THE DRAFT OF A NEW SWEDISH SALE OF GOODS ACT

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On December 15, 1976, a report containing the draft of a new Sale of Goods Act was presented to the Swedish Minister of Justice.[1] Formally, one person alone—the present writer—is responsible for the report and the proposals contained in it. In fact many people took part in the work, which began as early as 1962. Foremost among them was Dr Hjalmar Karlgren, a retired judge of the Supreme Court of Sweden and a former professor of law. He resigned in 1972 from what was until then a two-man commission, but he had already contributed a large part of the work which is the basis of the report. Moreover, the work of preparing new legislation on sales has taken place in cooperation between the Scandinavian countries, and the Swedish report is one of several proposals presented to the Scandinavian governments. Since these proposals are thus the result of a common effort, it is hardly possible to separate the contributions of any single commission or person.

SCANDINAVIAN COOPERATION IN THE LAW OF SALES

The background provided by the Scandinavian cooperation is so important for understanding the aim and scope of the present draft that it is necessary to describe it in some detail. Denmark, Norway and Sweden enacted Sale of Goods Acts at the beginning of this century,[2] and in the preparation of these Acts some eminent jurists took part.[3] The Acts have universally been acclaimed as extremely successful products of legislation. Their importance has been enhanced by the fact that the Swedish Act is the subject of a commentary by Tore Almén, who participated in the preparation of the Act.[4] This commentary is widely used in Scandinavia

[1] *Köplag. Slutbetänkande av köplagsutredningen, SOU* 1976:66 (hereinafter cited as *SOU* 1976:66). The report contains a short summary in English, pp. 21–9.

[2] Denmark: Lov om Køb, April 6, 1906; Norway: Lov om kjøb, May 24, 1907; Sweden: Lag (1905:38 s. 1) om köp och byte av lös egendom, June 20, 1905.

[3] Among them may be mentioned Jul. Lassen for Denmark, Fredrik Stang for Norway, and Tore Almén for Sweden.

[4] Tore Almén, *Om köp och byte av lös egendom, kommentar till lagen den 20 juni 1905*, 1st ed. (two volumes) 1906–08, 4th ed. by R. Eklund, Stockholm 1960.

and has been translated into German.[5] In 1961, Finland, which for political reasons had not been able to take part in the preparation of the Scandinavian Sales Acts, decided to start work on such an Act. As it was not considered desirable to enact in Finland a statute entirely similar to the existing Scandinavian Acts, a commission was appointed with the task of preparing a new Act, based substantially on the foundations laid by the earlier Acts but somewhat modernized. In Denmark, Norway and Sweden two experts were appointed in each country to follow the work of the Finnish commission and give advice. In 1967 the work of the Finnish commission had advanced so far that it was thought advisable that the efforts of the experts from the other Scandinavian countries should be diverted to revising the Acts of their own countries. It was feared that these statutes should appear outdated in comparison with the Finnish Act and it was desired to ensure continued Scandinavian uniformity.

However, the task of revision proved to be more complicated than had been foreseen in 1967. Consumer protection came into the foreground, and first Sweden, then Norway enacted special legislation on consumer sales.[6] The legislation had been prepared by those entrusted with revising the Sale of Goods Acts. The Swedish report on a Consumer Sales Act is dated April 28, 1972.[7] Other tasks delayed the work on the preparation of the new Swedish Sale of Goods Act,[8] which explains why the Swedish report was not delivered until December 1976. The Norwegian report had been presented some months earlier.[9] Meanwhile, the Finnish commission had presented a report, containing a draft Sale of Goods Act, which was published in 1973.[1] This report was favourably received on the whole. The Finnish Ministry of Justice nevertheless decided to prepare a new statute, with substantially the same contents as the commission's draft but with an entirely new structure, derived from the UNCITRAL draft of a convention on international sales. The new Finnish draft was published in 1977.[2]

[5] *Das skandinavische Kaufrecht*, I–III, *Deutsche Ausgabe von K. Neubecker*, Heidelberg 1922. The influence of this work can be perceived throughout E. Rabel, *Das Recht des Warenkaufs*, Bd. I, Berlin 1936 (reprinted 1957), Bd. II, Berlin & Tübingen 1958, and even in H. Dölle (ed.), *Kommentar zum einheitlichen Kaufrecht*, Munich 1976.

[6] Sweden: Konsumentköplag (1973: 877); Norway: Lov 14. juni 1974 nr. 36.

[7] *Konsumentköplag. Delbetänkande av köplagsutredningen, SOU* 1972: 28. The corresponding Norwegian report is printed as an annex to the bill, *Odelstingsproposition* 1973/74 no. 25.

[8] See *Räntelag. Delbetänkande av köplagsutredningen, SOU* 1974: 28, and *Generalklausul i förmögenhetsrätten. Betänkande av generalklausulutredningen, SOU* 1974: 83.

[9] *Lov om kjøp, Norges offentlige utredninger* 1976: 34, Oslo 1976.

[1] *Köplagskommitténs betänkande, Kommittébetänkande* 1973: 12, Helsinki 1973. The report is dated July 31, 1972.

[2] E Routamo and L. Sevón, *Förslag till köplag, Lagstiftningsavdelningens vid justitieministeriet publikation* 13/1977.

No Danish report has been presented so far, although the Danes have taken an active part in the Scandinavian cooperation.

SOME REASONS FOR REFORM

The foregoing survey will help to explain some of the features of the Swedish draft. According to the official terms of reference for the revision, a radical reform was not to be attempted. The structure, conceptual scheme and main principles of the existing Act were to be retained.[3] Accordingly, the draft follows that Act as to the order of the sections and the main contents. A new structure, such as characterizes the second Finnish draft, would have run counter to the terms of reference, quite apart from the fact that in the view of the Swedish reporter (the present writer) it would have constituted a change for the worse. In what follows, the main problems encountered in constructing the draft will be discussed, passing from some comparatively uncontroversial issues to other matters which are under serious dispute. It is hoped that this discussion will also throw some light on the general problem of preparing a modern statute on sales in a country where an earlier statute exists.

The present Sale of Goods Act exhibits the statutory style traditional in Swedish legislation, cramming a maximum of content into a minimum of text by making use of subtle shades of meaning of the words chosen and linking rules together by means of interlocking concepts. The use of such a compact style presupposes a heavy reliance on the *travaux préparatoires* for translating the intended—but often somewhat obscure—meaning of the text into workable rules. As mentioned before, Almén's commentary has done much to clarify the meaning of the Act and also to suggest solutions of problems which are not dealt with even indirectly by the text. A number of questions for which the Act gives no guidance have been settled by case law since the enactment of the statute.[4] Some of the emerging principles have become so familiar to Swedish lawyers that it is not always realized that they depend on precedents rather than on statute law and that case law may sometimes be different in the other countries that have the same statute. One of the foremost tasks of the revision has been to take up a standpoint on such case law. In general the object has been to recast the text so as to give expression to rules found in case law. Sometimes, how-

[3] See *Riksdagsberättelsen 1968*, Ju 30.
[4] The report contains a survey of the application of the present Act, ch. 2.

ever, the case law points to weaknesses of the Act, which needed to be remedied. Such minor adjustments are a necessary part of a revision of the kind intended.

A more important issue concerns the contents of the rules in so far as they are determined by the kinds of goods to which the Act applies and to which they should be suited. Like most other legislation on sales dating from around the turn of the century, the present Act is undoubtedly concerned chiefly with the sale of primary commodities and other goods which are sold in large quantities and which are subject to frequent and swift changes in price. The sales of such goods are often international, and transportation is an important factor. The preoccupation of the Act with these goods appears most clearly in the rules on the assessment of damages and on the meaning of trade terms.[5] A less obvious consequence, but one which is probably just as important, is to be found in the strictness of the sanctions for breach of contract, particularly by the seller. This strictness may be explained by a number of circumstances, above all the availability in international markets of goods of the type involved, which makes the strictness less perceptible, and the element of speculation often involved in such sales. As for domestic sales, which are also contemplated by the Act, it is clear that the concern is chiefly with corn, cattle, timber and other traditional objects of transactions in an agricultural society.

On the other hand, the present Act pays little heed to sales of industrial products, notably those of the engineering industry, which nowadays is so important for Sweden. Such goods often do not exist at the time of the contract but are to be manufactured afterwards, perhaps according to the instructions of the buyer. Strict rules for breach of contract are less suitable for application to the sale of such products, as they will often hit the manufacturer disproportionately hard. Moreover, price changes are less frequent in the case of these goods and the element of speculation may be entirely absent. An important issue for the sale of goods which have been or are to be manufactured is whether the buyer should have the right to require that a defect shall be remedied by the seller, and what the consequences should be when the seller fails to remedy a defect in accordance with his obligations. Assessment od damages takes a peculiar character with regard to goods that are to be manufactured after the making of the contract. One of the objects of the revision has accordingly been to meet the need for rules suited to sales of industrial products, particularly those that are to be manufactured.

A somewhat similar matter concerns transportation. At the time when

[5] The Act contains rules on trade terms (f.o.b., c.i.f., etc.) in secs. 61–5.

the present statute was enacted, sea transport dominated in this field and rail transport was also well developed. The Act therefore takes due account of these means of transportation. Nowadays, however, air and road transport are also important. Moreover, combined systems, involving several different means of transport in succession and making use of containers, are becoming increasingly common. The modes of payment which are applied in connection with current transport systems, and which depend on computers and telex rather than on traditional transport documents, must also be considered.

RELATION TO OTHER LEGISLATION

An issue whose importance emerged both during the work on the preparation of the report and in the subsequent discussion concerns the relationship of a Sale of Goods Act to other legislation, in Sweden and in other countries. This issue involves several interrelated questions.

The relationship between commercial and consumer sales must be taken into account. As already mentioned, both Sweden and Norway have enacted special legislation on consumer sales. The Swedish legislation is to be found in a separate statute, the Consumer Sales Act of 1974. This, however, deals only with a limited number of questions, particularly those relating to defects in goods sold.[6] For other matters, the Sale of Goods Act continues to apply to consumer sales.[7] In Norway, on the other hand, the rules on consumer sales were made part of the Sale of Goods Act, and a number of the general rules on sales have been made mandatory with regard to consumer sales. In Finland, where, as mentioned earlier, no general legislation on sales exists so far, a statute on consumer protection in general, containing *inter alia* some rules on consumer sales, has just been passed.[8] The position in Denmark is still uncertain, as no definite proposal for legislation has been submitted.

In principle, several possibilities can be considered. One is to have general legislation on sales, with some special rules for commercial sales. This is the situation in West Germany.[9] Another type of "mixed" legislation is general legislation on sales, with some special rules for consumer sales. As indicated, this type represents the present situation in Sweden.

[6] Cf. *supra*, n. 6.

[7] The relationship between the Sale of Goods Act and the Consumer Sales Act is the subject of a special provision in sec. 2, para. 2, of the latter Act.

[8] *Konsumentskyddslag*, Jan. 20, 1978. See *Regeringens proposition till Riksdagen med förslag till konsumentskyddslagstiftning.*

[9] The *Bürgerliches Gesetzbuch* contains rules on sales in secs. 433–515, and the *Handelsgesetzbuch* has rules on commercial sales in secs. 373–82.

Another possibility is to have a common statute for commercial and consumer sales, making some rules mandatory and introducing a few special rules for consumer sales. This method corresponds to the Norwegian situation. Finally, it is possible to have entirely separate statutes for consumer sales and for commercial sales. Such a method was tried in a Danish draft which was not published and did not seem successful. This last method obviates the necessity of finding rules that can be used both for commercial and for consumer sales. It would probably also facilitate the coordination of the rules on consumer sales with those on other consumer contracts, such as contracts of service, and on consumer credit. On the other hand, it may create new problems to have different sets of rules for the sale of goods that are sold by merchants both to consumers and to non-consumers. The rules intended for commercial sales may be unsuitable for application to buyers who are not consumers but are also not merchants in a strict sense, e.g. smallholders, artisans and keepers of small shops. A separation of the kind mentioned would also leave open the question how to deal with sales between consumers, and with sales where the seller is a private person and the buyer is a merchant. The choice between the various methods enumerated above may depend partly on the style of drafting. Abstract rules can be formulated in such a way as to cover both commercial and consumer sales, whereas more detailed provisions will bring the dissimilarities into focus.

The solution chosen in the Swedish draft has been to propose rules that can apply both to commercial and to consumer sales. It must be admitted that this solution is the consequence more of the general policy and aim of the revision than of a thorough analysis of the problem. The limited aim of the revision would hardly be consistent with an attempt to separate the law of consumer sales from the law of commercial sales. On some points consideration for the interests of consumers has influenced the rules or occasioned additional rules, but on the whole the rules are mainly aimed at commercial sales.

As might be expected, the result has been that some of the proposed rules are not suited to consumer sales, and there is accordingly a need for certain special rules relating to such sales. However, no new rules for consumer sales are included in the draft. Instead the report recommends a revision of the Consumer Sales Act for the purpose of introducing new rules where those based on the general Sales Act are not suitable, as well as of amending some of the existing rules on the basis of the experience gained from the application of the Act.[1]

[1] See *SOU* 1976:66, pp. 133 ff., 353 f.

Since the report was delivered, a commission has been appointed in Sweden with the task of revising the Consumer Sales Act. The terms of reference for this revision leave open the method of legislation.[2] The possibility of inserting all rules on consumer sales in the Sale of Goods Act—on the Norwegian pattern—is mentioned, as is also that of enlarging the present Consumer Sales Act by some additional rules. It is, further, within the authority conferred on the new commission to construct a new statute for consumer sales that would be independent of the Sale of Goods Act.

It will readily be understood that the question of the relationship between consumer sales and commercial sales is closely connected with the issue of Scandinavian unification in the law of sales. Maintaining the present unity, perhaps increasing it, is considered to be a chief object of the legislation. One must distinguish here between questions of legislative technique and matters of substantive law. As far as legislative technique is concerned, it has already appeared that there is a difference between Norwegian and Swedish law, since in Norway the rules on consumer sales form part of the Sale of Goods Act whereas in Sweden they constitute a separate statute. Since no change in this respect is proposed in the Swedish draft, there is no attempt in the latter to increase Scandinavian uniformity with regard to legislative technique. It remains to be seen whether the new Swedish commission will bring about any change in this respect.

The substantive rules on consumer sales differ somewhat between Norwegian and Swedish law, for various reasons. The fact that in Norwegian law a number of the rules of the Sales Act have been made mandatory for consumer sales constitutes another difference. With regard to substantive law not relating especially to consumer sales, the aim has been to achieve as much Scandinavian uniformity as possible. However, commissions and experts of four countries can hardly be expected to achieve complete unity on all points, especially as case law has developed somewhat differently in the different countries since the present Acts were passed in the early years of this century. The fact that the Danish proposal has not yet been presented does not mean that it has not been taken into account.[3] Some of the differences between the existing Norwegian and Swedish drafts are to be explained by the fact that the Swedish proposal agrees with the Danish plans rather than with the Norwegian proposal. However, on the whole the degree of uniformity between the three proposals is considerable. The

[2] See *Kommittédirektiv* 1977: 83 (*Kommittéberättelsen* 1978: Del II Ju:17).

[3] A draft text of a Danish Sale of Goods Act is published as annex 3 of the Swedish report, *SOU* 1976: 66, pp. 405–16.

proposals in their present forms do not seem to constitute any serious obstacles to maintaining substantive unity in Scandinavian sales law.

In the case of Finland, the situation is somewhat peculiar. The Finnish draft of 1973 was based on the same ideas as the Norwegian and Swedish drafts presented later. The new Finnish draft published in 1977 contains (like that of 1973) no special rules on consumer sales, and in this respect it is therefore similar to the Swedish draft presented at the end of 1976. On the other hand, the fact that some rules on consumer sales are contained in a general statute on consumer protection constitutes yet another mode of distributing the rules on sales. This feature is, however, relatively unimportant compared with the difference in legislative technique due to the structure of the new Finnish draft, which as mentioned before is derived from the UNCITRAL draft. With regard to substantive law, there is a good deal of similarity between the Finnish and the other Scandinavian drafts, although comparison is difficult because of the difference in structure.

Harmonization within Scandinavia is not the only goal of this kind to be considered when reforming Scandinavian sales law. When the task of revising the Sale of Goods Act was formulated in 1967, the convention of 1964 on the Uniform Law on International Sales existed but had not yet entered into force. The terms of reference prescribed that the contents of that Law should be taken into account in the work of revision.[4] During the course of the work the Convention was ratified by a number of states (though not by the Scandinavian countries) and entered into force, and UNCITRAL also started its task of revision. At the time when the Swedish draft was presented, an UNCITRAL draft had been submitted to a number of governments.[5] In the Swedish draft for a new Sales Act, account is taken both of the Uniform Law of International Sales and of the UNCITRAL draft. Other legislation on sales, particularly the American Uniform Commercial Code art. 2, has also been considered.

Although the matter lies somewhat outside the subject of the present study, whose aim is to present the Swedish draft of 1976, it may be pointed out that it is impossible to achieve complete consistency between a statute on sales and the other legislation with which it is connected in the way which has been described here. In fact, once one starts looking for other legislation with which a possible new statute is connected, so many different goals of harmonization can be perceived that it soon becomes clear that not all of them can be attained. It is easy to criticize any proposal for a new

[4] See *Riksdagsberättelsen 1968*, Ju 30.

[5] The Draft Convention on the International Sale of Goods (A/CN.9/116, annex I), March 17, 1976, is reprinted in the *UNCITRAL Yearbook*, vol. VII: 1976, pp. 89–96.

statute because it is not in complete harmony with other legislation dealing with similar matters, or because it lumps together under common rules matters which in fact differ from one another. In practice no higher aim can be set than to reach a suitable compromise between various legitimate needs of integration. This is particularly evident in a country like Sweden, which has to pay attention to influence from various countries.

STANDARD CONTRACTS AND THE AIMS OF THE DRAFT ACT

A main task in the revision of the Sales Act has been to decide how to deal with standard contracts. Such contracts were undoubtedly already in use at the time when the Scandinavian Sales Acts were passed, but they did not attract the attention of the legislators to any great extent and the problems which they raised were not much discussed. Nowadays, the treatment of standard contracts is a major issue in the law of contracts. On the one hand, it is acknowledged that not all varieties of contractual issues can be dealt with by statute, nor can they be left to be eventually decided by case law. Consequently, standard contracts are needed to cope with them. On the other hand, it is also universally recognized that standard contracts tend to favour the party formulating them and often upset the balance in a contract relation between a strong and a weak party.

The problem of dealing with standard contracts for sales is intimately connected with some of the aims of reform discussed earlier. In many ways these aims favour the method of resorting to standard contracts. If, as was the case in the preparation of the Swedish draft, the number of sections is restricted by the present structure and also, having regard to Swedish legislative technique, each section cannot well be expanded to more than a limited size; if the development of case law is to be considered; if account is to be taken of other kinds of goods than those contemplated in the present Act; if the special needs of consumers should be borne in mind; if harmonization within Scandinavia should be maintained and if the contents of international legislation on sales should be observed; then a good deal of scope must be given to standard contracts as a means of diversifying the law of sales beyond the possibilities of the statute. On the other hand, in formulating the Swedish proposals it was not considered desirable to leave the whole development of sales law to standard contracts. Some compromise had to be found.

The general position underlying the proposed rules can be described as follows.[6] It is assumed that for a number of important questions standard contracts will provide the detailed solutions, regardless of whether a new Sale of Goods Act is passed. The Act should, however, direct the attention of the parties to the problems and to solutions which the legislator has considered to be suitable for normal situations. When the parties negotiate over conditions, a party which will not acquiesce in the demands of a superior party should also be in a position to demand that the rule of the statute shall govern the relation, or that the detailed provision of the contract shall be in harmony with the statutory rule. In addition, it should be possible to apply the statute in connection with standard contracts. The Incoterms, for instance, prescribe only how parties should act and what risks shall fall on each of the parties.[7] They do not deal with the consequences of non-compliance with their prescriptions, and these consequences must accordingly be left to national rules (unless there are provisions in the special contract).

However, the main object of the proposed Sale of Goods Act is, of course, to supply rules for situations which are not subjected to special contractual provisions, because the parties did not find it necessary to make any special agreement, or because they did not contemplate the situation which eventually ensued, or for some other such reason.

The object of some proposed statutory rules is to decide the duties and rights of the parties, i.e. how they should perform and what performance one party can require from the other. For such cases the Swedish report often refers to business usages as means of supplementing the rules. In the text of the draft statute this method is supported principally by a proposed new rule, prescribing that sales contracts shall be interpreted and applied in accordance with faith and honour and with good business usage (sec. 1, para. 1, third sentence).[8]

When a dispute arises it is assumed that the parties will first try to settle it by negotiation. The aim of the draft statute is to give both parties the position which they need for reaching an agreement. In other words, the rules should further just and peaceful solutions of disputes by agreement. If this method is not successful and the dispute has to be settled by arbitrators or by a court of justice, the statute should enable the arbitrators or judges to reach suitable solutions. The draft Act therefore refers comparatively often to a test of reasonableness. Sometimes a number of

[6] Cf. *SOU* 1976: 66, pp. 127–30.
[7] Incoterms 1953.
[8] Cf. *SOU* 1976: 66, p. 202.

circumstances are mentioned which are to be taken into account when deciding what is reasonable. The report often gives further indications of the underlying purposes. This method has been considered better than that of using concepts and terms which apparently are more exact but which will in fact leave considerable scope for discretion, at the same time occasionally forcing arbitrators and judges to hand down decisions which they themselves consider to be unjust or unreasonable. The position chosen implies that those who desire certainty and foreseeability often have to resort to contractual regulation rather than rely on the application of the statute. It is assumed that where such a desire predominates, the parties will anyhow resort to detailed contracts, which suit their requirements better than an abstract statute can do, and that therefore the vagueness of the statutory rule will not affect the parties unfavourably.

REMEDIES FOR BREACH OF CONTRACT

The draft Sales Act contains, like the present Act which it follows closely, rules both on how the contract should be performed, when it is not explicit, and on remedies for breach of contract. The latter kind of provision is in many ways the more important, and all the substantial innovations of the draft are to be found in these provisions. The following survey will therefore be limited to the proposed rules on remedies for breaches.[9]

The present Act, like the draft, contains separate sets of rules on "delay by the seller", i.e. failure to deliver the goods at the time agreed (secs. 21–7), "delay by the buyer", i.e. failure to pay the price at the time agreed (secs. 28–37), and defects in the goods (secs. 42–58). For each type of breach, the aggrieved party has a number of remedies, which are subject to special conditions and which are also independent of one another, unless they are mutually incompatible. Thus, a party's right to declare the contract avoided because of the other party's breach is independent of his right to damages, and both are subject to special conditions. The two remedies can also be cumulative.

In what follows, the discussion will focus on different remedies and their occurrence at the various breaches.

[9] Some other questions are treated briefly in the summary of the report, *SOU* 1976: 66, pp. 23–9. The present writer has written on a special subject, termination of a contract of manufacture, in "Die Kündigung eines Werklieferungsvertrages", *Festschrift für Ernst von Caemmerer*, Tübingen 1978, pp. 823–36.

SPECIFIC PERFORMANCE

Like Continental legislation on sales, but unlike Anglo-American law, the Scandinavian Sale of Goods Acts accord the buyer a right to demand specific performance when the seller does not deliver the goods sold at the time agreed (sec. 21, para. 1). This right is in principle unlimited, except that if the buyer does not exercise his right within a reasonable time after the goods should have been delivered he loses it (sec. 26). The buyer is therefore under no coercion to avoid the contract and resort to an action for damages.

This general principle is retained in the draft, although like other rules of the Act it can be derogated by usages to the contrary.[1] However, some exceptions from this principle are proposed. One concerns *force majeure*. If the seller is exempted from paying damages because of *force majeure* (sec. 24)[2] the buyer is according to the proposed rule not entitled to require performance, since the practical result would then generally be the same as if the seller was obliged to pay damages.[3] This rule agrees with present law, although the principle it embodies is not expressed in the existing Act. Another proposed rule will bring the Sales Act somewhat closer to Anglo-American law. The buyer should not be allowed to demand specific performance if such performance would force the seller to make sacrifices which are evidently disproportionate to the interest of the buyer in obtaining performance.[4] An example is the situation where a manufacturer, after dispatching certain goods to a customer, ceases to produce that type of goods and disposes of his stocks of them. If some of the goods sold are destroyed in transit, a claim for specific performance would force the seller to restart manufacture, which might cause him unreasonable expense. If the buyer can easily procure goods of the same kind from another manufacturer, damages are considered to be a sufficient remedy for the buyer, and he should not be permitted to enforce specific performance.[5]

A more controversial matter is that concerning cases where the seller declares that he will not deliver the goods, although the circumstances are not such as just mentioned. According to Swedish case law—which seems to have good support in the wording of the present Act—the buyer is entitled to insist on specific performance in spite of the seller's declaration.[6] Danish and Norwegian case law, on the other hand, require the

[1] Cf. sec. 1 of the present Act, sec. 1, para. 2, of the draft Act.
[2] See further *infra*, p. 71 at n. 7.
[3] Draft, sec. 21, para. 2. Cf. *SOU* 1976: 66, p. 139.
[4] Draft, sec. 21, para. 2.
[5] Cf. *SOU* 1976: 66, pp. 139 f.
[6] See 1921 NJA 41; cf. J. Hellner, *Köprätt*, 4th ed. 1974, pp. 112 f.

buyer to declare the contract avoided and proceed to cover, unless there are special circumstances which justify a request for performance.[7] This result is considered to agree with general principles of fair dealing which supplement the text of the statute. The matter is not dealt with in either the Norwegian or the Swedish draft statute, though it is mentioned in both reports. The Swedish report, while on the whole keeping to the position taken in Swedish case law, suggests that under certain circumstances the buyer should have to declare the contract avoided and proceed to cover, especially when it is unlikely that the seller will ever deliver and it is moreover probable that the price will rise.[8] The Norwegian report, on the other hand, adheres to the rule found in Norwegian case law.[9]

There is a corresponding situation where the buyer does not pay the price in time. The present principle for this situation is the same as that just described for the seller's failure to deliver, i.e. the buyer's breach does not force the seller to avoid the contract and claim damages on the basis of a resale, but he is entitled to an action for price, without any restriction (sec. 28). However, the situation is a little more complex than appears from this principle, as the seller has another way open to him.[1] When the buyer does not pay the price, he will often also refuse to accept the goods. The seller is then entitled to rely on this latter circumstance and sell the goods for the buyer's account (sec. 34). He can sue for the price and set off what he has received when selling the goods for the buyer's account from the price. Often the result is in practice more favourable to the seller than it would have been if the contract had been avoided and damages claimed on the ground of having resold the goods, a procedure which in fact closely resembles the one just mentioned.[2] The draft, while acknowledging that it is unsatisfactory to let the seller escape the duties incumbent on him when avoiding the contract by resorting to the method now described, nevertheless retains the present rules (sec. 28). It has not been considered justifiable either to restrict the right to claim payment of the price or to prevent the seller from selling the goods for the buyer's account when the latter does not accept them. However, the draft contains a number of proposals which will reduce the seller's advantages in resorting to the criticized method and will ensure that the results will be virtually the same as if the contract had been avoided.[3]

[7] See for Danish law H. Hasle and B. Nebelong, *Løsørekøb*, Copenhagen 1949, pp. 164 f., for Norwegian law K. Gaarder, *Forelesninger over Kjøp*, Oslo 1970, p. 65.

[8] See *SOU* 1976:66, pp. 166 f.

[9] *Lov om kjøp* (*supra*, p. 56 n. 9), p. 29.

[1] Cf. *SOU* 1976:66, p. 142.

[2] The position is the same in German law; see G. Hager, *Die Rechtsbehelfe des Verkäufers wegen Nichtabnahme der Ware*, Frankfurt/M. 1975, pp. 129 ff.

[3] Cf. *SOU* 1976:66, pp. 142 f., 285.

With regard to defects in the goods, the equivalents of specific performance are the delivery of conforming goods, the supplying of a missing quantity, and the remedying of the defect, which can take the form of supplying a missing part, exchanging a defective part or repairing the defect. The present Act regulates the first two of these but does not deal with the remedying of the defect. The reason is clearly that the first two types of legal means are applicable to the kind of goods that the Act chiefly contemplates, whereas remedying the defect is mainly of relevance to defects in manufactured goods. Since one of the aims of the revision is to introduce rules suitable also for application to the sale of manufactured goods, the remedying of a defect is regulated in the draft. The rules on delivery of conforming goods or of a missing quantity do not differ much from those of the present Act, and they can therefore be left aside here.

According to the proposed rule, the buyer has the right to have the defect remedied, where this can be done without unreasonable cost or inconvenience to the seller. The cost of remedying the defect will, in so far as the statutory rule is applicable, fall wholly on the seller, notwithstanding the fact that when the contract establishes an obligation for the seller to remedy a defect, more detailed provisions on the subject are common. There is also, which is perhaps more important, a rule on the situation where the seller is under a duty to remedy a defect but does not fulfil his obligation. The buyer may then resort to the other remedies which are open to him when the goods are defective, i.e. he may demand a reduction of the price corresponding to the defect, or he may—provided that the defect is fundamental—declare the contract avoided or demand conforming goods. There is also a special remedy, consisting in a right for the buyer to demand reasonable compensation for the cost of repairing the goods himself. This latter right may be of importance to him if he is not entitled to claim damage (cf. *infra*).

AVOIDANCE OF THE CONTRACT

Another principal remedy in the Scandinavian law of sales is avoidance of the contract.[4] As mentioned before, this remedy is independent of the right to claim damages, and it is therefore a separate question whether a party that declares the contract avoided is also entitled to damages. Ac-

[4] The Uniform Law on International Sales and the UNCITRAL draft employ the expression "declare the contract avoided", and since the rules regarding this remedy are substantially the same as those of the Scandinavian Sales Acts, the expression quoted is used here.

cording to the present Act, avoiding the contract presupposes in general a fundamental breach, but there are a number of exceptions, different for different types of breach. For instance, with regard to commercial sales (i.e. sales between merchants) any delay in delivery of the goods will give the buyer the right to avoid the contract, unless the delay related only to a minor part of the goods sold (sec. 21, para. 1). A reason for this strict rule can be found in the fact that the Act is mostly concerned with sales of primary commodities and similar goods which are available in international markets. According to the rule in the draft, even for commercial sales the buyer can in general declare the contract avoided only when the seller's breach is fundamental (sec. 21, para. 3). However, the draft proposes the introduction of the German-inspired principle of the *Nachfrist,* which is also found in the Uniform Law on International Sales. According to this principle, the buyer may grant the seller an additional period for performance, and if delivery is not achieved within this period the buyer is entitled to avoid the contract (sec. 21, para. 3).

If the buyer fails to pay the price when it falls due, the same principle applies, according to the draft. The seller may declare the contract avoided if the breach is fundamental but not, as under the present Act, at any delay of payment in a commercial sale (sec. 28, para. 2). In case of a non-fundamental breach the seller may also set a *Nachfrist* and, if payment does not occur within the period stated, declare the contract avoided. However, exceptionally, the seller may declare the contract avoided without the breach being fundamental and without the setting of a *Nachfrist.* The exception concerns the case where the buyer is under a duty to pay against documents representing the goods (sec. 28, para. 2). This rule follows commercial practice. The draft retains the present Scandinavian rule, according to which the seller's right to declare a contract avoided because of non-payment of the price ceases when the goods have come into the buyer's possession, unless the seller has reserved the right to avoid the contract even after the buyer has taken possession (in practice such a reservation will take the form of a clause retaining the property of the goods until payment has been effected).

With regard to defective goods, even the present Act presupposes a fundamental breach for entitling the buyer to repudiate the contract, and there is of course no reason why the draft should propose any other rule (sec. 42, para. 1). For this case the main issue concerns the situation where the seller is under a duty to repair a defect but does not do so within the time that he has at his disposal. As mentioned before, the buyer should then have the right to declare the contract avoided, when the breach is fundamental (sec. 42, para. 2).

LIABILITY TO PAY DAMAGES

Damages are of course a most important remedy in the law of sales, and the draft contains detailed rules on liability for damages. The present Swedish Act is based on the general notion that obligations concerning *species* (specific goods) carry a liability to pay damages only in case of intention or negligence (*culpa*), whereas with regard to obligations concerning *genus* (money or generic goods), liability is strict, with an exception for impossibility. This notion applies to delay by the seller, delay by the buyer, and defects in goods. The draft, on the other hand, proposes rules which are more varied. In particular, the division between *species* and *genus*, although it will continue to be relevant for delay by the seller, is not to be determinative for liability for defect, and thus what seems to be an original feature of Scandinavian sales law is to disappear. Moreover, the German-inspired notion of impossibility, which underlies the present rules,[5] is to be replaced by the notion of *force majeure*, which has its chief support in French law.

With regard to delay by the seller, the draft retains the present principle concerning specific goods. The seller is liable to pay damages unless he can prove that the delay was not due to any fault of his (sec. 23, para. 1). The situation envisaged is that the goods sold cannot be delivered because they have been destroyed or damaged by accident. According to the proposed rule, the seller must also prove that the delay is not due to circumstances which he ought to have taken into account at the time of the making of the contract (sec. 23, para 1). There is thus to be liability for *culpa in contrahendo*.

With regard to goods of a generic character, the seller's liability is to remain strict, but the exceptions are more numerous than under present law and, as mentioned, are based on the notion of *force majeure*. This substantial change in favour of the seller has been prompted, *inter alia*, by a wish to bring sales law closer to what is generally accepted in standard contracts, even those which are not formulated by sellers alone but are agreed documents.[6] The proposed rule enumerates a number of circumstances which exempt the seller from liability, and among these are not only war and similar events, natural disasters, etc., but also strikes or other industrial action (sec. 24). The enumeration of particular events ends with a general expression indicating that the seller will be exempted also because of "other circumstances of a similarly exceptional character and

[5] Cf. J. Hellner, "The influence of the German Doctrine of Impossibility on Swedish Sales Law", in *Ius Privatum Gentium. Festschrift für Max Rheinstein*, Tübingen 1969, pp. 705–20.
[6] Cf. *SOU* 1976:66, pp. 141.

determinative influence". Events of the type mentioned will exempt the seller not only when they make delivery impossible in a strict sense but also if they make it unreasonably burdensome.[7] This is also a change in favour of the seller. A prerequisite for exemption is, however, that the seller shall not be liable according to the principle relating to the sale of specific goods, i.e. that he can prove that the delay is not due to his fault or to circumstances that he ought to have taken into account at the time of the making of the contract.

The principle relating to delay by the buyer at present corresponds to that of delay in the delivery of generic goods. The underlying idea is that, in both cases, the obligation is of a generic character and that therefore liability should be strict, tempered only by an exception for impossibility. However, the rules of the draft regarding the buyer's liability for damages take account of the fact that circumstances that prevent a buyer from paying on the agreed date are generally of another character than those that prevent a seller from delivery. The liability of the buyer is strict, but there is an exemption for delay caused by statutory regulations, interruption of general communications, and similar hindrances (sec. 30, para. 1). Regarding delay caused by statutory provisions, it is pointed out in the report that not every such delay should exempt the buyer. If the statutory hindrance is due to supervening legislation in the buyer's state, the buyer should often be the one that carries the burden of the ensuing loss.[8]

The draft does not contain any rules on *force majeure* which prevents the buyer from receiving or using the goods. Examples are a strike in the port of unloading whereby the buyer is prevented from receiving the goods, or a fire which destroys the buyer's plant and makes a machine that he has bought for use in the plant worthless to him. The problem is considered too complicated to be dealt with in a statute of the type of the Swedish Sale of Goods Act.[9]

The most intricate problems regarding liability for damages arise with regard to defects in the goods. As Rabel points out in *Das Recht des Warenkaufs,* such liability constitutes one of the points where common law and Continental law most clearly disagree.[1] To the common-law lawyer it seems almost self-evident that a seller should be strictly liable for losses due to defects in the goods; to the Continental lawyer, especially if he is a German, it appears equally clear that the seller should be liable only for

[7] The report refers to the notion of "commercial impracticability" described in the commentary to Uniform Commercial Code § 2–615, see *SOU* 1976: 66, p. 248.
[8] See *SOU* 1976: 66, p. 273; cf. p. 246.
[9] Cf. *SOU* 1976: 66, pp. 143 f.
[1] Rabel, *Das Recht des Warenkaufs* (*supra,* p. 56 n. 5), vol. 2 (1958), pp. 267 ff.

fault or for express guarantee. The present Scandinavian Sales Acts adopt a compromise; they hold the seller liable only for fault and guarantee when the sale concerns specific goods, but impose strict liability when the sale concerns generic goods (secs. 42, 43). This compromise is hard to justify; particularly when the determinative ground for finding the goods defective lies in an incorrect description by the seller, it is not easy to explain why there should be any difference between the consequences of a description which refers to specific goods and one that refers to generic goods.

The draft proposes another type of compromise for which, however, certain patterns can be found in the sales law of other countries.[2] The difference between specific and generic goods will no longer be relevant. Full liability to pay damages is to be dependent on fault or guarantee, according to a detailed description in the draft (sec. 43, para. 1).

In addition, a seller who is an entrepreneur is to have strict liability for direct loss and for incidental loss but not for consequential loss (sec. 43, para. 2). The underlying idea is that an entrepreneur should carry the risk of losses due to changes in price and similar losses whenever there is a defect in the goods, whereas his liability for consequential loss should be subject to those conditions of fault or guarantee which govern the liability of a seller who is not an entrepreneur. It is well known that sellers often hesitate to undertake any responsibility for consequential loss, which may vary from one buyer to another and can easily amount to large sums, and the draft respects this attitude. On the other hand, a seller who is an entrepreneur should not be allowed to shift over to the buyer a loss due to a change in price, even if he cannot be blamed for the defect.

ASSESSMENT OF DAMAGES

The present Act contains only a very few rules on the assessment of damages, and these refer to the effect of changes in price when the actual loss is not proved.[3] The reason is probably that, at the time of the preparation of the Scandinavian Sales Acts, the doctrine of "difference" elaborated in Germany by Fr. Mommsen seemed to provide a principle whose validity was obvious and which contained the solution of all practical problems.[4] The subsequent development, including the emergence of a quantity of

[2] See Rabel, *loc. cit.* and vol. 1 (1957), pp. 446–68.

[3] Cf. J. Hellner, "The Limits of Contractual Damages in the Scandinavian Law of Sales", 10 *Sc.St.L.*, pp. 37–79, especially pp. 55 ff. (1966).

[4] Cf. Hellner, *op. cit.*, pp. 40 ff.

case law, has demonstrated the complexity of the field. When taking up a position on the various questions in preparing the draft statute, a particular difficulty encountered was how to cram the necessary provisions into the available space in the sections devoted to assessment of damages. Only the fundamental principles have been expressed in the draft, and some problems have been relegated to discussion in the report, to be decided on the analogy of the rules given in the text of the statute.[5]

From a formal point of view, two devices employed in the draft should be noted. One consists in providing separate rules for the seller's delay (sec. 25), the buyer's delay (sec. 30), and defects in the goods (sec. 45). Not only does this arrangement conform to the general structure of the present Act and the draft, but it is justified by the fact that the rules regarding the seller's breach and those regarding the buyer's breach are different. The draft also differentiates between direct loss, incidental loss and consequential loss.[6] This distinction is in the main taken from the Uniform Commercial Code, which uses the concepts of "incidental damages" and "consequential damages".[7] Distinguishing between three types of loss makes the materia easier to handle. As has been mentioned already, with regard to defects in goods the draft makes a difference beween liability for direct loss and incidental loss, on the one hand, and consequential loss, on the other.

A general principle which is given prominence in the draft is that a person suffering a loss shall adopt reasonable measures to mitigate the loss.[8] This principle undoubtedly pervades present Swedish case law relating to the assessment of contractual damages, but it is not expressed in the existing statute.[9] The principle both governs a number of special rules and can be applied to adjust the results that would otherwise ensue.

Another general principle, whose importance appears mainly when assessing damages for consequential loss, relates to the limitation of damages and the possibility of reducing damages that are unreasonably high. From an international point of view, two main principles compete in this field. One is the principle of "adequate causation", which is found in German law and is supposed to govern Scandinavian sales law (and tort law) as well.[1] Under this principle the main question will be to what extent a loss for which compensation is sought is adequately caused by the breach

[5] See *SOU* 1976:66, pp. 160–80, 250–60, 275–81, and 314–17.
[6] See *SOU* 1976:66, pp. 160 f. Cf. Hellner, *op. cit.*, pp. 61 ff.
[7] See Uniform Commercial Code §§ 2-710–2-715.
[8] See *SOU* 1976:66, pp. 161 f.
[9] Cf., on the other hand, Uniform Law on International Sales art. 88.
[1] See Hellner, *op. cit.*, pp. 42, 52 f.

of a party. The other principle, which is found in French law and in Anglo-American law, is known as the principle of *Hadley* v. *Baxendale*.[2] It turns on the foreseeability of the loss at the time of the making of the contract. As is well known, this general principle can be and has been developed into two or more secondary rules. It has been adopted both in the Uniform Law on International Sales and in the UNCITRAL draft.[3]

The draft does not make use of either of these two principles but proposes a more discretionary method of reduction of damages. Damages are to be reduced in so far as is reasonable having regard to the loss which generally arises in similar cases, the possibility for the party in breach to foresee and prevent the loss, and other circumstances. As appears from these words, the normal loss of an aggrieved party is an important element. The proposed rule in this respect resembles the so-called "first rule of *Hadley* v. *Baxendale*".[4] In addition, the possibility for the party in breach to foresee the loss at the time of the making of the contract is mentioned. This feature can be compared to the so-called "second rule of *Hadley* v. *Baxendale*".[5] But, according to the rule proposed, the possibility for the party in breach to prevent the loss should also be taken into account. As pointed out in the report, the intention is that if a party after the making of the contract learns that the other party has much to lose by a breach, he has a duty to try to prevent such a loss as far as possible.[6] On this point, the proposed principle is a little less favourable to the party in breach than is the principle of *Hadley* v. *Baxendale*.

The detailed rules, which are different for the seller's breach and the buyer's breach, relate to direct loss. With the exception of defects in the goods, they also relate only to cases where the contract is avoided by the aggrieved party. There are no detailed rules on the computation of incidental loss and consequential loss.

With regard to the seller's breach, it is assumed that the normal way of computing the damages due to the buyer is by reference to a cover transaction (sec. 25, para. 2; sec. 45, para. 2). Where the buyer undertakes such a transaction he is entitled to receive as damages the difference in price between the cover transaction and the price of the contract which was repudiated. Where no such cover transaction can be proved, a method for abstract computation of the loss is prescribed. A rule of this kind exists

[2] French *Code civil* art. 1150, English Sale of Goods Act sec. 51 (2), Uniform Commercial Code § 2-715(2)(a).

[3] Uniform Law on International Sales arts. 82, 86, UNCITRAL draft art. 55.

[4] Cf., e.g., *Cheshire & Fifoot's Law of Contract* (9th ed. by M. P. Furston), London 1976, p. 592, *Benjamin's Sale of Goods* (A. G. Guest ed.), London 1974, para. 1205.

[5] Cf. *Cheshire & Fifoot, loc. cit.*, and *Benjamin's Sale of Goods*, para. 1208.

[6] *SOU* 1976: 66, pp. 164 f.

already in the present Act, but a change is now proposed. According to the present rule, the difference between the price prevailing at the time when the goods should have been delivered and the price agreed for the repudiated transaction is determinative (sec. 25). According to the draft—which on this point follows the Uniform Law on International Sales and the UNCITRAL draft—the relevant time is the time when the contract is avoided (sec. 25, para. 2).[7]

If the buyer resorts to cover, or receives compensation for the difference in price according to the principle just mentioned, he will normally not suffer any loss of profit, as he can use the goods bought by the cover transaction for the same purpose as those originally bought. However, it remains to decide whether the buyer shall be entitled to claim compensation for loss of profit in lieu of, or possibly in addition to, compensation based on the cover transaction (or assessed according to the corresponding rule of price difference). The draft proposes, largely in accordance with earlier Swedish case law, that the buyer shall be entitled to choose this means of establishing his loss only if a cover transaction was impossible or if the buyer had reasonable grounds for not making such a transaction (sec. 25, para. 2).[8] Accordingly, in these fairly exceptional circumstances the buyer may claim compensation for loss of profit under the heading of direct loss. The draft does not mention explicitly how the profit is to be estimated, but this matter is treated in the report.[9] In certain circumstances, compensation for loss of profit may also be awarded under the heading of consequential loss.[1]

As mentioned before, the buyer may also be entitled to compensation for incidental loss. The loss will in general consist in expenses incurred because of the breach.[2]

The character of consequential loss will depend largely on the purpose for which the buyer bought the goods. If he is a merchant who buys for resale, the loss will generally consist in the loss of profit which ensues, in spite of a cover transaction, when the seller fails to deliver in time. If he buys for production in his plant, the consequential loss may consist in the loss of profit on the enterprise. If he is a consumer, the loss may consist in having to hire corresponding goods for the time until he has received other goods. Other types of consequential loss may also arise.[3]

[7] Cf. Uniform Law on International Sales art. 84, para. 1, UNCITRAL draft art. 57(1).
[8] Cf. Hellner, *op. cit.*, p. 59 n. 2.
[9] See *SOU* 1976: 66, pp. 255 f.
[1] See *op. cit.*, p. 258.
[2] Cf. *op. cit.*, pp. 170 ff.
[3] See *op. cit.*, pp. 171 ff., 257 ff.

The proposed rule relating to the situation when a seller avoids the contract because of the buyer's delay is constructed on the same pattern as that on the seller's delay, but there are some important differences. Most of these appear most clearly in the discussion in the report.

As in the corresponding case of the seller's delay, it is assumed that the normal remedy of the aggrieved party, in this case the seller, when he avoids the contract, is to sell the goods again and claim damages from the buyer on the basis of the difference in price. Accordingly, the primary rule proposed is that the seller shall be entitled to compensation for direct loss for the difference between the price of the contract that was repudiated and the price that he obtains upon resale (sec. 30, para. 3). No special account is taken of the fact—mentioned previously—that in many cases the seller will prefer to sell the goods for the account of the buyer and set off the proceeds when he claims the price from the buyer. It is, however, pointed out in the report that in general the same demands must be placed on the care of the seller without regard to which of these two remedies he chooses.[4] If no resale can be proved and damages are assessed on the basis of an abstract computation, the decisive time is—as under the corresponding rule relating to the seller's delay—the time when the contract was avoided (sec. 30, para. 3).

Sometimes the goods sold cannot be sold again after avoidance, because they have been specially manufactured for the buyer in question, or because they will perish quickly, or for some other such reason. The only possible procedure, even if the seller has avoided the contract, may then be for him to use the goods in his own enterprise. There is no explicit rule in the draft for this case, but it is suggested in the report that the situation shall be judged on the analogy of the rule regarding resale.[5] This means in practice that the seller should be entitled to compensation for the difference between the price of the contract that was avoided and the value of the goods as used in the seller's business.

As in the case of the seller's delay, it must be decided whether the seller who has avoided the contract is entitled to claim damages for loss of profit. If it is impossible for the seller to sell the goods again (or to use them in his own business in the manner just described), it seems clear that the seller should be allowed to claim damages on this basis, just as the buyer can in the corresponding case.[6] But in Swedish case law, the seller has been accorded a more far-reaching right to claim damages for lost profit,

[4] See *op. cit.*, pp. 142 f., pp. 285 f.
[5] See *op. cit.*, p. 175.
[6] Cf. *op. cit.*, pp. 175 f.

instead of on the basis of a resale.[7] The underlying idea is that a seller who has sold goods once, and then because of avoidance of the contract has to sell them again in his regular market, thereby loses the profit that he would have made on the original sale. If his productive capacity is not fully utilized, he could have sold other goods instead of the goods that he has sold and now has to place on the market for the second time. According to the proposed rule, the seller is therefore entitled to compensation for the profit lost if by selling the goods again he loses a profit which he would have made if the buyer had paid the price.[8]

There is yet another problem relating to the amount of damages due to a seller who repudiates the contract because of the buyer's breach. The principles just mentioned cannot very well be employed when goods are being manufactured by the seller and he breaks off the manufacture because of the buyer's breach. The draft does not contain any explicit rules for this situation, except in so far as the rule on compensation for loss of profit is so framed as to cover this case too.[9] The seller is accordingly entitled to compensation for loss of profit, and the compensation is computed according to the so-called price-cost method, i.e. the damages correspond to the price agreed, less the cost that the seller saves by breaking off the production.[1] The treatment of overhead costs in this situation is an important and well-known problem which is also discussed in the report.[2]

The rules regarding assessment of damages because of a defect in the goods are on the whole constructed on the same pattern as the corresponding rules regarding damages based on the seller's delay. If the buyer declares the contract avoided because of the defect and claims damages for direct loss, the same rule is to apply as when the contract is avoided because of the seller's delay (sec. 45, para. 2). The buyer is supposed to proceed to cover, and only exceptionally is he entitled to claim damages for lost profit in lieu of the price difference. The rules relating to defects in goods are not to apply to "products liability", i.e. to cases where the goods sold have caused injury to the buyer's (or to someone else's) person or damage to property other than the goods sold (sec. 43, para. 4).

Unlike the corresponding rule regarding the seller's delay, the proposed

[7] Cf. Hellner, *op. cit.*, p. 60.

[8] See *SOU* 1976: 66, pp. 176 f., 277 f.

[9] See *op. cit.*, pp. 177, 278 f. The Uniform Commercial Code seems to resort to the same method, see § 2-708(2); compensation for profits is awarded "if the measure of damages provided in section (1) is inadequate to put the seller in as good a position as performance would have done ...".

[1] Cf. G. Hager, *op. cit., supra,* p. 67 n. 2, pp. 52–72, 86 ff.

[2] See Uniform Commercial Code § 2-708(2): "... the measure of damages is the profit (including reasonable overhead) ...". Cf. *SOU* 1976: 66, p. 177.

rule concerning damages because of a defect contains a special provision for the assessment of direct loss when the contract is not avoided. In the first place, it is assumed that if the seller remedies the defect (cf. *supra*) or if he delivers conforming goods instead of the defective goods, no direct loss ensues, or rather, the direct loss is eliminated by specific performance (sec. 45, para. 2). The proposed rule therefore relates to the remaining cases, and it simply says that the direct loss corresponds to the difference between the value that the goods would have had if they had been conforming and the value which they have when defective (sec. 45, para. 2). As explained in the report the most important case is that where the current price of the goods has risen.[3] If the buyer receives the difference in value, he will be compensated for the profit which he would have had if the goods had been conforming. Another example concerns the situation where a machine is defective. The difference in value will then correspond to the cost of repairing it, with the addition of any remaining loss of value after the repair has taken place.[4]

CONCLUDING REMARKS

The preceding survey of the rules on remedies for breach of contract has, it is hoped, illustrated some of the general aims and characteristics of the draft, which were set out in a general way in the first part of this paper. It should appear that the proposed revision is based partly on the experience gained from the application of the present Act, partly also on a comparative study of other legislation on sales, such as the Uniform Commercial Code and the Uniform Law on International Sales. Throughout, the aim has been to propose rules that are based on an analysis of the practical situations that arises. This may also explain why the rules regarding the seller's breach and those regarding the buyer's breach are often different, and why the rules for the two principal kinds of breach by the seller, delay and defect in the goods, differ considerably.

After the draft was presented, it was submitted for comment to various authorities and organizations, as is customary in Swedish legislative procedure. The criticisms made have largely been directed towards the relationship between the draft and other legislation.[5] A number of organizations

[3] See *SOU* 1976: 66, p. 315.
[4] See *loc. cit.*
[5] Cf. *supra*, the part on "Relation to Other Legislation".

representing Swedish business life have expressed a desire for legislation on sales to be postponed until the fate of the UNCITRAL draft has been decided. The same organizations suggest that there should be separate legislation on commercial sales and on consumer sales. As might be expected, some criticism has also been levied against individual rules and details.

At the time of writing (December 1977), the fate of the draft is uncertain. As legislation on sales is a matter of cooperation between the Scandinavian countries, the decision on whether and how to proceed is taken by the Scandinavian Ministers of Justice jointly, and although deliberations have taken place, the matter is still under consideration.