

The Vanishing Scandinavian Sales Law

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1 Introduction	258
2 The Art. 92 Reservation	258
3 Inter-Nordic Sales Transactions	259
4 “Direct” and “Indirect” Loss	260
5 Filling Gaps and Consumer Protection “Spill-over”	261
6 Will the Concept of “Scandinavian Sales Law” Remain?	264

1 Introduction

The traditional co-operation between the Scandinavian States in legislation was particularly important in the field of sales law. The Sale of Goods Acts of Denmark (1906) Norway (1907) and Sweden (1905) were practically identical. In the early 1900s, Finland was within the Russian sphere of influence and consequently a co-operation with the other Scandinavian States was deferred until the 1960s.

The Scandinavian States never ratified the 1964 international sales law conventions.¹ Instead, the efforts to modernize the sales law became strongly linked to the previous Sale of Goods Acts of Denmark, Norway and Sweden. However, the proposal for a new legislation in Sweden prepared by Hjalmar Karlgren and Jan Hellner² came at a time when the preparation of CISG was well advanced. Upon the ratification of CISG, it became a difficult matter to decide whether the common legal heritage should be retained³ or whether the international trend represented by CISG should be allowed to supersede. Practical considerations called for the latter option, as domestic régimes based upon different principles than those adopted in CISG would create confusion. So, in order to avoid setting up two completely separate legal régimes for contracts for international and domestic sale of goods, all Scandinavian States, except Denmark, opted for a revision of the national Sale of Goods Acts bringing them on line with the system and most of the contents of CISG. New Sale of Goods Acts came into force in Finland 1988, Norway 1989 and Sweden 1991, while Iceland adopted a new Sale of Goods Act similar to the Norwegian one in 2000.

In view of the traditional co-operation it was expected that Denmark would follow the path of the other Scandinavian countries so as to safeguard the common heritage within the law of sales.⁴ However, this did not happen and probably never will, it being well-known that any shortcomings of new legislation become more readily apparent with the passage of time.

2 The Art. 92 Reservation

First and foremost, formation of contract was considered a matter of general contract law which should not require any particular rules for contracts of sale. As a result, Denmark, Norway and Sweden – but not Iceland – made a reservation to the effect that they should not be considered Contracting States with respect to Part II of CISG dealing with formation (Art. 92). The Scandinavian States co-operated with each other when they adopted their

1 *The Uniform Law on the International Sale of Goods* and the *Uniform Law on the Formation of Contracts for the International Sale of Goods*.

2 SOU 1976:66.

3 As suggested in the Nordic Report NU 1985:5.

4 *See* concerning the expected continuation of the legislative process, A. Vinding Kruse, *Købsrett*, 1989, s. 140.

Contracts Acts in the early 1900s. There, Chapter 1 contains rules relating to formation of contracts and understandably Scandinavian legislators were reluctant to abandon the common legal heritage. Nevertheless, the rules in Chapter 1 of the Contracts Acts are not, in my view, any more appropriate than Articles 14-24 of CISG. According to Article 3 of the Contracts Acts a reasonable time for acceptance is stipulated when the parties have not determined a specific time for acceptance of an offer in writing. But one may ask if merchants are really assisted by this stipulation. How should the offeree know with sufficient certainty whether there is still time to accept? Presumably, the offeree would always ask the offeror which with contemporary methods of speedy communication he can do without any difficulty whatsoever. And one might well feel inclined to leave the offeree at his own peril if he fails to ask and nevertheless gambles by making his own contract of re-sale before he has secured that the offer is still effective. Be that as it may, it can hardly be appropriate for the Scandinavian States to rely on choice of law principles in order to determine whether there is a binding declaration or not. If, for instance, a party in one of the Scandinavian CISG-States were to enter into a contract of sale with a party in a non-Scandinavian CISG-State, choice of law principles would frequently lead to the application of CISG despite the Article 92 reservation, in particular where it is the seller who is situated in the non-Scandinavian CISG-State. Thus, the sooner the Scandinavian CISG-States are brought on line with the other CISG-States, the better.⁵ The problem has been sufficiently serious for the International Chamber of Commerce (ICC) to intervene by requesting the National Committees of the ICC in 2006 to insist on a withdrawal of the Article 92 reservation in order to avoid misunderstandings between merchants to the detriment of international trade.

3 Inter-Nordic Sales Transactions

In order to maintain the traditional status of Scandinavian Sales Law, the Scandinavian States also made a reservation to the effect that such law should apply in sales transactions between parties having their places of business in Denmark, Finland, Iceland, Norway and Sweden (Art. 94). However, Art. 94 requires for such a reservation to be allowed that the rules in the reservation-States are “closely related”. This is no longer true with respect to Denmark when only the other Scandinavian States opted for an internationalisation of their Sale of Goods Acts according to the system and principles of CISG. It may be argued that the reservations with respect to Denmark should now be withdrawn, as otherwise the Scandinavian States would find themselves in a situation where they are in breach of their international obligations. Yet, it does not follow that courts and arbitral tribunals should ignore the reservations, which are still in

⁵ See Ramberg/Herre, *Internationella köplagen (CISG)*, Stockholm 2004, s. 139, J. Lookofsky, *Understanding the CISG in Scandinavia 2nd ed.*, 2002, s. 51 et seq and L. Sévon, *Reservationen om avtalslut i FN-konventionen om internationella köp* FJFT, 4/2006 s. 431-437.

effect.⁶ However, if an arbitral tribunal is free to determine the choice of law, several institutional rules of arbitration would nowadays make it possible for the arbitral tribunal to avoid the application of choice-of-law principles and instead directly apply the “rules of law which it determines to be appropriate”.⁷ As an arbitrator I would be tempted to use this possibility to by-pass the choice of law principles and simply choose the appropriate rule, at least in some cases. One such case would be to avoid the principle of Article 21(3) of the Danish Sale of Goods Act applicable to commercial sales (“handelskøb”) – enabling the party affected by the breach to avoid the contract immediately in case of a delayed performance - and apply the international principle of Article 25 CISG requiring a fundamental breach as do the Scandinavian Sale of Goods Acts in Finland, Iceland, Norway and Sweden (Article 25).

4 “Direct” and “Indirect” Loss

The Sale of Goods Acts in Finland, Iceland, Norway and Sweden differ from CISG on liability for loss as a consequence of breach of contract. A differentiation is made with respect to liability for different type of losses.⁸ While liability for “direct” loss follows the main principle of a strict liability with the exception of “impediments beyond control” (Article 27 of the Scandinavian Sale of Goods Acts expressing the same principle as in Art. 79 of CISG), liability for “indirect loss” requires proven negligence by the party in breach or, with respect to the seller’s liability, non-conformity with an express guarantee (Articles 27 and 40 respectively). The reason for this differentiation of liability stems from the increased exposure for the seller of ascertained goods, who, in the absence of a guarantee, could avoid liability for damages under the Sale of Goods Acts of the early 1900s. Also, the sellers’ liability was generally reduced by disclaimers of liability for consequential and indirect losses. The organizations representing the industry in the Scandinavian countries requested that the Sale of Goods Acts should in this respect be based on current market practice, so as to avoid unpleasant surprises for sellers who occasionally did not enjoy the protection of disclaimers in their standard contracts or otherwise.

Nevertheless, drawing a distinction between “direct” and “indirect” loss is far from easy. The only possibility seems to be to indicate clearly what should be regarded as “direct loss” and, on that basis, to decide *e contrario* which loss is “indirect”. The Scandinavian legislator chose the other option, namely first to decide in Article 67, first paragraph, which loss should be recoverable at all (in principle, as in CISG Art. 74, all loss as a consequence of the breach).⁹ Then, in Article 67, second paragraph, types of “indirect” loss are enumerated as follows:

6 Ramberg/Herre, *op.cit. supra* at s. 626.

7 The *ICC Rules of Arbitration*, Art. 17.1 and the *Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce*, Art. 24.

8 “Direct” and “indirect” loss; Article 67 compared with Articles 27, 40 and 57.

9 Note however the exception in the Swedish Sale of Goods Act for “loss to other property than the goods sold”, which in the Finnish and Norwegian Acts is considered “indirect loss”.

1. Loss as a result of reduction or loss of production or turn-over.
2. Loss because it has not been possible to use the goods as contemplated.
3. Loss of profit.
4. Other similar loss if difficult to foresee.

This technique leaves the border-line between “direct” and “indirect” loss blurred, in particular with respect to “other *similar loss if difficult to foresee*” (my italics).

But, worst of all, even if the loss is “indirect” it could be converted into “direct” as a result of measures undertaken by the party affected by the breach to mitigate damages, as it would be unfair to impose upon him a duty to do so (according to Article 70) and then punish him by disallowing compensation from the party in breach.¹⁰ As an example could be mentioned expenses for measures undertaken to maintain production or use of the goods which otherwise would have represented “indirect” loss according to the above-mentioned points 1 and 2. Also, it is difficult to understand why “loss of profit” according to point 3 should be considered “indirect”, when damages for price difference calculated on the basis of Articles 68 and 69 are considered “direct” loss.

The difficulty in drawing a border-line between “direct” and “indirect” loss is well-known by persons engaged in contract drafting but seems to have been under-estimated by the Scandinavian legislators.¹¹ It may well be appropriate to reduce the risk of exposure of the party in breach for loss which is difficult to foresee, but it is better to use well-known methods to do so. Admittedly, the application of the foreseeability formula of Article 74 may be cold comfort but, if so, the parties may be expected to determine the extent of liability in their contract.¹²

5 Filling Gaps and Consumer Protection “Spill-over”

While, as has been suggested, the departure from the liability system of CISG may be open to criticism, what is more readily understandable is that a need was felt to fill gaps. The right to specific performance was one of the controversial issues in the drafting of CISG. This appears from the compromise of Article 28 to the effect that a court is not bound to enter a judgement for specific performance unless it would do so under its own law in respect of similar

10 See Prop 1988/89:76 *Köplagen* and J. Ramberg, *Köplagen*, 1995, s. 679.

11 See for critical remarks, J. Kleineman, *Indirekt skada och fråga om behovet av en köplagsreform*, Festskrift Ramberg, 1996, s. 307-318.

12 See Ramberg/Herre, *Allmän köprätt*, 2003, s. 207 et seq. Cf. J. Hellner, *Consequential Loss and Exemption Clauses* (1981), 1 *Oxford Journal of Legal Studies*, s. 13 et seq. and J. Ramberg, *Breach of Contract and Recoverable Losses* in *Making Commercial Law, Essays in Honour of Roy Goode* (Oxford) 1997, s. 191-200.

contracts of sale not governed by the Convention. Accordingly, there was every reason to clarify the position of the Scandinavian States in this regard. The obligation to perform the contract specifically is firmly rooted in Nordic contract law. However, there are some limitations and these are now expressed in Article 23 of the Scandinavian Sale of Goods Acts where it is determined that a seller is not obliged to perform the contract specifically, if there is an impediment which he could not overcome or if performance would entail unreasonable sacrifice considering the buyer's interest in having the contract fulfilled specifically. It should be mentioned that the principle of a right to specific performance is to some extent limited by the application of the general duty to mitigate damages according to Article 77 CISG and Article 70 of the Scandinavian Sale of Goods Acts. It is inappropriate that a party should insist on specific performance where he could without difficulty protect his economic interests by a cover transaction and his right to compensation for any price difference. The greater the emphasis placed on the duty to mitigate damages, the more the difference in principle between Anglo-American and Scandinavian law in this respect would be modified, since it would come closer to the Anglo-American principle that there is no right to specific performance when unascertained goods are easily obtainable on the market.

The CISG method of tailoring the remedies open to the seller and those of the buyer from the same cloth sometimes overshadows the need to consider their respective positions in a different light.¹³ The buyer also must specifically perform the contract which in his case means that the seller can hold him to the contract and demand the agreed price. But should this exclude the possibility of considering the particular interest of the buyer where he has no need for such goods which are intended to be particularly manufactured or provided for his special purposes? In such cases, it might be appropriate to release the buyer from the obligation to take delivery in return for economic compensation to the seller so that his expected profit is preserved. This may well follow also from Article 77 CISG, according to the principle that the seller must mitigate the damage when, at the time when the seller has not yet manufactured the goods or taken measures to provide them, the buyer expressly declares that he is not interested in taking delivery of the goods. Article 52 of the Scandinavian Sale of Goods Acts contains a specific rule for such cases to the effect that the seller may not, in principle, hold the buyer to the bargain by continuing manufacture or other preparations for delivery and thereupon demanding the full price. The buyer would be liable to pay compensation to the seller according to the same principles that apply to damages under Articles 67-70. Although the principle that emerges from Article 52 should not be difficult to accept, since it is more or less on line with the duty to mitigate damages under Article 77 CISG, its practical application will entail difficulties as it is far from easy to determine the required compensation to the seller.¹⁴

13 See J. Hellner, *The UN Convention on International Sale of Goods – an Outsider's View* [Festschrift für Stefan Riesenfeld, 1983, s. 71 et seq.].

14 See further in this respect, J. Ramberg, *Köplagen* 1995, s. 527 et seq.

The Scandinavians' desire to retain their heritage from times past and to heed the modern trend of protecting the weaker party in contractual relationships may, in some instances, have been carried too far. One may well ask whether it is appropriate to determine the liability of the buyer differently from that of the seller in case of breach (Articles 54 and 57 of the Scandinavian Sale of Goods Act) and, in particular, it is surely strange to limit the seller's right to avoid the contract when the buyer has received the goods (Article 54(4)).¹⁵

Although it is certainly appropriate these days not only to consider the need to protect consumers but also, generally, to consider the position of the weaker party such as small and medium-sized enterprises (the so-called SMEs), it is nevertheless questionable to what extent such protection can be made available in a wholly non-mandatory Statute. It may, of course, be appropriate to protect consumers by mandatory statute such as Articles 19 and 17 of the Swedish Consumer Sales Act. Article 19 protects the consumer where he has relied on the information obtained through the seller's marketing of the goods, while Article 17 provides special protection where the goods have been sold "as is". These provisions have also been included in the Sale of Goods Acts (Articles 18 and 19 respectively). Needless to say, any sophisticated seller observing this inclusion would have the possibility to protect himself using the principle of freedom of contract according to Article 3 of the Scandinavian Sale of Goods Act. The most common technique for doing so would be to include so-called "merger" or "entire agreement" clauses in the contract to the effect that only information expressly mentioned in the contract concerning the condition and use of the goods is to be effective. Indeed, in terms of the need to protect SMEs, their position might be worsened since such enterprises, in their capacity as sellers, might be unwittingly exposed to more stringent liability to their buyers, whereas SMEs in their capacity as buyers might, in contracts with sophisticated sellers, lose the intended protection under Articles 18-19 of the Scandinavian Sale of Goods Acts. Also, the situation grows more cumbersome under CISG when the national law of Finland, Iceland, Norway and Sweden applies. The question then arises whether it is permissible to supplement CISG with Articles 18-19 of the respective Sale of Goods Acts. In my view, Article 7 CISG should be upheld and such supplementing rules from national law not be permitted with respect to matters regulated by CISG. According to CISG, the legal effect of the seller's information in his marketing of the goods and the meaning of the common clause "as is" must be resolved according to the method of contract interpretation laid down in Articles 8-9 CISG, except where general principles of contract law on liability for fraudulent information are applicable.

A further supplement in the Scandinavian Sale of Goods Acts as compared with CISG appears in its Article 70(2). This determines that compensation in damages can be reduced if the amount is unreasonable in light of the possibility for the party in breach to foresee and prevent the damage. Further circumstances might be considered but are not specifically mentioned. Here again, the ambition to protect the weaker party in the contractual relationship appears. Thus, it could

15 See J. Ramberg, *The New Swedish Sales Law*, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari 28, Rome 1997 s. 12 et. seq.

be appropriate in particular to reduce heavy liability in damages in a contract where the seller is acting in a non-business capacity, while the buyer suffers extensive loss within the scope of his business operations, e.g. in the resale of used consumer property.¹⁶ Nevertheless, it may be questioned whether it is right to erode the important principle of full compensation to the party affected by the breach. Presumably, the interests of the party in breach are sufficiently protected by the limitation of the liability either according to the principle of adequate causation or the foreseeability formula in Article 74 CISG.

6 Will the Concept of “Scandinavian Sales Law” Remain?

The resounding success of CISG will influence not only further legislation in the field of sale of goods in Scandinavia but also, generally, willingness to accept CISG in practice. It may well be that the reservations under both Art. 92 and 94 will be withdrawn and that at the very least the inappropriate division between direct and indirect loss will be replaced by a liability system identical or at least more compatible with CISG Articles 74 and 79. However, this does not necessarily mean that CISG will actually govern in practice. There will always be parties that opt out of CISG wholly or in part and, indeed, as has been suggested above, they should be induced to do so when they seek more certainty than would be offered by some of the abstract and open-ended provisions of CISG. International organizations, such as the International Chamber of Commerce, have traditionally provided assistance to merchants by offering uniform rules and standard forms, and they will continue to do so in order to achieve an efficient inter-action between law and practice.

Indeed, as evidenced by the 2004 UNIDROIT Principles of International Commercial Contracts and the expansion of international standard rules and contract forms, the practical importance of national régimes within the field of sales law will be significantly reduced. So, even if it may still take some time until the present differences between domestic Scandinavian Sales Law and the international régime under CISG will disappear, the practical importance of the Scandinavian Sales Law will become successively diluted in international sales transactions.

16 This example appears in J. Ramberg, *Köplagen* 1995, s. 700.