# Interpretation of Contracts

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## Introduction

An important topic in contract law is how contracts and other legal documents should be interpreted. Since the Swedish Contracts Act contains no provisions for contractual interpretation, rules and principles in this area have extensively been developed in case law, which means that the provisions can be considered as a judge-made law. Furthermore, a number of authors have addressed and commented the topic of contractual interpretation and different contract theories have been developed.[1] However, concept formation and structure varies slightly between different authors and provisions in case law are often vague and may be subject to different interpretations. The purpose of this presentation is to describe the Swedish provisions of contract interpretation. The petition includes a statement of party-oriented interpretation, objective-oriented interpretation, complementary rules of interpretation and supplementation.

[1] See, for example, A. Adlerceutz / L. Gorton Avtalsrätt II, 6 uppl., Lund 2010, U. Bernitz Standardavtalsrätt p. 83 ff., 8 uppl., Stockholm 2013, P. Fohlin Avtalstolkning, Uppsala 1989, B. Lehrberg Avtalstolkning, 7 uppl., Uppsala 2016, M. Radetzki Tolkning av försäkringsvillkor, Stockholm 2014, Jan Ramberg / C. Ramberg Allmän avtalsrätt, 10 uppl., Stockholm 2016, s. 160 ff., J. Samuelsson Tolkning och utfyllning, Uppsala 2008 and L. Vahlén Avtal och tolkning, Stockholm 1966.

# Party-oriented interpretation

## The common will of the parties

A distinction is often made between party-oriented interpretation and objective-oriented interpretation of contracts.[2] The main rule of party-oriented interpretation is that a contract is to be understood according to the common intention of the parties.[3] This is of course a natural point of view if the intentions of the parties is in accordance with the ordinary meaning of the contractual wording. In this type of case, the parties use the normal language meaning to announce their intentions. The parties can, however, often also in an acceptable way communicate their intentions if they use words that are vague, incomplete or ambiguous. The reason for this is that they reckon that the counterparty will take in to account not only the wording but also what appears to be relevant and reasonable in the present context and so on.

The common intention of the parties will be given preference even if it is contrary to the ordinary meaning of the words used, which is expressed by the roman words "falsa demonstratio non nocet".[4] This applies even when there exist legal form requirement, albeit the extent to which the parties may derogate from everyday language without breaking a procedural requirement can be discussed.[5] In Swedish law, however, there is no parole evidence rule, four-corner rule or similar, which means that a court is normally entitled to take into account all interpretation data that the parties are aware of and that oral agreements are given legal relevance. Special form requirements exist only to an extremely limited extent and are therefore the exception and not the main rule. However, the party claiming that the common intention

[2] See, for example, B. Lehrberg Avtalstolkning p. 5 ff. and 77 ff.

[3] See, for example, B. Lehrberg p. 51 ff. and A. Adlercreutz / L. Gorton Avtalsrätt II p. 57. Cf. the statements by the Supreme Court in the case of NJA 1997 p. 382, NJA 1999 p. 35, NJA 2003 p. 650, NJA 2014 p. 960 and NJA 2016 p. 689.

[4] See A. Adlercreutz / L. Gorton Avtalsrätt II p. 58 and B. Lehrberg Avtalstolkning p. 56.

[5] Cf. NJA 1984 p. 482 and NJA 2016 p. 689.

differs from the ordinary meaning of the contractual text has the burden of proof for this.[6]

A further possibility is that the contractual text does not have a provision about what applies in a particular respect. If the parties in this case have formed an intention of what is applicable, the intentions of the parties is complementary to the explicit content of the contract. This can happen if something is so obvious that it does not explicitly need to be stated in the contract, for example, that the parties assume that the sold car has functional brakes.[7] The same applies if the parties in the past regularly have acted in a certain way and they have no need to repeat it in the written document once again. In this type of case, it is often said that the parties implicitly understand the contractual regulation. An implicit understanding is, however, only relevant if no specific formal requirements have been set.

### The Models of dolus and culpa

If it turns out that the parties interpreted the contract differently at the conclusion of the contract and a common intention of the parties therefore is absent, different models within the party-oriented interpretation have been developed.

One of these is called the dolus-model and it prescribes that if (A) have realized the intention of (B) while (B) have not realized the intention of (A) the contract is interpreted in favour of B.[8] The reason for this is that (A) has a duty to eliminate the misunderstanding if he had known that the counterparty had interpreted the contract differently. Not to comply with such an obligation is contrary to general principles of good faith and fair dealing of Swedish contract law. Section 6, second paragraph, of the Contracts Act, supports the dolus-model. This rule states that if an offeree

[6] See A. Adlercreutz / L. Gorton Avtalsrätt II p. 59.

[7] Cf. A. Adlercreutz / L. Gorton Avtalsrätt II p. 52.

[8] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 133 ff. and B. Lehrberg Avtalstolkning p. 62. Cf. the statements by the Supreme Court in the case of NJA 1948 p. 620, NJA 1951 p. 282, NJA 1955 p. 247, NJA 1997 p. 382 and NJA 1999 p. 35,

considers that the acceptance is in accordance with the offer and the offeree must realize this, a contract has been concluded between the parties in accordance with the content of the acceptance. The characteristic of this rule is that one party have realized that the counterparty understands the contract in a different way and becomes bound by the counterparty's understanding because he did not remove the misunderstanding.

An additional model that has been discussed is called the culpa-model.[9] This differs from the dolus-model in that it not only takes into account whether (A) must have realized the intention of (B) but also if he should have known this, that is if (A) as a reasonable person had reason to understand this. If (A) enter into the contract in such circumstances he is considered culpable, which means that the contract is interpreted in favor of (B) provided that this party acted in good faith.

To what extent the culpa-model is recognized as valid in Swedish law is unclear. While some advocates the use of the model other are more sceptical. The sceptics have argued that the culpa-model should only be applied in certain cases, such as if, the usual meaning of the words is ambiguous or if the culpable party occupy a superior position in relation to the other party.[10] The model has found expression in case law, but it is not possible to draw any firm conclusions about when it should be applied.[11]

In recent case law, the Supreme Court has applied the model of culpa to a lesser extent than before and there is a tendency for the court, after finding that there is no common intention, to apply an objective-oriented interpretation.[12] The ambiguity that this creates is unfortunate and there is a need for clarification of the extent to which the culpa-model applies in

[9] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 134 ff., , P. Fohlin Avtalstolkning p. 58 ff., U. Holmbäck Förklaringsmisstag och oklara avtal, Svensk Juristtidning 1960 p. 321, B. Lehrberg Avtalstolkning p. 71 ff., J. Ramberg / C. Ramberg Allmän avtalsrätt p. 176 f. and F. Schmidt Typfall, partsavsikt och partsculpa, Svensk Juristtidning 1959 p. 497.

[10] See, for example, B. Lehrberg Avtalstolkning p. 72 ff. and J. Ramberg / C. Ramberg Allmän avtalsrätt p. 176 f.

[11] See, for example, NJA 1960 p. 586, NJA 1969 p. 409 and NJA 1986 p. 596. Cf. the minority in NJA 1957 p. 69.

[12] See, for example, NJA 2014 p. 960 and NJA 2016 p. 689.

Swedish law. In my view, it is important that the culpa model is applied in future. The justifying reasons for the model are that a contracting party should act in accordance with good faith and fair dealing and help to eliminate misunderstandings in connection with the conclusion of the contract. This is in accordance with the values underlying Swedish contract law, and it would be a shame if the demands made by the culpa-model would be compromised by the kind of objective considerations noted below.[13]

The dolus-model is more often referred to in the grounds than the culpa-model, and it is reasonable to assume that the Supreme Court considers it to take precedence over objective-oriented interpretation.[14] Nevertheless, it happens that the court refrains from mentioning the model explicitly and a clarification of the model's applicability would therefore be desirable.[15]

A question that is difficult to answer is how the contract should be interpreted if both parties understood or should have understood the other party's perception of the contract.[16] If the dispute concerns a fundamental part of the contract and the parties have not begun to fulfil their contractual obligations the contract can be seen as void. However, if both parties to the contract agrees that it shall consist, and especially if it appears to be substantially completed this option is less desirable. In this type of case, it is therefore possible that the Court uses the kind of objective criteria highlighted below.

Something that can also be considered is if A had an actual understanding of B's intention, whereas B only should have realized A's intention. Since it can be argued that A in such a case, largely acted contrary to good faith than B,

[13] In NJA 2016 p. 689, which concerned a property purchase, it would, in my view, have been natural for the Supreme Court to apply the culpa-model. Unfortunately, the court did not apply this model. It did not even mention it.

[14] See, for example, NJA 1997 p. 382 and NJA 1999 p. 35.

[15] See, for example, NJA 2014 p. 960 and NJA 2016 p. 689. Cf. U. Bernitz Standardavtalsrätt p. 86.

[16] See, for example, F. Schmidt Typfall, partsavsikt och partsculpa, Svensk Juristtidning 1959 p. 497. Cf. J. Ramberg ”Medveten otydlighet som avtalsrättsligt problem” Juridisk Tidskrift 1992-93 p. 362 and NJA 1995 p. 586.

it may be argued that B's interpretation should be given priority (cf. Section 6, second paragraph, of the Swedish Contracts Act).

An additional case is that both parties acted in good faith, that is, none of the parties knew nor should have known the intention of the other party.[17] In this type of case, it can also be argued that no contract has been entered into or that the court uses an objective-oriented interpretation.

## Objective-oriented interpretation

### Importance of language standards

If it is not possible to apply the above-described rules on party-oriented interpretation, the rules on objective-oriented interpretation will apply. The main rule for the objective-oriented interpretation is that the courts should interpret a contractual text in accordance with common language usage.[18] This method of interpretation can be used if neither party invokes the party-oriented interpretation, if there is not enough evidence to use it or if none of the parties had formed an intention of how a contractual term should be interpreted. In practice, the courts in Sweden use the objective-oriented interpretation very often. The common language usage is, however, not the only language standard that give guidance within the framework of objective-oriented interpretation. If the contractual wording have, a different meaning according to commercial usages or other practices this meaning will be given preference.[19]

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[17] See, for example, F. Schmidt Typfall, partsavsikt och partsculpa, Svensk Juristtidning 1959 p. 497.

[18] See, for example, B. Lehrberg Avtalstolkning p. 111 ff.and J. Ramberg / C. Ramberg Allmän avtalsrätt p. 161 ff. Cf. the statements by the Supreme Court in the case of NJA 1990 p. 24 and NJA 2007 p. 35.

[19] Cf. A. Adlercreutz / L. Gorton Avtalsrätt II p. 73 ff., B. Lehrberg Avtalstolkning p. 116 f. and J. Ramberg / C. Ramberg Allmän avtalsrätt p. 168. See also, for example, NJA 1921 p. 511 and NJA 1978 p. 628.

A reason that a party did not form an understanding on the content of the contract in a certain respect is that a third party has drawn up the contract and none of the parties has read the contract in its entirety. In this case, the parties have taken a risk and are bound by the contractual text according to the common language usage even if they would not have accepted the provisions if they had read it. The same applies if the contract contains a reference to a standard form contract and a party has refrained from reading it. However, a rule in Swedish law provides that a party may not introduce an unexpected or onerous term without clarifying its meaning to the counterparty.[20]

When it comes to a technical and legal concept, it can be the case that the parties only have a superficial understanding of its meaning. In this type of case, the parties often take it for granted that the more precise technical or legal meaning is applicable. The legal system contains, for example, of concepts such as ownership and tenancy, which consists of a combination of different rights and obligations.[21] Although the nonprofessional has some understanding of what characterizes these legal relationships, it is up to lawyers to specify more precisely the composite legal positions.[22]

In order to state that a person has the belief that he sells something, rents something and so on, it is enough that the person has a certain minimum knowledge of the legal effects identified by the words in question. But it is normally also taken for granted that the person knows that if there is a dispute about the more detailed meaning of the words, he can be assisted by experts in the legal community. One way to describe this is that the nonprofessional's understanding of legal concepts contains an implicit reference to the legal expert meaning.[23]

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[20] See, for example, U. Bernitz Standardavtalsrätt p. 68 ff. and NJA 2011 p. 600.

[21] Cf. L. Lindahl Position and Change, Dortrecht 1977, p. 34 ff., and H. Hassler Allmän sakrätt, Stockholm 1973, p. 20 ff.

[22] See O. Svensson Viljeförklaringen och dess innehåll, Lund 1996, p. 117 ff. Cf. H. Putnam Philosophical Papers, vol. 2, Mind. Language and Reality, Cambridge 1975, p. 227. See also B. Lehrberg Avtalstolkning p. 118 f.

[23] Cf. O. Svensson Viljeförklaringen och dess innehåll p. 120.

A similar reasoning can be brought in respect to technical terms like "force-majeure" and "indirect losses".[24] If a contract-term contains such words, the parties have normally no precise understanding of the words but this does not prevent the concepts from having a well-defined legal meaning. However, legal concepts do not have a precise "expert-meaning" in all respects. Statutes can therefore contain definitions in order to give a term a more detailed meaning and courts can create precedents in order to give guidance on how a concept is to be understood.

A question that has been discussed is how to distinguish between the legal effects that are part of legal concepts as buying and renting and the legal effects, which do not form a part of the concept, but enters due to so-called supplementation of contracts.[25] Whiles some rules in the Sale of Goods Act, for example, tend to be perceived as interpretative rules other rules in the act are merely seen as supplementary rules. Regardless of how the boundary is drawn between the legal meaning of judicial concepts and supplementation, the legal effects in question are largely determined in the legislature and courts. Of great importance to the legal conceptualization in the area of contract, law is the work carried out by various legal scientists.

**Other circumstances of relevance for objective-oriented interpretation**

The meaning of a contractual text or statement according to a certain language -standard is not the only aspect taken into account in the objective-oriented interpretation. If the relevant meaning is vague or too general and the party-oriented interpretation does not give any guidance it may, for example, be necessary to take into account other aspects. The main rule is that all circumstances that the parties knew or should have known when they entered the contract may be taken into account in the interpretation.[26] This means, for instance, that circumstances that have not been directly reflected

[24] Cf. O. Svensson Viljeförklaringen och dess innehåll p. 119 f.

[25] See, for example, Ola Svensson Viljeförklaringen och dess innehåll p. 120 and F. Stang Innledning til Formueretten, 3 uppl., Oslo 1935, p. 1935

[26] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 54 ff. and B. Lehrberg Avtalstolkning p. 100 ff.

in the text of the contract can also be taken into account, such as contract negotiations and prior contracts between the parties. This delimitation is sometimes called the "intersubjective framework".[27]

It is sometimes said that the contract should be interpreted according to the meaning, which a reasonable person would give the contract based on the relevant circumstances.[28] Although an interpretation according to the understanding of a reasonable person only gives a general orientation, it establishes that the interpretation should be based on a comprehensive assessment of the relevant circumstances.

Of great importance is also, what is known as systematic interpretation.[29] This method of interpretation means that a term should be interpreted in light of the entire contract in which it is included. What constitutes the reasonable purpose of the contract can furthermore be taken into account in the objective-oriented interpretation.[30] Account may also be taken of the provisions contained in the supplementary regulation.[31] Consideration may also be given to which option is most likely to give rise to an equilibrium between the parties' performance. Normally the supplementary rules of the contracts gives guidance on what constitutes a reasonable regulation. Supplementary rules, however, have often a large scope. Although a rule may appear fair in the normal case, it may also cover some atypical situations in which this is not the case. In such cases, an interpretation based on the supplementary rules get fold for an equitable interpretation that appear fair

[27] See A. Adlercreutz / L. Gorton Avtalsrätt II p. 54.

[28] See, for example, F. Schmidt Typfall, partsavsikt och partsculpa, Svensk Juristtidning 1959 p. 497 (512). Cf. Article 4.1 (2) CISG.

[29] See, for, example U. Bernitz Standardavtalsrätt p. 87 f., B. Lehrberg Avtalstolkning p. 121 ff. and J. Ramberg / C. Ramberg Allmän avtalsrätt p. 173 f. Cf. the statements by the Supreme Court in the case of NJA 1990 p. 24, NJA 1992 p. 403, NJA 2007 p. 35, NJA 2013 p. 271 p. 7 and NJA 2014 p. 960 p. 22.

[30] See, for example, B. Lehrberg Avtalstolkning p. 140 ff. and J. Ramberg / C. Ramberg Allmän avtalsrätt p. 173. Cf., for example, NJA 1991 p. 319, NJA 2001 p. 750, NJA 2007 p. 35 and NJA 2013 p. 253.

[31] Se, for example, A. Adlercreutz, L. Gorton Avtalsrätt II p. 137 ff., B. Lehrberg Avtalstolkning p. 185 and J. Ramberg / C. Ramberg Allmän avtalsrätt. Cf., for example, NJA 1942 p. 548, NJA 1963 p. 683, NJA 1989 p. 269, NJA 2001 p. 750, NJA 2012 p. 597, NJA 2013 p. 271 and NJA 2014 p. 960

in the present case. An equity interpretation is particularly prominent when it comes to interpreting a contract where one party occupies an inferior position.

In Swedish law, courts have competence to modify or override an unfair contract term by applying section 36 of the Contracts Act. To some extent this competence overlap with the equity interpretation. The basis of assessment is to a large degree the same and the difference lies mainly in the fact that while the equity interpretation supposes an unclear contract terms this is not the case with section 36. Since a judge has a wider competence to do fairness assessments if the term is unclear than if this is not the case, it has a certain practical importance how the boundary between the two methods should be drawn.

## Complementary rules

### To the detriment of the party who could *avert the uncertainty*

If the objective-oriented interpretation does not give a clear result, it is possible to use some additional rules. Such a rule provides that if a term is unclear, the courts should interpret the contract to the detriment of the party who had the greatest opportunity to avert the uncertainty. To consider which party this is the courts consider different criteria.

One such criteria is the author or supplier of the contractual text. This aspect is linked to the internationally well-known rule that unclear contractual terms shall be interpreted "contra profarentem", that is an interpretation of the term against the author or supplier of the term is required.

Of importance for the assessment is, however, also who has the most experience and expertise in the field. If, for example, one of the parties is a professional while the other party is only a layman it can be argued that the contract should be interpreted to the detriment of the professional with the justification that this party is the most experienced party.

The above-mentioned criteria often coincide, as the most experienced has a tendency to be the party that drafted or supplied the text of the contract. However, it may happen that the nonprofessional has drafted the term and in this case, the two criteria must be weighed against each other in order to be able to judge which of the parties had the greatest opportunity to avert the uncertainty.

That consideration should be given to the party's constellation is expressed in section 10 of the Act on Contract Terms in Consumer Relations, which provide that if the meaning of a contract-term between a trader and a consumer that has not been individually negotiated by the parties is unclear, the term is interpreted to the consumer's benefit.

The rule that the courts should interpreted the term to the detriment of the party who had the greatest opportunity to avert the uncertainty is controversial. Although it can be argued that a court firstly should assess which interpretation should be given priority based on an objective-oriented approach, in some cases it may be difficult for a court to apply this interpretation-standard. There is also a risk that the court lacks the necessary skills to determine what constitutes the most reasonable understanding according to an objective-oriented interpretation, which may occur if the court lacks further knowledge of what characterizes the current market. It can be argued that the interpretation-rule in such cases should be designed so that at least one of the parties at the time of the conclusion of the contract is given an incentive to clarify the terms of the contract. This can be justified by the fact that in this type of case it is less costly for this party to eliminate the misunderstanding than it is for a court to interpret the contract in retrospect. The rule that the term should be interpreted to the detriment of the party who had the greatest opportunity to avert the uncertainty has the mentioned incentive effect and therefore acts as a "penalty default rule". That is why it can be argued that the rule should not be downgraded too much.

As regards Section 10 of the Act on Contract Terms in Consumer Relations, it should be noted that this is based on an EU directive and is a clearer and more stringent variant of the rule than that which has usually been applied in Swedish law. It may therefore be argued that the rule should apply in this

respect and that, in the case of business to consumer contracts, it has been given a stronger position than in business-to-business contracts. In Swedish case law, it is also primarily in the relationship between traders that the weight of the rule has been reduced.

### The Minimum-rule

An additional rule is the minimum-rule, which states that unclear contractual terms shall be interpreted to the detriment of the obligated party. This rule may seem natural in the case of beneficial contracts, such as gifts and gratuitous services, but is less natural as regards onerous contracts. Assume that the dispute concerns how a condition on the quality of the goods shall be construed in a purchase contract. Because the seller then is the obligated party the terms must be interpreted to the seller's advantage according to the minimum-rule. However, because the buyer must pay the same price regardless of the interpretation, this means that he is disadvantaged in ways that may be difficult to justify. If the minimum-rule must play a role in the interpretation of onerous contract, it can therefore be argued that it should be used as a last resort when none of the above-described rules of interpretation provides a result. That the rule is of limited importance is also the ruling opinion today

# Supplementation

**Generally about supplementation of contracts**

If neither the subjective-oriented, the objective-oriented interpretation nor the complementary rules provide any results, the legal relationship between the parties shall be determined by what is called the supplementation of the contract.[32] Whether supplementation is part of contract interpretation is disputed. However, some have suggested that while the rules described above can be called rules of contractual interpretation in a narrow sense, these rules along with the rules on supplementation can be called rules on contractual interpretation in a broad sense.[33]

Supplementary rules can have various functions. They can specify how the parties' main obligations must be carried out, such as how, where and when the duties of a purchase or service contract are to be fulfilled. They may provide conditions for the performance of an obligation. They may constitute additional obligations in the contract. They can stipulate remedies for breach of contracts and so on.[34] It is sometimes said that a supplementation with non-mandatory rules requires that the contract is incomplete or contains a gap. Such an approach can be telling when the contractual regulation is not sufficiently detailed to provide guidance to answer questions such as when, where and how a contractual performance shall be fulfilled, and to some extent when it comes to specify which sanctions become applicable upon a breach of contract.[35]

As regards additional obligations, however, it may be questioned if they fill out a gap in the contract. These obligations do not specify any commitment

[32] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 21 ff. and B. Lehrberg Avtalstolkning p. 257 ff.

[33] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 15., U. Holmbäck Förklaringsmisstag och oklara avtal, Svensk Juristtidning 1960 p. 321 (p. 322) and Studier i Förutsättningslärans terminologi p. 104 ff. Cf. B. Lehrberg Avtalstolkning p. 21 f.

[34] O. Svensson Avtalsfrihet och rättvisa, Lund 2012, p. 265 f.

[35] O. Svensson Avtalsfrihet och rättvisa p. 266.

of a party. Instead, they impose on a party a commitment that he has not undertaken, for example, provisions on the care of the goods sold or messages to the counter-party in certain situations. If you are going to talk about a gap in these types of cases, it is because the contract lacks a provision, which should have been included and which clarifies what it means for a party to act in accordance with what good faith, and fair dealing requires.[36] This shows that the application of supplementary rules might influence the balance between the party's rights and duties and that supplementation do not have the more reclusive role as one can get the impression of when it is said that they are used only if the contract is incomplete or contains a gap.

As stated the supplementary rules can provide conditions for the performance of an obligation, for example, that a person has the right to depart from the contract if a certain event occurs. Characteristic of this type of case is that the legislature transforms an unconditional commitment to a conditioned commitment, which implies a restriction of the scope of the commitment and thus a kind of adjustment or amendment of the contract between the parties and not the filling of a gap in the contract.[37] Complementary condition are, however, largely non-mandatory, which means that they can be eliminated if the contract explicitly states that they do not apply between the parties.

The supplementary rules facilitate the formation of contracts by providing a set of rules that effectively balance the parities rights and obligations and promotes good faith and fair dealing in contractual relationships. Characteristic of many supplementary rules is that they have the character of standards in order to cover possible cases, for example, that goods sold shall be consistent with what the buyer could reasonably assume, that a service should be carried out in a professional manner and that a commission shall be performed in good faith. When it comes to the rules about remedies for breach of contract, these are often more precise, but even in these cases standards exists, for example, rules concerning how to modify or limit any

[36] O. Svensson Avtalsfrihet och rättvisa p. 266.

[37] Cf. O. Svensson "Tolkning och bristande finhet", i B. Flodgren et.al, Avtalslagen 90 år, Stockholm 2005, p. 475.

liability. One way to reduce the disadvantages of general standards is to clarify the provisions by means of trade practice or other customs, which also characterizes the Swedish private law.

It is possible to distinguish in advance given rules of supplementation and afterwards created supplementation. The former include, for instance, statutes, precedent and legally binding customs. If there are, no predetermined rules of this kind a court must subsequently create a supplementation. As I will return to this can partly be done by so-called typical supplementation, which is a form of further development of dispositive law, or take place through so-called individual supplementation.

The lack of legal rules does not mean, however, that the court should have the right to decide without restrictions what rules should apply between the parties. The idea is that the courts should base their decision on the basic values and principles of the existing law. One way to do this is to make use of legal analogies, something which, according to a well-known legal scientist means *that a general norm is motivated by several more specific provisions that are so well connected with each other and resemble each other so much, that they may be perceived as a special case of this general norm*.[38] The importance of general principles of law has increased in recent years, since the Supreme Court has largely accepted that the court can modify the scope of a statute in the light of general principles of law.[39]

### Typical and individual supplementation of contracts

Sometimes the question arises if the supplementary rules shall be based on a hypothetical will of the parties. An argument for this benchmark is that it allows for a reduction in transaction costs between the parties. If the parties know that, the supplementary rules are consistent with what they had agreed

[38] A. Peczenik Juridikens teori och metod, Stockholm 1995, p. 54. Cf. B. Lehrberg Avtalstolkning p. 257 f. and O. Svensson Tankar om kontraktsrättens teori och metod, Stockholm 2017, p. 89 f. On the concept of legal principle in Nordic law, see, for example, T. Frøberg Rettslig Prinsippargumentasjon, Oslo 2014.

[39] Se, for example, NJA 2017 p. 203 and NJA 2017 p. 1195. Cf. Svensson Tankar om kontraktsrättens teori och metod p. 104 ff.

to as rational and informed persons, they can enter the contract without further need to regulate what applies in various cases.[40]

An example of a supplementary rule that is based on the hypothetical will of the parties is a rule, which prescribes that, unless the parties have agreed upon something else, the price of a contract must be equal to the ordinary market price.[41] This is what the parties, as informed persons most likely would have agreed on. If the seller had requested a higher market price, the buyer had refused the offer and bought the goods by another seller, and if the buyer had demanded a lower price, the seller had refused the request of the buyer, and sold the goods to another. Although some supplementary rules are based on a hypothetical will of the parties, it is difficult to specify the extent to which this is the case in Swedish contract law. However, the importance of customary practices and usages in the Contracts Act and the Sale of Goods Act is a sign of the importance of the average hypothetical will of the parties has in Swedish private law. The reason for this is that the custom largely can be said to reflect such a will.[42]

If the benchmark for the supplementary legislation is the hypothetical will of the parties, some guidelines may be used in the design of the rules. As an example, it can be mentioned that a contractual risk should be assumed by the party who at the lowest cost can prevent it from materializing or by the party who at the lowest cost can cover it by insurance.[43] Such guidelines can be the basis for legislation on the passing of risk, damages and so on. What constitutes an appropriate regulation based on the guidelines, however, can vary and it can sometimes be difficult to determine what constitutes an appropriate regulation in a particular market.[44]

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[40] Cf. O. Svensson Avtalsfrihet och rättvisa p. 272 and H. Ussing, Aftaler, Köpenhamn, p. 436, Köpenhamn 1950.

[41] See O. Svensson Avtalsfrihet och rättvisa p. 268.

[42] Cf. J. Lassen Obligationsretten, 3 uppl., Köpenhamn 1917-1929, p. 371 and F. Stang Fra Spredte Retsfelter, Kristiania 1916, p. 76 ff.

[43] See H. Kötz "Unfair Exemption Clauses", Svensk Juristtidning 1987 p. 473 (p. 478 f.)

[44] Cf. O. Svensson Avtalsfrihet och rättvisa p. 355 f.

In the legal doctrine, a distinction is made between rules based on what the parties on average had agreed on, which is called "untailored default rules", and an individual assessment of what the parties had agreed on in the individual case, which is called "tailored default rules".[45] If the legislature wants to regulate a certain type of contract, the former method must be used. The latter method can, however, be used if a court in a particular case deem that a departure from the typical assessment may be necessary.[46]

In Swedish law, the distinction between “untailored default rules” and “tailored default rules” corresponds to the distinction between typical supplementation and individual supplementation.[47] While the typical supplementation is based on what normally is appropriate for a particular type of contract, individual supplementation is based on what is appropriate in the circumstances of the particular case, which, for example, may happen if the court applies certain contractual provisions analogously to the nearby cases.

However, the characteristics of individual supplementation and the extent to which it can override supplementary rules is unclear. Furthermore, an individual supplementation requires knowledge about how various markets works and if the judges lack such knowledge the court will end up wrong in its view. If courts too often deviates from the rules, this also reduces predictability for the parties. They can therefore prefer to have a more clearly defined set of rules to abide by instead of relying on the judge's discretionary judgment.

**Penalty default rules**

[45] See I. Ayres / R. Gertner “Filling Gaps in Incomplete Contracts”, Yale Law Journal, vol. 99, 1989-1990 p. 87.

[46] See I. Ayres / R. Gertner “Filling Gaps in Incomplete Contracts”, Yale Law Journal, vol. 99, 1989-1990 p. 87 (p. 91 f.).

[47] See, for example, A. Adlercreutz / L. Gorton Avtalsrätt II p. 21 ff. and 29 ff., U. Holmbäck Studier förutsättningslärans terminologi, Uppsala 1970, p. 135 ff. and O. Svensson Viljeförklaringens innehåll p. 154 f.

Another type of supplementary rules which have attracted attention are so-called "penalty default rules". The feature of these is that they have been given a design that gives at least one of the parties' incentive to derogate from the supplementary rule. The aim is to induce a party to provide information to the other party or to the court. If it, for instance, is difficult for a court to determine the hypothetical will of the parties, it may be appropriate to require that the parties in advance have clarified the content of the contract if they want the contract to be valid.[48] A rule of this kind that is introduced in Swedish law is that the validity of a contract requires that it is not to incomplete or unclear in its basic parts. As I pointed out above, the rule that a contractual term should be interpreted to the detriment of the party who had the greatest opportunity to avert the uncertainty can also be seen as a penalty default rule. The very expression "penalty default rules", however, does not belong to the legal tradition in Swedish law.

A penalty default rule can also prevent some forms of strategic behaviour by the more informed party. [49] By making the supplementary rules unfavourable for the informed party, the legislature may persuade this party to inform his counterpart in some respects in order to avoid these disadvantages. If, for example, the buyer's risk of losses due to non-performance by the seller is greater than normal, it may be argued that the buyer should be able to demand compensation only if he informs the seller about the risk of losses at the conclusion of the contract. A rule that a loss should have been foreseeable in order to be replaced has this effect and therefore has the character of a penalty default rule.

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[48] See I. Ayres / R. Gertner "Filling Gaps in Incomplete Contracts", Yale Law Journal, vol. 99, 1989-1990, p. 87 and O. Svensson Avtalsfrihet och rättvisa p. 267 ff. Cf. J.S. Johnston "Strategic Bargaining and the Economic Theory of Contract Default Rules", Yale Law Journal, vol. 100, 1990-1991, p. 615 and P.A. Posner "There Are No Penalty Default Rules in Contract Law", Florida State University Law Review, vol. 33, 2005-2006, p. 563.

[49] See I. Ayres / R. Gertner "Filling Gaps in Incomplete Contracts", Yale Law Journal, vol. 99, 1989-1990 p. 87 (p. 95 ff.) and "Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules", Yale Law Journal, vol. 101, 1991-1992 p. 729 (p. 737) and O. Svensson Avtalsfrihet och rättvisa p. 273 f. Cf., however, O. Ben.Shahar / J.A.E Pottow "On the Stickiness of Default Rules", Florida State University Law Review, vol. 33, 2005-2006 p. 651 (p. 658).

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# Interpretation of Contracts

An important topic in contract law is how contracts and other legal documents should be interpreted. Since the Swedish Contracts Act contains no provisions for contractual interpretation, rules and principles in this area have extensively been developed in case law, which means that the provisions can be considered as a judge-made law. The purpose of this presentation is to describe the Swedish provisions of contract interpretation. The petition includes a statement of party-oriented interpretation, objective-oriented interpretation, complementary rules of interpretation and supplementation.

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