THE QUANTUM OF DAMAGES UNDER THE SCANDINAVIAN SALE OF GOODS ACT

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The aim of this article is to consider the question of the calculation of damages where, in a contract for the purchase of personal property (goods), a breach is committed by the seller in the form of delay in delivery or a defect in the goods, or by the buyer in the form of delay in payment of the purchase price.[1]

In the calculation of damages it is, under Scandinavian law, of decisive importance whether the contract has been rescinded (*hävt*) on the ground of the breach of contract, or not.

The concept "hävning" in Scandinavian law corresponds most closely to what, in Anglo-American law, is called "rescinding the contract" or "declaring the contract avoided". German law speaks of "Rücktritt" and French law of "résolution du contrat". However, these concepts do not really carry the same connotation in the different legal systems.[2]

Both German and traditional Anglo-American law place before the non-breaching party the choice between *either* declaring the contract avoided, and thereby in all respects discontinuing its effectiveness, *or* maintaining the effect of the contract. A party who chooses "Rücktritt" or "rescission of the contract" thereby irrevocably relinquishes his right to damages. For a party who chooses to remain bound to the contract there remains, in general, *another choice. Either* he can take the position that the contract's requirements shall be fulfilled, i.e., the seller shall deliver (or delivered goods shall remain with the buyer) and the buyer shall pay (or the tendered purchase price shall be retained by the seller). *Or* he can take the position that the contract's requirements shall

[1] Concerning Scandinavian law see, among others, Almén, *Om köp och byte av lös egendom*, 4th ed. Stockholm 1960, §§ 25, 30 and 45; Hellner, *Köprätt*, 2nd ed. Stockholm 1963; Rodhe, *Obligationsrätt*, Stockholm 1956, §§ 37 and 44–46; Andersen, *Kjøpsrett*, Oslo 1962, chaps. XII–XV; Ussing, *Køb*, 2nd ed. Copenhagen 1950, § 18 IV.

[2] See especially Rabel, *Das Recht des Warenkaufs*, I, Berlin & Leipzig 1936 (with reprints in 1957 and 1964), §§ 56 and 57. Cf. Rodhe, *Obligationsrätt*, § 37 at notes 28 ff.

not be fulfilled, i.e., the seller shall not deliver (or delivered goods shall be returned to the seller) and the buyer shall not pay (or the tendered purchase price shall be returned to the buyer).

In Scandinavian as well as in French law, there exists no alternative of total invalidation of the contract as a remedy for a breach of contract. Consequently, the first of the two choice situations just referred to never arises, and the contract is treated as continuing in force. Thus, the Scandinavian concept "hävning" (rescission of the contract), as well as the French concept "résolution du contrat", only concerns the second choice situation mentioned and implies that the non-breaching party chooses the second alternative under that situation, namely that the contract's requirements shall not be fulfilled.

However, the Uniform Commercial Code has, in section 2-720, taken a step away from the traditional Anglo-American standpoint, and prescribed that the circumstance that the non-breaching party has used expressions such as "cancellation" or "rescission" shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach, unless it clearly appears that this was intended. In other respects, too, it seems that the traditional standpoint in the U.S.A. is in process of being relaxed, especially with regard to a purchaser's breach of contract.[3]

The 1964 Uniform Law on the International Sale of Goods (hereinafter also cited as the International Sale of Goods Law) has chosen the Scandinavian and French solution. Among the remedies for contract breach that are named there is, in articles 24, 41 and 62, the right of the non-breaching party to rescind the contract ("déclarer la résolution du contrat" or "declare the contract avoided"). In articles 24, 41 and 63 it is expressly provided that, in such cases, the non-breaching party also has the right to request damages.

In what follows I shall leave aside the possibility of declaring the contract wholly invalid, since this implies that no damages will ever lie and is thus not pertinent to the discussion. I intend to follow the terminology that is common to the Scandinavian Sale of Goods Act and the International Sale of Goods Law, and to differentiate between cases where the non-breaching party has rescinded the contract and cases where he has not done so.

[3] Rabel, *Das Recht des Warenkaufs*, II, Berlin & Tübingen 1958, pp. 48 f. Cf. Uniform Commercial Code (1962), sec. 2–703 with comment 1 and sec. 2–706 (6) with comment 11.

A. COMPUTATION OF DAMAGES WHERE THE PURCHASER HAS RESCINDED THE CONTRACT OWING TO THE SELLER'S BREACH

The Scandinavian Sale of Goods Act provides as follows concerning the case where the purchase is rescinded owing to the seller's breach of contract:

> Section 25. When a contract of purchase is rescinded and compensation is to be paid according to the provisions of sections 23 or 24, the amount of damages shall, if no evidence of the loss sustained is produced, be equivalent to the sum by which the price of such goods as are referred to in the contract may have exceeded the contractual purchase price at the date when the goods should have been delivered.
>
> Section 45. The provisions of section 25 regarding the assessment of damages in case of rescission of a contract of purchase owing to delay in the delivery of the goods shall also apply where a contract of purchase is rescinded owing to defects in the goods.

According to this rule, one has to proceed from the market price of the goods that should have been, but now will not be, delivered, and calculate the damages as the difference between the market value of the goods on the delivery day specified in the contract and the price contracted for. Expressed in another way, the purchaser has to be given the sum that would be required to enable him to go into the market and purchase a corresponding quantity of goods of the same type. It can also be expressed by saying that the purchaser's loss is to be calculated as the extra cost of a hypothetical purchase of covering goods.[4]

This method of calculating damages is called the "abstract" method.

The above-cited provisions of the statute prescribe that the calculation of damages shall proceed from the point of time when, according to the contract, delivery should have occurred. However, in practice, the courts have made certain exceptions to this principal rule.

If the situation is one of default because of delay on the part of the seller, the purchaser can, according to section 21 of the

[4] Rodhe, *Obligationsrätt*, § 46 after note 5, and especially at note 13; Hellner, *Köprätt*, p. 95. Cf. *E. A. Brogren* v. *Lilly Borg*, 1947 N.J.A. 1.

Scandinavian Sale of Goods Act, choose between demanding delivery of the goods or rescinding the contract. If no goods are forthcoming, the purchaser need not exercise his right of rescission as soon as it arises, but may, for the present, bide his time and await delivery. In the beginning he may remain wholly passive. If, however, the seller inquires whether the purchaser still wants to have the goods in spite of the delay, then according to section 26 the purchaser must answer without unnecessary delay; otherwise he risks losing his right to demand the goods, and being considered to have rescinded the contract. If no such inquiry comes from the seller, the purchaser must nevertheless give notice of his own accord to the seller within a reasonable (*rimlig*) time that he wants to have the goods; otherwise he will lose his right to demand delivery.

Thus, if no inquiry comes from the seller, the purchaser may remain passive for a fairly long period before he loses his right to demand that the contract be fulfilled. On the other hand, he may, whenever he so desires, decide to rescind the contract, and tender notice of rescission. If he does this, the question arises of how the abstract calculation of damages shall be carried out in such a case. In the Swedish courts' implementation of the law, this question has been answered in the following way.[5] If the purchaser remained passive up to the time when he rescinded the contract, damages are to be calculated on the basis of the price of the goods on the delivery date specified in the contract. If, on the other hand, the purchaser showed himself so interested in obtaining delivery that relatively soon after the contracted delivery date he notified the seller of his own accord that he still desired to receive the goods, and then adhered to this position up until the time when he rescinded the contract, he is considered to have the right to use as a basis for his calculation of damages, not the price ruling on the contracted delivery date, but the price on the day he rescinded the contract. This rule has been justified on the ground that, according to the explicit provisions of the law, the purchaser has the right, up to the time when he rescinds the contract, to demand that the sale be fulfilled, and thus should be

[5] See *Kalmar–Torsås järnvägsaktiebolag* v. *H. Jeansson*, 1918 N.J.A. 620, *Mellersta Sveriges sockerfabriksaktiebolag* v. *Tycho Roberg*, 1919 N.J.A. 427, *AB John Beijers skofabrik* v. *AB Palen & Rydbeck*, 1920 N.J.A. 90, *O. Juhlin* v. *AB Linköpings exportaffär*, 1921 N.J.A. 241, *Föreningen Rogaland Felleskjøp* v. *Sigmund Brodaty*, 1934 N.J.A. 385. See also Almén, *Om köp och byte*, § 25 at notes 156–71e; Rodhe, *Obligationsrätt*, § 46 at notes 19–20; Hellner, *Köprätt*, p. 96.

placed in the same position as if, at the time of rescission, he had instead received the goods. This can also be expressed by saying that the purchaser does not have any duty to make a cover purchase before the day he decides to rescind the contract, and thus a hypothetical cover purchase should be calculated as of that day.

The rule just described applies to cases where the price of the goods has risen since the contracted delivery date. On the other hand, should the price have fallen after the stipulated date, one might question whether the purchaser should not, in this case too, be required to base the calculation of damages on the price at the time of rescission. However, the courts have chosen another solution: they apply the rule that the purchaser may always base his calculation of damages on the price applicable on the delivery date stipulated in the contract, if this price is higher than the price on the day of rescission.[6]

This last rule has been criticized on the ground that it gives the purchaser the opportunity to speculate at the seller's expense. By demanding that the sale be carried out, the purchaser can profit from a rise in price after the contracted delivery date without the need to bear the risk of a price fall during the same period. Such a possibility of speculating for profit without the risk of loss implies an unjust favouring of the purchaser. In answer to the criticism, it may be noted that a rule that gave the purchaser both the possibility of profiting in the event of a price rise and losing in the event of a price decline would have the undesirable effect of tempting the seller, in a period of falling prices, to postpone for too long the procurement of the goods to be delivered. In other words, the damage rule should be so constructed that the seller can never make a profit in the event of his defaulting through delay.[7]

Norwegian law has not completely followed the Swedish rule that the purchaser can, in the event of a rising market, use the price at the date of rescission for the calculation of damages. It provides that if, on the delivery date designated by the contract, the seller definitely declares that he will not deliver, then the purchaser must take this declaration seriously and immediately make a cover purchase.[8]

[6] See *H. Löfberg* v. *Ahlafors nya spinneriaktiebolag*, 1924 N.J.A. 115. See also Almén, *Om köp och byte*, § 25 at notes 172–6; Rodhe, *Obligationsrätt*, § 46 at note 21.

[7] Rodhe, *Obligationsrätt*, § 46 at note 21 and authors cited in that note, as well as Hellner, *Köprätt*, pp. 96 f.

[8] Andersen, *Kjøpsrett*, pp. 156 ff.

According to Swedish law there is one case where damages can be calculated on the basis of a price of the goods determined at an earlier time than the delivery date stipulated in the contract. If the seller, before this date, gives the purchaser a definite declaration that he will not deliver, the purchaser has the right to rely on this declaration and immediately rescind the contract. However, he need not do this, but can adopt the position that he still wants the goods. He then should, without unreasonable delay, protest against the seller's declaration and express his wish to receive delivery. According to Swedish law, the purchaser can then choose between the price current on the day of the seller's refusal to deliver and that ruling on the day designated for delivery in the contract, whether he immediately rescinded the contract or not. In Danish and Norwegian law, on the other hand, damages must always be calculated on the basis of the price on the day of the refusal to deliver.[9]

It is the principal rule in Anglo-American law that the contracted delivery date shall always be determinative, whether it is a question of ordinary or anticipated default by delay (Sale of Goods Act, section 51, Uniform Sales Act, section 67). However, English case law has obliged a purchaser who does not request specific performance to look after the seller's interest in a rising market by making his cover purchase at the earliest possible time. If this is not done, he risks losing his right to base his calculation of damages on a high price ruling at the contracted delivery date.[1] On the other hand, special attention has been paid to the possibility that the purchaser may have an excuse for not immediately making a cover purchase, this being, specifically, when he has already paid the purchase price and has thereby committed his liquid resources. In such cases it has been thought that the purchaser should be entitled to put off his cover purchase until, through a judgment of the court concerning repayment of the purchase price, his position is restored. The U.S. Supreme Court has modified this rule to the extent that the price proceeded from is the price on the day the purchaser should reasonably have made a cover purchase.[2]

[9] See *W. Brügmann & Sohn* v. *Ortvikens ångsågsaktiebolag*, 1896 N.J.A. 284, *Mellersta Sveriges sockerfabriksaktiebolag* v. *Tycho Roberg*, 1919 N.J.A. 427. See also Almén, *Om köp och byte*, § 25 at note 168a and at notes 112–14; Rodhe, *Obligationsrätt*, § 46 at note 22; Hasle & Nebelong, *Løsørekøb*, Copenhagen 1949, pp. 164 f.; Andersen, *Kjøpsrett*, pp. 157 f.

[1] Mayne & McGregor, *On Damages*, 12th ed. London 1961, no. 371.

[2] Williston, *Contracts*, rev. ed. New York 1936–45, § 1382; Mayne & McGregor, *On Damages*, no. 368.

The Uniform Commercial Code has added a nuance to the traditional principal rule by stipulating that the critical point of time is when the purchaser receives knowledge of the seller's breach of contract (section 2-713).

The following is laid down on this subject by the International Sale of Goods Law (article 84):

> 1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.
>
> 2. In calculating the amount of damages under paragraph 1 of this Article, the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

The International Sale of Goods Law thus provides that the damage calculation is always based on the price ruling on the day the contract is rescinded. Here, therefore, there is no correspondence to the Scandinavian Act's aforementioned condition which must be met before the purchaser may base his damages on the price on the day of rescission after a rise in prices. Nor is there any correspondence to the rule whereby the purchaser can require that the damages be based on the price on the delivery date stipulated in the contract, even if the price has fallen by the day of rescission.

On the other hand, note must be taken of Article 25 of the International Sale of Goods Law, where the following is provided:

> The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected.

What this provision may come to imply in practice it is difficult to say. It may mean that damages from the seller's delay will often be calculated on the basis of the price ruling at a relatively short time after the contracted delivery date.

As has been pointed out above, the "abstract" calculation of damages implies that the purchaser is compensated for the extra cost of a hypothetical cover purchase. An alternative to this method of calculating damages is, if the purchaser actually undertakes to make a cover purchase, to reimburse him for the actual extra cost of this purchase.

According to the Scandinavian sales laws the purchaser, if he so desires, has the right to base his calculation of damages on the extra cost incurred in a cover purchase made by him. According to Swedish law, such a cover purchase will be approved by the court, unless the seller is able to show that the purchaser did not take sufficient care to make the purchase at the lowest possible price.[3] On this point the Danish Act diverges from the other Scandinavian sales acts, and provides that the cover purchase must be made through an authorized broker if it is to be accepted without further evidence.

Until now Anglo-American legislation has not dealt particularly with this alternative. However, the Uniform Commercial Code, section 2-712, has taken up the subject, and gives the following rule, which seems to be in conformity with current practice:

> (1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2–715), but less expenses saved in consequence of the seller's breach.
>
> (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

The International Sale of Goods Law has also adopted this alternative for the calculation of damages. Thus, it is provided in article 85:

> If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

However, under Swedish practice, even where a cover purchase actually occurred, it will be examined whether the purchaser observed the regulations just mentioned concerning which point of time should serve as a basis for the damage calculation. Thus, if the purchaser, in a period of rising prices, has not made his cover purchase during the period immediately following the deli-

[3] Almén, *Om köp och byte*, § 25 at notes 138b–46; Rodhe, *Obligationsrätt*, § 46 at notes 6–9; Hellner, *Köprätt*, p. 94.

very date designated in the contract, but has postponed the purchase to a later time, it may occur that the cover purchase will not be accepted and the purchaser must content himself with damages calculated on the basis of a hypothetical cover purchase on the delivery date specified in the contract.[4]

If a purchaser makes (or is hypothetically thought of as making) a cover purchase, and thereby places himself in a position to fulfil a resale commitment that should have been fulfilled by the original goods purchased, he has earned the business profit that a normally executed transaction would have brought to him. However, he has had to make this second cover purchase, and the problem now is to what extent he should be compensated for the work this involved. He has the right to include in the cost of the cover purchase such particular outlays associated therewith as he was obliged to make. On the other hand, he is considered not to have the right to include in the damages, as lost profits or in any other form, compensation for fixed costs of the cover purchase. However, he probably does have the right to charge the seller for the costs incurred because of preparations for the delivery that never took place, which costs should have been covered by the profits, but have now proved to have been incurred in vain.[5]

The situation can be expressed by saying that the purchaser must make two purchases for the one resale without receiving more compensation for his own work than he would have had if he had made a single purchase for the resale.

In conclusion, attention is drawn to the case where the purchaser cannot make a cover purchase because the goods are not to be found on the market. Here, too, there is no question of a hypothetical cover purchase. In such a case, the purchaser can demand compensation for the profit he would have received on the transaction which is now wholly unconcludable.[6]

Besides damages that are calculated in some of the ways just

[4] See, for example, *Mellersta Sveriges sockerfabriksaktiebolag* v. *Tycho Roberg,* 1919 N.J.A. 427. See also Almén, *Om köp och byte,* § 25 at notes 143 and 168–71; Rodhe, *Obligationsrätt,* § 46 at note 18.

[5] See *John Feychting* v. *E. R. Johnson,* 1898 N.J.A. 278, *F. Klingsland* v. *W. Wendt,* 1915 N.J.A. 117, *A. Zadig* v. *Theo. Dieden & C:o,* 1917 Sv.J.T. 197 (rf.). See also Almén, *Om köp och byte,* § 25 at notes 57–57b and 70–88a; Rodhe, *Obligationsrätt,* § 46 at notes 24–6; Hellner, *Köprätt,* p. 94.

[6] See *P. Tham* v. *Andersson & Lindberg,* 1907 N.J.A. 445, *C. G. Edlund* v. *D. Rosenmüller,* 1909 N.J.A. 83, *P. Bergendorff* v. *I. Ekström,* 1918 N.J.A. 551. See also Almén, *Om köp och byte,* § 25 at note 56; Rodhe, *Obligationsrätt,* § 45 at note 18.

mentioned, the purchaser may always be compensated for damages that he, in his turn, was liable to pay to his purchaser because of late delivery on his part, or because of non-delivery.[7]

B. DAMAGES CALCULATION WHERE THE SELLER HAS BREACHED THE CONTRACT, BUT THE BUYER HAS NOT RESCINDED

There is not much to be said concerning the calculation of damages for a temporary delay by the seller. It is incumbent on the purchaser applying the general rules of damages to show what losses he has suffered, e.g., in the form of extra costs incurred because of the delay and, where occurring, in the form of damages owed to a third-party purchaser.

Greater interest is offered by the question of the calculation of damages where the seller's breach of contract results from goods being impaired by defect.

In these cases the purchaser can often, but not always, choose between two forms of compensation, one of which may be designated as damages and the other as an allowance on the purchase price or a price reduction.

Damages are to be calculated in such a way that the purchaser receives as compensation a sum corresponding to the difference between the value of defect-free goods and the value of those actually delivered. If the price of the goods has risen between the time the contract was concluded and the time designated for delivery in the contract, the benefit from this increase is to be enjoyed by the purchaser. In addition to this, the purchaser has the right to compensation for the various costs incurred through the seller's breach of the contract. On the other hand, should the price have fallen between the time when the contract was concluded and the time designated for delivery, this price decline is to be attributed to the purchaser, and will thus diminish his damages.

[7] See *J. Kock* v. *Forsberg & Mark*, 1913 N.J.A. 276, *C. J. G. Edlund* v. *Svenska lantmännens riksförbund*, 1913 N.J.A. 347. See also Almén, *Om köp och byte*, § 25 at notes 50–2 and 13–14a; Rodhe, *Obligationsrätt*, § 46 at note 52.

Reduction of the purchase price is determined in another way. There, the proportion by which the value of the goods is diminished through the defect will be established, and then the purchase price will be reduced by the same proportion. Thus, if the goods are, because of their defect, worth only 90 per cent of the value of similar non-defective goods, the purchaser has to pay only 90 per cent of the purchase price agreed on in the contract. Whether the price of the goods has risen or fallen since the time the contract was consummated is thus irrelevant.[8]

It should be noted by readers not familiar with the legal systems of Continental Europe and Scandinavia that reduction of the price is a separate remedy, distinct from damages. Reduction of the price is not to be regarded as a set-off between the full price and damages, which would be subject to the general limitations in the right to demand a set-off. The price is quite simply diminished to a lower level. In other words, the significance of this remedy is *not a deduction from* the price *but a reduction of* the price.[9]

The *raison d'être* of this remedy is that it is available to the purchaser even in situations where there is a breach of contract but where the remedy of damages is subject to certain conditions which do not exist in the case in question.

On this point there is an interesting difference between Anglo-American legal reasoning on the one hand and Continental European and Scandinavian thinking on the other.

According to the latter way of reasoning "breach of contract" means the earliest point where any remedy becomes available to the non-breaching party. This remedy may be damages, but it may also be of some other kind, for instance reduction of the price or rescission of the contract. In fact, this will most likely be the case, as in our law the remedy of damages is often available only in cases where the contract-breaching party has acted negligently, while other remedies, such as price reduction or rescission, are not subject to this condition.

In contrast to this, the Anglo-American concept "breach of contract" seems to be inseparably linked to the point of time where the remedy of damages becomes available. The background to this terminology is the fact that the Anglo-American rules on damages

[8] Almén, *Om köp och byte*, § 42 at notes 30–45.

[9] Consequently, sec. 2–717 of the Uniform Commercial Code, which concerns "Deduction of Damages From the Price", has no bearing on the rule now being discussed.

are so extensive that this remedy is always the "first" one or, at least, is one of those which first become available.

If we now look at the Uniform Commercial Code, we do not *prima facie* find any remedy for breach of contract which can be compared to price reduction in the above-mentioned sense. The reason for this is apparently that the seller is always liable for damages in case of defects in goods that have been sold (section 2-714).

Nevertheless, there is in the Code a rule which gives the purchaser a right to a reduction of the price. However, this right, in accordance with the Anglo-American view just mentioned, is not characterized as a remedy for breach of contract. Section 2-613 states, *inter alia,* that where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, then if the goods have so deteriorated as no longer to conform to the contract, the buyer may at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration but without further right against the seller.

This seems to be precisely the same rule as is given for the same case in the Scandinavian Sale of Goods Act, section 42, with the exception that under that section the purchaser cannot treat the contract as avoided if the deterioration is not substantial. According to Scandinavian terminology, however, the situation is described as a breach of contract, and the existing remedies are rescission of the contract or reduction of the price, but not damages.

The price reduction is also not entirely unknown to English law, where it is called "recoupment". The method of calculation, however, is different. There, no proportional reduction of the price is made, but the purchaser must pay the value of the goods he actually received. It seems that the contract is considered to be nullified and that the purchaser has a quasi-contractual duty to pay for what he has received.[1]

To make clear the differences between damages, price reduction and recoupment, an illustration of the various methods of calculation is given in the following table, where it is presumed that the defect has reduced the value of the goods by 20 per cent:

[1] Rabel, *Das Recht des Warenkaufs,* II, pp. 227 f. and 234 f.

	The market price		
	has risen	is unchanged	has fallen
Contract price	1000	1000	1000
The value of non-defective goods on the delivery date designated in the contract	1200	1000	800
The value of the defective delivery on the same date	960	800	640
Purchaser's loss = damages	240	200	160
Reduction of the purchase price by 20 %	200	200	200
The purchaser must pay:			
(a) If the general rule of damages is applied and the damages are deducted from the price	760	800	840
(b) If the rule regarding reduction of the purchase price is applied	800	800	800
(c) If the English rule of "recoupment" is applied	960	800	640

From this table we see that in the cases where the purchaser can choose between damages and reduction of the price he will choose damages if the price has risen, and reduction of the price if the price has fallen, while in the case of an unchanged price it is immaterial whether he demands damages or reduction of the price.

Consequently, the reduction of the price is a useful remedy for the purchaser, not only when he has no claim for damages but also when he could claim damages but the price has fallen and therefore reduction of the price is a better choice for him.

The International Sale of Goods Law has accepted the principle of reduction of the purchase price and provides for this in article 46:

> Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.

The scope of this rule is, however, narrower than that of the corresponding Scandinavian rule. According to the International Sale of Goods Law, the seller of defective goods incurs a strict liability for damages (article 41), restricted only by the exoneration rule in article 74. Thus, the purchaser derives an advantage from demanding price reduction only when the exoneration rule operates and, generally, when the price has fallen.

C. CALCULATION OF DAMAGES WHERE THE SELLER HAS RESCINDED THE CONTRACT OWING TO THE PURCHASER'S BREACH

In the Scandinavian Sale of Goods Act, section 30 provides as follows concerning the calculation of damages in cases where the purchase is rescinded owing to the purchaser's breaching the contract:

> ... In the absence of evidence of the loss sustained, the amount of compensation shall be equivalent to the amount by which the contractual price may have exceeded the price of such goods as referred to in the contract of purchase at the time when the delay occurred.

According to this rule, one must proceed from the market value of the goods that the purchaser should have received, but which now have not been delivered, and calculate the damage as the difference between the price contracted for and the market value of the goods on the delivery date stipulated in the contract. In other words the seller must be given the sum necessary to compensate the loss that he would have incurred if he had gone into the market and sold a corresponding amount of goods of the same type.

Here we are thus dealing with a hypothetical resale, which can be said to be the converse of a hypothetical cover purchase. There is no recognized Swedish term for this resale, but one might consider introducing the term "kompensationsförsäljning" ("compensating resale").[2]

Here, too, there is an "abstract" method for damage calculation. According to the provisions of the Act just cited, the calculation

[2] Almén, *Om köp och byte*, § 30 at notes 17–24a; Rodhe, *Obligationsrätt*, § 46 after note 28; Hellner, *Köprätt*, p. 106.

of damages proceeds from the point of time when, according to the contract, delivery should have occurred. However, judicial interpretation has made certain exceptions to this principal rule, similar to those which are made where a purchase has been rescinded owing to the seller's breaching the contract. According to section 28 of the Scandinavian Sale of Goods Act, if the purchaser is in default because of delay, the seller can demand that the contract be fulfilled or he can rescind the purchase. Thus, if the payment is in default, the seller need not immediately exercise his right of rescission as soon as the right has arisen, but can bide his time for the present and await tender. In the beginning he may remain wholly passive. If, however, the purchaser asks whether the seller still wishes to remain bound to the contract in spite of the delay, the seller must answer without unnecessary delay, at the risk of otherwise losing his right to stand by the contract, and thus of being considered to have rescinded it. If no such inquiry comes from the purchaser, the seller still must within a reasonable time of his own accord notify the purchaser that he wants to remain bound to the bargain, otherwise he loses his right to stand by it.

If no inquiry comes from the purchaser, the seller may thus remain passive for a rather long period without losing his right to demand that the contract be fulfilled. On the other hand he may, when he so desires, decide to rescind the contract and tender a declaration of rescission. If he has done this, the question arises, similarly to the situation of rescission due to the seller's delay, of how the abstract damage calculation shall be carried out in these cases.[3]

The same rules are applied here as in the aforementioned case of breach by the seller. Specifically, if the seller, relatively soon after the contracted payment date, of his own accord notifies the purchaser that he still wishes to remain bound to the bargain, and then adheres to that position up to the time when he rescinds the contract, he will have the right to base his damages calculation on the price of the goods prevailing on the day he rescinded. Expressed in another way, a seller conforming to the conditions just mentioned has no obligation to make a compensating resale before the day on which he decides to rescind the contract, and thus a

[3] See *Schröder Gebrüder & C:o* v. *Skånska lantmännens centralförening*, 1912 N.J.A. 204. See also Almén, *Om köp och byte*, § 30 at notes 21–31; Rodhe, *Obligationsrätt*, § 46 at notes 37–9.

hypothetical compensating resale should be calculated as of that day.

There remains here, however, a certain difference from the rule applicable in the event of the seller's delay. The purchaser has the right, when calculating his damage, to take advantage of a price rise after the delivery date designated in the contract, but, as has previously been pointed out, he need not bear the burden of a price decline during the same period. This distinction is not applicable, however, in the case of a delay by the purchaser. In this situation, damages are calculated on the basis of the price at the point of time when the rescission occurred, whether or not the price has risen or fallen since the time for tender designated by the contract.

In the case of a purchaser's delay, Anglo-American law, just as in the case of a seller's delay, gives prominence to the time for tender specified in the contract, and awards, as compensation to the seller, the difference between the contracted price and the price at the time just mentioned (Sale of Goods Act, section 50; Uniform Sales Act, section 64; Uniform Commercial Code, section 2-708). This also applies in the case of an anticipated breach by delay; in English case law, however, one finds the opinion exposed that a seller who has earlier received and accepted a refusal from the purchaser to remain bound to the bargain is responsible during a falling market to guard the purchaser's interests, and thus is not entitled to await the contract-designated tender date and then base his damage calculation as of that date.[4]

With regard to the approach of the International Sale of Goods Law to the problem just considered, the reader is referred to the above-cited article 84, which is applicable in the same degree to the seller's breach of contract and to the purchaser's breach of contract.[5]

The provisions of article 25 of the International Sale of Goods Law concerning the purchaser's breach of contract[6] have a parallel in article 61, paragraph 2, which reads as follows:

> The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected.

[4] Mayne & McGregor, *On Damages*, no. 430.
[5] *Supra*, p. 157.
[6] *Supra*, p. 157.

According to Swedish law, if the seller has made a compensating resale with sufficient care, this is to be used as the basis for the calculation of damages. However, one is more suspicious of the seller who has made a compensating resale than of the purchaser who has made a cover purchase. The risk of the seller disposing of the goods below market price is considered to be so great that the seller is required to offer the goods at auction or through a broker. If this is not done, and the goods are sold privately, he is charged with the burden of proving that a higher price could not have been obtained.[7]

The Uniform Commercial Code similarly prescribes, in section 2-706 (1), that a compensating resale made by the seller shall serve as the basis for damage computation if it was made "in good faith and in a commercially reasonable manner". The rest of the section is concerned with stating in a relatively detailed way what this will mean in various connections.

Under Swedish law, the seller has the right to postpone the compensating resale to a time later than the contracted tender date only on condition that he shall expressly demand that the bargain be adhered to. If this is not done, the purchaser has the right to demand that the compensating resale made by the seller shall not be considered, and that the damage calculations shall instead be based on a hypothetical compensating resale made on the date of tender stipulated in the contract.[8]

When a purchase contract is rescinded owing to the purchaser's breach, the compensation for business profits is calculated in a way different from that used where rescission was due to the seller's breaching the contract. We have previously seen that the purchaser cannot demand to receive his profit more than once, even if he has to make two purchases to fulfil a resale commitment.[9] On the other hand, a seller who has himself purchased the goods and who is now compelled to negotiate a second sale of the same goods can in certain circumstances gain the benefit of a double profit, with a reduction, however, for any costs that

[7] See *F. W. Schütt* v. *Sundsvalls importaktiebolag*, 1913 N.J.A. 315, *Viggo Öberg* v. *J. O. Andersson*, 1916 N.J.A. 178, *J. T. Freeman* v. *E. R. Johnson*, 1920 N.J.A. 79 (I), *G. Robertson* v. *J. Lundborg*, 1920 N.J.A. 79 (II), *Hölkens handelsaktiebolag* v. *AB Olson & Wright*, 1935 N.J.A. 340. See also Almén, *Om köp och byte*, § 30 at notes 12c–15; Rodhe, *Obligationsrätt*, § 46 at notes 29–30; Hellner, *Köprätt*, p. 106.

[8] Almén, *Om köp och byte*, § 30 at notes 27–31; Rodhe, *Obligationsrätt*, § 46 at notes 38–9.

[9] *Supra*, p. 159.

he has directly saved as a result of the first sale not reaching its fulfilment. Consequently a seller who is a wholesale dealer may receive for one purchase and two sales a compensation that he would normally have earned by two purchases and two sales, while a purchaser in the converse case receives compensation for only one purchase and one sale and thus must make one purchase without compensation. The condition for a seller's receiving, beyond the difference in price, compensation for lost profits in the case of a breach by the purchaser is considered to be, however, that the sales possibilities for the goods are limited with respect to supply, i.e., that it is a buyer's market. If in this situation the seller succeeds in disposing of the goods not delivered to the first purchaser by selling them to another, he reduces to a corresponding extent his possibilities of making a subsequent sale.[1]

In section 2-708 (2) the Uniform Commercial Code gives a rule that opens up the possibility of an equivalent solution. This says that "... if the measure of damages provided in subsection (1) (that is, the difference in price) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with ...".

D. THE CALCULATION OF DAMAGES WHERE THE PURCHASER HAS BREACHED, BUT THE SELLER HAS NOT RESCINDED THE CONTRACT

If the purchaser is guilty of default by delay in paying the purchase price, but the seller, in spite of this, remains bound to the contract, the failure to pay carries an obligation for the purchaser to pay interest on the purchase price. The rules concerning this are peculiar to Swedish law and are hardly of interest in this context.[2] If, however, the purchase price is prescribed in a currency

[1] *Gruvaktiebolaget Dalarne* v. *AB Ystads kalkbruk*, 1915 N.J.A. 508, *N. J. Johansson Hörberg* v. *K. E. Bergmark*, 1917 N.J.A. 109, *Audun Koren & C:o aktieselskap* v. *G. Thisell and N. Thisell*, 1920 N.J.A. 248, *Corin & Linder* v. *D. Johansson*, 1928 N.J.A. 44, *H. V. Ulrich* v. *K. E. Horwitz*, 1929 N.J.A. 556. See also Almén, *Om köp och byte*, § 30 at notes 11d–h; Rodhe, *Obligationsrätt*, § 46 at notes 42–3; Hellner, *Köprätt*, p. 107.

[2] Rodhe, *Obligationsrätt*, § 51, *inter alia* at note 21.

that is not the currency in use at the place where payment should be made, and if the value of the currency stipulated in the contract falls during the time of delay in relation to the currency in use at the stipulated place of payment, the seller, through application by analogy of section 7 of the Scandinavian Instruments of Debt Act, can receive compensation for the loss he incurred through the fall in the rate of exchange.[3]

If the purchaser's breach of contract required the seller to take care of the goods longer than he would have done otherwise, the seller has, according to section 36 of the Scandinavian Sale of Goods Act, the right to compensation for "costs for the care of the goods or other special expenses". This is a more limited form of compensation than damages awarded through the general law.

E. CONCLUSIONS

A fundamental element in the rules of damages which are described above is that the party who made a good transaction and, for his part, fulfilled the contract should be able to preserve for himself the economic results of the contract. Through damages he should be put in the same position as if the other party had properly lived up to the contract.

If, on the other hand, the non-breaching party has made a bad transaction, he has, to the extent that rescission is admitted, the possibility of returning to his original position by rescinding the contract. The rules about reduction of the purchase price and recoupment also imply that the non-breaching party may, to a greater or lesser extent, be liberated from the bad transaction.

This construction of the rules of the law carries a temptation for a party who, because of price developments, finds that he made a bad transaction to seek to regain his original position by asserting, on more or less weak grounds, that the other party is guilty of a breach of contract. This is obviously a drawback to the rules of the law. Another drawback is that, in a case where a contract breach indisputably exists, the non-breaching party is given the possibility of choosing between different remedies, permitting himself to be led by considerations involving market conditions.

[3] Rodhe, *Obligationsrätt,* § 48 at notes 44–8 and § 45 at notes 33–8.

Would it be possible to construct the remedies for breach of contract in such a way that these drawbacks were eliminated?

In the Scandinavian Sale of Goods Act, the legislators have at least made a deliberate attempt to reduce the possibility that one party will speculate at the expense of the other, by giving a set of rules imposing on the non-breaching party a duty to notify the other party without delay of his decisions on account of the breach. These rules, which are found in sections 26, 27, 31, 32 and 52–54 of the Act, and which in part have been described *supra,* are elaborated in detail. They seem to be on the whole far more rigorous than the corresponding rules to be found in Continental European and in Anglo-American legal systems.

Nevertheless, only very limited results can be reached by this method. If one really wants to eliminate the drawbacks just mentioned, far more radical changes in the traditional rules on sales must be made. I know of no legal system where the legislator has tried to realize this goal. I have, however, found a contract-made system of rules on sales that aims at completely eliminating the possibility of speculation in market fluctuations. I will conclude by giving a short survey of this system, which is employed on the cotton exchange in Bremen (Germany) and which seems to have parallels at the cotton exchanges in Liverpool and New York.[4]

The system implies that, to begin with, there is only one remedy available for breach of contract, namely that of "regulation" (*Regulierung*) of the contract. This remedy corresponds most nearly to rescission. Since all other remedies are eliminated, the non-breaching party cannot speculate on market developments through the choice of remedies. The right to claim "regulation" of the contract is to be exercised within a certain short time after the non-breaching party learns of the contract breach.

To this is added—and this is the unique feature of the rules—that each "regulation" shall include a pecuniary agreement between the parties, which aims, with due consideration of the price situation at the time of the "regulation", at putting both parties in the same position as if the contract had actually been fulfilled. This means that if the price has risen from the point of time when the contract was concluded, the seller shall pay the purchaser a sum equivalent to the difference in the prices, so that

[4] See Klaus Prassel, *Die Regulierung von Verträgen bei Leistungsstörungen im Baumwollhandel,* Diss. Frankfurt am Main, 1962.

the purchaser can make a cover purchase without loss. On the other hand, if the price has fallen, the purchaser has to pay the price difference to the seller so that he can make a compensating resale without loss. In both cases the payment of the price difference is to occur without regard to which of the parties committed the breach of contract.

Through this system, a situation is created whereby neither of the parties gains or loses in the case of a contract rescission.

In addition to this, the party who has broken the contract has to pay the other party a standardized damage of 2 per cent of the price on which the "regulation" was based.

In practice, a contract of this type is always associated with forward exchange operations, through which each party hedges off the effect of market fluctuations in the price of the commodity.

It is difficult to imagine this contract-made system, which is adapted to a professional and well-functioning market, being transformed into a general statute-made system, applicable to all kinds of sales transactions. Nevertheless, it seems to me that the contract-made system, compared with the traditional rules on sales, may serve as a good illustration of the interaction between market fluctuations and the functioning of the system of remedies for breach of contract. Perhaps this system could also serve as an incentive to a discussion of further partial changes in the traditional rules, aiming at diminishing the possibility of speculation in market fluctuations.