a number of decisions related to *force majeure* questions. This discussion goes back to the Sales of Goods Act of 1905. One later case that was at its time much discussed is NJA 1970, p. 478, also involving a *force majeure* clause.

courts have applied the control liability provision of the CISG for a price increase.[27]

There may be an automatic variation in the price depending on particular price increases. The parties may have agreed that the price shall follow an index,[28] certain price increases reported in a certain publication, labour costs, material costs, etc. The cost increase may be applied automatically or it may be a basis for negotiations. Furthermore, there may be clauses dealing with changes in the foreign exchange rates having an impact on the price agreed.[29]

The hardship clause is drafted differently and normally it is separate from the *force majeure* clause. Hardship clauses are primarily related to circumstances which have changed the agreed parameters for the price calculation, mainly due to substantial cost increases. The hardship clause normally gives rise to renegotiation between the parties.[30]

Swedish case law in this area is again rather limited, but there are cases illustrating how courts may take into consideration substantial changes with respect to the duty to perform. There may also have been a certain change in view over time. The Supreme Court has thus in some cases accepted substantial cost increases as a basis for an adjustment of hire.[31] In a couple of later cases, it applied §36 in the Contracts Act to amend very long contracts.[32]

5.3.3.4 Material adverse change The material adverse change (MAC) clause seems to appear most frequently in loan agreements and in

[27] See, for example, I. Schwenzer, '*Force Majeure* and Hardship in International Sales Contracts' (2009) 39 *Victoria University of Wellington Law Review*, 709–725. In Swedish law, there are some old cases where economic *force majeure* was discussed; see NJA 1918, p. 20 and NJA 1923, p. 20.

[28] For example, NJA 1953, p. 301 and NJA 1983, p. 385.

[29] See E. M. Runesson, 'Bidrag till frågan om existensen av en omförhandlingsplikt och dess innehåll', in B. Flodgren, L. Gorton, B. Nyström and P. Samuelsson (eds.), *Vänskrift till Axel Adlercreutz* (Juristförlaget i Lund, 2007), pp. 451–462, 451, with references.

[30] See Articles 6.2.1–6.2.3 of the UPICC and Article 6.111 of the PECL (using the terminology change of circumstances).

[31] In NJA 1946, p. 679, the Supreme Court decided that there was a continued right to buy tickets from a railway at a certain price (agreed in connection with the purchase of land for the building of houses) even though there had been substantial price increase since the agreement was made. For a further discussion, see J. Hellner, 'Jämkning av långvarigt avtal' (1994–1995) *Juridisk Tidskrift*, 137–141.

[32] In NJA 1983, p. 385, the Supreme Court amended the contract, but in NJA 1979 p. 731, it did not make any further amendment than what the contract party had already accepted. In NJA 1994, p. 359, §36 was used to limit in time an agreement 'for eternity'.

mergers and acquisitions (M&A) transactions. This clause could be seen as incorporating the effects of the legal doctrine of failed assumptions ('förutsättningsläran') that, in Scandinavian law, is one of several legal methods that could be used by a court or by arbitrators in certain cases of changed circumstances.[33] It could be seen as one of the doctrines developed in order to balance out some effects of the *pacta sunt servanda* principle. When circumstances have changed at the time of performance of the contract, as compared to those prevailing at the time of the conclusion of the contract, courts may, in some cases, declare that the contract is no longer binding upon the parties. The doctrine of failed assumptions has developed differently and is applied somewhat differently in the various Scandinavian countries. In Swedish law, courts used to be more reluctant to apply this doctrine than Norwegian judges, but there currently seems to be some more readiness among Swedish judges to apply the doctrine.[34]

The MAC clause has some objects of a rather similar nature as those covered by this doctrine. When used in M&A agreements, the MAC clause is generally inserted to release a buyer of a company from its promise to buy in the event that material adverse changes have occurred. It is often drafted as a renegotiation clause. Loan agreements often have one MAC clause geared at the phase prior to drawdown and another applicable to the loan period. With respect to the first period, the MAC clause may be used as a reason for the lender not to advance the loan amount and, with respect to the loan period, the clause may be used as a particular event entitling the lender to early termination of the loan agreement.[35]

Depending on their drafting, MAC clauses may be applicable in relation to the particular financial situation of the borrower or in relation to a general economic downturn, which may also affect the financial activities of the prospective borrower. Lacking precise parameters for its application, a MAC clause may turn out to be difficult to use in the

[33] See, for example, B. Lehrberg, *Förutsättningsläran* (Iustus, 1989).

[34] This may be an effect of the study by Lehrberg opening up for a broader discussion of the related matters.

[35] In Swedish legal doctrine, the MAC clause has been discussed by L. Gorton, 'Material Adverse Change-klausuler', in Flodgren *et al.*, *Vänskrift till Axel Adlercreutz*, pp. 117–132.

Although the expression 'early termination' is not generally recognised in different European legal systems, it is used here because it seems to be the term normally applied in this type of agreement. International loan agreements are also often drafted on the basis of model forms drafted under Anglo-American law.

individual situation, but it may also prove to be useful for the opening up of renegotiation of an agreement.

As far as I know, there is no case involving the interpretation or the application of a MAC clause in Swedish court practice.

6 Compensation clauses

6.1 General background

I have chosen to delve somewhat into the question of compensation clauses, since this is an area where there is some legal doctrine and some Swedish case law.[36] There are some different solutions in different jurisdictions. As a starting point, the CISG prescribes that the seller has certain rights in case of breach of performance by the seller (Articles 45–52), including the right to claim damages (Articles 74–77).[37]

Parties to a contract may, however, prefer other solutions than those offered in particular legislation. In such a case, they must address the question through contractually agreed clauses. There are several types of compensation clauses in use designed for different purposes and with different effect.

In individual contracts, but often also in standard contracts, the parties frequently determine the character of their contractual undertakings as well as the prerequisites for, and the consequences of, a breach, including the determination of compensation. The parties are basically free to agree on the consequences of a breach, but within a certain framework.[38] §36 of the Nordic Contracts Acts may be used as a balance in case a compensation clause would be deemed to be unreasonable.[39]

[36] Again, it must be reiterated that case law from the courts is rather old and present-day disputes are often referred to arbitration, the decisions of which are basically not public.

[37] See, for example, J. Herre and J. Ramberg, *Internationella köplagen (CISG). En kommentar*, 3rd edn (Juristförlaget, 2010), pp. 302ff. and 480ff.

[38] Different legal systems may have different rules regarding how far the parties may use their contractual freedom in this respect. Are they free to agree that a breach entitles the suffering party to retain a prepayment or down payment (forfeiture) and still terminate the contract? Could a compensation clause be used by one party to buy itself out of its contractual obligations? Several different questions may thus arise. Depending on the particular situation, a forfeiture clause may not be acceptable in all legal systems.

[39] See, for example, Statens Offentliga Utredningar (SOU) 1974:84 for a thorough discussion of the ideas behind §36 of the Contracts Act and its use.

6.2 *Liquidated damages and penalties*

Given an extensive meaning, the term 'compensation clause' may cover clauses of different types, such as forfeiture, limitation of liability, exclusion and liquidated damages. They may be interpreted differently and may be dealt with differently in different legal systems. I mainly focus here on the compensation clause in the more narrow form of a liquidated damages clause.

6.3 *The use of compensation clauses*

Compensation clauses are more common in commercial contracts than in consumer contracts.[40] In its original form in 1916, the Swedish Contracts Act had an explicit provision (§36) on liquidated damages, allowing a court the discretion to adjust the agreed amount if it appeared 'obviously unreasonable'. The introduction of the provision followed a long discussion in the legal doctrine on the use of such clauses.[41] A large number of cases related to compensation clauses are reported in the years following the introduction of the Contracts Act and there is a comprehensive survey of these cases, including an analysis and a discussion of the principles, in a study by Lena Olsen.[42]

As explained by Almén, these clauses are used in various situations[43] and in connection with different contract types. They may be designed differently, they may be standardised or individually negotiated, they may concern delay but also other types of breach whether of positive or negative type, they may rule out the use of all other consequences of the breach and they may work as an option.[44] This means that the variety is considerable, which also opens up different interpretations. These clauses are quite specific, but also need to be read in their legal context.

Different drafting techniques may thus be used with respect to different types of contracts. Sales contracts often contain standard terms with

[40] Courts are rather reluctant to accept compensation clauses in consumer contracts.

[41] T. Almén, *Lagen om avtal och andra rättshandlingar på förmögenhetsrättens område av den 11 julin 1915 samt därav föranledda författningar med litteraturhänvisningar och förklarande anmärkningar* (P. A. Norstedt & Söners Förlag, 1916).

[42] L. Olsen, *Ersättningsklasusuler. Vite och andra avtalade klausuler vid kontraktsbrott* (Nerenius & Santérus, 1986); see in particular pp. 70ff. and 93ff.

[43] Almén, *Lagen om avtal*, p. 211.

[44] In later Swedish legal doctrine, the question has been discussed by L. Gorton and P. Samuelsson, 'Kontraktuella viten', in C. Dahlman (ed.), *Festskrift till Ingemar Ståhl. Studier i rättsekonomi*, (Studentlitteratur, 2005), pp. 75–106, Chapters 5–7.

respect to compensation due to the seller's delay. They often spell out that the compensation amount shall be the *only* compensation, but if there is a considerable delay, the buyer shall also be entitled to terminate the contract. In some cases, there may be an option for the suffering party to choose either the agreed compensation or to demand damages, in which case the suffering party will have to prove his or her loss.

In all compensation clauses, there is a particular amount agreed with respect to the particular breach (a certain amount per day of delay, a certain amount per deficiency in speed, etc.), but the contract may also specifically provide that, in case the buyer is entitled to cancel the contract, no liquidated damages will be paid. The rationale for this is that a builder (in a construction contract) will make a considerable loss in case of cancellation and that the buyer should carry some of this burden.

Sales contract compensation clauses are most common in relation to delay in performance. In such cases, the contract normally prescribes that a certain amount shall be paid as compensation to the other party per day, per week or per other specified time unit of delay. In some contracts, a compensation clause with respect to other types of breach of performance may also be inserted. This is particularly the case where the obligation is precise, such as deficiency in a particular warranted quality or characteristic. Sometimes, the compensation clauses are standardised in a contract form, while in other cases, room is left open for the insertion of a certain amount, and in yet other instances, the parties will negotiate the compensation clause individually.

Compensation clauses are often agreed upon with respect to a positive obligation ('we undertake to deliver . . .'), but there are also instances where the compensation clause is agreed upon in relation to a negative undertaking ('we undertake not to disclose . . .'). The question may arise as to whether there is a principal difference between these types when it comes to their interpretation.

In contracts where a party sells a business, the M&A agreement often accompanies a prohibition for the seller to compete with the buyer within the same type of business for a certain period of time, with a compensation clause in case of breach.[45] In addition, in the event that a party has promised not to disclose information received during negotiations, such an undertaking may be underpinned by a compensation

[45] This may thus set out that if any information received during the negotiations is abused or disclosed to a third party, a certain amount shall be paid as a penalty.