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# Application of General Principles in Private Law in the Nordic Countries

## 1. Introduction

General principles, for instance the principle of good faith and fair dealing, reputedly play a prominent role in the law of the Nordic countries. Further, the application of rules is said to be rather pragmatic in Nordic law. As a result, the dominant approach in contract law is to search for a reasonable outcome in the interpretation and performance of contracts. This picture of the role of general principles and of pragmatism in contract law corresponds fairly well to the self-image frequently found in Nordic legal doctrine and in governmental documents. My aim here is to show that such a reputation may be undeserved, for better or for worse. In my opinion, the margin for applying general principles to soften the results of literal interpretation and strict performance of contracts is less wide in practice than legal doctrine often suggests.

‘Nordic’ countries will be defined as Denmark, Finland, Iceland, Norway and Sweden. These countries share a long history, including a history of legislative co-operation, that justifies considering them together in discussions of comparative law. Important differences do however subsist both in the legal traditions and in more recent developments of the law.\*<sup>1</sup> Given these differences, it will be necessary to take Norwegian law, which the author knows best, as a starting point here, while comments on the law of the other Nordic countries will necessarily be less accurate. Politically speaking, the expression ‘Nordic countries’ could also comprise Estonia, Latvia and Lithuania, but this definition would be less meaningful in comparative law.

The present discussion will concentrate on contract law. General principles are of course relevant in other parts of private law as well, but analysis of the entire field would become too abstract.

## 2. General principles, in particular the principle of *lojalitet*

The expression ‘general principles’ has been used with different meanings in different legal contexts. It is not always clear what is meant when general principles or maxims (*Grundsätze*) are referred to in government documents, in judgments, or in legal doctrine.

Nowadays, any discussion on the general principles of European private law must take into consideration the recent academic texts on principles and model rules, in particular the Draft Common Frame of

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<sup>1</sup> For some reflections, see K. Lilleholt. European private law: Unification, harmonisation or coordination? – R. Brownsword *et al.* (eds). *The Foundations of European Private Law*. Oxford and Portland, Oregon: Hart Publishing 2011, Chapter 21, pp. 353–361.

Reference (DCFR) and the *Principes contractuels communs*. In the DCFR, four ‘underlying principles’ are presented, namely freedom, security, justice and efficiency.<sup>\*2</sup> In the *Principes contractuels communs*, there are three *principes directeurs*, namely *la liberté, la sécurité et la loyauté contractuelles*.<sup>\*3</sup> In their general form, such ‘underlying’ or ‘guiding’ principles may be thought of as values. In both of the texts referred to, there is more detailed discussion of the values, demonstrating the effects of each value, whether direct or indirect, on legal rules and legal reasoning. The values, or principles, may be coined as general norms or guidelines, i.e., norms that point in a certain direction, without determining the outcome of concrete cases, or they may contribute to the formation of certain patterns of reasoning in the search for the best solution to a legal problem.

In the European Commission’s proposal for a common European sales law (CESL), there is a section on general principles.<sup>\*4</sup> It includes freedom of contract, good faith and fair dealing, and co-operation. The difference with the DCFR and the French principles is probably merely a question of level of abstraction.<sup>\*5</sup>

For some decades now, a principle of *lojalitet* has been thoroughly discussed in Nordic contract law doctrine.<sup>\*6</sup> The term *lojalitet* corresponds of course to French *loyauté*, and this word is said to have common roots in Latin with the word ‘legal’. It is interesting to note that the French groups in their translation of the guiding principles into English have chosen the term ‘fairness’ for *loyauté*, obviously based on the conception that ‘loyalty’ in English would not convey the same associations as *loyauté* in French. At the same time, the French groups point out that the expressions *bonne foi* (‘good faith’) and *loyauté* (‘fairness’) should be interchangeable when we are talking about a norm of behaviour and not of knowledge or mistake.<sup>\*7</sup>

In Nordic doctrine, the principle of *lojalitet* is often described as the duty of a contracting party to take into consideration the other party’s interests. The word *lojalitet* is not much used in legislation, where expressions like *god tro og redelighet* or *tro och heder*, which both literally translate into ‘good faith and honesty’, are more common. The parallel in continental law and in the European academic texts to both *lojalitet* and ‘good faith and honesty’ is ‘good faith’ or ‘good faith and fair dealing’. In this paper, I will refer mostly to *lojalitet* when alluding to the Nordic context.

Another discussion in Nordic law should be mentioned here: the discussion on social contract law, which has been particularly important in Finland.<sup>\*8</sup> In social contract law, the contents of the contract, together with the idea of fairness and the protection of the weaker party, are central elements, more so than in the discussion of the principle of *lojalitet*. There are, however, close connections between the two discussions, not least because the general clause in the Formation of Contracts Act may serve as a basis for both the principle of *lojalitet* and the protection of weaker parties. Some questions concerning fairness and the protection of weaker parties will also be touched upon in this paper.

<sup>2</sup> C. von Bar, E. Clive (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Full edition, 6 vols. Munich: Sellier 2009, p. 37.

<sup>3</sup> B. Fauvarque-Cosson, D. Mazeaud (eds). *Projet de cadre commune de référence. Principes contractuels communs*. Paris: Société de Législation Comparée 2008, p. 19.

<sup>4</sup> COM(2011) 635 final, Chapter 1, Section 1.

<sup>5</sup> For (critical) comments, see R. Schulze (ed.). *Common European Sales Law (CESL) – Commentary*. Munich: Beck 2012, pp. 85–94 (comments by H. Schulte-Nölke).

<sup>6</sup> Some comprehensive works are A. Holm. *Den avtalsgrundade lojalitetsplikten*. Linköping: Avdelningen för Rätt och rättsfilosofi, Linköpings universitet 2004; J. Munukka. *Kontraktuell lojalitetsplikt*. Stockholm: Jure 2007; H. Nazarian. *Lojalitetsplikt i kontraktsforhold*. Oslo: Cappelen 2007. Comments pertaining to Danish law are found in L.L. Andersen, P.B. Madsen. *Aftaler og mellemænd*. 6th ed. Copenhagen: Karnov 2012, pp. 413–423; M.B. Andersen. *Grundlæggende aftaleret, Aftaleretten I*. Copenhagen: Gjellerup 2008, pp. 113–116. On pre-contractual liability in particular, see L. Simonsen. *Prekontraktuel ansvar*. Oslo: Universitetsforlaget 1997; E.P. Björkdahl. *Lojalitet och kontraktsliknande förhållanden*. Uppsala: Iustus 2007 (107).

<sup>7</sup> B. Fauvarque-Cosson, D. Mazeaud (see Note 3), p. 133; B. Fauvarque-Cosson, D. Mazeaud (eds). *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*. Munich: Sellier 2008, p. 515.

<sup>8</sup> For a presentation in English, see, for example, T. Wilhelmsson. *Social Contract Law and European Integration*. Aldershot: Dartmouth 1995, pp. 25–43.

### 3. The principle of *lojalitet* in legislation: the general clauses

Perhaps the most distinct feature of Nordic contract law is the general clause in Section 36 in the Formation of Contracts Act in each of the Nordic countries. The wording of this provision is essentially the same in all five Acts and among Nordic contract lawyers the general clause is usually referred to simply as ‘Section 36’. The essence of the rule is that a contract term may be adjusted or set aside if the application of the term would lead to unfair results (the Norwegian version refers also to results contrary to ‘good business practice’). In the assessment, the content of the contract, the position of the parties, the conditions at the time of conclusion of the contract, as well as subsequent developments and other circumstances, are all taken into consideration. Section 36 was included in the Formation of Contracts Acts of the Nordic countries during the 1970s and 1980s. The Formation of Contracts Acts were originally the result of Nordic legislative co-operation at the beginning of the twentieth century and the Acts were passed in the various countries during the period 1915–1936.<sup>9</sup> None of the Nordic countries has a civil code. The Formation of Contracts Act in each country is one of the few pieces of contract law legislation with general scope; in addition there are separate enactments regulating quite a few types of specific contracts, the most important being the Sale of Goods Act in each country.

The Formation of Contracts Acts have from the outset contained a provision, Section 33, which is now, since the inclusion of Section 36, sometimes called the ‘minor general clause’. Section 33 also has essentially the same wording in each of the five Nordic countries:

An otherwise valid declaration of intent may not be invoked by the person to whom it is made if it would be contrary to good faith and honesty to rely on the declaration because of circumstances which existed at the time when the declaration was made and which must be regarded as having been known to that person. (Author’s translation)

According to the committee which prepared the Acts, this provision was primarily intended to avoid interpretation using arguments *e contrario* of the provisions on voidability for coercion, for fraud and for unfair exploitation. We shall see that Section 33 was received quite differently from country to country.

Besides Section 33, some other provisions have been included over a long period of time in special legislation allowing for the voidability of contract clauses producing results contrary to reasonableness or good business practice. Most of these provisions were abolished when Section 36 was introduced in the 1970s and 1980s.<sup>10</sup>

In the Nordic countries, the general clause in Section 36 is meant to be sufficient implementation of Directive 93/13 on unfair terms in consumer contracts, with only some small additions.<sup>11</sup> The common view in the Nordic countries is that Section 36 protects the consumer better than does the Directive. Over the years, simply referring to this view without comparing the subsequent development in the EU and Nordic law, has, of course, become rather problematic.

<sup>9</sup> Denmark: *lov nr. 242 af 8. maj 1917 om aftaler og andre retshandler på aftalerettens område*, most recently published as *LBK nr. 781 af 26/08/1996*; Finland: *lag om rättshandlingar på förmögenhetsrättens område 13.6.1929/228*; Iceland: *lög 1936 nr. 71. febrúar 1926 um samningsgerð, umboð og ógilda löggerninga*; Norway: *lov 31. mai 1918 nr. 4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer*; Sweden: *lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*. The translation ‘Contracts Act’ is also in use.

<sup>10</sup> For an overview with reference to Norway, see the Government’s proposal for Section 36, *Ot.prp. No. 5 (1982–83)* (the Government’s proposal to the Parliament), Chapter 2.4.

<sup>11</sup> In Finland and Sweden, the rules on consumer contracts have their place in separate legislation, outside the Formation of Contracts Acts, but in substance the situation is the same.

## 4. The principle of *lojalitet* in legal doctrine

In Norwegian legal doctrine, Section 33 of the Formation of Contract Act (the ‘minor general clause’) was received with enthusiasm, in particular by one of its drafters, the Oslo professor Fredrik Stang (1867–1941, professor 1897–1933). He asserted that this provision was a confirmation and further development of ideas already established in Norwegian law, and that the rule had a wide scope of application. In particular, he emphasised that the provision applied to cases where a contract was concluded due to a mistake concerning facts or law, i.e. the problem of *error in motivis*. If the promisee is regarded as having known—or in Stang’s opinion, even if he ought to have known—of the mistake, the principle of good faith and honesty determines whether or not the promisee can rely on the promise. Good faith and honesty referred, in Stang’s opinion, to the general conception in society of loyal and decent behaviour, in particular the prevailing rules on good business practice.<sup>\*12</sup> One of his illustrations concerned the sale of a house: if the prospective buyer has revealed that he is buying the property because of a planned new railway line, the seller must inform the buyer if he knows that these plans have been definitely cancelled before the contract is concluded. If not, the buyer is not bound by the contract. On the other hand, the seller does not have to inform the buyer if he simply has his doubts about whether the railway line will ever be built.<sup>\*13</sup>

In the other Nordic countries, Section 33 was met with scepticism by legal scholars, and particularly so in Sweden.<sup>\*14</sup> By and by, however, it was generally accepted in legal doctrine in all the Nordic countries that parties to a contract have a general duty to take into consideration the interests of the other party. A requirement of good faith, or *lojalitet*, both in the formation and the performance of contracts was advocated even prior to the introduction of the Section 36 general clause in the Formation of Contracts Acts. Typically, the influential Finnish professor Lars Taxell characterised contracts as a form of co-operation between the parties, stating in 1972 that the *lojalitet* approach underlined the relation of trust between parties.<sup>\*15</sup> In today’s doctrine, duties of good faith or of *lojalitet* are of course thought to be expressed in Section 36 in particular, but not exclusively. That such a principle of *lojalitet* is part of contract law is generally accepted in leading textbooks and monographs.<sup>\*16</sup>

Interpretation of contracts is usually regarded as an area of law where general principles play a very important role. This holds true also for Nordic legal doctrine. With some small exceptions for non-negotiated terms, there is no general legislation on the interpretation of contracts in Nordic countries. In Nordic legal doctrine, it has often been pointed out that the distinction is not clear-cut between interpretation on the one hand and control of unreasonable terms on the other. Basic principles of interpretation leave much room for a good faith approach. The common intention of the parties prevails even where it differs from the literal meaning of the words used. Further, one party must accept the meaning intended by the other party where this meaning was known, or could reasonably be expected to have been known, to the first party. Even the so-called objective interpretation has a good faith element, as one seeks the meaning which a reasonable person would give to the contract under the circumstances. In other words, a party must accept the meaning that the other party might reasonably give to the contract under the circumstances. These principles leave much leeway for a judge to choose the interpretation which seems to lead to the most reasonable reading of the contract. In this way, a more or less bold interpretation of a contract may reduce the need to avoid the contract or to set it aside because of unfairness. It has been observed that this kind of ‘hidden review’ by way of interpretation is less necessary after the introduction of the general clause in Section 36, as an unfair outcome resulting from a literal interpretation can be softened by application of the general clause.<sup>\*17</sup> Further, interpretation guidelines like the *contra proferentem* rule may be regarded as related to a principle of good faith.

<sup>12</sup> F. Stang. *Innledning til formueretten*. Oslo: Aschehoug 1935, p. 596.

<sup>13</sup> *Ibid.*, p. 600.

<sup>14</sup> On this point, see J. Munukka (see Note 6), pp. 52–58.

<sup>15</sup> L.E. Taxell. *Avtal och rättsskydd*. Åbo: Åbo Akademi, 1972, p. 81.

<sup>16</sup> See, for example, (Denmark) L.L. Andersen, P.B. Madsen (see Note 6), pp. 413–423; B. Gomard. *Obligationsret 1. del*. 4th ed. Copenhagen: Djøf 2006, pp. 48–58; (Iceland) Þ. Örlygsson *et al.* *Kröfuréttur. I. Efnidir kröfu*. Reykjavík: Bókaútgáfan Codex 2009, pp. 86–87; (Norway) V. Hagstrøm. *Obligasjonsrett*. 2nd ed. Oslo: Universitetsforlaget 2011, pp. 77–82; E. Selvig. *Inngåelse av kontrakt*. – K. Lilleholt (ed.). *Knophs oversikt over Norges rett*. 13th ed. Oslo: Universitetsforlaget 2009, Chapter 44 (V. Hagstrøm), pp. 228–247, 240; (Sweden) J. Ramberg, C. Ramberg. *Allmän avtalsrätt*. Stockholm: Norstedts juridik 2010, pp. 37–39.

<sup>17</sup> L.L. Andersen, P.B. Madsen (see Note 6), p. 392 (with further references).

The rules on interpretation advocated in Nordic legal doctrine find their parallel in the DCFR and the CESL. In these texts, good faith and fair dealing are explicitly included among the matters which are relevant to interpretation. At the same time, the rules on interpretation are formulated in such abstract terms that the results may vary quite a lot in practice. We shall see that, at least for Norwegian law, courts seem not to be prone to depart much from the literal meaning of words.

In sum, it seems fair to say that the principle of *lojalitet* has a central position in Nordic contract law doctrine and that the principle embraces formation and performance of contracts as well as interpretation of contracts.

## 5. The principle of *lojalitet* in the courts

As already suggested in the introduction, the advocacy of a principle of *lojalitet* in legal doctrine has hardly found full resonance in the practice of Nordic courts, at least not in the Norwegian Supreme Court, where the general clauses in Sections 33 and 36 of the Formation of Contracts Acts have been applied in only few cases. In Denmark and Sweden, there are significantly more examples of contract terms being set aside or amended on the basis of Section 36, but my impression is that the threshold for review is still relatively high.

When it comes to a non-legislated principle of good faith or *lojalitet*, the conclusion is necessarily more uncertain, as the application of such a principle will tend to be less explicit. In particular, where a court has reached a reasonable result by way of interpretation of a contract, it is not always easy to tell whether the court was convinced that such was the real intention of the parties or whether it was exercising more or less hidden control of the fairness of the contract. The impression is, however, that the Supreme Courts tend to stick to a rather literal interpretation.

The practice of the lower instance courts is more varied, as may be expected. Admittedly, there is also a possibility that the general clauses and the broad acceptance in legal doctrine of a principle of *lojalitet* may have influenced Nordic lawyers to the point that business practice is less harsh than it would otherwise be or at least that parties do not try to rely on clauses contrary to *lojalitet* before the courts. The existence of such an influence seems rather doubtful however. Textbooks may shape the minds of law students and young practicing lawyers to a certain extent, but in the long term, Supreme Court cases and the clients' desire for economic results are more important sources of inspiration.

Section 33 of the Formation of Contract Act, the 'minor general clause', has been part of Norwegian law since 1918, but there are very few cases where the provision has been successfully invoked before the Supreme Court. After 1945, there are no cases where Section 33 has been decisive in disputes between professionals<sup>\*18</sup> and just a few examples of direct application of Section 33 where non-professionals have been involved.<sup>\*19</sup> In another few cases, principles close to the one in Section 33 have been referred to.<sup>\*20</sup> In total, we are talking of less than ten cases in more than sixty years. Earlier cases are also rare, and they are in any case of less interest today.

As for Section 36, the wider and more recent general clause, the situation is much the same. In Norway, Section 36 was introduced in 1983 and to date has been decisive in about ten cases, depending a little on the counting. The most important cases dealt with old ground lease contracts where the rent had become extremely low due to inflation; the landowners were allowed, on the basis of Section 36, to adjust the rent in order to compensate for inflation. Apart from this, the cases where Section 36 led to contract terms being set aside or amended have been rather peculiar and of little general interest. The numerous cases where Section 36 has been invoked without success have demonstrated that the threshold for setting aside a contract or a contract term is very high. The Norwegian Supreme Court has characterised the relevant criterion as 'qualified unfairness'.<sup>\*21</sup> Prior to March 2013, there were no Supreme Court cases setting aside non-negotiated terms in contracts between consumers and professionals.

<sup>18</sup> See V. Hagstrøm (see Note 16), p. 152.

<sup>19</sup> Examples (not necessarily exhaustive): Rt. 1956, 572 (on mental capacity); Rt. 1959, 1048 (on contracts that could not possibly have been performed by the non-professional); Rt. 1997, 1445 (on sham contracts); Rt. 2003, 521 (on division among heirs).

<sup>20</sup> Rt. 1984, 28 (on suretyship and breach of a creditor's duty to inform); Rt. 1995, 1460 (also on breach of the duty to inform).

<sup>21</sup> Rt. 2003, 1132; Rt. 2012, 1537.

The first case of real general interest in which a consumer successfully invoked Section 36 was decided on 22 March 2013.<sup>\*22</sup> This case, dealing with consumer investment services, will be commented upon following some observations concerning the previous cases.

Two cases from 2011 illustrate the Norwegian Supreme Court's rather reserved approach to the general clause to date. The disputes concerned the interpretation and fairness of terms in some consumer contracts for planned new residential dwellings, more specifically the terms concerning time of delivery. According to the wording of the contracts, the seller 'aimed' to deliver the apartments in the second half of 2007, in one contract and 'planned' to deliver the apartments in the third quarter of 2007, in another. As it turned out, the apartments were delivered much later and the consumers claimed economic compensation for the delay, without success. Firstly, the Supreme Court interpreted the clauses strictly literally, stating that there was no actual agreement on the time of delivery. Secondly, the Court did not even discuss possible review under Section 36 and the Directive on unfair terms was not mentioned. This is surprising, as the 'grey list' in the annex to the Directive (that is the list of terms presumed to be unfair) gives several examples of terms leaving a wide range of choice to the professional regarding correct performance of the contract. It should be added that the consumer authorities later took the initiative to prohibit the use of the relevant clauses under public law legislation.

In two cases from 2012, the Supreme Court dealt with consumer investment services.<sup>\*23</sup> Again, the Court approached the cases rather formally, assessing whether the information given, including the information in 'small print', was correct and complete and whether the contracts were balanced, rather than asking how the marketing of the products was perceived, and was meant to be perceived, by the consumers.

In the case decided on 22 March 2013, a bank had sold a so-called index-linked bond to one of its customers, for money borrowed from the bank. The combination of the interest on the loan, the banking fees, and a rather uncertain yield on the bond made the bond a rather risky investment. The Supreme Court, in a 'Grand Chamber' decision, unanimously held that the contract was not invalid under Section 36 solely because of a lack of balance between the obligations of the parties. However, what made the contract invalid was insufficient and partly incorrect information from the bank regarding the risk of loss resulting from the transaction. If the bank had given more sober, and correct, information, the consumer would not have entered into the contract, the Court found.

Interestingly, the Supreme Court concentrates on the consumer's right to receive sufficient and correct information. The Court even referred to the Directive on unfair contract terms, more or less for the first time ever, as a supporting argument. Given the importance accorded to insufficient and partly incorrect information, the same result could probably have been reached on the basis of Section 33, the 'minor general clause' (which was not invoked by the consumer).

The cases prior to 2013 can also serve as illustrations regarding the Norwegian Supreme Court's approach to the interpretation of contracts. The contracts for the planned apartments were interpreted quite literally, as we saw, and the same may be said for the two consumer investment services cases of 2012. As for disputes between professionals, the Supreme Court has underlined on several occasions that the interpretation of contracts should be based on objective and available elements, first and foremost the wording of the contracts, for reasons of legal security and predictability, as well as third parties' reliance on the contract.<sup>\*24</sup> There are exceptions, however. In two recent cases on suretyship, the Supreme Court applied an approach similar to the Common Law 'business common sense' rule<sup>\*25</sup>, and, in another suretyship case, a surprisingly bold application of the *contra proferentem* rule.<sup>\*26</sup> All three cases dealt with disputes between businesses and there were no references to a principle of *lojalitet* or good faith. In my opinion, it cannot be said that the Norwegian Supreme Court applies a principle of *lojalitet* in its interpretation of contracts any more so than what would be regarded as normal in most jurisdictions.

The somewhat more generous application of Section 36 in the Danish Supreme Court includes, amongst others, cases of unreasonable terms concerning remedies for non-performance in contracts between

<sup>22</sup> Rt. 2013, 388.

<sup>23</sup> Rt. 2012, 355; Rt. 2012, 1926.

<sup>24</sup> See, in particular, Rt. 2003, 1132; see also Rt. 1994, 581; Rt. 2000, 806; Rt. 2002, 1155; Rt. 2005, 268; Rt. 2005, 1447; Rt. 2009, 813; Rt. 2011, 1153; Rt. 2012, 1267.

<sup>25</sup> Rt. 2012, 96, and Rt. 2011, 1553 (both on the majority vote). For the 'business common sense' rule, see, in particular, *Rainy Sky S. A. and Others v. Kookmin Bank* [2010], UKSC 50.

<sup>26</sup> Rt. 2012, 1267.

professionals and a couple of remarkable cases on suretyship.<sup>\*27</sup> The threshold for applying Section 36 seems to be lower in Denmark than in Norway, in particular when it comes to review of the contents of the contract. My impression is that the situation in Sweden lies somewhere in-between; Section 36 has been applied more often than in Norway but perhaps a little more strictly than in Denmark.<sup>\*28</sup> In particular, several arbitration clauses have been set aside by the Swedish Supreme Court. I have not sufficient information on the court practice of Finland and Iceland regarding Section 36 to draw conclusions.<sup>\*29</sup>

As for the style of interpretation of contracts, it is difficult to draw conclusions for Nordic countries other than Norway, as a reliable impression of a court's style of interpretation requires a close reading of a great number of cases over a long period.

## 6. Duty of information and lack of conformity

The principle of *lojalitet* is important in the assessment of whether performance is in conformity with the contract. If a contracting party has not disclosed to the other party circumstances which the former is expected to have known of and which the latter had reason to expect to be informed about, this may result in a lack of conformity, giving rise to ordinary remedies for non-performance. For example, if the seller does not inform the buyer that the car has severe, but hidden, corrosion damage, despite being aware of this fact, the car will regularly be regarded as non-conforming. This is so even if the buyer might have had to accept this as the normal condition of an old car if the seller was not aware of the damage.

The Sale of Goods Acts in Finland, Iceland, Norway and Sweden have provisions to this effect for contracts where the goods are sold 'as is' or with similar reservations.<sup>\*30</sup> The same rule does of course apply even when the seller has *not* tried to reduce his liability in this way. In contracts for the sale of consumer goods, the rule is even more buyer-friendly in Denmark, Norway and Sweden, as it includes circumstances which the seller ought to have known of.<sup>\*31</sup> In Denmark, the provision applies only to consumer sales.<sup>\*32</sup> It should be added that lack of conformity was unsuccessfully invoked by the consumers in the second 2012 case on consumer investment services.<sup>\*33</sup>

There is no corresponding rule on lack of conformity as a result of breach of information duties in the CISG, the DCFR or the CESL. According to CESL Article 69, incorrect information may lead to a lack of conformity, as the information is incorporated as a term of the contract. There are duties to supply pre-contractual information, but it seems that a lack of information may only lead to liability in damages or to voidability for mistake, as the case may be. Strictly speaking, a seller may also avoid a defect being regarded as a lack of conformity under these instruments by informing the buyer of the defect, but this is another kind of rule: the information duty we are considering under Nordic law implies that an otherwise conforming performance will be regarded as non-conforming solely because of the breach of the duty to inform.

<sup>27</sup> U 1987, 526 H; U 1987, 531 H; U 1987, 801 H; U 1991, 4 H; U 1994, 898 H; U 1998, 281 H; U 2002, 74 H; U 2002, 706 H; U 2002, 1224 H; U 2002, 1698 H; U 2004, 1268 H (on suretyship); U 2004, 2400 H; U 2005, 1978 H; U 2010, 1628 H (on suretyship); U 2011, 2654 H; U 2012, 535 H. See generally, M.B. Andersen (see Note 6), pp. 423–448; L.L. Andersen, P.B. Madsen (see Note 6), pp. 198–239.

<sup>28</sup> Some examples: NJA 1979, 666; NJA 1981, 711; NJA 1982, 613; NJA 1982, 800; NJA 1982, 853; NJA 1983, 865; NJA 1983, 332; NJA 1987, 639; NJA 1989, 346; NJA 1997, 524; NJA 1999, 408; NJA 2009 N 3. See generally, K. Grönfors, R. Dotevall. *Avtalslagen. En kommentar*. Stockholm: Norstedts juridik 2010, pp. 237–292; J. Ramberg, C. Ramberg (see Note 16), pp. 175–181.

<sup>29</sup> On the principle of loyalty in Finnish Supreme Court practice, see S. Nystén-Haaral. *Lojalitetsprincipen både från domstolens och från rättsanvändarens perspektiv – kommentar med betoning på proaktiv avtalsverksamhet*. – B. Flodgren *et al.* (eds). *Avtalslagen 90 år. Aktuell nordisk rättspraxis*. Stockholm: Norstedts Juridik 2005, pp. 437–445. For Iceland, see P. Sigurðsson. *Samninga- og kröfuréttur*. – B. Thorarensen *et al.* (eds). *Um lög og rétt*. 2nd ed. Reykjavík: Bókauktgáfan Codex 2009, pp. 219–279, 242–246 ('applied with caution and moderation', *af varkárni og höfsemd*, p. 244).

<sup>30</sup> Finland: *köplag 27.3.1987/355* (Sale of Goods Act), Section 19, and *konsumentskyddslag 20.1.1978/38* (Consumer Protection Act), Section 4:14; Iceland: *lög um lausaffjárkaup 2000 nr. 50 16. mai* (Sale of Goods Act), Section 19, and *lög um neytendakaup 2003 nr. 48 20. mars* (Consumer Sales Act), Section 17 (cf. Section 16(1)(b)); Norway: *lov 13. mai 1987 nr. 27 om kjøp* (Sale of Goods Act), Section 19; Sweden: *köplag (1990:931)* (Sale of Goods Act), Section 19.

<sup>31</sup> Denmark: *lov om køb LBK nr 237 af 28/03/2003* (Sale of Goods Act, originally from 1906), Section 76(3); Norway: *lov 21. juni 2002 nr. 34 om forbrukerkjøp* (Consumer Sales Act), Section 16(1)(b) (cf. Section 17); Sweden: *konsumentköplag 1990:352* (Consumer Sales Act), Section 16(3)(2) (cf. Section 17).

<sup>32</sup> J. Munukka (see Note 6), pp. 364–369.

<sup>33</sup> Rt. 2012, 1926.

The rule on lack of conformity resulting from breach of information duties is included in legislation concerning several types of specific contracts. It is of particular importance in contracts for the sale of real property, even outside the scope of legislation.<sup>\*34</sup> Lack of conformity resulting from a breach of information duties may occur even for contracts concerning non-physical assets, for example in a sale of all the shares of a limited company.<sup>\*35</sup> Whether or not this rule can be regarded as a general principle in contract law is debatable however.

The rule on lack of conformity due to breach of information duties is commonly used as an example of the principle of *lojalitet* and it has been pointed out that the rule is closely related to the rule on voidability due to mistake.<sup>\*36</sup> In particular in Norway, voidability due to *error in motivis* has been based on Section 33 of the Formation of Contracts Act (the ‘minor general clause’). A party has no duty to furnish the other party with all possible information regarding the contract. Here we are talking about information of importance to the other party and the test is whether the other party could reasonably have expected to receive the information.

In my opinion, this rule on lack of conformity due to breach of information duties is the most remarkable example of application of a general principle of good faith and fair dealing in Nordic contract law. The rule has turned out to be very important in practice, unlike the general clauses of the Formation of Contracts Acts.<sup>\*37</sup> In legal doctrine, the opposite is true to a certain degree: the general clauses have been extensively discussed, while the more fundamental aspects of the rules on lack of conformity have attracted less interest.

## 7. Conclusions

This paper has concentrated on some aspects of the principle of *lojalitet* (fairness, loyalty), which has been discussed in legal doctrine in the Nordic countries for about 100 years. A survey of a limited topic like this is of course insufficient as a basis for general conclusions concerning the application of general principles in private law in the Nordic countries. Some observations seem justified however.

The principle of *lojalitet*, in the sense that a contract party must take into consideration the other party’s interests, belongs to the realm of principles or values often referred to as ‘good faith’, ‘good faith and honesty’ or ‘good faith and fair dealing’. The principle has been advocated in doctrine as applicable to the formation of contract phase, the interpretation phase, and the performance and remedies phases. A duty of *lojalitet* has been regarded as an important aspect of the general clause in Section 36 of the Formation of Contract Acts in the Nordic countries. In this author’s opinion, the principle of *lojalitet* has played a less significant role in practice than one might expect from its place in legal doctrine, with one important exception: the principle of *lojalitet* is a central element in the assessment of conformity of performance with the contract.

<sup>34</sup> For Denmark: B. Gomard (see Note 16), pp. 191–193 (see also N.J. Clausen *et al. Købsretten*. 5th ed. Copenhagen: Karnov 2012, pp. 165–169); for Sweden: NJA 2007, 86; J. Hellner *et al. Speciell avtalsrätt II. Kontraktetsrätt. 1 häftet. Särskilda avtal*. 5th ed. Stockholm: Norstedts Juridik 2010, pp. 61–63.

<sup>35</sup> Rt. 2002, 1110; M.B. Christoffersen. *Kjøp og salg av virksomhet: risiko og ansvar for mangler*. Oslo: Gyldendal 2008, pp. 491–558; C. Ramberg. *Kontraktbrott vid köp av aktie. Särskilt om fel*. Stockholm: Juristförlaget 1992, pp. 103–129.

<sup>36</sup> V. Hagstrøm (see Note 16), pp. 135–149; J. Munukka (see Note 6), p. 366.

<sup>37</sup> See, for example, for Norwegian law, Rt. 1998, 1510; Rt. 2001, 369; Rt. 2002, 696; Rt. 2002, 1110.