INTERFERENCE WITH CONTRACTUAL RELATIONS

A PROBLEM OF THE LAW OF UNFAIR COMPETITION IN A COMPARATIVE PERSPECTIVE

BY

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1. THE PROBLEM

It is a fundamental main rule of the law of contract, already formed in classical Roman law,[1] that a contract involves legal effect only *inter partes*, i.e. it is impossible through a contract to bind a third party who has not shown himself willing to be bound by the obligation. This rule, which is of course closely linked with the principle of contractual freedom, is in Anglo-American law known as the doctrine of privity of contract.[2] It has also found expression in the French Code civil which provides in art. 1165 that "*les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers ...*". A similar main rule applies in German law, albeit not codified in the BGB. It is often described as the principle of the relativity of contractual effects.[3]

Using slightly different terminology, it is possible to speak of *the principle of the subjective limitation of contractual effects.*[4]

While the principle is probably viewed as an almost self-evident main rule, several problems attach to its scope and justification in certain situations. Thus it is possible in Swedish law and elsewhere contractually (through a so-called third-party contract) to *entitle* a third party, who may then invoke the contract.[5] However, the situations that may be relevant in this context fall outside the scope of this enquiry. Here it is

[1] See among other authors R. W. Lee, *The Elements of Roman Law*, with a translation of the Institutes of Justinian, rev. ed., London 1946, pp. 345 ff., where the principle is treated in more detail.

[2] See e.g. the clarifying presentation in Cheshire-Fifoot, *The Law of Contracts*, 11th ed. London 1987, pp. 437 ff.

[3] See e.g. the basic work of R. Krasser, *Der Schutz vertraglicher Rechte gegen Eingriffe Dritter* (*Schriftenreihe zum gewerblichen Rechtsschutz*, vol. 21), Munich 1971. For French law, pp. 21 ff., for German law, pp. 87 ff.

[4] Thus U. Bernitz, *Standardavtalsrätt* (The Law of Standard Contracts), 4th ed. Stockholm 1987, p. 23, and the same author's references given in *SvJT* 1972, p. 416, note 1, esp. K. Grönfors, *Ställningsfullmakt och bulvanskap* (Proxy and Dummy Ownership), Stockholm 1961, pp. 10 f.

[5] See e.g. 1956 NJA 209 with references; K. Rodhe in *SvJT* 1968, p. 196, K. Grönfors, *op.cit.*, p. 20 with references. The French Code civil contains in art. 1121 a special provision on the validity of contracts made in favour of third parties. A particular reference to this is given in a subsequent clause of art. 1165 of the Code civil, mentioned in the text.

chiefly the possibilities of *committing* outsiders that is of interest. Further delimitations must be made, however.[6]

The problem area to be dealt with concerns the possibilities of using a contract between vendor and purchaser to bind up contractual relations at a later stage, and also the possibilities of intervening directly against competing persons engaged in trade or industry who, not respecting existing contracts between parties other than themselves, assist in (possibly induce) breach of contract by one of these. Between these two ways of exercising control there exists a close connection, although they are based on two entirely different legal foundations. In the former case it is a question of extensive application of principles of contract law, while the latter concerns application of tort law or unfair competition law, including means of seeking injunctions possibly linked with these.

Both are of interest predominantly in connection with contracts that limit the contracting parties' possibilities of engaging in competing activities. The wide discussion and practice regarding pertinent questions, chiefly in the EEC countries and the USA, shows that vendors or licensers often consider it important to control as far as possible the further exploitation of their goods or rights through appropriate contractual clauses. Accessory non-competition clauses[7] are drawn up to prevent sales outside a given market, sales to certain categories of purchaser, the use of the products for certain purposes, etc. Such contractual limitations are normally considered particularly important in large companies that use comprehensive networks of dealers or licensees with delimited areas of operations. Corresponding problems arise where employees, contractors, collaborators, etc., are bound by terms of employment or commission or special contracts to respect company secrets and an outsider, usually a competitor, causes the bound party to disclose the secret in exchange for pecuniary compensation or appointment or commission with attractive conditions attached.

[6] The intention is not to discuss how far contractual relations within an industry can be regulated using standard contracts drawn up by organizations. The chief problem here is at another level: to what extent standard contracts, particularly agreed documents with broad but not quite complete coverage of an industry, can be viewed as expressions of custom or trade practice and in this way gain legal force outside their own area of application. The present author considers that great caution should be shown, see his article "Consumer Protection and Standard Contracts" in 17 *Sc.St.L.*, pp. 19 ff. (1973).

[7] By accessory non-competition clauses are understood contractual obligations which to some extent limit the bound contracting party's opportunity of engaging in competitive activity, and which are linked with contracts whose main import cannot be viewed as restrictive (i.e. as opposed to cartel agreements). A type example is competition clauses linked with the granting of licensing or selling rights, or with the transfer of enterprises. In the United States it is customary to speak of ancillary restraints of trade.

It is possible to imagine various methods of arranging for contracts to have legal force with reference to outsiders. One way is to have *contractual restrictions concerning the disposal of personal property invoked against outsiders acting in bad faith.* This method has, both in Sweden and elsewhere, been considered as a possible way of supplementing legislation on intellectual property, particularly regarding copyright law, and will be touched on later in connection with some well-known Swedish cases (section 5 below).

The most common approach, however, is to employ *legal rules against unfair competition.* In this area the formation of law has succeeded in taking place more flexibly, so as to meet the wishes of commercial life for protection against competitors' action that has been deemed unfair. Thus, for reasons of legal policy intended to offer certain protection of, among other things, trade secrets, exclusive contracts, licence agreements and so on, both in Anglo-American and in continental European law, *unwarranted interference with contractual relations* on the part of third parties has been developed into a special type of unfair competition.

The type of competitive measure that is considered unfair according to the principle of unwarranted interference with contractual relations means that C, a third-party outsider, causes B, one party to a contract with A, to break his contract in C's favour. C is therefore considered to be committing an act of unfair competition directly against A, who thereby has a claim for indemnity against C (and perhaps also the possibility of bringing an action for an injunction). Behind this view lies the conception that a party to a contract ought to be able to plan his action on the assumption that the other party will fulfil his contractual obligations. The other party's indemnity liability, etc., in the case of breach of contract is not viewed as an alternative to fulfilment of the contractual obligations.[8] An outside competitor who causes a party to a contract to break his contract, for example by "buying him out", is thus acting in an improper manner.

It is clear that we are dealing here with situations where a third party induces or complies in breach of contract, and the situation is therefore known also as inducement of or *complicity in breach of contract.* In its

[8] In American law O.W. Holmes maintained that liability in damages was an acceptable alternative to fulfilment, see 10 *Harv.L.Rev.*, p. 461 (1897). This, not accepted, view was, however, well countered with the following statement in 77 *Harv.L.Rev.*, p. 959 (1963): "By creating a temporary island of stability in a fluid competitive system, the commercial contract protects the expectations which are necessary to all but the simplest competitive activity". The quotation, in the present author's view, indicates a very important function of contractual obligation and the system of rules associated with it.

practical effect the legal principle entails breaking the main rule that contracts are not binding upon third parties, even if this is achieved through the law of unfair competition and not through the law of contract.

In an earlier paper the whole legal field of unfair competition between persons engaged in trade and industry has been described by the present author as underdeveloped in Swedish law and characterized as "the forgotten field of law".[9] The type of competitive measure treated in the present paper fits well into this framework, where the circumstances have received, and are receiving, great attention in both Anglo-American and in continental European legal tradition and where there exist in many countries rich legal practice and writing. In Sweden, on the other hand, unwarranted interference with contractual relations has never been recognized as a type of unfair competition. Rather, it is the case that the complex has very seldom been the object of legal writing.[10] The intention of this paper is partly to clarify the differences in the legal position in Sweden and internationally, and their practical significance, and partly to explain why the development of law has been different.

2. "INTERFERENCE WITH CONTRACTUAL RELATIONS" IN COMMON LAW

Within the sphere of Anglo-American law the rules dealt with here are normally treated under headings such as "interference with contractual relations" or "procuring a breach of contract".[11] The rules originated in English labour law and initially concerned the recruitment of another's contractually bound servants. Basic to further development of the law on both sides of the Atlantic was an English "leading case" of 1853, *Lumley* v. *Gye*.[12] In this case a theatre director was bound over to

[9] U. Bernitz, "Otillbörlig konkurrens mellan näringsidkare—det glömda rättsområdet" (Unfair competition between persons engaged in trade or industry—the forgotten field of law), in *Festskrift till Jan Hellner*, Stockholm 1984, p. 115.

[10] The problem is treated by J. Kleineman, *Ren förmögenhetsskada* (Pure Economic Loss), Stockholm 1987; see section 6 *infra* and by K. Rodhe in *Handbok i sakrätt* (Handbook of the Law of Property), Stockholm 1985, pp. 309 ff., 332 ff.

[11] See generally for English law, e.g. Salmond on *The Law of Torts*, 17th ed. London 1977, pp. 367 ff.; J. D. Heydon, *Economic Torts*, 2nd ed. London 1978, pp. 28 ff., and for American law, 4 Restatement of Torts, secs. 766 ff.; Harper-James, *The Law of Torts*, Boston 1956, Vol. I, pp. 489 ff.; *Prosser-Keeton on Torts*, 5th ed. St Paul 1984, pp. 978 ff.; 77 *Harv.L.Rev.*, pp. 959 ff. (1963).

[12] (1843–60) All England Law Reports Reprint, p. 208.

indemnify a competitor in consequence of his causing a singer employed by the competitor to break her contract and sing for him instead. Now the legal principle applies fairly generally and represents an important type of tort within the common-law system of non-contractual indemnity rules in the area of damage through competition: what are termed competitive torts. The rule is also of significance in labour-relations law, an aspect that will not however be dealt with in this paper. What is important here is that indemnity liability in both English and American law can arise for persons acting in bad faith who obtain knowledge of competitors' company secrets by exploiting employees or contractors who are bound by competition or confidentiality clauses.[13]

More detailed examination of the forms of interference in another's contractual relations that are considered grounds for indemnity will here only be indicated, chiefly in terms of American law. Normally, only interference with existing contractual relations, and not with expectations of continued or new business connections, is considered to entail indemnity liability. In situations that appear clearly unwarranted, however, indemnity liability can be conceived of as obtaining, even in "interference with reasonable economic expectancies".[14] The scope for such liability outside the area of boycotts and the like appears, however, to be but small. Freedom of competition is in fact considered to require that persons engaged in trade or industry are able to entice their competitors' customers with advantageous offers that do not conflict with contracts already entered into. It seems to apply generally that indemnity liability is limited to cases where a third party procures breach of contract through particular activities, for example the offer of significant special benefits.[15] The primary intention of the measures need not necessarily, however, be to damage the other contracting party but may be the furthering of one's own business interest. Contracts resulting from interference in other parties' contractual relations of a kind rendering the parties liable for indemnity are not, according to the main rule, upheld by the legal order.[16] It should be mentioned that it is

[13] On this point, e.g. A. Turner, *The Law of Trade Secrets*, pp. 419 ff.; W.R. Cornish, *Intellectual Property*, London 1981, pp. 280 ff. and, for American law, 77 *Harv.L.Rev.*, pp. 947 ff. (1963); 4 Restatement of Torts, sec. 757 with commentary; S.C. Oppenheim *et al.*, *Unfair Trade Practices*, 4th ed. St Paul 1983, pp. 298 ff.;

[14] Harper-James, *The Law of Torts*, Vol. I, p. 510; *Prosser-Keeton on Torts*, pp. 978 ff.

[15] 4 Restatement of Torts, sec. 766, spec. note (i), 77 *Harv.L.Rev.*, p. 965 (1963). Among the special cases of more far-reaching liability may be mentioned attempts to prevent competitors' sales of patented products by imparting to potential customers the claim that they, by using the product, would render themselves liable to complicity in patent infringement.

[16] *Corbin on Contracts*, St Paul 1951, Vol. 6, pp. 854 ff.

nevertheless considered permissible for a third party to interfere with contracts that lack legal force, for example because these are prohibited in the laws against restrictive practices.

3. "OPPOSABILITÉ AUX TIERS" AND "VERLEITUNG ZUM VERTRAGSBRUCH" IN FRENCH, GERMAN AND SWISS LAW

Indemnity liability for unwarranted interference in contractual relations also exists in *French* law and in closely related legal systems.[17] Legal development here has taken place in case law on the basis of the general rules regarding liability in tort in arts. 1382 and 1383 Code civil. These rules have formed the legal basis for the successive growth in legal practice during the 19th and 20th centuries of the central French system of norms against unfair competition.

Contracts protected in this way are said to be "opposable aux tiers" and the legal principle is known as the doctrine of "tiers-complicité".

In *German* law a similar legal principle emerged as early as the beginning of the 20th century, supported by the broad general clause against unfair competition in sec. 1 UWG (*Gesetz gegen den unlauteren Wettbewerb*).[18] In Germany, this unfair practice is usually termed "Verleitung zum Vertragsbruch".[19] German case law on this point is now extremely comprehensive.

In German competition law *Verleitung zum Vertragsbruch* is closely connected with the type of unfair competitive act that is termed *Vorsprung durch Rechtsbruch*.[20] The basis here is the idea of a competitive advantage, which is characteristic for deliberations underlying the application of UWG. According to this, a person engaged in trade or industry can render himself guilty of unfair competition if in committing breach

[17] R. Krasser, *op.cit.*, pp. 47 ff.; Ulmer-Krasser, *Das Recht des unlauteren Wettbewerbs in der EWG*, vol. IV, *Frankreich*, Cologne 1967 pp. 503 ff., 520 ff.; P. Roubier, *Le droit de la propriété industrielle I*, Paris 1952, pp. 579 ff. Regarding other EEC countries, see Ulmer, *op.cit.*, vol. I, p. 207.

[18] The main features of the general clause in UWG and its application have been presented in e.g. U. Bernitz, *Marknadsrätt* (Market Law), Stockholm 1969, pp. 442 ff. The general clause refers to action inconsonant with good practice as being the norm of assessment, and runs "Wer im geschäftlichen Verkehre zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstossen, kann auf Unterlassung und Schadenersatz in Anspruch genommen werden".

[19] In what follows see R. Krasser, *op.cit.*, pp. 87 ff. and, among others, Ulmer-Reimer, *Das Recht des unlauteren Wettbewerbs in der EWG*, vol. III, pp. 247 ff.; Baumbach-Hefermehl, *Wettbewerbs- und Warenzeichenrecht*, vol. I, 13th ed. Munich 1981, pp. 796 ff.

[20] See among others Ulmer-Reimer, *op.cit.*, p. 65; Baumbach-Hefermehl, *op.cit.*, pp. 783 ff. Regarding legal development, see H. Eichmann in *GRUR* 1967, pp. 564 ff.

of contract he gains a competitive advantage in relation to competitors who respect their similar contracts and thus remain faithful to the contract, *vertragstreu*. In the German view the situation resembles the case where an agent by disregarding special regulations of market law and to some extent other legal provisions also gains advantages in relation to competitors who act *gesetzestreu*, i.e. remain loyal to the statutory provisions: here too one speaks of *Vorsprung durch Rechtsbruch*. In both cases the competitors are as a rule entitled to damages.

What is obvious is that the rules on *Vorsprung durch Rechtsbruch* and *Verleitung zum Vertragsbruch* are often closely linked in their functioning. Assume that a supplier applies a system of agreement (*Vertriebsbindung*) which implies that each of his retailers has a contractual right to the sole agency for a given area and is obliged not to sell competing goods. Now, if a retailer allows himself to be persuaded by a competitor of the supplier to carry his goods in breach of the exclusive contract, the retailer probably renders himself guilty of *Vorsprung durch Rechtsbruch* and the supplier to *Verleitung zum Vertragsbruch*.

In Germany the principles of unwarranted interference with contractual relations have gained particular significance in the maintenance of developed exclusive and licence agreement systems. Most important are probably the possibilities afforded of achieving in this way protection for retail agreements versus outsiders. A part of this area where these legal principles have gained in importance in recent years is franchising. Earlier, when resale price maintenance was normally permitted in Germany for brand goods, the principles were used to a great degree for protecting vertical price fixing systems against breach of contract through underselling. For a supplier of brand goods to be allowed to maintain resale price maintenance, it was required that this should be applied consistently so as to be *lückenlos*, i.e. without loop-holes.[21] However, the extremely comprehensive legal practice that had developed regarding this has lost much of its interest since West Germany, too, introduced a general prohibition on resale price maintenance in 1973.

It is interesting that the recent 1986 *Swiss* law against unfair competition, which came into force during 1987, contains statutory provisions on unwarranted interference with contractual relations. Like its predecessor, the new Swiss law is based on a general clause against unfair competitive acts, the closer import of which is clarified in subsequent

[21] See here in detail R. Krasser, *Der Schutz von Preis- und Vertriebsbindungen gegenüber Aussenseiten* (*Schriftenreihe zum Gewerblichen Rechtsschutz*, vol. 22), Munich 1972. The requirement on *Lückenlosigkeit* is still maintained in distribution agreements.

sections that detail types of unfair act. One type, which has a section to itself, (art.4), is unwarranted interference with contractual relations, in the section heading described as *Verleitung zum Vertragsverletzung oder -auflösung*.[22] Two of the objects of such enticement particularly mentioned in the statutory text are distributors and employees with knowledge of the employer's and principal's trade secrets.

In general the Swiss law appears to summarize fairly well what in the continental European view is considered to fall into this category of unfair competitive act, though the legal position may naturally differ in detail between the countries.

It is clear that rules on unwarranted interference with contractual relations are commonly intended to reinforce the effect of accessory non-competition clauses, and thus in some degree contribute to reduced freedom of movement in trade and industry. In this way, collisions may easily occur with legislation on restrictive trade practices, both in theory and in practical situations. This has evidently happened in, among other things, the application of the competition rules in art. 85 of the Treaty of Rome. Thus the basic decision of the European Court in the *Grundig* case of 1966[23] was based on a civil suit before a French court concerning responsibility for unwarranted interference in contractual relations against Grundig's network of exclusive agreements by market. In general it is common in France and Germany that the rules on unwarranted interference in contractual relations afford the chief legal support for juridical actions against retailers competing on price who, unable to gain access to attractive products through the normal purchasing channels, have gone via other companies who have then supplied the product in breach of competitive restrictions laid

[22] The text runs (translation in *Industrial Property*, Sept. 1988, published by WIPO, Geneva):

4. Shall be deemed to have committed an act of unfair competition, anyone who, in particular,

(a) induces a customer to break a contract in order to conclude a contract with him,

(b) seeks to obtain advantage for himself or for someone else by affording or offering to employees, agents or other ancillaries of a third party benefits to which they are not legally entitled in order to induce those persons to act contrary to their duty in accomplishing their service or professional tasks,

(c) induces employees, agents or ancillaries to betray or pry into the manufacturing or trading secrets of their employer or principal,

(d) induces a purchaser or borrower who has concluded a sale by installments, a sale with prior payments or a small loan contract to revoke the contract, or a purchaser who has concluded a contract for sale with prior payments to denounce such sale, in order himself to conclude such a contract with that person.

[23] (1966) European Court Reports, p. 429, (1966) Common Market Law Reports, p. 418.

upon them in distribution or licence agreements. The comprehensive developments within restrictive trade practices law, both at Community level and nationally, chiefly in Germany, have, however, not led to any real change in the view of unwarranted interference in contractual relations as a type of unfair and reprehensible competitive act.

4. NORWEGIAN LAW

Unwarranted interference in contractual relations has also be noted as a type of unfair competitive act in the Scandinavian countries, chiefly Norway.

In somewhat older Norwegian legal writing this legal complex has among others been touched upon by Augdahl[24] on the basis of general principles of the laws of contracts and torts. He has found himself able to state as a general rule that a person who unfairly entices or occasions a contractual party to commit breach of contract is liable to indemnity in relation to the other party. According to Augdahl, the same should apply to a person who deliberately and improperly becomes an accessory to breach of contract. A similar view has been put forward by Arnholm[25] and in Danish law by Ussing.[26]

In Norway, the Marketing Act of 1972 is considered to support the legal principle. This law contains a broad general clause in sec. 1, with sanctions in the form of indemnity and injunctions. One of the central purposes of the clause, apart from protection of the consumer, is to continue the legal protection, formed according to older legislation, of persons engaged in trade and industry against unfair competition.[27] On the other hand it appears unclear whether the corresponding general clause in the Danish Marketing Act can be interpreted similarly. The Business Practices Council which in Norway assesses questions of unfair trade competition, *Næringslivets Konkurranseutvalg*, has, as fixed practice, considered that it is against good business custom for an outside trader to interfere in existing agency or sole-rigths agreements by himself taking the initiative in an attempt to take over an existing, not vacant, agency or sole agency agreement. The problem has been exam-

[24] P. Augdahl, *Den norske obligationsretts almindelige del*, 4th ed., Oslo 1972, p. 417.
[25] C.J. Arnholm, *Privatrett III*, Oslo 1966, p. 320.
[26] H. Ussing, *Obligationsretten, Almindelig del*, 4th ed. Copenhagen 1967, p. 449.
[27] Fr. Fr. Gundersen-U. Bernitz, *Norsk og internasjonal markedsrett*, Oslo 1977, p. 426 with references.

ined recently by the Norwegian Supreme Court in the *John Deere* case, which has attracted much attention.[28]

> The facts were briefly as follows. Nanset Standard (Nanset) was the general agent in Norway for John Deere agricultural machinery. After cancellation of the Nanset contract John Deere on the same day concluded a new contract concerning sole selling rights with Norsk Felleskjøp. Nanset and John Deere settled out of court. Nanset subsequently sued Felleskjøp for damages (related to the loss of goodwill) on the ground that Felleskjøp had contributed to Nanset's losing the agency by entering into negotiations with John Deere regarding a takeover. Moreover, Felleskjøp had not informed Nanset of the negotiations.

The courts were in disagreement regarding the judgment. The Supreme Court majority, however, dismissed Nanset's action and stated that it could not be inconsonant with good business practice, i.e. with the general clause of sec. 1 of the Marketing Act, for a third party receiving an offer to take over a sole agency held by another to enter negotiations regarding this. Nor did there in these circumstances obtain any obligation to inform the other party. In the grounds for the decision it was stated that the legal principle Nanset wished to see applied would have a limiting effect on competition; further that the Supreme Court did not consider whether it would have been unlawful if Felleskjøp itself had taken the initiative in relation to John Deere for the purpose of taking over the sales agency.

The *John Deere* case appears to represent a moderate application, in the interest of freedom of competition, of the legal principle of unwarranted interference in contractual relations. However, it should still be possible to apply this principle in Norway in flagrant cases. Yet compared with the legal systems of continental Europe treated above, the principle is less clear in its outlines and has to all appearances a more limited practical scope.

5. CONTRACTUAL BINDING OF THIRD PARTIES UNDER SWEDISH LAW

Before considering how Swedish law views the legal area of unwarranted interference with contractual relations, there is reason to attempt to answer the partly associated question, touched upon in section 1 above, of whether contract-law stipulations concerning rights in moveable property may be upheld against third parties. In the sparse Swedish case

[28] 1984 NRt 248, also reported in *Nordisk Domssamling* 1985, p. 109.

law there in fact appear two Supreme Court decisions that meet this situation directly. Both cases have their background in copyright law.

> The first case, 1939 NJA 592 (*book rental*) concerned the effect of a reservation printed on the title page of a book: *"Lending for purposes of profit forbidden"*. The copyright owner and the publisher brought an action for injunction and indemnity against the owner of a commercially run lending library that had bought a copy of the book on the market and hired it out on various occasions. It was claimed that the hirer, according to general principles of private law, was obliged to observe the reservation, but on the other hand no infringement of copyright was claimed. The action was dismissed unanimously by the courts. In the grounds for the decision by the Stockholm district court, which was not modified by the superior courts, it was stated that the circumstance of the reservation being printed in the book did not of itself entitle the author or the publisher to invoke it against parties acquiring copies of the book, that observation of the reservation had not been made a condition of purchase when the hirer bought the copy in question, and that the hirer could not therefore be considered obliged to observe the reservation concerning that particular copy.[29]
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> In the other case, 1949 NJA 645[30] (*sales of gramophone records*) a manufacturer of gramophone records had attached the following reservation to the records: *"Copyright. Patented record. May not be performed in public without permission, nor sold at a price lower than that fixed by the owner of the patent"*. The purpose was to prevent *Radiotjänst* (as the Swedish Broadcasting Company was then called) from buying gramophone records on the market and broadcasting them without paying compensation to the manufacturer, a practice then permitted under the copyright laws. In the case the manufacturer brought an action for indemnity against *Radiotjänst,* which had broadcast records bought through the retail trade, invoking the reservation of which *Radiotjänst* had been particularly notified. The price-fixing clause, however, did not enter into the dispute. The action was dismissed unanimously by the courts on grounds closely linked to those in the earlier case.[31]

In both cases the courts took as their point of departure the tenet that obligations of the character of property right may not be created freely. The import of this was analysed in more detail in the 1949 case by Justice Karlgren of the Supreme Court in his opinion in the case.

> Karlgren stated that the manufacturer's reservation had not been expressly included in the purchase agreement between *Radiotjänst* and the retailers; nor were the circumstances such that "the retailers could be considered to have made such a reservation silently". He then raised the question of

[29] Book rental is still not covered by the author's rights under the Swedish Copyright Act, cf. sec. 23 of the Act.

[30] Also reported in *NIR* 1949, p 252.

[31] Gramophone record manufacturers and artists have now been granted a fifty-year period of compensation for radio and TV broadcasts as a neighbouring right under copyright law, see sec. 47 of the Swedish Copyright Act.

> whether one dared lay down a general rule stating that an otherwise purely contractual right to a chose in possession could be treated as a right *in rem* vis-à-vis a third-party acquirer acting in bad faith. He referred to the interests of general trade and to the fact that such situations were of a type different in kind from those of, e.g., the right of pledge. He further stated that granting the claim would imply the creation of a protection of authors' rights through court precedence where the legislator, at least thus far, was unprepared to grant such protection.

The outcome of both cases and Karlgren's accompanying analysis have probably, as far as Swedish law is concerned, removed the possibilities of extending the legal protection intellectual property law may afford through reservations printed in copies and similar contractual provisos. This legal position does not prevent one from seeing in practice similar contractual reservations, for example in connection with sales of computer programs. In other countries, on the other hand, the courts have in similar cases not infrequently considered themselves free to undertake a broader scrutiny of what appears factually reasonable in claims presented, and they have then reached the opposite conclusion as, for example, in French law.[32] A case similar to the gramophone record case was allowed in the Norwegian Supreme Court with a vague reference to general principles of law. Such was also the outcome of a later Norwegian case, albeit not unanimous, concerning the playing of gramophone music through loudspeakers at sports events.[33] The Norwegian Supreme Court here applied a juridically freer argument as to applicability, clearly different from the Swedish Supreme Court's theoretical-juridical opinion: a difference in the traditions of juridical reasoning that may also be observed in other contexts when comparing the two courts.

However, these problems are not specific to intellectual property law, but are of a general nature of contract law. The 1949 case represents an early example, viz. the printed retail price clause regarding prohibition of sales below a fixed price. Such clauses now fall under the prohibition of resale price maintenance in sec. 13 of the Swedish Competition Act, i.e. the Act against restrictive business practices, and are thus no longer an issue.[34] However, other examples of this type of reservation may be

[32] See e.g. S. Strömholm in *Droit d'auteur*, Stockholm 1967, pp. 285 f., 298 ff.; A. Françon in *NIR* 1982, pp. 384 ff.

[33] 1940 NRt 450 and 1955 NRt 536 (*NIR* 1955, p. 202); and S. Ljungman in *NIR* 1962, p. 55, where Danish practice is also touched upon. Nowadays, the practical situation in these cases is covered by copyright law protection.

[34] Exemption from the resale price maintenance prohibition may be given according to sec. 16 of the Competition Act, but occurs extremely seldom.

mentioned, such as "Not for export",[35] "For sale only within Greater Stockholm", "May be repaired only by the manufacturer", "In connection with this product only original parts may be offered for sale".

Reservations of this type have been analysed in a broader property law context by Hessler, who views the reservations as a sub-type of the wider, quite heterogeneous category of stipulations marked by the fact that the owner of something is enjoined to use the property in a certain way or to avoid certain uses.[36] Hessler considers that the prevailing view on the *numerus-clausus* principle in Swedish property law is too unsophisticated, and that certain types of stipulation can be protected in property, at least partly.[37] As regards stipulations of the type considered here, that is, non-beneficial provisions concerning certain use of moveable property, Hessler states that these cannot in different cases enjoy more complete protection in property, e.g. protection in cases of bankruptcy or against creditors in cases of foreclosure. As to the situation where the acquirer is acting in bad faith (as *Radiotjänst* was in this case), Hessler finds, after considering views of expediency, that it would be a serious obstacle to trade if an acquirer should need to be subjected to undertakings of such varying kinds as may arise.[38] Similarly to legal practice and Karlgren's view, Hessler considers that obligation should obtain only if on transfer an explicit reservation has been made concerning observation of the stipulation.[39] Clearly, the matter then becomes one of a normal contractual obligation.

The somewhat older Danish law professor Fr. Vinding Kruse has put forward the view that easements should not be confined to real property.[40] From the general freedom to create new types of contract it should follow that a vendor of moveable property has the power of linking with the goods a *negative easement* placing a tie upon them regarding their further use for purposes of trade. For example, every vendor should on this basis, and thus regardless of the question of obligation under the

[35] It is thus not unusual that copies of works protected by copyright have printed reservations of the type "Not for export", cf. G. Karnell in *Festskrift till Ivar Agge*, Stockholm 1970, p. 224, which touches upon the matter in connection with the question of territorial protection of copyright. See also the same author in *NIR* 1982, pp. 375 ff.

[36] H. Hessler, *Allmän sakrätt* (The Law of Property), Stockholm 1973, pp. 54 f., 466 ff.

[37] Hessler, *op.cit.*, specially pp. 280, 447.

[38] Hessler, *op.cit.*, pp. 460 ff.; T. Håstad, *Sakrätt avseende lös egendom* (Personal Property Law), 2nd ed. Stockholm 1984, pp. 299 f., speaks of provisions of expediency and in the main agrees with Hessler's view. See also K. Rodhe, *Handbok i sakrätt*, p. 617.

[39] Hessler makes a reservation for cases of collusion, mentioned in section 6 below.

[40] Fr. Vinding Kruse, *Ejendomsretten* II, 3rd ed. Copenhagen 1951, p. 1257. He wished to allow clauses on prohibiting the loaning out of books for profit legal force against third parties, *op.cit.*, p. 1263.

law of contract, be obliged to observe a retail price stated on an article, or a prohibition on hire for purposes of profit, printed in a book. The prevailing view in modern Danish legal writing would, however, seem to be that ties of the easement type can refer only to real property.[41] The doctrine of the *numerus-clausus* principle in Swedish property law has meant that the construction "negative easement on moveable property" has never gained a foothold in Swedish law.[42]

An important reason against having outsiders bound by non-beneficial provisions on certain uses of moveable property has to do with the far-reaching opportunities that would otherwise arise for individual companies or organizations legally to circumscribe economic freedom of action and to hamper certain forms of commercial activity.[43] For example, if such were the case, a maximum-price provision[44] printed on an article would be immediately binding on a subsequent re-seller, and the same would apply to provisions on an article to the effect that it might not be sold outside a certain area or to certain categories of customer. The interest of free competition represents a strong argument in favour of not being able, without reciprocal contractual undertaking, to place limitations on third parties' freedom of action. One should be able to establish firmly that, in Sweden, it is not possible to use a contract in one phase of selling to bind directly the contractual relations of a later phase of selling.[45]

Yet Hessler's analysis also opens other perspectives. The judges in the book hire and gramophone record cases started with the *numerus-clausus* principle within the law of property. If, however, one adopts Hessler's sophisticated position, the question arises of whether reservations of the kind treated regarding the use of moveable property can possibly be accepted in special situations where the reasons of unhindered trade and competition that normally preclude them do not obtain or are not particularly powerful. On Hessler's argument, then, the position of the Norwegian Supreme Court examined above appears

[41] W.E. von Eyben, *Formuerettigheder*, 6th ed. Copenhagen 1979, p. 34 with references.

[42] On this point see H. Forsell, *Tredjemansskyddets gränser* (The Limits of Protection of Third Parties), Stockholm 1976, pp. 194 ff.

[43] Had the action in the book hire case been successful, the book publishers would have been able to inhibit continued operation of the so-called book bars through a general use of clauses prohibiting hiring out.

[44] Provisions regarding maximum price for subsequent sales fall outside the prohibition on resale price maintenance in sec. 13 of the Swedish Competition Act, but are rare.

[45] See also U. Bernitz, *Standardavtalsrätt* (The Law of Standard Contracts), 4th ed. Stockholm 1987, pp. 23 f., where the subject is treated briefly in a more general perspective of contract law. Re computer programs, see R. Blume in *NIR* 1987, pp. 279 ff., on so-called shrink-wrap clauses.

fully defensible. If on the basis of more general considerations one considers it justifiable to introduce, through the courts' approval of this type of contractual binding, an indemnity obligation for exploitation of works not protected by legislation, then neither reasons of unhampered trade nor of freedom of competition carry much weight. The outcome of the book-rental and the gramophone record cases cannot be explained only with considerations of property law but also represents decisions regarding the suitability of extending, through the courts, the protection afforded by the laws on intellectual property rights. In his opinion in the gramophone record case, Justice Karlgren particularly noted that allowing the lawsuit would have implied extended copyright protection over and above what the legislation "had been prepared to grant".

In the present author's view it would be inappropriate to attempt in this way to extend the law of copyright or other intellectual property rights. Demarcation must here always be based on a balancing of interests and should be viewed primarily as a task for legislation. Nor is there anything to indicate that Swedish courts would have a different view of the matter.

In conclusion, Swedish law in the type of situation discussed here holds fast to the principle of subjective limitation of contractual effect. It is thus not possible to bind up a third party's rights to use lawfully acquired goods as they see fit by means of contractual reservations that have not formed part of a contract binding upon that particular party.

6. UNWARRANTED INTERFERENCE WITH CONTRACTUAL RELATIONS UNDER SWEDISH LAW

One main reason why unwarranted interference in contractual relations has received such little interest in Sweden so far as a legal problem is certainly that the limited legislation against unfair competition, in combination with the restrictive view of the possibilities of indemnity for pure economic loss in non-contractual relations, has not afforded starting points or material for a development of law of the type that has taken place elsewhere. Swedish lawyers may not be inclined to attempt to further claims for damages directly against outsiders who interfere in contractual relations, e.g. in the form where one "buys out" a contractually bound party afterwards by making him a better offer. The rules forbidding such procedures, in force according to guild rules and market hall rules prior to 1846, when freedom of trade was introduced,

have long been forgotten.[46] Swedish law is not, however, averse to an obligation to indemnify in certain situations arising through interference in contractual relations or, as it is perhaps more frequently expressed, being accessory to breach of contract. Here will be examined how the situation appears when viewed according to the different legal foundations that may be relevant.

Comprehensive legislation against unfair competition has developed only with difficulty in Sweden. The 1931 *Act Against Unfair Competition* has, as opposed to its German model and the corresponding Norwegian, Danish and Finnish Acts, never contained a general clause. On the contrary, the provisions of the Swedish Act have had an appreciably casuistic form. Since 1960 development has been towards successive abolition of the Act.[47]

The Commission on Unfair Competition, which worked in close collaboration with similar committees in the other Nordic countries and strove to achieve the greatest possible degree of harmony in Nordic legislation in the area, presented in 1966 a draft bill on unfair competition that was intended to replace the old one.[48] This proposed the introduction of a general clause relating to the law of unfair competition which was broadly formulated but whose application the Commission sought to restrict greatly through the *travaux préparatoires*. Thus it was stated that the general clause was not intended to function "as a general complement to the law of contract and torts". The permissibility of "buying out afterwards" was thus to be judged according to the parties' contracts and, over and above this, according to the general norms of contract and tort law.[49] It may be added that a similar demarcation was applied in the practice of the Swedish Council on Business Practice, which in many ways was fundamental for the design of the proposal.

Only parts of the 1966 proposal ever became law. The parts of the proposal that directly covered marketing were separated and transformed so that their primary bearing was upon consumer protection in the 1970 Act on Unfair Marketing Practices and later, in further developed form, in the Marketing Practices Act of 1975. The general clause

[46] The 1720 Guild Rules, art. VII, provided: "Colleagues should not force their way into another's trade, offering more for goods than another colleague has already bespoken and agreed to purchase".

[47] This development has been described by U. Bernitz in *Festskrift till Jan Hellner*, pp. 121 ff.

[48] Unfair Competition, *SOU* 1966:71.

[49] *Op.cit.*, p. 248.

in sec. 2 of this latter Act is limited to acts undertaken by tradesmen in marketing and which are unfair to consumers or other entrepreneurs by conflicting with good business practice or in other ways. The consequence is an injunction, usually sanctioned by a fine, against continued unfair action. The question of damages arises only when a tradesman is in breach of an injunction made against him. In the *travaux préparatoires* to the general clause it is stated that it should not be used against activity that conflicts with accepted trade standards solely for the reason that it involves a breach of a contract entered; for example, where a businessman carries on certain activity in breach of a restrictive practices clause in a contract.[50] It would be possible to view this statement as a furthering of the argument in the 1966 draft bill.

In view of what has been said it appears clear that the Marketing Practices Act offers no basis for the development of a body of Swedish legal practice regarding unwarranted interference with contractual relations. This is supported both by the fact that the Act is confined to marketing activity, oriented towards injunctions and special stress on consumer interests, and by the statements referred to in the *travaux préparatoires*. Experience shows that the Market Court in its application of the law gives very great weight to statements of this nature in *travaux préparatoires*. Characteristically, the question has never been tried by this court.[51]

There is reason to consider the surviving part of the 1931 Act against Unfair Competition, viz. its sections 3–5 regarding improper use or disclosure of trade secrets and technical models, even though the intention is that these legal rules will shortly be replaced by a new law concerning protection of *trade secrets*, based on a draft bill of 1983.[52]

These rules are aimed mainly at employees' use or disclosure of an employer's secrets. However, through sec. 3, para. 2, of the Act, technical models enjoy further protection, also covering outsiders entrusted with models for business purposes. Under the Act there obtains in certain situations a direct liability for competitors who persuade employees, contractors, etc. to reveal secrets, this being unwarranted interference with contractual relations.[53] Here belong cases where a

[50] *Prop.* 1970:57, p. 88.

[51] For a general presentation of the Marketing Practices Act and its general clause, see U. Bernitz in *An Introduction to Swedish Law* (S. Strömholm ed.), 2nd ed. Stockholm 1988, pp. 278 ff.

[52] Företagshemligheter (Trade Secrets), *SOU* 1983:52.

[53] *Op.cit.*, pp. 48 f., 327 f. A survey of the law in force in the area is given in Bernitz-Karnell-Pehrson-Sandgren, *Immaterialrätt* (Intellectual Property Law), 2nd ed. Stockholm 1987, pp. 184 ff.

competitor is an accessory to contravention of the legal rules. Further, sec. 5 of the Act contains a rule regarding independent liability for outsiders acting in bad faith who receive a trade secret or technical model from a person guilty of a contravention of sec. 3. It should be noted that the rules of the Act contain several limiting pre-conditions and that the liability to indemnity does not extend further than the criminal liability. More serious cases may if necessary be judged as breach of faith with respect to a principal, or as being an accessory to this, under chap. 5, sec. 10, of the Swedish Criminal Code.

Viewed as a whole the draft bill on protection of trade secrets represents a significant extension of protection in this area. The bill expressly places a liability upon an outsider who exploits or discloses a trade secret he has acquired in consequence of action forbidden in the bill, such as industrial espionage or abuse of company confidentiality in a business connection.[54]

Particularly interesting from the perspective adopted in this paper is the fact that, by a special rule of the general-clause type, the bill proposes an independent competitor liability, associated with indemnity and injunction but no penalty.[55] As examples of cases where this rule relating to direct liability upon outsider competitors could be applied are mentioned in the *travaux préparatoires* clearly improper cases of questioning of employees and recruitment or buying over of employees for the purpose of acquiring their trade secrets. This is an example of a competition law rule against unwarranted interference with contractual relations in certain cases.[56]

It is however clear that Swedish law gives certain legal protection in the field of trade secrets through competition law rules against unwarranted interference with contractual relations by outsiders. While the concern here is most often contractual relations or terms of employment, the rules also relate to licensing agreements in which the licensee has been entrusted with, for example, manufacturing secrets under the conditions of the contractual relationship. According to present law, however, these must be documented as technical models, a limitation which will in all probability be removed in the forthcoming new law. Yet

[54] Sec. 2, para. 2, and sec. 3, para. 2, of the draft bill.

[55] Sec. 7 in the draft bill, which runs: "A person who in a case other than in secs. 2–4 and 6 is found to have improperly gained access to, exploited or disclosed a trade secret shall, where the action is intentional or careless, indemnify for damage arising." Re injunction see sec. 10 of the bill. See further Företagshemligheter (Trade Secrets), *SOU* 1983:52, pp. 21, 327 ff. and 392 ff.

[56] *Prop.* 1987/88:155, pp. 47 f.

it should be emphasized that limits of legal protection are determined by the legislation applying in the field. There is scant intention that there shall be in Sweden any room for supplemental general legal principles that would broaden the limits.

Subornation is a type of improper competitive measure of significance in the present context. What is reprehensible here is the actual approach of offering an improper reward. Many cases of subornation in commercial life may be described as forms of unwarranted interference in contractual relations. It is not unusual for subornation to be used as a method of revealing trade secrets. An example of this type is for a company, by giving an improper reward, to cause an employee or contractor in a position of trust to disclose a trade secret that belongs to a competitor. There is thus a close connection between the laws regarding trade secrets and those regarding subornation. There are also other forms of subornation which can come under the heading of unwarranted interference in contractual relations, for example if an agent by improperly rewarding, say, a purchasing manager or a sales manager causes this person to break off his company's contracts with the suborner's competitors and transfer business connections to the suborner.

The rules regarding subornation in commercial life were transferred in 1977 from secs. 6–8 of the Unfair Competition Act to chap. 17, sec. 7, and chap. 20, sec. 2, of the Swedish Criminal Code, where they were combined with corresponding rules relating to the public service.[57] Tort liability follows penalty liability. Quite clearly the new Criminal Code rules also have as their purpose to protect competitors from corrupt methods, and competitors suffering damage through such measures can therefore bring actions for damages, in which the rules of the Code also state the limits for tort liability. Criminal subornation occurring under the scope of the unfair marketing legislation may also lead to injunctions under the general clause in sec. 2 of the Marketing Practices Act. This may also be applied to measures resembling subornation which are considered improper without coming within the limits of criminal liability.[58]

Moving from the legal field of unfair competition to *contract law*, the points of departure are what has already been said in section 1 above

[57] Regarding the subornation rules, see among other sources *Prop.* 1975/76:176; T. Cars, *Mutor och bestickning* (Bribes and Subornation), 3rd ed. Stockholm 1983; Beckman-Holmberg-Hult-Strahl, *Kommentar till brottsbalken* II (Commentary on the Criminal Code II), 5th ed. Stockholm 1982, pp. 399 ff.

[58] U. Bernitz, *Svensk marknadsrätt* (Swedish Market Law), 2nd ed. Stockholm 1986, pp. 182 f. and subsequent references.

about the subjective limitation of a contract's scope and in section 5 about the contractual binding of third parties. With regard to the mutual relations between contracting parties, note that employees and contractors both have a considerable obligation of loyalty, based in contract law, to their employer or principal respectively. Also, restrictive clauses that oblige an agent, contractor or employee not to engage in certain competing activities or to work for a competitor are fully valid in Swedish law as long as they are not unreasonable or entail harmful limitation of competition. Fully permissible within the framework of what is not unreasonable are also secrecy clauses obliging former employees or contractors to preserve confidentiality in certain respects, e.g. not to disclose trade secrets.[59]

The central problem is not, however, contractual constraint between the contractual parties and the limits to this, but how the situation appears when an outside agent fails to respect existing obligations of loyalty, restrictive clauses, confidentiality clauses, etc., and interferes in the contractual relationship by persuading one party to act in conflict with this. Normally such action is to be judged on the basis of non-contractual legal principles. Discernible in Swedish law, however, is a tendency in certain borderline areas to seek the legal solution in the application of principles of contract law, and to assess the situation as quasi-contractual or resembling a contract. A standard example, albeit referring to a slightly different type of situation, is negligent witnessing of another's signature. This complex and abstruse area has recently been treated in a very interesting book by J. Kleineman.[60]

The interference of outsiders in contractual relations may be viewed in contract law as unwarranted and representing grounds for indemnity where there is a close connection between the outsider and one of the contractual parties, possibly in the form that both of them, while having no mutual contractual relation, are included in the same complex of contracts. Though the legal position is uncertain, there is cause to note a Supreme Court decision which is of particular interest since it lies directly in the sphere of the law of contract. The case is 1946 NJA 15 re a *break-in commission in the car trade.*

> The Ford Motor Company, in accordance with current practice in the car industry, had its car sales organized on the basis of bilateral exclusive rights agreements that were linked to areas. Each dealer had his own district and,

[59] See for a survey of the legal position and references Bernitz-Karnell-Pehrson-Sandgren, *op.cit.*, pp. 184 f., 187 f.

[60] Kleineman, *op.cit.*, *passim* and pp. 231 ff. See also, *inter alia,* H. Karlgren, *Skadeståndsrätt* (Tort Law), 5th ed. Stockholm 1972, p. 109.

> according to his contract with Ford (standard contract), was entitled to a break-in commission (a so-called service remuneration) when another dealer sold cars to customers in his district. There were, however, no direct agreements about this between the dealers. In the case the Ford dealer in one district claimed payment of this commission directly from the dealer in a neighbouring district. The latter objected that the first dealer could not base any right to such recompense in his contract with Ford. The Court of Appeal, whose decision was upheld in the Supreme Court, found, however, that the parties were also bound in relation to each other by the provisions of the contract regarding break-in commission, and decided that this recompense be made.

In the case the courts evidently considered the dealers contractually bound even among themselves, and there was then no difficulty in applying general rules regarding indemnity in contractual relations. The courts presumably noted that both parties were included in a uniform contractual complex for the Ford sales organization and were fully aware of this. The courts were also able to draw an analogy with the adjacent provision on the commercial agent's right to commission in sec. 70 of the Commercial Agencies and Commercial Travellers Act, although no analogy of this kind was mentioned in the sparse grounds for the decision.[61] However, it hardly seems a matter of a third-party contract in the accepted meaning.[62]

The case bears on a type of situation of considerable practical interest. It is not unusual that *many agents are each bound individually by prohibitions on competition or similar in relation to each counterpart*. In other words, these are cases where A through separate contracts with B, C, D, etc., has normalized the situation with regard to their mutual competition. In the selling of cars the district system with break-in commission has now been abolished following the intervention of the Commissioner for Freedom of Commerce using the general clause against harmful restriction of competition in the Competition Act.[63] The division into districts between dealers as a component of exclusive agreements is not forbidden as such and probably occurs in varying forms in certain areas of commerce. In franchising, contract complexes of this type are typical. They occur also in licensing agreements where the licensor has

[61] The case is observed under this section in Gadde-Eklund, *Lagen om kommission, etc.*, 3rd ed. Stockholm 1952, pp. 157 f.

[62] K. Rodhe, however, in *SvJT* 1951, p. 596, mentions the case under the heading third-party contract. The case is noted briefly in Kleineman, *op.cit.*, p. 239.

[63] Å. Martenius, *Konkurrenslagstiftningen* (The Competition Legislation), Stockholm 1985, pp. 161 f.; Bernitz, *Svensk marknadsrätt*, 2nd ed., p. 85.

agreements with several licensees, whose licences are limited (for example geographically or quantitatively) as part of the contractual complex.

The case reported above is in fact a single one. However, the outcome appears well grounded in the facts and it seems correct to see the situation as broadly one of contract law. Division by district and other types of obstacle to competition may be suspect from the point of view of restrictive practices, specially if a contractual complex is viewed as a whole, but in that case the matter is to be assessed according to the Competition Act's general clause on the harmful effects of restrictive practices. The decision should therefore be a guide in the assessment of the type of situation just described.

The usual case, however, is that *wholly outside* agents are the ones who intervene in an existing contractual relation, and the situation is thus non-contractual in character. As already indicated, Swedish law is based on the principle that damage through competition in non-contractual relations represents pure economic loss, which is normally subject to compensation only if caused through criminal act (chap. 2, sec. 4, of the Tort Liability Act) or if statutory provisions prescribe tort liability. On the other hand, it emerges from statements in the *travaux préparatoires* and from Supreme Court decisions that this principle, which is peculiar to Sweden, is not intended to be categorical: there is a certain latitude in practice for apportioning tort liability for pure economic loss outside the area of what is punishable or otherwise regulated in statutes. This further development through legal practice has, however, been largely absent up to now.[64] The legal position has recently been heavily criticized by Kleineman, who claims that the development of an independent system of tort liability in the area of damaging competition would have been desirable and should be recommended for the future.[65]

In special cases one can envisage actions that may be characterized as unwarranted interference in contractual relations entailing tort liability on the grounds that *the action is classified as one of the crimes against property in the Criminal Code*, e.g. complicity in fraudulent conversion

[64] Kleineman, *op.cit.*, treats this problem area and criticizes what he calls the "blocking rule" in chap. 2, sec. 4, of the Tort Liability Act. See further among other authors U. Bernitz in *Festskrift till Jan Hellner*, pp. 116 ff.; J. Hellner, *Skadeståndsrätt* (The Law of Torts), 4th ed. Stockholm 1985, pp. 49 ff. In 1975 NJA 282 the Supreme Court considered, but rejected, introducing, without the support of specific legislation, a protection, sanctioned by damages, of a right to the picture of one's own face. The Supreme Court decision in 1987 NJA 692, in which the Court adjudged a person who negligently issued a certificate of property valuation liable to damages, appears however to mark a certain further development.

[65] Kleineman, *op.cit.*, especially pp. 285 f.

(chap 10, sec. 4, Criminal Code), complicity in breach of faith (chap. 10, sec. 5, Criminal Code) or complicity in favouritism to creditors (chap. 11, sec. 4, Criminal Code).[66]

On the other hand there appears to be only one Supreme Court decision where tort liability for pure economic loss for a type of unwarranted interference in non-contractual relations, not covered by any statutory provisions, has been found to exist, namely 1928 NJA 621, *Baggå Ångsåg*.[67]

In this case foreign purchaser A entered into a contract with B regarding the purchase of wood manufactures. B transferred the invoice to C, who collected the sum as payment for a claim on B. B subsequently went into bankruptcy and A did not receive the goods. What was special in the case was that C, according to what the Supreme Court found to be the facts, had B under his economic control and had accurate knowledge of B's economic position. C had caused B to make out the invoice. The Supreme Court bound C to compensate A for the latter's loss and in the grounds for the decision stated, *inter alia*, that the power according to the purchase contract to call in payment for goods not yet delivered had been "exercised without regard to good commercial practice". One remarks that the Supreme Court reference to good commercial practice, oriented as it is towards competition law, had no support in any legislation. Yet the case, despite its age, can hardly be regarded as outdated, particularly as there can be found in legal writing sympathy for a non-contractual tort liability in situations where an *outsider has acted with qualified impropriety in collaboration with one of the parties to a contract*. Mr Justice Karlgren concluded his opinion in the gramophone record case (1949 NJA 645), discussed in section 5 above, with the following statement:

> In what has been said, the possibility has not been denied that, if a third party has so to speak rendered himself guilty of qualified bad faith in that with the acquisition from the contractual party bound by obligation he has become accessory to the latter's breach of contract in a way that conflicts with 'good practice' or is otherwise clearly improper, then it may be considered that a tort liability should rest upon that third party.

Another statement by Mr Justice Karlgren may be compared with this:

> Under special circumstances such as those where the conduct judged by accepted social views appears markedly disloyal—there is for example a

[66] Civil suits where claims for damages of this type are made do not, however, seem to be particularly common. In AD 1984 no. 3, damages were adjudged for pure economic loss caused through criminal incitement to unlawful interference (chap. 8, sec. 8, Criminal Code).

[67] The case is treated in detail in Kleineman, *op.cit.*, pp. 234 f.

> deliberate complicity on the part of the third party in this form with the debtor's breach of contract ("collusion")—a vicarious liability is perhaps not excluded.[68]

The aspects brought out by Karlgren, particularly in the latter quotation, have been touched upon in a broader property law context by Hessler. He also uses the term *collusion*. By this is meant generally that contracting party B and outsider C collaborate closely with the intention of damaging contracting party A, or otherwise with qualified impropriety against A. It may for example be a matter of using transfer to "get round" contractual obligations which are binding upon B but which, given their obligatory character according to accepted rules, do not bind outsider C. If there is collusion here between B and C (C for example acting in qualified bad faith), then C also may be bound by the contractual obligation or liable in damages to A. Cases of ostensible partnership come under this category, even where C is a free agent not acting on behalf of B.[69] Within the framework of what can be considered as collusion, there is thus some, but hardly very extensive, protection against unwarranted interference in contractual relations.

Apart from the situations considered here, and possibly others closely resembling them,[70] it is probably impossible to demonstrate in Swedish law[71] any legal principle covering liability for unwarranted interference in contractual relations. This means that, in other situations, outsiders who interfere in existing exclusive contracts, licence agreements, agency agreements and so on, or in employees' or employers' contractually based obligations of loyalty, and induce one contracting party to commit breach of contract, do not thereby incur a tort liability vis-a-vis the injured party, unless they have acted contrary to criminal law or other special statutory provision.

[68] H. Karlgren, *Kollegier i allmän obligationsrätt* I (Collegia in the Law of Obligations I), Lund 1952, p. 9. See also H. Karlgren in *SvJT* 1956, pp. 249 f., with p. 250, note 19; H. Nial in *SvJT* 1940, pp. 682 f. with p. 682, note 3, re the book rental case, and H. Nial in *Handelsbolag och enkla bolag* (Companies and Partnerships), 2nd ed. Lund 1983, p. 387, note 1.

[69] H. Hessler, *Allmän sakrätt*, *passim*, e.g. pp. 286, 462, 463. See also T. Håstad, *Sakrätt avseende lös egendom* (Personal Property Law), 2nd ed. Stockholm 1984, p. 293, and K. Rodhe, *Handbok i sakrätt*, p. 332, with reference to 1943 NJA 370.

[70] *Boycotts* and the like are passed over here. These are judged in unfair competition relations under the general clause against harmful effects of restrictive business practices in sec. 2 of the Competition Act. The sanction here is, where no settlement is reached or seems possible, an injunction, possibly a temporary injunction. See among other authors U. Bernitz, *Svensk marknadsrätt*, 2nd ed. 1986, p. 102, cf. pp. 78 f. and further references.

[71] Special reference is made here to K. Rodhe, *Handbok i sakrätt*, p. 335; J. Kleineman, *Ren förmögenhetsskada*, 2nd ed. 1979, pp. 241 ff., esp. p. 243. Regarding Finnish law here, H. Saxén, *Skadeståndsrätt* (The Law of Damages), 2nd ed. Turku 1975, pp. 74 f.

This state of the law has not been widely questioned, even though in Kleineman's work, as mentioned, there emerges a general tendency to recommend an extended liability in the area of damages through unfair competition. In the present author's view the possibility of having tort liability for pure economic loss include situations not covered in chap. 2, sec. 4, of the Tort Liability Act should be viewed as a reality and the courts should be able to make use of this. As to interference in contractual relations, there seems to be good reason for development of the present legal position towards increased liability in specially unwarranted situations, in the first place those approaching criminal conduct or otherwise parallelling cases that probably already give grounds for liability.

There appears, however, to be insufficient reason for any wider acceptance of the foreign legal principles governing the area.

From the standpoint of legal policy, the suitability of a broad liability for unwarranted interference in contractual relations is in fact highly debatable. As indicated in the sections on comparative law (sections 2–4 above), a legal principle of this nature implies that various types of contractual restraint on trade acquire considerably more powerful legal protection, a kind of third-party protection, which is often intended to act to limit competition. It would for example consort ill with the basic free competition ideas behind the Competition Act to introduce increased third-party protection for exclusive agreements within the distribution trade. In the field of trade secrets the forthcoming new act must be seen as the result of a legal balance between the need for protection and the interest of freedom of action.

7. CONCLUDING WORDS

With some generalization, the prevailing view in Swedish legal writing appears to be that unwarranted interference with contractual relations should not exist as a legal concept in Sweden. As just stated it is clear that our legal position is different from what is common internationally. The study now undertaken shows, however, that Sweden—albeit in a more confined area—does in fact apply the principle that unwarranted interference with contractual relations can entail liability in a significant number of situations. The present study has considered instigation of and complicity in disclosure of trade secrets, subornation as a method of interfering with contractual relations, certain quasi-contractual legal relations such as conduct in contravention of restrictive-practice agree-

ments binding several agents in relation to the same partner, cases of collusion and similar where the outsider acts with qualified impropriety in collaboration with one contracting party, and cases where indemnity suits can be brought following such interference in contractual relations as represents complicity in crime, breach of faith, fraudulent conversion, favouritism to creditors and so on.

The conclusion is that the legal concept unwarranted interference in contractual relations does in fact exist in Sweden, and this should be recognized within Swedish jurisprudence and legal writing. By international standards, however, the concept has an unusually narrow scope in Swedish law and, at the moment, its contours are also rather imprecise.