

## Swedish Case Note on the Penalty Clause Decisions by the UK Supreme Court

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**Abstract:** The UK Supreme Court has recently decided two interesting cases on harsh remedies for breach of contract (the penalty doctrine). I will give approximate descriptions of the cases and compare the outcome in the UK Supreme Court with the likely outcomes and reasonings as if the cases were tried by the Swedish Supreme Court. My conclusion is that the outcomes would be similar. The reasonings would differ slightly, but not much. The applicable types of sources of law, however, differ considerably.

### 1. Introduction

The UK Supreme Court has recently decided two interesting cases on harsh remedies for breach of contract (the penalty doctrine). I will give approximate descriptions of the cases and compare the outcome in the UK Supreme Court with the likely outcomes and reasonings as if the cases were tried by the Swedish Supreme Court. My conclusion is that the outcomes would be similar. The reasonings would differ slightly, but not much. The applicable types of sources of law, however, differ considerably.

In the following, I will make references to what the UK Supreme Court has stated, without analysing which judge said what or to what extent the judges' statements constitute binding authority in England.

### 2. The M&A-Case: *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67

#### 2.1. Description of the M&A Case

The M&A contract concerned the sale of a marketing company ('the target company'). The sellers sold approximately 50 per cent of their shares in the target company to the buyer. The value of the target company was to a large extent dependent on goodwill, i.e. the value of future transactions with customers. The personal relations between the sellers and the customers were important and the target company's value was based on the sellers' continued engagement and loyalty,

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which was explicitly explained in the contract. The target company's value with goodwill was 300 MUSD and without goodwill 70 MUSD.

The buyer was to pay the price in instalments. First 65 MUSD in connection with the signing and closing. Thereafter two additional instalments which were dependent on the target company's future performance. The buyer had an option to buy the sellers' remaining shares in the target company at a price determined by a specified calculation. The contract, which was negotiated during six months, stipulated that the sellers were obliged to engage in the target company and to not compete. It was clear in the contract that the purpose of these obligations was to secure the target company's goodwill value.

The remedies for breach against the sellers' obligations to engage in the target company and to not compete were:

- (1) The buyer did not have to pay the additional instalments, and
- (2) the buyer was entitled to acquire the breaching party's remaining shares at a reduced price, not including the goodwill value.

One of the sellers (Makdessi) breached his obligations to engage in the target company and to not compete by encouraging the target company's customers and employees to move to competitors and by himself getting engaged in competitors, inter alia as a CEO of a competing company. The buyer invoked both remedies for the breach, which entailed that Makdessi would lose payments of approximately 90 MUSD and would in total receive 40 MUSD for all his shares, instead of 150 MUSD.

## ***2.2. The UK Supreme Court's Reasoning***

The crucial question was whether the contractually agreed remedies constituted a penalty, which would entail that the remedies were unenforceable. If the contractual remedies were unenforceable, Makdessi would according to default law be liable to compensate the buyer by damages amounting to the buyer's real damage.

After very extensive reasonings, all seven judges in the Supreme Court upheld the contractually agreed remedies and concluded that Makdessi was not entitled to any additional payment and was obliged to sell all his remaining shares to the buyer for the low price. The judges considered that the remedies did not constitute a penalty and that they were not oppressive, exorbitant or unconscionable, since they in essence only entailed a price reduction for the target company's potentially lower value. The effect of the contracted remedies was that the sellers earned the consideration for their shares not only by transferring them to the buyer, but also by observing their obligations to engage and not to compete.

## 2.3. A Swedish Comparison

### 2.3.1. Generally About the Swedish Regulation of Penalizing Remedies

Swedish law upholds the principle of freedom of contract and *pacta sunt servanda*. Consequently, parties are free to agree on the remedies in case of breach of contract.

The Swedish default law on remedies – i.e. the law when the parties have not agreed specifically on remedies for breach of contract – is favourable for the non-breaching party. That party is entitled to his expectation interest (*Positive Vertragsinteresse*) which includes the right to damages so that the non-breaching party is put in the same financial position as if the contractual obligations had been performed. The Swedish default law does not entitle the non-breaching party to become better off because of the breach.

Swedish legislation does not have any special provision on liquidated damages or penalty clauses. Instead the very general provision in the Contract Act Section 36 provides that a contract can be adjusted or set aside if it contains an unconscionable term as determined at the time of conclusion of the contract or later (*ex ante* and *ex post*). The preparatory works (which have standing as a rather strong soft source of law in Sweden) give clauses on liquidated damages that aims at penalizing a breaching party by excessive compensation as an example of unconscionable contract terms.<sup>1</sup>

The Swedish legislator refrained from stating casuistic prerequisites to determine the unconscionableness in the Swedish Contract Act Section 36. The reason for this is echoed by the UK Supreme Court: ‘it is impossible to lay down abstract rules about what may or may not be “extravagant or unconscionable”, because it depends on the particular facts and circumstances established in the individual case.’

The Swedish assessment whether a contract is unconscionable mainly corresponds to what is expressed by the UK Supreme Court:

*‘The question whether it is enforceable should depend on whether the means by which the contracting party’s conduct is to be influenced are “unconscionable” or (which will usually amount to the same thing) “extravagant” by reference to some norm.’ ‘Many, though not all of these are better addressed (i) by a realistic appraisal of the substance of contractual provisions operating upon breach, and (ii) by taking a more principled approach to the interests that may properly be protected by the terms of the parties’ agreement.’ ‘the focus should be not on any particular possible breach or its timing or consequences, but on the general interest being protected, and the question whether the protection which the parties agreed*

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1 Proposition 1975/76, p 118 *et seq.*

*can be condemned as unconscionable or manifestly excessive.’ ‘The rule against penalties is a rule of contract law based on public policy ... the public policy is that the courts will not enforce a stipulation for punishment for breach of contract.’ ‘When the court makes a value judgment on whether a provision is exorbitant or unconscionable, it has regard to the legitimate interests, commercial or otherwise, which the innocent party has sought to protect.’ ‘the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable.’<sup>2</sup>*

The provision in the Swedish Contract Act Section 36 mainly focuses on consumer contracts and is very rarely applied in Business-to-Business (B2B) contracts. Also in English law the bargaining position of the parties is relevant. In harmony with the general impression of English law, the Swedish Supreme Court is less reluctant to declare a Business-to-Consumer (B2C) contract unconscionable than a B2B contract. The Swedish Contract Act Section 36 on unconscionable contracts is applicable to any contract clause, irrespective of whether it provides for payment of a sum of money or an obligation to transfer assets. This corresponds to English law.<sup>3</sup>

Contractual remedy provisions with a purpose to penalize a party in breach are not accepted in Swedish law. A contract term drafted with a purpose to provide a non-breaching party with compensation exorbitantly exceeding the estimated future damage, will be adjusted according to the Swedish Contract Act Section 36, also in B2B-contract.

There is no case-law from the Swedish Supreme Court regarding contracted unconscionable remedies.<sup>4</sup> The Swedish Supreme Court has stated obiter dictum in the case NJA 2012 s. 597 that when a compensation for damages excessively

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2 See along the same lines the Scottish Law Commission in its Report on Penalty Clauses (Scottish Law Commission No. 171) which recommended as the criterion for such control whether the penalty was ‘manifestly excessive’ in all the circumstances when the contract was entered into.

3 ‘As Lord Hoffmann put it in addressing a similar issue “the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance”’: *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15.’

4 There is, however, case law on the opposite question whether a seller’s exemption of liability for damage is unconscionable.

compensates the non-breaching party there could be reason to adapt the compensation in exceptional cases.<sup>5</sup> The courts in Denmark, having the same Contract Act provision on unconscionable terms as Sweden, have adjusted clauses on liquidated damages whereby the non-breaching party has been excessively compensated.<sup>6</sup>

We see that both Swedish and English law are in harmony with the provisions in UNIDROIT Principles Articles 7.4.13 and 7.1.6; Principles of European Contract Law 9:509 and 8:109; and the Draft Common Frame of Reference DCFR III.-3:712.<sup>7</sup> There are differences in the wordings between these instruments under Swedish law and English law. There may also be some differences in the underlying rationale. The material outcome is however the same; they all end up in a determination of what is ‘unconscionable’ or ‘reasonable’.

Swedish law differs from English law in one important respect. The legal effect of a penalty clause in English law is that the clause is unenforceable and that the breaching party shall compensate the non-breaching party for damages corresponding to the non-breaching party’s actual loss. According to the Swedish Contract Act Section 36 an unconscionable term has the effect that the term can be set aside as a whole, that the contract as a whole can be set aside or that the term or other terms in the contract can be adjusted in order to create a fair equilibrium between the parties. As the remedies in the UK Supreme Court case were not unconscionable, I will not analyse the consequences of unconscionableness in this case note.

### 2.3.2. *The Purpose of Automatic Remedies*

It is common in Swedish contracts to find terms providing ‘automatic’ remedies in case of breach. It is particularly common to find provisions on ‘liquidated damages’ (Sw. ‘vitesklausuler’). The main purpose of such provisions is normally to *limit* the extensive liability for breach that follow from the default law. Also when the parties wish to create a strong incentive on a party not to breach the contract, clauses on liquidated damages often limit the liability as compared to the default law. This article, however, will discuss the legal effects of contracted remedies making the non-breaching party *better off* as compared to the non-breaching party’s situation when there had been no breach.

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5 The legal situation in Swedish law is, despite the lack of case law, clear as Sweden treats preparatory works as an important source of law. The preparatory works to the Swedish Contract Act Section 36 (Proposition 1975/76 p 118 *et seq.*) give penalizing liquidated damages clauses as an example of contracts that may be adjusted. Cases from the Swedish Supreme Court are cited ‘NJA’ which refers to the publication and the year of the decision and the page in the publication.

6 UfR 1974.583 V, UfR 1977.306 H; UfR 1979.931 Ö; UfR 1983. 157 H; UfR 1984.702 Ö; UfR 1994.898 H; UfR 1999.66 H; UfR 2004.2400 H; UfR 2007.1949 V; UfR 2009.2800 SH (see B. GOMARD & H.V.G. PEDERSEN & P.B. MADSEN, *Almindelig kontraktsret* (Copenhagen: Djøf Forlag 2012), p 204 *et seq.*).

7 See also the UNCITRAL Texts on Liquidated Damages and Penalty Clauses.

### 2.3.3. *Application of Swedish Law to the M&A Case*

The purpose of the remedies in the M&A contract was not to penalize the sellers, but to create an incentive on the sellers to preserve the target company's goodwill value and to make a pre-estimation of the price for the shares if the goodwill value was harmed or endangered due to a seller's competing activities and/or non-engagement. For these reasons the case would likely entail the same outcome according to Swedish law as in the UK Supreme Court case.

The Swedish Supreme Court would most likely be inclined to use the following reasoning by the UK Supreme Court:

*There is a perfectly respectable commercial case for saying that [the buyer] should not be required to pay the value of goodwill in circumstances where the Defaulting Shareholder's efforts and connections are no longer available to the [target company], and indeed are being deployed to the benefit of the [target company's] competitors, and where goodwill going forward would be attributable to the efforts and connections of others.*

Price reduction is a generally available remedy in Swedish sales law. The Swedish Sales Act applies also to the sale of shares and provides in sections 37 and 38 that the buyer is entitled to a price reduction if the seller commits a breach.<sup>8</sup> Price reduction is not the same type of remedy as damages and the distinction may appear confusing to English lawyers. It is frequently stipulated in Swedish M&A contracts that the seller's breach entitles the buyer to a price reduction (often capped). Even though Swedish law has a special price reduction remedy, the Swedish Supreme Court would reason in the same way as the UK Supreme Court did, and classify the remedy provision in this particular contract as a legitimate method to establish the price of the shares for a situation when the goodwill value was endangered.

I am concerned about some facts that are not discussed in the UK Supreme Court's reasonings, namely how much the target company's goodwill value was lowered due to the seller's breach. Did all customers disappear due to the breach? Was only a small number of small customers leaving the target company? Or was most of the goodwill value actually harmed? If the seller's breach was very limited and quickly corrected, would the remedies still be enforced according to English law? The Swedish Supreme Court would probably be interested in the actual effect of the breach and take this matter into account in the determination of whether the remedy is unconscionable. This factor would not be exclusively decisive but could influence the overall assessment of whether the remedy is unconscionable. There may be a difference between English and Swedish law in this respect. English law

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8 See also CISG Art. 50. CISG is, however, not applicable to M&A-transactions.

appears to solely focus on how the contracted clause appeared at the point in time when the contract was concluded. As stated by the UK Supreme Court:

*It is a question of construction of the parties' contract judged by reference to the circumstances at the time of contracting.*

However, it seems as if also the actual situation of the non-breaching party after the conclusion of the contract may be relevant in English law (see below on forfeiture clauses: '*looking at the position of the parties after the breach and the circumstances in which the contract was broken*').

One UK Supreme Court judge noted that it is '*difficult, if not impossible, to predict*' the financial consequences for the target company of the seller's breach. Such evidentiary problems are relevant in the Swedish assessment of whether the remedy is unconscionable and the threshold for adjusting the remedy becomes higher due to evidentiary problems foreseen at the time of conclusion of the contract.

Swedish law accepts oppressive contractual remedy provisions, including clauses on liquidated damages that aims at acting as a strong deterrence. The Swedish Supreme Court recently stated in a case concerning an interpretation of a non-compete provision in a shareholder agreement (my translation):<sup>9</sup>

*the purpose of the damage liability was to keep the partners together and to protect the business. The remedy is considered clearly burdensome for a partner wishing to leave the cooperation. Its objective is, however, to function as a deterrence and to protect [the business] and the shareholders from damage due to loss of income ... the liability for damage in the shareholders' agreement was drafted with the intention to be burdensome ... It is, however, a contract where each of the parties not only had an individual interest to avoid liability for damage, but also had an overall common interest that their partners did not leave the business to become competitors. Therefore, it is not possible to give decisive weight to the fact that the contract provision is burdensome for the party who has left the partnership.*

According to the same line of reasoning as the Swedish Supreme Court, we find a statement in the UK Supreme Court case that the buyer had a legitimate interest to '*protecting its investment from the risk of either of the sellers acting against the company's interests*'.

And to a similar point:

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9 Swedish Supreme Court case NJA 2015 s. 741.

*Clause 5.1 was not addressing the loss which [the buyer] might suffer from breach of the restrictive covenant, whether an isolated and minor breach or repeated and fundamental breaches. It was addressing the disloyalty of a seller who was prepared in any way to attack the [target company's] goodwill.*

#### 2.3.4. *A Remark Concerning Shareholder Agreements*

In shareholder agreements it is frequent to include terms giving rights to acquire a defaulting party's shares at a pre-determined reduced price. Sometimes the non-breaching party is entitled to acquire the shares at 75 per cent or 50 per cent of the market value (or an equivalent to the market value). Sometimes the non-breaching party has a right to acquire the breaching party's shares for no compensation at all.

Substantially reduced price in shareholder agreements for acquisition of shares entails two effects according to Swedish law:

- (1) The breach may not be deemed 'fundamental' (material) which is often a prerequisite for the non-breaching party's right to acquire the breaching party's shares. The more severe remedy, the less probability that the breach is deemed fundamental.<sup>10</sup> Examples of breaches that may not be deemed fundamental due to the harsh remedy are breach against confidentiality, minor breaches against non-competition obligations and breaches regarding incorrect board decisions that are quickly corrected.
- (2) Another effect of contractual provisions stipulating substantial price reductions, is that the price may be adjusted according to the Swedish Contract Act Section 36 if the price for the shares become exorbitantly low and thereby excessively compensates the non-breaching party. In other words; the contracted price for the shares can be adjusted when the low price entails penalizing (detering, oppressive) elements. As explained above, however, Swedish law accepts contractual provisions with strong deterring elements. Only exorbitant provisions in B2B-contracts are adjusted according to the Swedish Contract Act Section 36. This Swedish approach is in line with English law as the UK Supreme Court states: '*I accept that a forced transfer for no consideration or for a consideration which does not reflect the value of the asset transferred may constitute a penalty within the scope of the penalty doctrine.*'

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10 C. RAMBERG, *Aktieägaravtal i praktiken* (Stockholm: Norstedts juridik 2011), Ch. 9; C. RAMBERG & J. RAMBERG, *Allmän avtalsrätt* (Stockholm: Wolters Kluwer 2016), p 232. See also UNIDROIT Principles of International Commercial Contracts Art. 7.3.1(e).



### 2.3.5. *A Remark Concerning High Interest Rates When Debtors Are in Default*

The UK Supreme Court refers to cases concerning a common provision in loan agreements for interest to be payable at a higher rate when the borrower is in default.<sup>11</sup> In the most recent of these cases the provision was deemed valid because its predominant purpose was not to deter default but to reflect the greater credit risk associated with a borrower in default. According to English law, a provision for the payment of money upon breach is not categorized as a penalty simply because it was not a genuine pre-estimate of damages.

Swedish law is similar to English law with respect to high interest rates for defaulting debtors. The creditor is allowed to charge high interest rates when the debtor is in default in order to cover the increased risk.<sup>12</sup> The interest rate could be adjusted if it is exorbitantly high, but there is no case law from the Swedish Supreme Court where adjustment of high interest rates has been made.

### 2.3.6. *A Remark Concerning Forfeiture and Withheld Performance*

The UK Supreme Court explains that the relief against forfeiture clauses is the origin of the rule on penalty clauses and points to the similarities:

*There is no reason in principle why a contractual provision, which involves forfeiture of sums otherwise due, should not be subjected to the rule against penalties, if the forfeiture is wholly disproportionate either to the loss suffered by the innocent party or to another justifiable commercial interest which that party has sought to protect by the clause. If the forfeiture is not so exorbitant and therefore is enforceable under the rule against penalties, the court can then consider whether under English law it should grant equitable relief from forfeiture, looking at the position of the parties after the breach and the circumstances in which the contract was broken.*

The UK Supreme Court referred to a number of cases on forfeiture clauses.<sup>13</sup> The outcome would likely be the same according to Swedish law. The Swedish Contract Act Section 37 expressly stipulates that a security agreement provision is invalid if it states that the security is forfeited if the debtor is in default. For other types of forfeiture clauses, the general provision in the Swedish Contract Act Section 36 regarding unconscionable contracts applies.

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11 *Lordsvale Finance plc v. Bank of Zambia* [1996] QB 752; *Lady Holles v. Wyse* (1693) 2 Vern 289; *Strode v. Parker* (1694) 2 Vern 316; *Wallingford v. Mutual Society* (1880) 5 App Cas 685, 702 (Lord Hatherley).

12 C. RAMBERG & J. RAMBERG, *Allmän avtalsrätt*, p 128.

13 *Jobson v. Johnson* [1989] 1 WLR 1026; *Public Works Comr v. Hills* [1906] AC 368, 375-376; *Watson v. Noble* (1885) 13 R 347; *BICC plc v. Burndy Corpn* [1985] Ch. 232.

The UK Supreme Court referred to a case regarding the right to withhold performance due to the other party's breach of contract.<sup>14</sup> In the M&A case the UK Supreme Court stated:

*I see no principled reason why the law on penalties should be confined to clauses that require the contract-breaker to pay money in the event of breach and not extend to clauses that in the same circumstance allow the innocent party to withhold moneys which are otherwise due.*

In Sweden there is a general right for a party to withhold performance when the other party has breached its obligation (in Swedish 'detentionsrätt').<sup>15</sup> The withheld performance must however be proportional to the breach. This general principle in Swedish contract law is in harmony with CISG Article 71, Principles of European Contract Law 9:201, UNIDROIT Principles of International Commercial Contracts Article 7.1.3 and the Draft Common Frame of Reference III.-3:401. In Swedish law the parties are free to contract about rights to withhold performance. When such contracted withholding provisions are unconscionable, they can be adjusted or set aside according to the Swedish Contract Act Section 36. Swedish law is in harmony with the UK Supreme Court's statement in the quotation above.

### **3. The Parking Agreement: *ParkingEye Ltd v. Beavis* [2015] UKSC 67**

#### ***3.1. Description of the Parking Agreement and the Outcome in the UK Supreme Court***

ParkingEye managed a parking lot. The car driver Beavis concluded a contract with ParkingEye by entering the parking premises. According to the contract terms Beavis was allowed to park for free during two hours. If this time was exceeded, Beavis had to pay a fee of GBP 85. ParkingEye had a contract with the owners of the parking lot (a retail outlet). ParkingEye had undertaken to ensure that the cars were parked for only two hours, as the owners wanted to ensure that cars were not parked too long in order to attract customers to its shopping mall. ParkingEye's only remuneration from the owners consisted of the fees from car drivers staying longer than two hours.<sup>16</sup>

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14 *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689.

15 Swedish Supreme Court case NJA 2008 s. 643.

16 ParkingEye could have had economic reasons for formulating the liability to pay GBP 85 as a liability for breach, rather than as a consideration payable for parking for longer than two hours. As a consideration, it would have attracted VAT and ParkingEye could furthermore have incurred liability for rates as a person in beneficial occupation of the car park.

Hypothetically, ParkingEye did not lose any money due to Beavis' breach of contract, as it would not receive any payment from another car being parked there if Beavis had left the parking lot earlier. The question was whether the fee ParkingEye charged Beavis corresponded to a penalty clause and therefore was unenforceable.

Six of the seven judges in the UK Supreme Court upheld the provision for the fee and Beavis had to pay GBP 85 to ParkingEye. The UK Supreme Court took into account the owner's interest in efficient use of the parking spaces by deterring customers from staying more than two hours and ParkingEye's interest in receiving a profit from its services.

## **3.2. A Swedish Comparison**

### *3.2.1. Generally About the Swedish Regulation of Parking Fees*

Swedish law has a special act concerning parking fees, *Lag (984:318) om kontrollavgift vid olovlig parkering*. According to this act, land owners and their sub-contractors are entitled to charge a 'control fee' from owners of illegally parked cars. The control fee may not be higher than SEK 1,000 (corresponding to roughly GBP 85).<sup>17</sup> Due to the Swedish act ParkingEye would be allowed to charge a fee of GBP 85. The case would therefore be easily solved according to Swedish law, without resorting to contractual interpretation or assessing the unconscionableness.

In the following, I will not analyse this particular Swedish legislation on parking fees, but instead take a general contract law perspective.

### *3.2.2. Application of Swedish Law to the Parking Agreement Case*

The first question in Swedish law is whether Beavis committed any breach of contract by parking his car for longer than two hours. In Sweden, this would probably not amount to a breach. The terms stipulated that parking for more than two hours costs GBP 85. In other words, the fee of GBP 85 was a *term of the contract* and not a damage for breach. Therefore, the question of ParkingEye's right to damage exceeding its loss, would not come up.

The Swedish approach seem to be in line with the UK Supreme Court's reasoning about primary and secondary obligations:

*But in most cases parties know and reflect in their contracts a real distinction, legal and psychological, between what, on the one hand, a party can permissibly do and what, on the other hand, constitutes a breach and may attract a liability to damages for – or even to an injunction to restrain – the breach.*

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<sup>17</sup> The act authorizes cities to introduce local regulation on maximum control fees. I will not describe the act in detail here.

To my mind the distinction between primary and secondary obligations is not useful – at least not from a Swedish perspective.<sup>18</sup> It may be that the distinction between primary and secondary obligations is more relevant in English law, since the Swedish Contract Act Section 36 concerns all types of unconscionable contract terms, and not only clauses concerning contract remedies. The English ‘problem’ in this respect is mentioned by the UK Supreme Court:

*This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law.*

Swedish law is in harmony with the statement by the UK Supreme Court:

*The qualification and safeguard is that the agreed sum must not have been extravagant, unconscionable or incommensurate with any possible interest in the maintenance of the system, this being for the party in breach to show. ... It is most easily explained on the basis that the dichotomy between the compensatory and the penal is not exclusive. There may be interests beyond the compensatory which justify the imposition on a party in breach of an additional financial burden. ... What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm’s length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor.*

#### **4. Conclusion**

The two cases from the UK Supreme Court illustrate the trend that Swedish law and English law are gradually becoming more similar. The Swedish Contract Act Section 36 regarding unconscionable contracts, in practice by and large corresponds to the reasonings in the UK Supreme Court on how to apply the English penalty doctrine.

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18 The Swedish Supreme Court judge Stefan Lindskog, however, seems to make a distinction between main obligations and ancillary obligations, see Stefan LINDSKOG, ‘Garantier och dokumentvillkor – kommentarer med anledning av en avhandling’, *Juridisk Tidskrift (JT)* 2014-2015, p 829 at 867; and S. LINDSKOG, *Betalning* (Stockholm: Wolters Kluwer 2015), Ch. 11.5.1.

Lawyers outside Sweden often criticize the Swedish Contract Act Section 36 for being too general and for not providing sufficient predictability. The reasonings in the UK Supreme Court cases clearly demonstrate that English law has the same level of unpredictability regarding how to determine whether a remedy is exorbitant, extravagant, excessive, unconscionable or disproportionate. A quotation from the UK Supreme Court summarizes the difficulties in attaining predictability in both England and Sweden:

*... it is impossible to lay down abstract rules about what may or may not be 'extravagant or unconscionable', because it depends on the particular facts and circumstances established in the individual case.*

