# Transnational Contract Law Principles in Swedish Case Law – PICC, PECL and DCFR

Jori Munukka

## 1 Introduction

Soft law instruments emerged in the field of general private law in the mid 1990s. These instruments are structured in the form of codes. They have not been passed unnoticed by anyone engaged in academic research in this field. The UNIDROIT Principles of International Commercial Contracts (PICC) seek to create a common private law ground with global applicability, whereas the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) have had harmonisation of European private law as a primary goal.[1] These instruments have of course also been processed by the academia in the Nordic countries, and have even been noticed in legislative preparatory works.[2] More surprisingly, though, is the number of references to these principles made by the Swedish Supreme Court and in individual opinions rendered by Supreme Court Justices. So far there are seven cases – one from the year 2000 and then six cases during the period 2006–2011. This gives rise to some questions, such as why, how and when references to transnational private law instruments are made. These questions all gather under the over-arching legal theoretical issue of the normative value of these norms.

It might be beneficial to have some idea of the authority attached to case law in Sweden. Here follows first a very short overview of the Swedish court system, the role of precedents in Swedish law, and the practices concerning minority opinions. Subsequently, an account of the relevant Swedish case law is given, this before turning to the analysis of the normative value of transnational contract law principles in Swedish general private law.

## 2 Precedents in Swedish Law

The Swedish court system is roughly divided into one general court system and one administrative court system. Both systems have three tiers. The Supreme

1 There are more instruments of this kind, *e.g.*, Principles of EC/EU Contract Law (”Acquis Principles”, ACQP), Principles of European Insurance Contract Law (PEICL) and Principles of European Tort Law (PETL). A Global Commercial Code has been discussed, *see*, *e.g.*, Bonell, M.J., *Do We Need a Global Commercial Code?*, 106 Dickinson Law Review (2001) 87 *et seq*., and in East Asia and other regions of the world there have been thoughts of creating similar instruments, *see*, *e.g.*, von Bar, C., *A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities*, 12 Electronic Journal of Comparative Law (2008) 2. There is also work in progress for the creation of a Nordic Restatement of Contract Law, *see* Lando, O., *En nordisk restatement*, Tidsskrift for Rettsvitenskap 2009 pp. 495 *et seq*. Also, European principles of family law and criminal law are being processed.

2 Governmental legislative reports on consumer contracts concerning hotel services, lease of goods and various types of services, such as treatment of persons: Ds 2011:8, Hotelltjänster, p. 37 *et seq*, Ds 2010:24, Hyra av lös sak, pp. 22, 44, 48 *et seq*. and 60, and Ds 2009:13, Konsumenttjänster m.m., pp. 18, 100 *et seq*., 106 *et seq*., 112, 119, 123, 126, 160, 179, 193, 197 and 200.

Court is placed on the top of the general court system. The Supreme Court's judgments have the value of precedents, but their authority is not absolute. A precedent is rather a strong presumption of the current state of the law on the point of question. The Supreme Court itself is not allowed to deviate from its earlier precedents without trying the case *in pleno*, meaning that all Supreme Court Justices must sit on the case, unless a deviation is motivated by substantial legislative or societal changes.[3]

Judges in all levels of the court system have to present their personal opinion. The majority opinion is usually authored by the judge reporting the case. Most often the judges in the case agree on one opinion, maybe after internal discussions leading to compromises. In the Supreme Court, a highly trained law clerk will prepare the initial proposal for a judgment, which is occasionally accepted by the Justices to form the final judgment, but usually the Justices want to deviate from such proposals. Dissenting opinions are made public *in extenso*. Dissenting opinions may agree in the substantive conclusion, but disagree as to the reasons for that conclusion. In addition, judges that agree with the majority reasoning may want to develop some thoughts not covered by the majority vote, and this is done in an addendum.[4] The use of addendums in the Supreme Court has increased during the last decade. In many of the cases referred to below, reference to transnational principles is made in dissenting opinions or addendums.

The judgments of the Supreme Court are reported in *Nytt Juridiskt Arkiv* (NJA), a semi-official publication. All Supreme Court judgments are not published in full. Some cases that are considered to be of minor importance are published in abbreviated form, as notes. These case notes have less authority than the cases reported in full.[5]

3 Judicial Code of 1942, § 3:5.

4 Mostly an addendum is made for a judge´s "own account", this phrase noted in print, and meaning that the majority has not fully agreed with the position. Sometimes an addendum is made in the name of one judge, but reflecting the views of all the judges in the case. If so, the phrase "own account" is omitted. The reason why such an addendum is not made part of the judgment in those cases is that the content of the addendum is not considered necessary, even if it might be clarifying.

5 *See* Ekelöf, P.O. & Edelstam, H. *Rättsmedlen*, 12th ed. 2008, p. 147.

# 3 References to Transnational Principles in Supreme Court Case Law

## *3.1 Transnational Principles as Gap Fillers*

*A. Acceptances take effect when they reach the offeror? – Minority opinions in NJA 2000 p. 747 I and II (Justice Håstad, Justice Magnusson concurring)*

In *NJA 2000 p. 747* two cases were tried.[6] In both cases the buyers of real property tried to withdraw their acts of sale, even though they had signed the contracts of sale and dispatched them.

In *NJA 2000 p. 747 I* the seller had engaged a real estate agent to sell his property. The buyers had signed a deed of sale at the agent's office. The agent had sent the signed deed to the seller. The seller signed the deed and returned it to the real estate agent. In the meantime, the buyers had heard of plans to build a road nearby the property, precipitating a desire to cancel the contract. They invoked that they had not received the deed from the seller or from the agent. According to Swedish law, the sale of real property is required to be in writing and to be signed by both parties.[7] The three Justice majority discussed whether a binding contract would be completed at the time of making the second signature, or if this act of will must be somehow externally manifested to take effect. Considering the risk of manipulation and bad faith behavior on the part of the second signer, as well as the general rule that an act has to be dispatched to have any effect, the majority found that an external manifestation, plus the opportunity for the other party to have knowledge of that manifestation, would be required. It was further observed that a real estate agent has to act impartially, even if only one of the parties has assigned the agent,[8] and that a real estate agent is by law forbidden to act as a representative for any of the parties.[9]

The majority in *NJA 2000 p. 747 I* found that the contract was concluded when the deed was *received by a person external to the parties*, into which category a real estate agent would fall. Therefore the buyers' cancellation was made too late.

The minority of two Justices concurred in the conclusion, but disagreed as to the reasons. After a thorough account for older case law, legislation, preparatory works and legal writings, the minority concluded that the exact

6 The cases have been commented in Victorin, A., *När uppstår bundenhet vid successivt undertecknande av köpehandlingar vid fastighetsköp?*, Juridisk Tidskrift 2000–01 pp. 951 *et seq*., Adlercreutz, A., *Ytterligare om fullbordande av fastighetsköp*, Juridisk Tidskrift 2001–02 pp. 452 *et seq.*, and Adlercreutz, A., *Om avtalsslut per korrespondens* (*inter absentes*). *NJA 2000 s. 747 I och II*, in Flodgren, B., *et al.* (eds.), *Avtalslagen 90 år. Aktuell nordisk rättspraxis*, 2005, pp. 29 *et seq*.

7 Land Code of 1972, § 4:1.

8 Real Estate Agent Act of 1995, § 12(1). This obligation is now pronounced in § 8(2) of the new Real Estate Agent Act of 2011.

9 Real Estate Agent Act of 1995, § 15. The prohibition is now found in § 15 of the new Real Estate Agent Act.

point of time for conclusion of a sale of land was unclear. In this state of law the minority found that in the balancing of reasons for and against, the reasons for requiring something more than the mere signing of the deed ought to be preferred. It should therefore, in accordance with general contract law, also be required that the signed deed reaches the counterparty before it takes effect. With that choice, it would not matter whether the required form would be based on statute or agreed upon, even though – according to Swedish law – the first signer in the latter case would be bound to its offer during a period of acceptance.

Here, the minority made a reference to the §§ 126[10] and 130[11] of the German Civil Code (BGB) and to PECL Art. 2:205(1). PECL Art. 2:205(1) states:

> If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

After this the minority found, in contrast with the majority, that it would not be enough that the deed would be dispatched to someone external to the parties, since it would deviate from general contract law and it would not guarantee that the counterpart would become informed of the acceptance, and therefore of the fact that the contract would be definitely concluded. A deed of sale would therefore have to be *delivered to the first signer or to someone competent to receive the deed on behalf of the first signer*. In this respect it is, according to the minority, natural for both parties to turn to the real estate agent to be informed of whether the contract has been concluded. An agent would therefore be competent to receive the deed on behalf of both parties, such a finding again dictating that the cancellation was made too late.

According to the majority it would suffice if anyone external to the parties would receive a deed of sale of land after the second signer had dispatched the deed. According to the minority, such a wide range of addressees could not be accepted to have contractual effect. The deed would instead have to be received by the counterpart, or by someone competent to receive it on behalf of the counterpart. Such a qualification of the potential receivers of offers and

10 BGB § 126, unofficial translation, with paragraph divisions replaced with marks: "*Written form* [./.] (1) If written form is prescribed by statute law, the document must be signed by the author with his own hand by the signature of his name or by means of a notarially attested mark. [./.] (2 In the case of a contract, the signature of the parties must be made on the same document. If several documents in identical terms are drawn up in respect of the contract, it suffices if each party signs the document intended for the other party. [./.] (3) Written form can be replaced by electronic form unless a different conclusion follows from statute law. [./.] (4) Notarial authentication can take the place of written form."

11 BGB § 130, unofficial translation, with paragraph divisions replaced with marks: "*Declaration of will becoming effective as against absent persons* [./.] (1) A declaration of will which is to be given as against another person is, when it is given in that person's absence, effective at the point in time at which it reaches him. It is not effective if a revocation reaches the other person previously or at the same time. [./.] (2) It has no influence on the effectiveness of the declaration of will if the declarant dies or becomes legally incompetent after it is given. [./.] (3) These provisions also apply if the declaration of will is to be given as against an authority."

acceptances would be in coherence with Swedish general contract law *and* German law and European contract law principles.

> In the next case, *NJA 2000 s. 747 II*, it was again the buyers as first signers who wanted to withdraw their offer of 20 million Swedish crowns. The deed had also been signed by the sellers, who had sent the deed to their attorney. The attorney of the sellers had not yet passed the deed on to the real estate agent, or to the buyers, when the attorney of the buyers sent a declaration of withdrawal to the real estate agent. The sellers sold the property to a third party for 16 million crowns and claimed a loss of 4 million crowns. The reasoning in *NJA 2000 p. 747 II* is mostly identical with case I. Since the signed deed had only been sent to the sellers' attorney by the sellers themselves, both the majority and the same minority as in case I found that the acceptance had not been effectively issued before the withdrawal reached the real estate agent.

The difference between the majority and the minority opinions might seem small. Both opinions make it clear that the mere signing of the second signer is not enough.[12] According to the majority, it is enough that the acceptance is issued by the offeree and received by someone external to the parties, but according to the minority – supported by transnational principles – the acceptance must be issued by the offeree and received by the offeror. The majority might have based its opinion on the fact that a real estate agent cannot represent any of the parties, whereas the minority seem to have found that the concept of representation is more nuanced, and that also an impartial agent can have powers of passive representation, *i.e.* being able to receive offers, acceptances and other legally relevant messages on behalf of the parties. The references, especially those to the German BGB, showed that the minority understanding could have been valid even when written form is required, however not accepted by the majority.

### *B. Are contractual prohibitions of assignment to be respected? – Addendum for own account in NJA 2008 p. 733 (Justice Håstad)*

*NJA 2008 p. 733* dealt with a procedural question.[13] A debtor applied for extraordinary judicial remedies in a private law dispute. The plaintiff won the case, a sum of 12 million Swedish crowns for a real estate sales commission. On the day of the judgment by the trial court, the plaintiff assigned the claim. The case was appealed, and the plaintiff did not mention the assignment. The debtor did not learn about the assignment until later. According to the debtor,

12 *Cf., e.g., NJA 1928 A 145* and *NJA 1934 p. 358.* But *see NJA 2001 p. 800*, concerning a question of choice of law. Swedish law was chosen, and the decisive fact was that the contract was concluded when the second signer of an international commercial agreement signed the contract in Sweden, even if the first signer had then left the country, and therefore was not present at the time of the second signing.

13 The case is shortly commented in Edlund L., *Rätt part? – Om processöverlåtelser, felskrivningar och inkassomandatarier*, in Festskrift till Torkel Gregow, 2009, pp. 63 *et seq*. at p. 66 and p. 71 *et seq*.

he would have won the case if he would have known about the assignment and invoked the fact during the procedure.

The Supreme Court found that it was correct that the court normally should reject the plaintiff's action if the claim is assigned during the trial. Would the plaintiff, however, succeed anyway, the fact that the debtor would have to pay someone other than the plaintiff would generally not be such a severe detriment that the judgment should be vacated. In case of uncertainty as to the rightful possessor of the claim, the debtor may effect payment by depositing the money in public escrow in accordance with the Deposit of Money in Escrow Act of 1927. In this case the contract of assignment obligated the plaintiff to pursue the claim until the end, in the plaintiff's name but on behalf of the assignee. Under these circumstances the plaintiff's standing would not be lost.

Justice Håstad's addendum referred to many issues, under some of which reference was made to transnational principles, discussing the possibility of assigning claims in general. Håstad made a reference to the PECL Part III Volume dealing with *inter alia* assignment of rights,[14] after quite closely citing the introductory comment to PECL Art. 11:301, which has the heading 'Contractual Prohibition of Assignment'. According to the addendum of Håstad (and the comment to the article) a debtor may have many reasons to oppose an assignment, and some reasons were given. Later in his addendum, Håstad returned to the question of contractual prohibitions of assignment of claims. He explained that prohibitions of assignment are found to be troublesome on the financial market, and that the financial industry has sometimes succeeded to make such prohibitions void. Håstad referred to the German Commercial Code (HGB) § 354a (compared to BGB § 399),[15] the U.S. model law Uniform Commercial Law (UCC) § 9-401(1)(b),[16] UNIDROIT Convention on International Factoring Art. 6(1) and UNCITRAL Model Law on Assignment of Receivables Art. 11, according to which a prohibition lacks effect. This was compared to PECL Art. 11:301, according to which a prohibition is generally to be respected, with the exception of when the debtor has accepted an assignment, the assignee was in good faith of the prohibition, or when the assignment concerns future claims. Håstad pointed out that the exception concerning future claims seemed peculiar at first glance, but supposed that it was aiming at making assignment of factoring claims possible even when there is a contractual clause forbidding assignment. Håstad summarized by stating that it is doubtful whether a prohibition of assignments

14 Lando, O., Clive, E., Prüm, A. & Zimmermann, R. (eds.), *Principles of European Contract Law. Part III*, 2003, p. 107.

15 BGB § 399, unofficial translation, with paragraph division indicated with mark: "*Exclusion of assignment in case of change of contents or by agreement* [./.] A claim may not be assigned if the performance cannot be made to a person other than the original obligee without a change of its contents or if the assignment is excluded by agreement with the obligor."

16 Paragraph division indicated with mark: "*Agreement does not prevent transfer* [./.] An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect."

has any effect towards the assignee, especially when the assignee is in good faith of the prohibition, but also when the assignee is aware of the prohibition. This conclusion was additionally supported by *NJA 1966 p. 97*.

Håstad then noted that paying the plaintiff, despite the judgment and despite a contractual prohibition of assignment, after being informed of the assignment would probably not discharge the debt due to the good faith requirement in § 29 of the Promissory Notes Act of 1936.[17] Therefore it could not be established that a debtor's payment to the plaintiff would discharge the debt when the debtor after the judgment has become aware of the assignment. However, in accordance with the majority reasoning, the plaintiff had the role of a procedural commission agent, pursuing the claim in his own name on behalf of the assignee. Therefore the plaintiff still had a standing in the trial, and why it could not have influenced the outcome if the debtor would have become aware of the assignment during the trial.

The references to transnational principles in the addendum clarifies that it is not at all certain whether contractual prohibitions of assignment of rights have any effect against the assignee. Rather, it seems like such prohibitions are not respected in factoring even if the factor would, or should, be aware of the prohibition. This question is quite alienated with the facts of the case, where no prohibition clause was agreed. However, the reasoning shows that an assignment of a claim may not be barred *even if* the assignor has made a commitment not to assign.

The references also show a crack in the mutual coherence of the transnational norms. It may be noted that PICC makes a distinction between monetary rights and other rights. A prohibition has no effect at all as to assignment of rights to payment of a monetary sum,[18] whereas the opposite rule is given for other rights, unless the assignee was in good faith of the prohibition. The rule in PECL, applicable to rights of all kinds except for *future* monetary rights, is the same as the one in PICC concerning other rights, *i.e.* respecting the prohibition. Since the judgment, DCFR has been published. According to DCFR III. – 5:108, a contractual prohibition against, or restriction of assignment of a right (monetary or other) does not affect the assignability (see however III. – 5:109 on personal rights). At first glance, this seems to support the view that a prohibition lacks effect against the assignee. But the provision then states – as does HGB § 354a – that a prohibition gives the debtor the right to discharge the debt by paying the assignor, which is of course one of the most important purposes of a prohibition of assignment. However, the provision does not end with that. The right to perform against the assignor does not apply when the assigned right is a right to payment for the provision of goods or services.

17 This rule corresponds with BGB § 407(1). Similar rules are found in PICC Art. 9.1.10, PECL Art. 11:303 and DCFR III. – 5:119(1).

18 PICC Art. 9.1.9(1): "The assignment of a right to the payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such an assignment. However, the assignor may be liable to the obligor for breach of contract."

*C. Are liquidated damages clauses also limiting liability? Must the primary liable person ask the finally liable person for possible defences against the creditor? – Majority decision in NJA 2010 p. 629 (four of five Justices)*[19]

In *NJA 2010 s. 629* a landlord assigned a construction company for some work in apartment bathrooms.[20] The construction company assigned in its turn a plumbing company for plumbing jobs in those bathrooms. The subcontractor fetched a main key from the landlord and signed a receipt with a liquidated damages clause of the amount of 15.000 Swedish crowns. The subcontractor lost the key, and the landlord had to switch locks for a cost of some 170.000 crowns. The landlord demanded to be indemnified by the contractor, which paid the full amount, unaware of the clause in question. The contractor sued the subcontractor for the amount.

The Supreme Court addressed the question whether the clause, apart from being a liquidated damages clause, could be seen as a limitation of liability. The clause had the heading "Rules for lending keys!" and contained the phrases "Keys not returned on demand will be charged for 15.000 crowns" (*sic!*) and "Keys to apartments owned by tenants and that disappears, are charged for shift of locks" (*sic!*). The clause was found to be a part of a contract between the landlord and the subcontractor. The court then observed that liquidated damages clauses may serve different purposes. In standard form contracts in construction and sales it is common that the liquidated damages clause is an exclusive regulation of the liability for late performance, unless the contract is rescinded due to breach of contract. In the Nordic legal writings there were differing opinions on what might be the default rule. Referring to DCFR Volume I, the view in Europe was found to be shattered in cases were the contract is not rescinded.[21] The court then drew the conclusion that it is not possible to state a general rule. Instead, the clause at hand must be interpreted without the help of such a supporting rule. The court made a lexical interpretation. The court noted that the clause was formulated by the landlord, and that the size of the sum of 15.000 crowns would give the subcontractor the justifiable impression that the clause was stating a final regulation of the loss of a key. Therefore the clause was interpreted as being the exclusive regulation of the liability, thus limiting the liability for the loss of a key.

The next question was whether the subcontractor could invoke the limitation also against the contractor. The court clarified that the subcontractor could not validly make an agreement with the landlord that would increase the liability of the contractor. The clause was in this case a limitation of the liability of the contractor. It was a mere coincidence that the key was fetched by the subcontractor instead of the contractor. This fact spoke, according to the court,

19 Justice Håstad was reporter of the case.

20 The case is commented in van der Sluijs, J., *Utgör en vitesklausul en ansvarsbegränsning och i så fall mot vem?*, Juridisk Tidskrift 2011–12 pp. 160 *et seq*.

21 von Bar, C. & Clive, E. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Volume I*, 2009, p. 964 *et seq*., concerning DCFR III. – 3:712.

to the contractor's possibility to invoke the said limitation against the landlord, even if the contractor was not part of that contract. Unaware of the limitation clause, the contractor paid an amount far above the liquidated damages sum. The court then stated that it must be seen as a general principle that a party that wants to exercise a right to recourse against the person bearing the final liability, must ask that person for possible defences before paying the creditor. Here, the court made a reference to the legal writings, which was also found to be consistent with DCFR IV.G. – 2:112.

> DCFR IV.G. – 2:112:
>
> (1) Before performance to the creditor, the security provider is required to notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.
>
> (2) If the security provider fails to comply with the requirements in paragraph (1) or neglects to raise defences communicated by the debtor or known to the security provider from other sources, the security provider's rights to recover from the debtor under IV. G. – 2:113 (Security provider's rights after performance) are reduced by the extent necessary to prevent loss to the debtor as a result of such failure or neglect.
>
> (3) The security provider's rights against the creditor remain unaffected.

The court made clear that a failure to ask the person bearing the final liability does not preclude the right to recourse if the person bearing the final liability has given the person bearing the primary liability reason to believe that the right to recourse is unlimited. It was undisputed that the contractor had not asked the subcontractor for possible defences. The contractor's right to recourse was therefore limited to 15.000 crowns.

The references to transnational principles in this case were double-fold. The first reference had a comparative law function. Instead of studying comparative works or investigating national legal orders, one may use the comparative notes in DCFR. The second reference clarified that the transnational solution was in line with the comprehension in Swedish law. A reference may function as a control station, so as to check whether the conclusions seem right or not.

### *3.2 Transnational Principles as Points of Reference When Evaluating the Existing Policy*

*A. Is the bad faith rule in negotiation useful? – Addendum for own account in NJA 2006 p. 638 (Justice Håstad)*

A psychiatrist employed by a public hospital had a business on the side.[22] An agreement was made with the hospital that the psychiatrist could treat some

22 The case is commented in Herre J., *Rättsverkan av passivitet vid mottagande av avtalsbekräftelse*, Juridisk Tidskrift 2006–07 pp. 687 *et seq*.

patients as an employee of his own company instead of as an employee of the hospital. Later, the company demanded payment for its services. The hospital only agreed to pay the psychiatrist's salary and not the fees for patient treatment, a sum of more than one million Swedish crowns. The company sued the hospital. The hospital and the company made a preliminary settlement, and the company withdrew its action. The parties then started to negotiate the terms of the final settlement. Meetings were held on a regular basis, about every six weeks, for about six months. After the last of these meetings, the hospital asked the attorney engaged by the psychiatrist's company for a draft of a contract. Shortly after that, the attorney sent the hospital a draft, according to which the hospital would pay the company within about six weeks. A letter accompanying the draft asked the hospital to return a signed copy of the contract soon and no later than within two weeks. The hospital never returned the contract. After some months had passed, the company sued the hospital again. Taking the background into consideration, the Supreme Court classified the draft as a confirmation of an alleged contract rather than an offer. The Supreme Court then noted that the hospital had not replied without undue delay. Under these circumstances the hospital would be considered to have entered a contract on the terms in the confirmation unless the hospital could prove that no contract was reached, with references to the Commercial Agency Act[23] and to *NJA 1930 p. 131*.[24] The hospital could not prove that, thus a contract was to be considered to have been concluded during the last meeting.

The rule of the case is that a party that has been engaged in contract negotiations, and after these negotiations has received a message from the other party which seems to confirm that a contract has been concluded, must without undue delay object to the existence of a contract or bear the burden of proof for the claim that no contract was concluded during these negotiations.

Justice Håstad made a rather long and learned statement in his addendum. References were made to legislation, preparatory works, case law and legal writings, and also to the U.S. model law UCC, the United Nations Convention on Contracts for the International Sale of Goods (CISG), PECL and PICC.

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23 Commercial Agency Act § 21, unofficial translation: "Where a third party which is an undertaking negotiates with the agent and thereafter receives notice from the principal that the latter ratifies the contract or accepts an offer which was forwarded by the agent, the third party shall, where he considers that no contract has been concluded or that no offer has been made, or that the contract or the offer have been incorrectly represented in the notification, shall inform the principal thereof without unreasonable delay. Should the third party fail to do so, and where he cannot show that the notification was incorrect, the third party shall be deemed to have concluded a contract on the terms indicated in the notification from the principal."

24 In *NJA 1930 p. 131* a business broker and an owner of a company reached the agreement that the broker was to find prospective buyers of the company. The day after the meeting when the contract was concluded the broker sent the owner a confirmation of the contract. Later, when the company had been sold and the broker demanded a sales commission, the former owner objected that the confirmation of the contract did not reflect the real content of the agreement. The Supreme Court found that the owner, since he had not objected against the confirmation without undue delay, had the burden of proof to show the real content, which he failed to do.

The Contracts Act § 6 regulates modified acceptances.[25] In accordance with all the transnational instruments, a modified acceptance is treated as a rejection and a counter-offer, § 6(1). However, § 6(2) states that an offeror, which must be aware of that the offeree believes that the acceptance corresponds to the offer, must inform the offeree without undue delay if the offeror does not wish to be bound on the offeree's terms. This rule might be described as a bad faith rule, with a double subjective condition. In the transnational instruments this exception rule is similar, but instead the obligation to object is not a bad faith rule, but connected to the objective criterion "material alteration" of the offer. Only if the offer is not materially altered, there is an obligation to object.

According to Håstad one could not apply the Contracts Act § 6(2) in this case, unless the hospital would have been deemed to have given an offer or an acceptance during the last meeting. The same would also be the case if one would to try to apply UCC Art. 2-207, CISG Art. 19, PECL Art. 2:208 and PICC Arts. 2.11 and 2.12. None of these norms would be applicable. What Håstad seems to have aimed at, was to clarify that there is no statutory rule in Swedish law to apply on the situation, and that seeking elsewhere will not lead us closer to a solution. Then Håstad described that a combined application of the Contracts Act § 6(2) and § 9[26] may lead to an obligation for a person to explain that no contract has been concluded when the contract negotiations have been initiated by that person.

Justice Håstad also explained that the double subjective condition of the Contracts Act § 6(2) has been the object of criticism in the legal writings: For the bad faith rule to be applicable a person must realize that another person mistakenly believes something, which would make the provision hard to apply or even presuppose a psychological absurdity, whereas the rules in UCC and CISG do not have any subjective conditions at all. Håstad nevertheless defended the bad faith rule. Sometimes the circumstances are such that a person must see that the other has made a mistake, and the aim to counteract speculation on other's risk motivates a duty to react swiftly. According to Håstad one cannot even in deciding whether a term is materially altering the offer, in applying UCC or CISG, ignore what impression the parties had to the

25 Contracts Act of 1915, § 6, unofficial translation, with paragraph division indicated with mark: "A reply which contains an acceptance but which, by reason of any addition, restriction or reservation does not conform with the offer, shall be deemed to constitute a rejection in conjunction with a new offer. [./.] The aforementioned provisions shall not apply where the offeree believes it to correspond to the offer, and where this fact must have been realised by the offeror. In such circumstances the offeror shall, should he wish to repudiate the acceptance, so inform the offeree without unreasonable delay. Should he fail to do so, a contract shall be deemed to have been concluded through, and in accordance with, the acceptance."

26 Contracts Act § 9, unofficial translation: "Where a statement which would otherwise be deemed to constitute an offer includes the words 'not binding', 'without obligation', or suchlike expression, such statement shall be deemed to constitute an invitation to tender an offer on the basis of the contents of the statement. Where such an offer is forthcoming within a reasonable period of time thereafter from a party thus invited, and where the recipient must realise that the offer has been occasioned by his invitation, the recipient shall, should he not wish to accept the offer, so inform the offeror without unreasonable delay. Should he fail to do so, he shall be deemed to have accepted the offer."

discrepancy. The difference between subjective rules and objective rules would in practice therefore be small. To support this conclusion, Håstad reminded of the fact that CISG Art. 8 requires that statements made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was, and that the commercially inspired rules of PECL and PICC have requirements of good faith and fair dealing, *inter alia* in contract negotiation – PECL Art. 1:201 and PICC Art. 1.7 – and concluded that ideas similar to those behind § 6(2) might have influence even in the application of these instruments.

The references to transnational instruments in this case support the existing policy of law, even though the closest corresponding rules clearly differ from the Swedish rule. The references were made somewhat *obiter*, since a double subjective rule was not applied. One might see the Supreme Court's choice of using an objective rule instead of the bad faith rule as a response to the criticism in the legal writings. The addendum might be concluded in this way: A rule might be useful even if it is hard to apply or if there are sometimes other rules to apply, the key criterion being that they would lead to the same or similar results. Even if transnational rules have been formulated differently, they might have the same purpose, and even ensure the same outcomes.

### *3.3 Transnational Principles as Over-arching Corrective Instruments*

*A. Can legislation be corrected by courts? – Addendum for own account in NJA 2010 p. 467 (Justice Håstad)*

In *NJA 2010 p. 467* a pair of debtors had taken a residential loan.[27] They had signed a promissory note payable to order, *i.e.* to the original creditor or to any consecutive assignee. This type of note is a kind of negotiable instrument, limiting the debtor's possible defences. The note was assigned repeatedly between financial institutions. The loan was paid off. The financial institution being the last bearer of the instrument was unaware of this, as was its assignor. The financial institution demanded full payment.

The Supreme Court explained the content of § 15 of the Promissory Notes Act of 1936. According to this provision the debtor may not as a defence invoke that payment has been made against an assignee that was in good faith of the payment. The court then mentioned two exceptions, namely that if a defence has been noted on the promissory note, § 15(3), or if a payment made is corresponding with a payment plan put down on the promissory note, § 16, the defence is valid even if the assignee of some reason was unaware of the defence. Citing the legislative preparatory works, the court found that if one assignee has made a good faith acquisition, any following assignee may invoke that, irrespective of personally being in bad faith at the time of the assignment. The court then gave a closer account of the preparatory works' statements on the requirement of good faith in § 15, and concluded that the assignee has a

27 The case is commented in Munukka J., *Är orderskuldebrev negotiabla? Höjd godtroströskel vid förvärv av löpande skuldebrev*, Juridisk Tidskrift 2010–11 pp. 464 *et seq*.

duty to investigate only when there is a qualified reason to suspect that the debtor may have a justified objection. The reason as to defences concerning payments etc. lacking validity against good faith acquirers, according to § 15, is that negotiable instruments ought to be easy to assign. For claims in general, non-negotiable claims, on the other hand, the rule is that the assignee's right is no better than the assignor's was, Promissory Notes Act § 27. Nonetheless, explained the court, non-negotiable claims are assigned to a very large extent, *inter alia* by factoring, whereby the assignor according to the Promissory Notes Act § 9 and the factoring contracts is liable for the validity of the claim. The Supreme Court had asked two financial industry NGO's for opinions, according to which, the use of negotiable instruments in the Swedish market was satisfactory. The Supreme Court then observed that the trial court and the court of appeal in this case both had come to the conclusion that § 15 did not function satisfactorily if a customer would have to pay twice when the assignee had no special reason to suspect that the debt was already paid off, and the Supreme Court explained that it agreed with the lower courts. After the creation of the Promissory Notes Act the payment routines had been changed on the initiative of the banks, so that only on rare occasions is payment made at the creditor's place of business against the presentation of the promissory note. Pre-payments are nowadays never noted on the promissory note and the debtor seldom retrieves the promissory note after the final payment. At least assignees that are part of the financial sector – such as banks, financial companies and debt collection firms – must be aware that there may be settlements or pre-payments that do not appear on the promissory note to the extent that was presupposed at the making of the Promissory Notes Act. Unless the debtor is also a financial institution, declared the court, such an assignee can nowadays not be content with an investigation of the underlying circumstances only where there are special reasons, and still be in good faith. The investigation that must be conducted to satisfy the requirement of good faith is to inquire the debtor before the assignment. None of the relevant assignees had made such inquiries, why the claim was rejected.

Justice Håstad made an interesting reference to German law and transnational principles. Håstad observed that the trial court had applied the general clause in Contracts Act § 36 to invalidate the claim. According to Håstad this was formally possible, but found that the trial court in reality had adjusted the negotiability that follows from the Promissory Notes Act § 15. The question whether the general clause in Contracts Act § 36 may be applied on legislation or on the effects of legislation had been discussed in the preparatory works of § 36, and this possibility could not be excluded, referring to the German general clause BGB § 242. Håstad explained that according to BGB § 242 all rights should be executed in accordance with *Treu und Glauben*, and that a large and important part of the German private law had been evolved or modified through the application of this provision. Corresponding provisions are to be found in many countries in Continental Europe and an over-arching norm of good faith and fair dealing has been introduced in model laws such as PECL (Art. 1:201), PICC (Art. 1.7) and DCFR (III. – 1:103). Since the unfairness test is to be made with regard to mandatory and default rules, Håstad

noted that it becomes problematic if § 36 is to be regarded as superior in relation to other statutory provisions, and that the Supreme Court in *NJA 2007 p. 1018* stated that § 36 could not be applied on the statutory provision that was relevant in the case. Håstad ended with posing the question whether the Supreme Court in this case had not in fact adjusted or abrogated the Promissory Notes Act § 15 in the core of the provision, on the grounds that due to changed payment routines the provision had become unfair.

The judgment was quite surprising. The Supreme Court deviated from what was common knowledge for lawyers. On the specific question whether legislation or effects of legislation may be adjusted by courts on the grounds of unfairness, one may note that the Supreme Court lately has reasoned in a manner that supports the view that this is possible.[28] In accordance with Justice Håstad's view, one may ask whether the application in the case has not adjusted the legislation. The former threshold for good faith acquisition has clearly been raised from a very low level to a very high one. This case, and others, may influence the view on what is possible to do with the aid of Contracts Act § 36. However, the transnational principles offer no guidance in this respect. A possibility to adjust legislation or its effects cannot be ascribed to the transnational instruments. It is only the application of the German general clauses, especially BGB § 242, that may do so. This becomes ever so clear when one studies the consequences of breaching the duty of good faith according to DCFR III. – 1:103(3). It does not even give rise to normal remedies for breach of contract.

> Breach of the duty does not give rise directly to the remedies for nonperformance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

The fact that the transnational principles contain similarly worded provisions does not give them the same normative content as the German general clauses, or for that matter the UCC provision on good faith and fair dealing. The only possibility for the transnational provisions to get a role similar to these general clauses is by application.

28 *See NJA 1998 p. 390*, where a provision limiting the liability for postal offices which was issued by the Swedish postal board, was found unfair and abrogated in the specific case. The case is commented in Hellner J., *Stulna diamanter*, Juridisk Tidskrift 1998–99 pp. 150 *et seq*., and Hellner J., *Stulna diamanter: ett tillägg*, Juridisk Tidskrift 1998–99 pp. 949 *et seq*. *See NJA 2009 p. 355*, commented in van der Sluijs, J., *Förlikning medförde att ansvarsförsäkringsersättning uteblev*, JT 2009–10 pp. 682 *et seq*. at p. 685 *et seq*., *NJA 2009 p. 408*, commented in Munukka, J., *Försäkringsbolags krav på egendomens återställande oskäligt – trots att metoden är tillåten enligt FAL*, Svensk Juristtidning 2009 pp. 960 *et seq*. at p. 968 *et seq*., and *NJA 2011 p. 67*, commented in Mulder, B.J., *Avtalskrav på försäkring inte oskäligt*, Juridisk Tidskrift 2011–12 pp. 370 *et seq*., at p. 382 *et seq*.

### *3.4 Transnational Principles in Support of a Change of Policy*

*A. A termination period in distribution contracts? – Majority decision in NJA 2009 p. 672 (Unanimous)*[29]

In *NJA 2009 p. 672* a small bakery terminated the distribution contract with Sweden's second largest bread distributor with only a few days' notice.[30] The contractual relationship had lasted for seven years and was entered into orally. No definite contract period or terms on termination had been agreed. The distributor was the bakery's only sales channel.

The main questions were if the distributor would be entitled to a period of notice and, if so, the length of that period. The Supreme Court observed that there was no legislation that covered distribution contracts, and that the legislature had considered to regulate but eventually refrained from taking legislative action since a standard form contract had been worked out in collaboration of suppliers and distributors and due to the possibility of analogous application of the Commercial Agency Act. The Supreme Court concluded that the default rules had to be constructed, having regard to legislation applicable to nearby contract types, case law and of the fact that distribution contracts often have international character. After having accounted for the relevant legislation and the standard form contract, most of which stating a right to a period of notice of six months, the Supreme Court found that a case not reported in full, a noted case, *NJA 1989 A 7*, with facts similar to the actual case, indicated that a period of notice would not be granted.

With reference to legal writings, the Supreme Court observed that in Western Europe a period of notice in distribution contracts had been granted to a considerable extent, even though such legislation covering distribution contracts is only found in Belgium, and that general contract law principles are instead applied.

The Supreme Court then loosely referred to parts of DCFR IV.E. – 2:302: Either party may terminate the contract by giving notice with a period of reasonable length without having to pay any damages. Whether a period of notice is of reasonable length depends, among other factors, on (a) the time the contractual relationship has lasted, (b) reasonable investments made, (c) the time it will take to find a reasonable alternative, and (d) usages. A period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is presumed to be reasonable. For termination by the principal or the like the parties may not agree upon a shorter period of notice than one month a year for the first six years. The Supreme Court also noted that IV.E. – 2:305 has rules on indemnity for goodwill.

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29 Justice Håstad was reporter of the case.

30 The case is commented in Ramberg, C., *Uppsägningstid vid långvariga samarbetsavtal*, Svensk Juristtidning 2010 pp. 94 *et seq*., and Munukka J., *Transnationella principer – rättskälla vid bestämning av återförsäljares rätt till uppsägningstid*, Ny Juridik 1:10 pp. 21 *et seq*.

The Supreme Court concluded that a party terminating a distribution contract – despite *NJA 1989 A 7* – ought to be obligated to observe a reasonable period of notice unless otherwise has been agreed upon. Contracts containing periods which are not of reasonable length may, under the circumstances, be considered unfair under the general clause in the Contracts Act § 36. In the estimation of the reasonable period of notice, the factors mentioned in DCFR IV.E. – 2:302 should serve as guidance. Hence it follows that, if the contract is terminated by the supplier, it is less important whether the distributor had exclusive rights within the district (so called exclusive distribution) than whether the distributor could sell solely the goods of the supplier (so called exclusive purchasing). This remark must be considered to be obiter, since none of these factors were present in the case (it seems that there was exclusive distribution *in fact*, however it was not decided whether this actual behavior of the parties restricted the supplier's right to use other distribution channels). The Supreme Court pursued with stating that if the distributor is not compensated for the circle of customers worked up by the distributor, if the circle of customers is to be handed over to the supplier at termination – which was not the case here – that would be a factor that would call for a longer termination period. Reference was made to the Commercial Agency Act § 28 (which corresponds to the goodwill indemnity provision DCFR IV.E. – 2:305).[31] Any *fixed* minimum period linked to the length of the contractual relationship should, on the non-regulated area of distribution contracts, not be established. Instead, the estimation of the reasonable period should be done more freely.

The Supreme Court finally applied the rules on the case at hand. The distributor was part of a larger group of companies, while the supplier was a small, local business. The distributor did not only sell the supplier's products. It had not been made clear whether the distributor had refrained from selling other's competing products apart from the distributor's own products. It was also unclear whether the distributor had suffered any unnecessary margin costs. It must, however, be supposed that the termination had led to a loss of revenue and the search for a new supplier, and that the supplier has had a benefit from the market worked up by the distributor. The reasonable period of notice was therefore decided to be three months, and damages for some 120.000 crowns were awarded.

31 Commercial Agency Act of 1991, § 28, unofficial translation, with line and paragraph divisions indicated with marks: "Upon termination of the agency agreement, the agent shall be entitled to severance compensation if, and to the extent, that: [./.] 1. the agent has provided the principal with new customers or has significantly increased trade with the existing group of customers, and the principal will derive a significant advantage from such development; and [./.] 2. severance compensation is reasonable given the totality of the circumstances, and in particular the loss to the agent of commission in respect of contracts with the customers referred to in the first paragraph. [./.] The provisions of the first paragraph shall apply *mutatis mutandis* where the agency relationship is terminated as a result of the death of the agent. [./.] The severance compensation shall not exceed a sum corresponding to the remuneration for one year, calculated according to the average annual remuneration during the last five years or during the period in which the agent performed the agency, whichever is shorter. [./.] The agent shall not be bound by contractual terms which are less advantageous to him than the provisions of this section."

The Supreme Court's last reference to DCFR IV.E. – 2:302 may need some clarification. It cannot be read out directly from the provision that so called exclusive purchasing contracts[32] should be given a longer period of notice than exclusive distribution contracts[33] when the contract is terminated by the supplier. This follows, however, indirectly from DCFR IV.E. – 2:302(2)(c), which states that the time it will take to find a reasonable alternative is an important factor in estimating the reasonable length. If the distributor already has reasonable alternatives at place, in the form of other suppliers, the termination period can be shorter.

References to transnational principles were made in respect of two aspects. When answering the question whether a period of notice should be granted at all there were many references, all of them, except for *NJA 1989 A 7*, supporting the view that a period should be granted. The DCFR rule and reference, was therefore probably not decisive. When estimating the length of the period, however, the Supreme Court clearly gave DCFR a guiding role. The preferred method when estimating the reasonable termination period in distributorships is, according to the Supreme Court, to have regard to the factors enumerated in DCFR. The judges or the arbitrators, as well as the parties, should therefore study DCFR before making their minds up. The judgment may also be construed as directing the courts to also take notice of DCFR in other matters left unresolved by the Swedish legislator. It lies near at hand to consult DCFR in contract types close to this case, such as franchising.

### *B. What is required to incorporate standard terms? – Majority decision in NJA 2011 p. 600 (Unanimous)*[34]

In *NJA 2011 p. 600* a patient at a public dental clinic had a dental bridge put in place.[35] The patient was billed for the service. A few days later the patient complained that the bridge was not properly fitted. A temporary repair was done a couple of days later; the patient was informed of the temporary nature, and that the bridge had to be remade. The clinic referred the patient to a specialist to have a new bridge without cost. Before the maturity of the bill the parties agreed on a payment plan. Before the work on the new bridge could commence, the clinic demanded full payment. The patient invoked that the work done was of no use, and that he would pay when the work was finished. After noticing that there was no legislation applicable to private law relations in treatment of persons, but that the Consumer Services Act of 1985 may offer guidance, the Supreme Court turned to the question whether the general conditions of the dental clinic were applicable. The clinic maintained that the

32 *See* DCFR IV.E. – 5:101(4).

33 *See* DCFR IV.E. – 5:101(2).

34 The reporter of the case was Justice Herre.

35 The case is commented in Bernitz, U., *Tandvårdstjänster: kraven för införlivande av standardvillkor och analogisk tillämpning av konsumenttjänstlagen*, Juridisk Tidskrift 2011–12 pp. 590 *et seq*.

general conditions required full payment before the amendment work could begin. The court found that neither the Contracts Act, nor other legislation, stated what would be required for a standard form contract to be incorporated in the individual contract. The general rule is that the terms must be brought to the other party's attention before the contract is concluded. With references to case law and legal writings, the Supreme Court established that for terms that have not been individually negotiated, *i.e.* terms that the consumer has not been given the possibility to influence, it is required that the business has taken reasonable steps to ensure that the consumer has become aware of them at the latest in the conclusion of the contract. Here, the court observed that a corresponding order has been "suggested" in DCFR II. – 9:103.

> II. – 9:103: Terms not individually negotiated
>
> (1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
>
> (2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.
>
> (3) For the purposes of this Article
>
> (a) "not individually negotiated" has the meaning given by II. – 1:110 (Terms "not individually negotiated"); and
>
> (b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.

The Supreme Court then explained that when standard terms are put together with the individually negotiated terms in the same text, this is generally considered sufficient for the standard terms to become part of the agreement. If the terms are printed on the back side of the document, said the court, it is required that there is a clear reference on the front to the terms on the back side, for the terms to be considered part of the agreement. A clear reference in the individual terms is also needed when the standard terms are placed in a separate appendix. Any requirement that the consumer has actually read the terms is not upheld. With reference to legal writings, the court established that stricter requirements than otherwise are applicable as to unexpected, surprising and particularly onerous terms in standard form contracts. The court then observed that some types of contracts are entered into by conduct of the consumer. In these cases it cannot be required that by the time of conclusion the consumer is given a document with the terms. However, also here it is required that the business has taken necessary measures to draw the consumer's attention to the terms, or that the consumer otherwise has had reason to be aware of the terms.

The clinic had not informed the patient of the terms. The clinic failed to prove that the patient had had reason to be aware of the terms, or that the terms were accessible on the clinic's premises in such a manner that the patient would have had reason and possibility to study the terms. The patient could not either be seen to have become bound of the terms due to his actions. The parties could therefore not be deemed to have specifically agreed on the time of payment.

The next issue addressed was whether an obligation to pay had arisen. With reference to §§ 10 and 49 of the Sale of Goods Act of 1990, it was held that the general rule requires mutually simultaneous performance of the parties. In case of services, though, this is hard to accomplish. In accordance with the Consumer Services Act § 41, the rule in services is that the consumer has to pay upon demand after the service has been completed. The main rule ought also in dental services to be that the obligation to pay arises first when the service has been fully rendered. Such an obligation arose in the actual case when the service was first finished. After that, the parties agreed upon that the treatment had to be remade. Since the parties had not regulated the situation, the main rule was applicable, why the obligation to pay would not arise until the service had been completed.

According to the ruling of the Supreme Court, although the statement was made *obiter*, terms on the back side of the document will never be sufficiently brought to a consumer's attention unless the front page makes a clear reference to the back side. On the surface, it seems like this case is only making a reference that would confirm that the Swedish order is in line with the general European view. The reasoning gives the impression that the transparency requirement in the test of standard terms incorporation is a rigorous one.

Certainly, there are norms demanding transparency in Swedish law. One is the *contra proferentem* rule.[36] Inadequacies as to the clarity, legibility etc. might also be considered under the unfairness test of the Contracts Act § 36.[37]

None of these rules deal directly with the question of standard term incorporation. Arguably, it can be supposed that such a severe obscurity as to the content or the structure that a normal person would not understand or take notice of a term, might have the effect that the term as such would be disregarded on the ground that it failed to become incorporated. A well established incorporation rule has been formed in case law: Even if a standard form contract as such is deemed to be incorporated, surprising or particularly onerous terms are to be disregarded, *if* the standard form contract was not provided at the time of entering the contract and the counterpart was unaware of the terms in question.[38]

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36 Compared to other European legal orders it has been used restrictively in Swedish court practice, Bernitz, U., *Standardavtalsrätt*, 7th ed. 2008, p. 89., and rather as a last resort, *cf., e.g., NJA 2010 p. 416*. Due to the nature of insurance contract negotiation, the rule has especially come to use in the interpretation of insurance contracts, *cf*. Bengtsson, B., *Försäkringsteknik och civilrätt*, 1998, p. 84.

37 *Cf*. the proposal for the adoption of a general clause Statens offentliga utredningar 1974:83, Generalklausul i förmögenhetsrätten, p. 132 *et.seq*.

38 *NJA 1978 p. 432* (consumer case). *NJA 1980 p. 46* (commercial case).

> In *NJA 1978 p. 432*, concerning a package travel contract, there was no reference to the terms on the ticket or any other document provided. Nonetheless, the terms were considered to have been incorporated. The standard terms were printed in the travel catalogue, which was available at the travel agent's shop. The fact that the actual consumer had not picked up the catalogue at her visit in the shop was not decisive, since it was expected of consumers to investigate on what terms travel agents offer their services. The disputed term was not deemed to have been surprising or particularly onerous.

For standard terms printed on the back side of a document to have effect, there must, according to *NJA 2011 p. 600*, be a reference to the terms on the front. In practice this embodies a formal requirement, nothing less.

> One may of course put to question whether this requirement can be upheld when the consumer has in fact noticed the terms on the back side. The reason for making this requirement must be that consumers should not risk to be bound to terms that were unknown to them. But, to what extent can it be expected that the same consumers, who neglect to observe that the document has fine print on the back side, will observe and reflect on the reference printed on the front?

The rule formulated by the Supreme Court had some support in the legal writings. A statement in a treatise referred to, could however have been understood as stating an ideal, instead of pronouncing a rule with direct legal consequences.[39] The basis for such a rule, considering case law, was namely weak.[40]

> The Supreme Court made a reference to *NJA 1979 p. 401*. This is probably the best support in case law for the *obiter dctum*. In *NJA 1979 p. 401*, concerning a consumer relation, there was a mere reference in the main contract document to a standard form contract. Thus, the standard terms were neither presented to the consumer, nor were they known by him. The Supreme Court found that the disputed price index clause in the standard form contract was placed under a misleading heading, and that the content was onerous (it led to a 41 percent price raise). The business could therefore not invoke the index clause. However, the Supreme Court seem to have accepted that *the standard terms as such* were incorporated, even though the consumer made the opposite argument.

The former weak normative basis of the norm that the Supreme Court formulated, indicates that the reasoning might have been influenced by something more. According to DCFR II. – 9:103(1) the party supplying the terms must take reasonable steps to draw the other party's attention to them in

39 Bernitz, *Standardavtalsrätt*, p. 58. In the other work referred to, Ramberg, J. & Ramberg, C., *Allmän avtalsrätt*, 8th ed. 2010, pp. 141 *et seq*., there are no similar expressions.

40 Cf. Bernitz, *Tandvårdstjänster: kraven för införlivande av standardvillkor och analogisk tillämpning av konsumenttjänstlagen*, Juridisk Tidskrift 2011–12 p. 593, stating that the wordings of the judgment are close to the cited works, but more distinct than ever in previous cases.

order to have them incorporated. In the DCFR Volume I the reasonable steps are described more closely. A passage here is interesting:[41]

> "Usually it will be sufficient:
>
> …
>
> – if the terms are reprinted on the reverse side of an offer with the offer referring to them, …"

This has a close connection also to the DCFR duty of transparency of terms, breach of this duty being a ground for unfairness itself.

> II. – 9:402: Duty of transparency in terms not individually negotiated
>
> (1) A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language.
>
> (2) In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.

I believe that the Supreme Court was influenced by this stricter consumer policy. Instead of accepting formal expressions of will, one has become even more apt to scrutinize the negotiation procedure and regard the expressions with skepticism, and especially in the field of consumer law.

## 4 Final Assessments

Former Supreme Court Justice Håstad was sitting on the bench in all the cases, with one recent exception, where references to PICC, PECL or DCFR were made. In all of these cases one can assume that Håstad himself was the author, either in minority, or in majority as the reporter of the case or in an addendum for his own account. Håstad formed part of the group of academics that authored DCFR, and also part of the Expert Group on European Contract Law that made the Feasibility Studies[42] used as preparatory works for the Commission proposal for Regulation on a Common European Sales Law.[43] One could have feared that the retirement of Justice Håstad would lead to a halt concerning such references. However, Justice Herre, that also took great part in the creation of DCFR, was the reporter of the 2011 case, where the reasoning was probably influenced by the consumer policy of DCFR. The references to transnational principles will most probably not stop.

Obtaining knowledge of the contents of the transnational contract law principles will provide the lawyer with increased control. A check with the

41 von Bar, C. & Clive, E. (eds.), *Principles, Definitions and Model Rules of European Private Law. Volume I* , p. 589.

42 The latest draft of the Expert Group's Feasibility Studies, made public in August 2011, is available at "ec.europa.eu/justice/contract/files/feasibility-study_en.pdf".

43 COM(2011) 635 final.

transnational principles can give guidance as to the probability of the content of the Swedish rule. If the actual norm seems to be in line with a Swedish legal reasoning, the norm in its condensed form of a black letter rule may highlight the conditions of the rule, and also reflect its purposes in a more concrete, still often very nuanced, fashion.

So far the references in the Supreme Court to transnational principles have been safely within contract law. The most probable fields of observation would be contract types that are not at all or scarcely regulated in statutory law, such as distributorships, franchising, commercial material services, lease of goods and personal security.

Maybe one cannot expect more. There are however signs that these boundaries might be crossed in the future. In *NJA 2011 p. 548* the question was whether a member of a housing association had been unjustifiably enriched.[44] The apartment was damaged by smoke from a fire in the neighboring building. According to the Housing Association Act of 1991, § 7:12(3), the member is not liable in cases of fire unless the member has caused the fire by negligence. The housing association repaired the apartment, and sought to be reimbursed by its insurance company. The insurance company only admitted compensation for 80 percent of the costs, due to reduction for the wear and tear. The association sought recourse for the 20 percent of the repairing costs against the member, invoking *inter alia* that the member had been unjustifiably enriched, since the apartment value had increased due to the repair. The Supreme Court found that the repairing obligation, including the paying for the costs of repair had been laid down in statute, and that the obligation was put on the association. A right for the association to claim compensation for the increase of value would – in lack of statutory support – have to be motivated by weighty policy reasons, this interpretation holding even if the member would clearly profit from the repair. With reference to legal writings, the Supreme Court found the principle of non-discrimination in the law of associations pointed in that policy direction, but the weight of the argument was not sufficient.

A reference to DCFR was made in the presenting law clerk's proposal for judgment. The clerk suggested that in order to find the increase of value unjustified, it would take that it would lack a legal foundation. Here, the clerk made a reference to the literature, but also to DCFR VII. – 2:101 and to DCFR Volume IV.[45] The clerk suggested the same result as the Supreme Court arrived at, however not explicitly considering the principle of non-discrimination.

So, in this case the Supreme Court made no reference to DCFR. This might be construed as a resistance against expanding the recognition of transnational principles, where the substantive connection between these and Swedish law is less pronounced. Swedish law treats the concept of unjustified enrichment with hesitance, formerly by simply rejecting its normative status. Lately, unjustified

44 The case is commented in Munukka, J., *Värdehöjande reparation efter brandskada ska bäras av bostadsrättsföreningen*, Juridisk Tidskrift 2011–12 pp. 387 *et seq*.

45 von Bar, C. & Clive, E. (eds.), *Principles, Definitions and Model Rules of European Private Law. Volume IV*, pp. 3874 *et seq*.

enrichment has been acknowledged, though mostly as a value to be observed rather than a clear cut norm.[46] Even if it appears plausible that there is a greater resistance to expand the scope of recognition outside of contract law, it must be noted that the evidence thereof is meager, since there are not much more than a handful of cases. Only the future will tell.

The use of the transnational principles is probably more widespread than what can be seen on the surface. Probably attorneys and judges sometimes consult these instruments without openly referring to them. From the case law of the Supreme Court, this is most likely done in hard cases, cases where one has to look for that extra argument.

46 Munukka, J., *Är obehörig vinst en svensk rättsprincip?*, Ny Juridik 3:09 p. 26 *et seq.* and Schulz, M., *Nya argumentationslinjer i förmögenhetsrätten. Obehörig vinst rediviva*, Svensk Juristtidning 2009 p. 946 *et seq*.