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Interference with contractual relations

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1 Introduction

1.1 Background

A company or a businessman who has not heard of the phenomenon "interference with contractual relations" might end up in a situation having to pay billions in damages. Certainly, this was the case in a dispute between two oil company giants, Pennzoil Company and Texaco Inc., in which an agreement in principle between Pennzoil Company and Getty Oil Company was, in a lawsuit, established to amount to a contractual relation. Texaco Inc. had negotiated with Pennzoil, offered a better deal than Getty Oil and eventually, after the agreement in principle already mentioned was closed, signed a "final" agreement with Pennzoil. In court Texaco Inc. was held to have interfered with the Pennzoil-Getty Oil contractual relation and was ordered to pay \$10.53 billion in damages.¹ Certainly, a better understanding and knowledge about interference with contractual understanding would have been valuable to Texaco!

The phenomenon of interference with contractual relations, however, stems from an English case, namely, *Lumley v Gye* (see below), and consists of a tri-partite situation where C persuades B to break his contract with A. The persuasion is what constitutes the interference. It has been held that it is wrong to interfere and to be an accomplice in a breach of contract and, therefore, the interfering party should be liable to pay damages in such cases, provided that A has suffered pure economic loss. However, this approach or opinion regarding interference with contractual relations differs in different legal systems. It is, therefore, important to make a comparative study in order to get a deeper understanding about the interference tort.

1.2 Presentation of the problem

What then is the core of the problem when taking a stand for or against liability for interference with contractual relations? The answer to that question is that one can have different opinions of the directions in which claims for compensation should be possible when a contract has been breached. Some legal systems argue that liability for pure economic loss can only be held on contractual basis, while other systems argue that such liability can also be held on a non-contractual basis. The first solution, thus, implies that only B can be held to pay damages. The second solution, however, implies that C can also be held liable to pay damages. The basis for this second solution is the fact that if B has no opportunity to pay damages then A could turn to C as well. Furthermore, there could also be a wish to prevent C's behaviour, which is considered disloyal and undesirable. In other words, since C is the original initiator of breaching the contract it is only morally right that A should be able to claim compensation from C. In addition to these arguments, liability for interference with contractual relations also depends on how much weight is put on the contract as a legal instrument. A legal system which puts a lot of emphasis on the contract is more willing to accept liability for interference than a legal system which does not.

1.3 Purpose

¹*Pennzoil Company v Texaco, Inc.*, 107 S. Ct. 1519, 1522-1524 (1987).

The purpose of this essay is, through a comparative analysis of the legal state in a number of different legal systems, namely the Common law, French law, German law, and the laws of the Nordic countries, to see how these systems differ in their approaches towards interference with contractual relations. Do the different systems find the phenomenon of interference with contractual relations a problem and, if so, in what way and which methods or techniques are used to handle the matter? The purpose is, therefore, also to examine whether different legal systems can, through different approaches, find different solutions to a problem such as interference with contractual relations, and if these solutions have the same effect regarding legal protection. Furthermore, the purpose is to study why and how come the different legal systems have chosen to deal with the matter in different ways. Is there an underlying interest which is approached with a different degree of protectionistic enthusiasm? If so, what are the consequences?

1.4 Delimitations

A number of delimitations are necessary. Firstly, this essay only speaks of pure economic loss. This loss is, thus, separated from damage to person or property. Secondly, the essay is about economic loss in non-contractual relations. However, this fact must be separated from the fact that such loss can be compensated in contractual relations. Thirdly, I will only be dealing with liability for *intentional* interference with contractual relations. Liability for negligent behaviour is, thus, not treated. Fourthly, many interference cases can be referred to labour law. However, this is a fact I will not focus on in this work. Finally, I have chosen to study three major legal systems, Common law, German law and French law. In addition I have also chosen to study the Nordic legal systems. The reason for studying these particular systems is that, since they approach the phenomenon of interference with contractual relations in different ways and also use different methods and techniques when doing so, a study of these systems contributes in many ways to a deeper understanding of interference with contractual relations.

1.5 Method and Disposition

A comparative method will be used in order to create and facilitate a deeper understanding of the problem and the different attitudes towards it. Certainly, a comparative method can be useful, since one can draw conclusions from different experiences in different legal systems. Moreover, a comparative awareness can serve as a harmonizing tool when forming a future direction of law in the area of liability for interference with contractual relations.

In my comparative excursion I will have English Common law as a starting-point, since this legal system, through the case *Lumley v Gye*, initiated the doctrine of interference with contractual relations. In my Common law study I will scan through a variety of legal cases in order to establish the foundation, background and purpose of the tort, but I will also study English doctrine which can be useful in order to find some underlying principles. Following this English Common law study, I will move on to study the development of the interference tort in American law. Here, the interference development has resulted in a second interference tort, the so-called interference with *prospective* contractual relations tort. The reason for examining this development is to see whether one can detect or discern any mutual features or principles which emphasize and justify the existence of the first interference tort.

I will then continue my study by examining two other legal systems, that is French and German law, in order to establish how and to what extent these systems have approached interference with contractual relations. This study will be based on material found in comparative doctrine and the direction of the study is to focus and shed light on similarities and differences of approach regarding interference questions.

Then, when examining the Nordic attitudes I will divide the examination in two parts. In the first part I will examine the Norwegian and Danish legal systems which have a mutual approach and in the second part I will study the Finnish and Swedish legal systems which also share a mutual foundation. This divided study makes it possible to confront and compare different solutions. I will also, in connection to this Nordic study, take a closer look at the Swedish legal system, since it displays a certain unique feature. This close study will be based on Swedish preparatory work since these are significant in Swedish law.

Based on my results from my comparative study of liability for interference with contractual relations I will in a separate chapter focus on different contractual issues and viewpoints. This study will also be carried out using a comparative method in order to search for a connection between a contractual view and liability for interference with contractual relations. Following this chapter on contractual issues there is a chapter which aims to show which interests are linked to the interference situation. I will in this study be focusing on Swedish law in order to find out whether different interests are linked to different approaches regarding interference with contractual relations. Swedish law is used in this regard due to the fact that it displays a unique and negative approach to interference with contractual relations which makes it easier to sort out the different possible interests. I will also in this context study which effects these observations have on the existing attitudes to the contract as a legal instrument.

The essay is concluded with a study of arguments against liability for interference with contractual relations. This study also has the purpose of crystalising arguments in favour of such liability. As a natural consequence, the arguments against liability have been searched for and found in Swedish doctrine since Swedish law indicates such a negative attitude towards interference with contractual relations.

2 Common Law

2.1 Economic Torts

Interference with contractual relations is a tort which falls into a group of torts called Economic Torts. The Economic Torts are supposed to protect the economic relations of the plaintiff with third parties so that the plaintiff can carry out his contract without being obstructed or injured in his contractual dealings. Consequently, the Economic Torts stipulate what kind of economic behaviour is desirable or rather permissible in the area between too little competition and too much competition. Since the Common law doesn't protect negligently caused economic loss, the economic torts are intentional torts. This means that if a person intentionally invades a protected interest of another without justification or excuse, he is legally and morally at fault. The Economic Torts can be divided into two groups of torts. The first group is "Interference with contractual relations", which includes torts like "inducement of breach of contract", "conspiracy" and "intimidation". The second group of Economic Torts, "Injurious falsehood and cognate torts", include torts like "Injurious falsehood" and "infringement of rights in immaterial property". This essay, however, will merely concentrate on the group "Interference with contractual relations" which affect the plaintiff's economic relations in a very specific way. Thus, the defendant's wrongful act is aimed at influencing the third party directly or indirectly, through means of persuasion, inducement or intimidation, to act in a way that is injurious to the plaintiff's economic relations with the third party.

2.2 Lumley vs Gye

The tort of "interference with contractual relations" has its roots in the tort of "inducing breach of contract". Even though English common law from an early stage protected master-servant relations from interference, the modern origin of "inducing breach of contract" was established in the leading case *Lumley v. Gye*². In this famous case, the manager of an opera company was held liable for inducing an opera singer, by offering her higher wages, to break her contract to sing exclusively with the plaintiff's opera company instead. Several new principles were established and this makes the case particularly interesting. Firstly, it was established that any kind of contract, even apart from the master-servant relations, is protected from interference. Secondly, no so-called improper means, like for instance coercion or intimidation, were needed to constitute interference. Actually, the malice consisted of the defendant's intentional inducement to the singer to break her contract. As a consequence, contractual relations are protected even from competitive interference. Thirdly, since the defendant in the Lumley case induced the singer to break an exclusive dealing provision, it can be noted that at least certain contractual relations are protected from interference even if they actually restrain trade.

²(1853), 2 E & B 216, 118 ER 749

2.3 Different forms of interference

Since Lumley, the tort "interference with contractual relations" has expanded into many forms such as direct persuasion, direct inducement, other direct intervention and finally indirect intervention.³ These different forms display and exemplify a variety of interferences actionable.

2.3.1 Direct persuasion

To begin with, the Lumley case is a pure example of direct persuasion which is the original and simplest form of interference, where C persuades B to break his contract with A. It makes no difference whether it is C or B who has initiated the negotiations and it is irrelevant whether B is eager to break the contract or not. Furthermore, the actual persuasion may involve unlawful means such as threats but it can also amount to a quiet and peaceful dialogue. However, it is not sufficient that a party simply enters a relation with another party who has recently breached a contract. The fact that a party announces attractive trade terms to the public with a feeling that another party will be motivated to breach a contract is not sufficient to constitute persuasion. It must be shown that the defendant has actively persuaded the third party to break off his contractual relation with the plaintiff. In addition, a distinction is made between persuading and advising a party to breach a contract. In an attempt to illustrate this distinction it has been argued that to persuade someone to breach a contractual relation means to create a reason for breaking it while advice to breach a contractual relation is merely to call attention to already existing reasons. Moreover, it has been argued that advice which has a persuasive effect cannot amount to anything else than persuasion.⁴ Others, however, have argued that, since the gist of the tort is the intention to injure, the distinction between persuasion and advice is unnecessary.

2.3.2 Direct inducement

The second form of interference, direct inducement, is rather similar to the first form. C, who is aware of the contractual relation between A and B, has dealings with B which he knows to be incompatible with the A-B contractual relation, causing B to breach the same relation. However, any persuasion is not necessary since the contract-breaker may be a willing party to the breach. In *British Motor Trade Association v. Salvatori*⁵ the plaintiff, in order to prevent the immediate resale of new cars, then in short supply, required purchasers to agree not to resell within twelve months. However, the defendant interfered by purchasing cars from the primary purchaser despite the covenant provisions which were known to him. The defendant was held to have tortiously interfered with the car-owner's contract with the Association.

2.3.3 Other direct intervention

When direct persuasion or inducement cannot be established, other circumstances can amount to an interference when a party causes a breach of contract between others. These miscellaneous circumstances are referred to the form called "other direct intervention". The conduct of direct disablement is related to this form and constitutes an interference as C disables B against B's will

³Gerven, Tort Law, p 256

⁴Heydon, Economic Torts, p 26

⁵[1949] Ch 556, ChD. see also Gerven, Tort law, p 256

to perform according to his contract with A. Undoubtedly, the means used are often unlawful but this is not a necessary condition for liability. A case which attracted much attention and can serve as an example is the case *G.W.K. Ltd v. Dunlop Rubber Co. Ltd*⁶. In this case the plaintiff and a car manufacturer had an agreement that the car manufacturer should exhibit tyres manufactured by the plaintiff on his cars. However, another car manufacturer who was a competitor of the plaintiff interfered with this agreement by substituting the competitor's tyres with his own and thereby disabling the first car manufacturer to perform according to his contract. Accordingly, the actual contract-breaker did not assist in breaching the contract. As a matter of fact, in contrast to direct inducement, the contract-breaker is not willing to breach the contract. Furthermore, he might not even be aware of the fact that he is in breach of the contract. Other direct intervention does, consequently, not require the participation of the actual contract-breaker.

2.3.4 Indirect intervention

Finally, so called indirect intervention can be established when C, who has knowledge of a contractual relation between A and B, influences D to act in a way which render B's performance of his contractual obligations to A impossible. For example, a company could intentionally hire away employees from another company, making it impossible for this latter company to perform according to its contractual obligations with other parties, of which existence the first company was very well aware. Indirect intervention is only unlawful if unlawful means are used. Thereby, it differs from the other forms in a very significant and important way.

2.4 Contracts protected

The different variants of interference illustrate and exemplify what kind of different business behaviours Common law disapproves of concerning contractual relations. In that respect, "interference with contractual relations" can be seen as a catalogue of improper business methods which Common law strives and intends to steer away from. The method used is to prohibit certain business objectives which can be considered as improper. But which contracts are then protected towards improper business methods and improper business objectives? Are all contractual relations protected or are some contracts privileged?

It is clear that case-law has been very willing and eager to protect contractual relations. However, one limitation is thoroughly established in the English Common law system, namely that only "promised advantages and not mere expectancies" are protected⁷ (the American attitude, however, is different; see below). In addition, contracts which constitute a nullity, that is illegal contracts, are not protected. For example, contractual relations which constitute an unreasonable restraint of trade are null and void and therefore not protected by tort. Besides these two exceptions, virtually all contracts are protected from interference with contractual relations by the Common law, whether the contract is express or implied, enforceable or unenforceable, term or terminable at will. Undoubtedly, this very strong protection of the contract clearly shows that

⁶(1926) 42 TLR 375

⁷Armands, Otillbörligt ingripande i avtalsförhållande, p 15

the interest protected is not merely the contract interest in performances between two parties but rather a much wider interest in contract stability.

2.5 Prerequisites of "interference with contractual relations"

The prerequisites of interference with contractual relations are: an *existing contractual relation* between the plaintiff and some third person, *knowledge* by the defendant of this existing contractual relation, *intentional acts* on the part of the defendant intended to disturb the contractual relation, actual *disturbance of the contractual relation* and finally *damages* to the plaintiff *caused by the acts* of the defendant.

2.5.1 Knowledge

The knowledge prerequisite is certainly necessary since otherwise there would be an obvious risk that each and every businessman would be liable of interference with contractual relations without even having the possibility of preventing or escaping such liability. However, it is not necessary to have knowledge of the exact conditions or provisions of the contract. Furthermore, knowledge is presumed when it is objectively likely that contractual relations exist considering the way business is carried out in the world.

2.5.2 Intent

It has been established that the interference must be malicious. However, this only means that intent to interfere with a known contract is shown. Accordingly, spite or ill-will need not be shown. Nevertheless, it is a matter of fact that spite and ill-will frequently appear in interference cases. In addition, reckless indifference to interfere with a contractual relation is sufficient to amount to intent.

2.5.3 Disturbance (or breach)

It is sufficient to prove a disturbance of the contract. An actual breach of the contract is therefore, not a necessary consequence. Accordingly, a deliberate interference is actionable if it frustrates the contract even if there is no breach.

2.5.4 Damage and causation

Damage to the defendant must be proved. However, damage is presumed when it is considered an inevitable consequence of a certain disturbance or breach. Naturally, there must be a causal link so that the defendant's interference must cause the plaintiff's loss.

2.6 Justification

Liability for interference is to be imposed unless some privilege or legal justification can be established. Thus, one who knows of another's contract is liable for intended interference unless he can show that a ground of justification exists. Undoubtedly, it is very interesting and

elucidating to explore the different interests which are regarded as privileged since it helps to bring a deeper understanding about the tort and its broad application. It also sheds a light on which interests or objectives are *not* regarded as a justification and which therefore are considered as actionable interferences.

To begin with, one can establish that in order to justify an interference the actual interference must be in protection or defence of another interest which is regarded as an interest of greater social utility than the interest in contractual stability. Consequently, it's a question of balancing different social values against the social value of contractual stability. When doing so, it is important to recognize that the scale pan of contractual stability can carry different weights. It can be observed that valid term contracts, on the one hand, and contracts terminable at will, on the other hand, earn different protection and weight. Accordingly, the interest in contractual stability is considered to be strong when it comes to valid term contracts and the freedom to interfere is therefore limited as the contractual stability has more social utility than the freedom to pursue business relations. The interest in contractual stability is considered less regarding contracts terminable at will and therefore the freedom to interfere is greater on these occasions. Accordingly, it can be noted that the weight of contractual stability is not constant when balancing it against other social values of the society.

When investigating the other scale pan, one can note that the purpose of the interfering party can be so honorable as to deprive the plaintiff of his freedom from interference. Admittedly, many factors are to be considered and it has been stated that the most relevant are the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and the object of the person in procuring the breach.⁸ When examining what different interests the courts have been willing to protect one can discern a variety of interests has been considered to outweigh the contractual stability interest. For instance, the defendant is justified when his behaviour is a result of him trying to protect his existing contract, property interest or financial interest. Furthermore, the defendant is privileged if his acts can be said to protect the public interest or uphold public morality. In addition, an agent can never be liable for inducing his principal to break a contract. This is due to the unity of principal and agent and their confidential relationship. Neither can a person with a duty to give advice be liable for interference. The most famous case of justification is the case of *Brimelow v. Casson*⁹ in which a privilege to uphold public morality was established. In this case an actor persuaded a theatre proprietor to break his engagement with the manager of a troupe who paid his chorus girls such a low wage that they were forced to prostitution to be able to afford a living.

The defendant's own trade interest is not a justification cause. The reason for this is that Common law sees no reason for giving precedence to one of two self-interests, namely the defendant's self-interest over the legally protected interest of the plaintiff to pursue his contractual relation without interference from others. Thus, it is considered a moral wrong that one existing and established legal interest should be frustrated by a following interest of a stranger to the first contractual interest. All according to the principle; first come, first served!

⁸Heuston, Salmond on the Law of Torts, p 372

⁹[1924] 1 Ch. 302

To sum up, the doctrine of justification serves one specific purpose, namely to allow interferences when these are worthy of legal protection, that is when the interference serves a social utility which weighs more than the interest to uphold contract stability. Such social values are not easily defined and can certainly vary from time to time wherefore the scope of justification has widened throughout the years.

2.7 Remedies

The remedies available for interference with contractual relations are damages and injunctive relief.

2.8 Contractual freedom vs Contractual stability

The case *Lumley v Gye* expanded the tort of interference with contractual relations into a universal principle in Common law stating a liability for inducing breach of any kind of contract. It has been stated that the reasons given for the extension were firstly, that it might be insufficient to be referred to claiming the contract-breaker since he might be insolvent or unable to pay the damages. Secondly, it's a fact that damages in tort may be greater than in contract since lost prestige is recoverable and while the damage recoverable in contract actions must be foreseeable at the time of contracting, the damage recoverable in interference cases must be foreseeable at the time of breach. In addition, the duty to mitigate is lower in interference situations. However, in addition to these reasons it is clear that the Lumley decision also emphasized and strengthened the interest in contractual stability. What is also important though is that Common law recognizes the fact that contract freedom isn't an absolute freedom. On the contrary there are many interests worthy of protection and since reality is complicated and complex there has to be a border line where contract freedom must be limited. The question is only how to limit it and by which means. Common law has recognized that since the contract is the basis of commercial life it is also essential to acknowledge and uphold contractual stability. However, whenever the need for contract freedom is urgent it is always possible to resort to justification. Thereby, both contractual freedom and contractual stability are embraced by Common law in the interference tort.

3. American Law

3.1 Interference with prospective contractual relations

Having examined the Common law approach to interference with contractual relations and its continuous struggle to embrace both contractual freedom and contractual stability, it might be interesting to glance at the American legal system to see how the interference tort has developed. Hence, in addition to interference with contractual relations the American law recognizes the tort "interference with *prospective* contractual relations" as the second of the two so called interference torts. As the title suggests this tort protects benefits that would have resulted from future contracts had not the interference occurred. The principle difference between this tort and interference with contractual relations is that a legally binding agreement is not required to constitute a tort in this case.

Accordingly, "one who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation".¹⁰ The interference can consist of inducing or causing a person not to enter or continue a prospective relation but it can also consist of preventing a person from entering or continuing such a relation. It can, thus, be observed that a party's interference with a pre-contractual relation is presumed to be lawful unless it is shown that improper means were used. To decide whether the means are improper or not several factors are to be taken into consideration; such as: the nature of the actor's conduct; the actor's motive; the interests of the other with which the actor's conduct interferes; the interest sought to be advanced by the actor; the social interests in protecting the freedom of action of the actor and the contractual interests of the other; the proximity or remoteness of the actor's conduct to the interference and finally the relations between the parties.¹¹ How to balance these factors depends on the individual case; however, business ethics, customs and practices are essential when determining if the interference

¹⁰Restatement (Second) of Torts, § 766B

¹¹Restatement (Second) of Torts, § 767

is improper or not.¹² Many courts have looked for illegal, unethical or fraudulent conduct or malicious motives.

The principle defence of this interference tort is the privilege of competition. However, this privilege is not absolute. A business may neither seek to restrain or destroy competition nor cause damage for purely malicious purpose. These behaviours are considered as improper business objectives. Consequently, deliberate breach of contract for the sole purpose of ruining another person's business has been held to be an interference with prospective contractual relations.¹³ The malice motive can be established, for instance, if it can be shown that the defendant has engaged in competition with the intent of going out of business as soon as the plaintiff's business has been destroyed. Moreover, malice might be established when the defendant injures a business with which he is not actually competing. A case which can serve as an example is *Tuttle v Buck*¹⁴ in which the plaintiff was a barber and the defendant was a banker. The banker hired another barber to compete with the plaintiff with the sole purpose to injure the plaintiff and drive him out of business. Furthermore, the banker sought to induce customers to support his shop instead of the plaintiff's and spread false and malicious accusations and rumours about the plaintiff. It was concluded that the banker had abused his great wealth and position in the community and the case amounted to an interference with prospective contractual relations.

Where interference with prospective contractual relations is proved, the available remedies are damages, restitution and injunctive relief.

3.2 Freedom of trade vs trade stability

The extension of the interference tort into interference with prospective contractual relations is an exciting feature, certainly not uncontroversial, in American law. When English law refuses to acknowledge such an extension, the foremost practitioner of competition, America, recognizes this tort as an important means to secure trade stability. However, just as interference with contractual relations comprises a tension between freedom of contract and contract stability, the interference tort regarding prospective contractual relations seems to be affected by a corresponding tension between freedom of trade and trade stability. Being aware of this fact, it is easy to draw the conclusion that freedom of trade should be the prevailing interest in a country which promotes competition. Nevertheless, such a conclusion is too easily reached and does not recognize the core of the tension. As in the case of freedom of contract v contract stability, the interference tort of prospective contractual relations holds a wish to embrace both trade stability and the possibility of freedom of trade. The reason for this is, of course, that both trade stability and freedom of trade are necessary and basic elements in competition. For a market to function satisfactory, businessmen need to trust their trade to be stable. An unstable trade situation is very costly since the businessmen need to secure their dealings. Therefore, trade stability is cost-efficient and wholesome for competition. On the other hand, if freedom of trade is restricted it does not promote competition since such a restriction disturbs an efficient cost allocation. Nevertheless, even if there obviously is a tension between freedom of trade and trade stability,

¹²Hondius, Precontractual Liability, p 341

¹³McManis, Unfair Trade Practices, p 58

¹⁴(1909), see McManis, Unfair Trade Practice, p 59

American law does not consider these elements to be incompatible. Thus, the American solution lies in the definition of trade freedom. Hence, trade freedom is considered to be a freedom of a business to pursue prospective trade relations *without undue interference*. Admittedly, it is easy to recognize that this definition does not contradict a promotion of trade stability. Certainly, this solution, embracing both trade freedom and contract stability, strengthens the basis of competition, at least in theory. In practice or real life, however, the interference with prospective contractual relations tort is controversial and since it carries a lot of difficulties in interpreting what is undue interference, or rather improper interference, the tension between trade stability and freedom of trade is indeed very obvious and difficult to handle.

3.3 The American contract view

The American attitude and readiness to protect interests which have not yet been manifested nor resulted in a contract demonstrates a very specific view on the contract as such. There is no doubt that this attitude emphasizes and upholds the importance of the contract as a legal instrument. Again, the opinion that the contract is the basis of all commercial life influences the scope of protection one is willing to implement. Therefore, to strengthen and emphasize the importance of the contract as such, American law is willing to protect prospective contractual relations from improper interferences. This position also indicates a fear, that if prospective contractual relations were not protected from improper interferences, this would have a weakening effect on the contract as a legal instrument since it would be more vulnerable to economic or some other abuse. As a consequence, the American conclusion would thus be that a weak contract results in a weak commercial life.

4. Pure Economic Loss

4.1 A comparative study

After having studied the two so-called interference torts, I will now continue to examine whether these torts exist in other legal systems or if they have any equivalent or display any similarities with other possible solutions. In other words, have the other European legal systems recognized interference with contractual relations as a problem which has got to be dealt with and be referred to a legal regulation? I intend to approach the matter by examining the views on pure economic loss since liability for interference with contractual relations depends on a positive attitude towards compensation for pure economic loss regarding intentionally caused interference torts. Thus, I will start by comparing the Common Law system with the French legal system. Later, with conclusions drawn from this comparison, I will go on to examine the German legal system to put their view in relation to the Common Law and French systems. Finally, I will continue to the Nordic countries to see how they have approached the issue. I will then examine the Swedish law in particular since Sweden has a unique perspective or approach concerning compensation for pure economic loss and interference with contractual relations.

4.2 Common law approach compared with French law

As I have implied, liability for interference with contractual relations depends on the view of pure economic loss. English Common law has a very restrictive view on compensating pure economic loss. However, it recognizes that it is urgent to protect certain valuable interests and is

therefore willing to compensate certain intentionally caused loss. Thus, the English method of imposing liability for pure economic loss is the so-called "pigeon-hole" approach¹⁵ which limits liability through specifying and defining certain interests worthy of protection from a specified form of attack. Interference with contractual relations is such a tort which is considered legally and morally wrong and the plaintiffs are therefore entitled to compensation for their pure economic loss. In short, English Common law does not recognize any general rights which deserve protection but rather enumerates certain specific interests protected through a catalogue of torts.

Having examined the English Common law approach to pure economic loss, it is very interesting to study French law since its view on pure economic loss is quite the opposite from the English. As a result, French law does not specify or try to sort out certain legal interests which are more valuable and thus more worthy of protection than others. Instead, French law establishes that *all* rights and interests deserve protection, with the exception of illicit interests. All behaviour which is considered wrongful or dangerous is socially unacceptable and French law intends to discourage such socially undesirable behaviour by imposing liability. Accordingly, every injury which is caused by such behaviour can be recovered. Thus, French law, as a contrast to English law, offers full protection to all kinds of legitimate interests. The basis for this protection is the general clause of Article 1382 of the Code Civil, which states that "Anyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage".¹⁶ It is therefore clear that the interest protected in English law by the tort interference with contractual relations is also protected in French law. The principle is, however, known as "liability of a third-party accomplice to a contractual breach".¹⁷ There is an uncertainty, though, if it is sufficient that the interfering party knew of the contract or if collusion with the contracting party is required. However, it is presumed that the first view is prevailing.¹⁸

What is even more interesting when examining French law, is the fact that, through its generous view on recovery for pure economic loss, it protects the same interests which in American law are protected by the tort called "interference with prospective contractual relations". In France this figure is named "loss of chance" (*perte d'une chance*)¹⁹ and it recognizes recovery when the opportunity has been real and not merely hypothetical. Once again, Article 1382 is the basis for this liability.

When comparing English Common law and French law it becomes obvious that although different methods or techniques are used both systems protect the same interests and they achieve the same effects regarding "interference with contractual relations". While English law, on the one hand, only recognizes some particularly protectionworthy interests which are specified in detail, French law, on the other hand, with its general clause embraces the idea that all legal interests are worthy of protection. Therefore, French law directly focuses on questions of fault, causation and damage instead of distinguishing or sorting out certain valuable interests. It is evident, though, that both English law with its restrictive view on pure economic loss and French law with its generous view on pure economic loss protect from "interference with contractual relations". This

¹⁵Gerven, Tort Law, p 3

¹⁶Gerven, Tort Law, p 31

¹⁷Gerven, Tort Law, p 284

¹⁸Gerven, Tort Law, p 285

¹⁹Hondius, Precontractual Liability, p 149

matter of fact emphasizes and underlines the opinion that the existence of a contractual relation is a legal circumstance which third parties cannot completely disregard when they do business with or deal with one of the contracting parties. Thus, both systems dislike and disapprove of interference. Moreover, this also means that both systems acknowledge the fact that contractual stability is important and indeed this attitude intends to uphold and strengthen the contract as a legal instrument. Furthermore, both systems represent the opinion that contractual freedom is not an absolute freedom, but rather a freedom to contract without undue interference from a third party who is a stranger to the contractual relation.

A similar argumentation can be held when comparing the American tort "interference with prospective contractual relations" and the French equivalent "loss of chance". Again, different techniques are used in the different systems but the effect is the same. Accordingly, the existence of a prospective contractual relation is a fact that a third party cannot close his eyes to. On the contrary, this is something that the third party has to respect in his dealings with one of the prospective parties. American and French law thus show the same protective attitude towards trade stability and both systems recognize that trade freedom is not an absolute freedom, but rather a freedom to trade without undue interference from a third party.

4.3 German law and Pure Economic Loss

As we have seen, Common law and the French approaches to pure economic loss differ substantially. Thus, English Common law maintains a pigeon-hole technique to protect certain values worth protecting while French law sustains a broad general clause to thwart socially unacceptable behaviour. It has been shown that a contractual relation is such an interest worth protecting from interference, which is considered to be a socially unacceptable behaviour if intent and knowledge can be shown.

In comparison German law with its Bürgerliches Gesetzbuch has yet another third line of approach regarding pure economic loss. BGB has neither chosen the French solution with a general clause nor the pigeon-hole procedure so characteristic of Common law. Instead, the BGB has laid down three limited yet broad general torts which apply to many different situations yet acknowledge the restrictive view of German law concerning pure economic loss. Two of these torts can be found in § 823 BGB. Firstly, § 823 (1) BGB, which can be considered to be the main tort, concludes that "Anyone who intentionally or negligently injures life, body, health, freedom, ownership or any other right of another in a manner contrary to law shall be obliged to compensate the other for the loss arising".²⁰ What is interesting with this article is the fact that it declares certain specific privileged and absolute rights which are always to be secured whether they are interfered with negligently or intentionally. However, apart from this main tort German law has also recognized that there are other rights which deserve protection. Thus, § 823 (2) BGB imposes liability if a law which is intended to protect another person is infringed.²¹ However, German law has considered that these two broad torts found in § 823 BGB are limiting liability for pure economic loss to an extent which in many different cases can appear offensive, objectionable or doubtful. Therefore, in addition to these torts, liability also arises under § 826 BGB which states that "Anyone who intentionally causes harm to another in a manner *contra*

²⁰Gerven, Tort Law, p 37

²¹Gerven, Tort Law, p 37

bonos mores is liable to the other for the harm thereby occasioned”.²² Certainly, this tort mitigates the limitations established in § 823 BGB and which only protect a number of privileged and absolute rights. German law has, thus, produced a particular tort which does not refer to any specifically defined legal interest or enactment as is the case with § 823 BGB, but rather protects society from offences against morals. This particular tort, however, requires intent. Admittedly, this fact underlines a basic feature in German law, namely, that although there is a restrictive view on compensation for pure economic loss, there is an emphasis on the fact that different legal interests deserve differentiated protection.²³

4.3.1 § 826 BGB, Contra bonos mores

There is no doubt that § 826 BGB is a very exciting provision and, moreover, a very interesting solution when providing protection for pure economic loss. It is, furthermore, a significant provision in this study since it is under this article that liability may arise in German law for interference with contractual relations. Accordingly, I will in this section examine this tort and its connection to interference with contractual relations.

To begin with, liability under § 826 BGB can, thus, be imposed when someone intentionally causes harm to another in a manner *contra bonos mores*. In contrast to § 823 BGB, a first condition for the application of § 826 BGB is that intent must be shown. It has been held that intention in this case includes both intent and recklessness.²⁴ However, intention is not sufficient. German law, thus, requires under § 826 BGB that the conduct is intentional and, in addition, *contra bonos mores*. Admittedly, the notion *contra bonos mores* is indeed interesting since it indicates that there is such a thing as a prevailing morality which deserves to be upheld and protected. Consequently, it has been argued that there are some “minimum standards of conduct required by legal and social ethics”.²⁵ Good morals have in this context been defined as “the sense of propriety of all good and right-thinking members of society”.²⁶ Furthermore, behaviour *contra bonos mores* is considered to offend “fundamental concepts of morally acceptable conduct towards persons with whom one is in a legal relationship”.²⁷ In conclusion, one can maintain that § 826 BGB can be seen as a legal-ethical provision which is supposed to protect from behaviour regarded as unacceptable in society.

The article § 826 BGB has been used by the courts in a variety of cases where the behaviour has been considered so improper as to be likely to meet with strong disapproval from the average person in the relevant section of society.²⁸ It is therefore very interesting to observe that liability for interference with contractual relations has been referred to this provision in the BGB. Accordingly, liability has been held, for instance, for inducing breach of contract. It has, however, been established that interference with contractual relations as such does not amount to a behaviour *contra bonos mores*. Through case-law it has been argued that there is no moral order which obliges a third party to respect someone else’s contract to the extent that it subordinates

²²Gerven, Tort Law, p 37

²³Gerven, Tort Law, p 42

²⁴Markesinis, A Comparative Introduction to the German Law of Torts, p 895

²⁵Gerven, Tort Law, p 42

²⁶Markesinis, A Comparative Introduction to the German Law of Torts, p 896

²⁷Gerven, Tort Law, p 277

²⁸Gerven, Tort Law, p 40

its own interests. Therefore, to amount to an act that can be considered to be *contra bonos mores*, the interference must consist of a lack of consideration or be incompatible with decency or "with the basic requirements of a proper view of the law".²⁹ Collusion with a party to the contract in question is an example of such manners. However, all circumstances in an individual case must be considered.³⁰

4.3.2 German law compared with other systems

Through examining the three broad torts in § 823 and § 826 BGB one can easily detect a firm reluctance to admit recovery for pure economic loss. This reluctance is very reminiscent of the restrictive view of English Common law. However, whereas English Common law specifies certain detailed torts German law generally protects certain privileged and absolute rights. This approach is significant of German law and derives from the attitude that different legal interests deserve differentiated protection. Consequently, a contractual relation is not as worthy of protection as the interests of life, body and health. In contrast to these systems, French law has a very generous view on pure economic loss allowing recovery for all rights which are shown to be interfered with.

It can be held that in German law a contractual relationship is not among those privileged and absolute rights which are always to be protected from interferences. However, it has been recognized that beside these absolute rights protected in § 823 BGB there are certain values which cannot be trampled on or interfered with at any cost. German law thereby acknowledges the idea that one has to consider the quality of the conduct. Accordingly, an interference with a contractual relation can be conducted in many different ways and not every interference qualifies for protection. Consequently, interferences considered morally or ethically unacceptable, such as for instance collusion, can render liability under § 826 BGB. This emphasis or interest in the quality of the conduct cannot be detected in either French law or English Common law.

The main rule governing recovery for pure economic loss, § 823 BGB, can be seen as an exclusionary rule. However, it is not an absolute exclusionary rule. The Germans have recognized the importance of having a flexible system which can take moral and ethical aspects into consideration. Undoubtedly, these social values are not constant but change with time. The system therefore allows for future developments when such developments appear to be crucial for society from a moral, legal or ethical point of view. This attitude also enables the law to consider each and every individual case as important. Certainly, this individualistic approach, which is possible due to § 826 BGB, is a result of an acknowledgement that an exclusionary system undoubtedly leaves individual cases in the dark being more interested in excluding recovery for a large number of groups. The German law, however, has through § 826 BGB put an emphasis on the inappropriateness of precluding recovery in certain offensive and objectionable cases. As such, article 826 BGB can clearly be seen as a legal-ethical provision which condemns socially unacceptable behaviour. This disapproval of and this willingness to deal with socially unacceptable behaviour is a feature which can easily be recognized also in French law. The difference is that French law accepts recovery for negligently and intentionally caused harm while § 826 BGB only allows recovery for intentionally caused harm.

²⁹Gerven, Tort Law, p 278

³⁰Markesinis, A Comparative Introduction to the German Law of Torts, p 898

It is, again, very interesting to observe how yet another system with a different technique and approach to pure economic loss recognizes the need to protect contractual relations from interferences. The German protection, however, is not an automatic or self-evident matter. Consequently, German law is willing to take measures to protect a contractual relation only when the interference is considered to be morally or ethically reprehensible. Still, through § 826 BGB, German law has recognized that the contract as a legal instrument can be unacceptably weakened through certain interferences and, furthermore, it has recognized that an absolute exclusionary rule will contribute to such a weakening process and this is not acceptable in a commercial society.

When comparing German law with Common law and French law one can observe that German law, in contrast to the other systems, puts contract freedom in the foreground while the notion of contract stability is somewhat more emphasized in Common law and French law. Accordingly, when contract freedom in Common law and French law can be defined as a freedom to contract without undue interference from a third party, the German definition of contract freedom is rather a freedom to contract without interferences which are held to be morally and/or ethically reprehensible. Admittedly, certain interferences will fall into both categories and one could argue that the difference is subtle but, nevertheless, when comparing case-law one can easily discern the difference of approach. Mere knowledge, for instance, of the contractual relation will not suffice in German law to make the interference reprehensible, while this fact will amount to an undue interference in the other two systems. However, it is important not to overemphasize this lack of consideration for contract stability. The mere existence of § 826 BGB is an acknowledgement that contract stability is necessary to uphold.

4.4 Pure Economic Loss in the Nordic countries

After having examined the different views of pure economic loss in three legal systems and also these system's protection from interference with contractual relations, I will now go on to examine the approach of pure economic loss in the Nordic countries. However, it can initially be established that the Nordic countries do not share a similar viewpoint but can rather be referred to either of two separate lines of development. From this starting-point I will approach the Nordic countries in two different sections. Firstly, I will study Danish and Norwegian law and, secondly, I will focus on Swedish and Finnish law. Moreover, I will in a following third section take a closer look at the Swedish approach to pure economic loss since it displays a certain unique feature.

4.4.1 Danish and Norwegian law - The doctrine of unlawfulness

As already stated there is no uniform Nordic view of pure economic loss, despite the fact that Nordic co-operation frequently has resulted in uniform laws, for instance the law of contracts. Instead, the Nordic approach can be divided into two separate branches. Thus, Norwegian and Danish law early based its view on the doctrine of unlawfulness.³¹ The basic idea behind this doctrine is to determine liability through a "weighing of the benefit produced by an act against the

³¹Kleineman, Ren Förmögenhetsskada, p 40

injury or risk of injury that the act gives rise to”.³² There is, consequently, no general tort principle in Norwegian and Danish law concerning pure economic loss. Instead, the courts have been free to attack pure economic damage caused by intentional acts whenever this has been held to be necessary. Thereby, the courts have been able through the above mentioned weighing technique to distinguish lawful conduct from unlawful conduct. Norwegian and Danish law have, thus, recognized the complex nature of reality by not adopting a simple rule to apply consistently to different cases full of nuances.

Norwegian law has, however a firmer and more positive attitude when it comes to compensating pure economic loss in tort. Whereas in Denmark there is a presumption that tort law merely protects absolute rights and legal interests while the pure economic interests are preserved in contract law³³, the unlawfulness doctrine is in Norwegian law supported by the Marketing Act. This Act includes a broad general clause, § 1, which establishes that liability for interference with contractual relations can be held if the interference is performed in a way contrary to good customs.³⁴ It has been argued in Norwegian doctrine that this provision with its reference to good customs is based on economic policies and that these policies must be taken into consideration when deciding and drawing the borderline between contract freedom and contract stability.

Although Norwegian law is more eager to defend contractual relations from interferences than Danish law there is no doubt that Danish courts have upheld contractual relations through the support of the unlawfulness doctrine whenever this has been held necessary to protect commercial life from unacceptable behaviour. An example of a typical case would be misinformation forwarded to a non-contracting party.³⁵ Thus, both Norwegian and Danish law, based on the doctrine of unlawfulness, are willing to compensate pure economic loss in interference cases. A condition required, though, is the fact that the interference must offend good morals or consist of some other unacceptable behaviour. The unlawfulness doctrine can, consequently, be used to weigh the benefit of contract stability against the injury of contract freedom in interferences with contractual relations.

4.4.2 Finnish and Swedish law - The exclusionary rule

It can immediately be established that Finnish and Swedish law were not particularly influenced by the doctrine of unlawfulness which has played such an important and significant role in the Norwegian and Danish development of a tort system. Even though the Norwegian and Danish approach to pure economic loss can be regarded as cautious, Swedish and Finnish law display an even more restrictive attitude by indicating that pure economic loss only will be recoverable if caused by a criminal act. This principle, which can be regarded as an absolute exclusionary rule, is somewhat modified in Finnish law by the important addition that pure economic loss also may be recoverable in tort if there is a serious reason for it. Since Finnish law to a larger extent resembles solutions found in other legal systems, I will at first concentrate on the Finnish approach to pure economic loss.

Finnish law

³²Kleineman, Ren Förmögenhetsskada, p 581

³³Gerven, Tort Law, p 45

³⁴Simonsen, Prekontraktuelt ansvar, p 64

³⁵Gerven, Tort Law, p 45

The Finnish Tort Law Act, enacted in 1974, certainly displayed a change of the Finnish attitude towards pure economic loss. From having concentrated on the question of which interests were to be protected, the Tort Law Act turned its focus to the quality of the offensive act. The liability rule can be found in § 5 SKL:

”Damages include compensation for harm to person and property. Compensation for other economic harm may be included if it is caused by a punishable act or by a public authority or otherwise if there is a serious reason for it”.³⁶

The article can, certainly, be seen as an exclusionary rule which demonstrates the restrictive Finnish approach. There is no doubt that the Finnish legal order does not seek to attain limitations on the freedom of action but rather strives for such freedom.

The Finnish Tort Law Act is based on the Swedish Tort Law Act, enacted in 1972. However, the Finnish system considered the Swedish view on pure economic loss to be far too restrictive with its single reference to criminal acts. Earlier case-law had also allowed compensation for pure economic loss not caused by criminal acts. Hence the important addition of ”a serious reason”. What then is implied by a serious reason? It can be held that such reason exists when the damage is caused intentionally or when there’s a question of some other evidently disloyal behaviour. To spread disparaging and untrue information about a company is an example of such behaviour. Furthermore, inducement of breach of contract and intimidation are considered to be disloyal behaviour amounting to a serious reason.³⁷ However, mere persuasion is not sufficient but if the purpose is to injure liability can be imposed whether the persuasion results in a breach or merely prevents or delays performance.³⁸

It has been argued in Finnish doctrine that society has no reason to allow intentional interference with contractual relations since it is in the best interest of society that contracts are performed as agreed.³⁹ Again, this kind of argument indicates an acknowledgement of the importance of contractual stability. Moreover, Finnish law displays a wish to uphold the contract as a legal instrument when it is attacked by serious and unacceptable interferences. Admittedly, this is a feature which can be recognized from the other above examined legal systems.

In a comparative light Finnish law share the same restrictive approach towards pure economic loss as English Common law and German law. The technique used, though, shows no resemblance to the Common law technique. Instead, it can be argued that the Finnish law in several ways is particularly closely linked to the German law. Firstly, the division of the three bases of liability in German law can also be found in § 5:1 SKL, namely, infringement of legal interest, breach of statute and, finally, offence against morals which can convincingly be compared to a serious reason.⁴⁰ Finnish doctrine has, also, recognized that whenever a behaviour offends ethical principles or good morals this fact should constitute a serious reason which should be compensated.⁴¹ Undoubtedly, the notion of a serious reason resembles the notion of

³⁶Gerven, Tort Law, p 44

³⁷Saxén, Skadeståndsrätt, p 74

³⁸Saxén, Skadeståndsrätt, p 75

³⁹Saxén, Skadeståndsrätt, p 75

⁴⁰Gerven, Tort Law, p 44-45

⁴¹Saxén, Skadeståndsrätt, p 74

contra bonos mores in § 826 BGB. Secondly, the focus or emphasis on the quality of the conduct is a feature well recognized from German tort law. In both systems the nature of the behaviour holds a central position. Thirdly, both Finnish and German law can be held to have construed an exclusionary rule, however not absolutely so. This fact emphasizes the wish to balance contractual stability with an important freedom of contract.

Swedish law

As I have already mentioned above the Swedish Tort Law Act of 1972 was the forerunner of the Finnish Tort Law Act. However, the Swedish attitude towards pure economic loss is unique in its severity and restrictiveness. Thus, § 2:1 SKL initially states that "Whoever causes personal injury or property damage intentionally or negligently must make reparation....".⁴² Then, in § 2:4 SKL follows the important and special provision which states that "Whoever causes pure economic loss through a crime shall compensate that injury...".⁴³ Undoubtedly, this provision can be interpreted as an absolute exclusionary rule which prevents the courts from imposing tort liability in cases which are not connected to a criminal offence. The unusual and narrow Swedish solution regarding compensation for pure economic loss has its historical background. Thus, provisions were transferred from the criminal code to be adopted in the tort legislation⁴⁴ and have since then maintained a very close connection to the criminal code.

The main rule in Swedish tort law is, accordingly, that pure economic loss only is recoverable if caused by a criminal offence. Consequently, an express statutory provision is required if pure economic loss is to be compensated in other cases.⁴⁵ Such provisions can, for example, be found in Swedish competition law. Furthermore, case-law has in certain areas accepted liability for pure economic loss caused by negligence outside pure contractual relations. The technique used for this purpose, though, has been particular since case-law has so to speak drawn the third-party interest within the protective sphere of a contract. Thus, a third party with a close and protection-worthy interest in an accurate performance of a contractual relation has been provided protection through case-law.⁴⁶ Liability has, consequently, been accepted for erroneous certificates of authenticity, affidavits and information on solvency.⁴⁷ It has been argued in Swedish doctrine that in order to accept such liability a close connection to a contractual relation must exist and, furthermore, it must be obvious to the defendant that there is an individual or a narrow group of individuals whose interest deserves protection.⁴⁸

An example of this case-law is NJA 1987 s 117⁴⁹ in which incorrect information regarding town planning in a valuation certificate, drawn up by a professional, gave rise to compensation for a plaintiff who had granted a mortgage loan relying on that incorrect statement. This despite the fact that it was the recipient of the loan who had actually requested the statement. Undoubtedly, one can discern that this developed case-law is as such not a recognition of compensation for

⁴²Gerven, Tort Law, p 44

⁴³Gerven, Tort Law, p 44

⁴⁴Hellner, Skadeståndsrätt, p 50

⁴⁵§ 1:1 SKL

⁴⁶Ramberg, Allmän avtalsrätt, p 275

⁴⁷Gerven, Tort Law, p 292

⁴⁸Ramberg, Allmän avtalsrätt, p 276

⁴⁹see also NJA 1987 s 692

pure economic loss in *tort law*, but should rather be seen as an expansion of the contractual relation sphere.

In a comparative view Swedish law is the most reluctant legal system examined to incur liability for pure economic loss. The exclusionary rule found in § 2:4 SKL can be considered as absolute and is therefore as such not comparable with either the German or the Finnish approach. The prerequisite of a criminal offense cannot be found in any other legal system, except for the Finnish, and as a consequence of this criminal offense prerequisite Swedish law does not recognize or accept any liability for interference with contractual relations unless, of course, the interference constitutes a criminal offence or is otherwise expressly illegal according to a statutory provision. Swedish tort law, thus, puts a particular emphasis on the concept of freedom of contract. As a consequence, interference with contractual relations is considered legal and just even if it consists of undue, immoral, unethical or socially unacceptable behaviour. Strangely enough, the Swedish system does not seem interested in balancing contractual stability with the freedom of contract but has rather, in accordance with § 2:4 SKL, taken sides with freedom of contract against contract stability. This Swedish view of freedom of contract can, therefore, not be defined as a freedom to contract without undue interference but rather as a freedom to contract even with undue means of interference.

§ 2:4 Skadeståndslagen - The Swedish Exclusionary rule

Since the Swedish approach to pure economic loss differs from other approaches found in the other examined legal systems I will in this section take a closer look at the provision § 2:4 SKL and its influence on Swedish tort law. How come it was designed so narrowly? And what were the consequences?

Indeed it can be established that the Swedish legislature has chosen a legal principle which implies that it is possible to regulate liability for pure economic loss in completely different areas through one single and generally applicable rule. This rule, § 2:4 SKL, is as already mentioned considered to be an exclusionary rule with its express reference to a criminal offense. Undoubtedly, this connection between a criminal act and damages is from an international viewpoint a Swedish particularity.⁵⁰ The actual wording of § 2:4 SKL does not allow for any exceptions whatsoever. Only victims of crime may claim compensation for pure economic loss. Surprisingly and strangely enough, however, it is a fact that the Swedish legislature did not intend § 2:4 SKL to be an absolute exclusionary rule. This is clearly established in the preparatory work which expressly states that the wording of § 2:4 SKL is not intended to prevent the courts from imposing liability whenever this is found to be appropriate even in the absence of a punishable act. Accordingly, the article is not intended to be exhaustive. The fact that § 2:4 SKL states that whoever causes a pure economic loss through a crime shall compensate that injury does not, consequently, mean that whoever causes a pure economic loss through some other behaviour than a criminal offence escapes liability to compensate that injury.⁵¹ § 2:4 SKL was not supposed to be regarded as an exclusionary rule at all. On the contrary, it was supposed to keep

⁵⁰Bernitz, Otillbörlig konkurrens mellan näringsidkare- det glömda rättsområdet, Festskrift till Jan Hellner, p 120

⁵¹Prop 1972:5 p 568

the door open for a future legal development concerning liability for pure economic loss.⁵² Earlier case-law had, actually, allowed for compensation for pure economic loss without any existence of a criminal offence and it is expressly indicated in the preparatory work that the new Tort Law Act did not intend to alter this attitude in such cases.⁵³ The preparatory work, accordingly, encouraged the courts to continue developing the field of pure economic loss. § 2:4 SKL, thus, was supposed to act as a principle main standpoint provided with several exceptions. It was never intended to prevent future case-law from extending liability in this legal field. Several authors have in Swedish doctrine argued that "the possibility of having tort liability for pure economic loss include situations not covered in chap 2, sec. 4, of the Tort Liability Act should be viewed as a reality and the courts should be able to make use of this".⁵⁴ Such situations include interference with contractual relations. Furthermore, it has been argued that the Swedish exclusionary rule should have a function similar to the Finnish rule⁵⁵ and, consequently, it would not be absolute in its character after all.

Undoubtedly, however, the preparatory work has not had any pervasive effect on case-law. It has been argued that Swedish jurists certainly consider § 2:4 SKL as an exclusionary rule.⁵⁶ Moreover, it is a troublesome fact that the actual wording of § 2:4 SKL does not contradict this matter. As a consequence, the narrow and strict design of the rule has, certainly, influenced the extremely positivistic view of law, which is such a particular feature of Swedish law in general and of the law of torts in particular. There is little doubt that if the actual wording of a legal provision does not expressly state a liability, then the Swedish courts are not willing to impose such liability in case-law. The wording of § 2:4 SKL has, consequently, in contrast to what was intended, prevented the preparatory work from functioning as a guideline when developing Swedish case-law. The case-law development of pure economic loss in demand has therefore failed to appear. That the Swedish courts would refer to the preparatory work of § 2:4 SKL in the future is, accordingly, not very likely. A plaintiff is, therefore not helped by § 2:4 SKL in an interference situation which does not constitute a criminal offense.

Liability according to § 2:4 SKL v an extension of the contract sphere

It has been concluded above that case-law has not accepted or been prepared to use § 2:4 SKL to impose liability for pure economic loss in cases not amounting to a crime. The actual wording has prevented it. Thereby, the Swedish positivistic view of law has denied the fact that § 2:4 SKL could be used as an accessible provision when extending liability for such loss. However, such an extension has been held necessary and has also actually taken place. Not through § 2:4 SKL, though, but rather by using the contractual sphere. Case-law has, therefore, as indicated earlier been willing to impose liability, despite the absence of a criminal offence, in tri-partite relations by expanding the contract sphere and thereby drawing the third party interest within the contractual ambit. This expansion technique, thus, transforms a non-liability in tort into a liability in contract. In this case the actual wording "in contract" has not prevented courts from interpreting non-contractual relations to be contractual when the third party has a close and

⁵²Kleineman, Ren förmögenhetsskada, p 138

⁵³Prop 1972:5 p 568

⁵⁴Bernitz, Interference with contractual relations, Scandinavian Studies in Law 1989, p 75

⁵⁵Kleineman, Ren Förmögenhetsskada, p 139

⁵⁶Bernitz, Otillbörlig konkurrens mellan näringsidkare - det glömda rättsområdet, p 119

protection-worthy interest. Undoubtedly, this is an inconsistent feature in the Swedish positivistic view of law⁵⁷ which, certainly, can be considered odd and surprising.

The relevant question, though, is whether this inconsistent solution makes any material difference regarding interference with contractual relations. Or expressed in other words, is it irrelevant whether an extension of liability for pure economic loss is made possible through § 2:4 SKL or through an expansion of the contractual sphere?

Firstly, it can be argued that most interference cases cannot be drawn into the contract sphere according to the developed case-law since the interfering party almost always is a stranger to the contract and, therefore, has no close connection to it. Certainly, this fact excludes liability for interference with contractual relations almost completely according to the contract expansion solution. Secondly, it can be observed that the case-law based on an expansion of a contract sphere has, so far, not included pure interferences. By this I mean that the cases decided have, so far, not included intentional interference but have rather dealt with questions of negligent misstatements and incorrect information.

Thus, in conclusion, this case-law development with its particular and inconsistent technique, although admittedly necessary, does not in reality make it possible to impose liability for interference with contractual relations. An extension of case-law based on the preparatory work of § 2:4 SKL, though, would have made it possible to impose such liability for pure economic loss. Swedish law has, accordingly, through this choice of developing case-law further emphasized its reluctance to impose liability for interference with contractual relations. Moreover, it has accentuated its support for freedom of contract.

Swedish property law

It has been concluded that there is no liability for interference with contractual relations in Swedish tort law. However, in Swedish property law interference problems have been thoroughly discussed and considered. For example, there is a right prescribed by law for a third party, C, to make an acquisition of property in good faith even though the transferor, B, has already, prior to the acquisition, agreed to sell the property to another party, A. Accordingly, C must have acted in good faith. Consequently, he must have been unaware of the agreement between A and B. In addition, he must have come in possession of the property.⁵⁸

The protection of C's right to the property is based on the need for protection against concealed competition. The good faith is, therefore, a necessary prerequisite and it draws a line between a party worthy of protection and a party not worthy of such protection. It has been held that a third party who has acquired property with knowledge of a prior and conflicting right to the property cannot reasonably be protected from concealed competition, since the competition is no longer concealed if the third party has knowledge of it. The prerequisite of good faith, therefore, serves as a duty of care to prevent conflicts. Questions of morality are, therefore, held not to be relevant in this context.⁵⁹

⁵⁷Kleineman, *Ren Förmögenhetsskada*, p 138

⁵⁸§ 2, Lag (1986:796) om godtrostförvärv av lösöre

⁵⁹Forssell, *Tredjemansskyddets gränser*, p 209

The Swedish method of solving conflicts in property law, thus, to a large extent resembles the English tort law approach towards interference with contractual relations. Knowledge of a contractual relation is equivalent to bad faith and deserves no protection. One can, certainly, argue that a good faith/bad faith discussion would serve a purpose in Swedish tort law as well. However, as we have seen, this is not the case.

4.5 Pure Economic Loss - A comparative summary

I have through a survey of different legal systems examined diverse approaches regarding the possibility of compensating pure economic loss in general and through interference with contractual relations in particular. It has been shown that although different methods or techniques are used in different legal systems, there is a clear tendency to impose liability for interference with contractual relations except in the Swedish legal system which in a comparative view seems to stand on its own. Accordingly, whether the pigeon-hole technique, a general clause, the doctrine of unlawfulness or an exclusionary rule (however not absolute in its character) is used when regulating liability, these different means all result in a protection from interference with contractual relations. The different legal systems, thus, although different techniques protect the same interest, namely, the contractual relation interest. Even though Common law and French law tend to emphasize the importance of contractual stability more than, for instance, German and Finnish law, there is a joint and mutual consensus that third parties cannot completely ignore the existence of a contractual relation. Accordingly, there is a unanimous ambition to spare and protect society from socially unacceptable behaviour and offences against morals since these are considered to weaken the contract as a legal instrument. These legal systems, consequently, acknowledge the fact that there are some prevailing minimum standards of conduct required by legal and social ethics in commercial life which must be observed in order to uphold the importance of the contract. Interference with contractual relations is therefore in these systems considered with disapproval. Whereas some systems, for instance Common law and French law, consider interference in itself unacceptable, other systems, like German law and Finnish law, pay more attention to the actual quality of the conduct and therefore approve of some interference behaviour yet, at the same time, disapprove of other serious and grave interference behaviour. Furthermore, the German and the Finnish legal system share together with the Norwegian and the Danish legal system an individualistic interest which cannot be found in Common law or French law. Thus, this individualistic interest rests on a belief that there is an inappropriateness of precluding recovery in certain offensive and objectionable cases and, as a consequence, different legal interests deserve different degrees of protection. There is, furthermore, a belief that since the commercial life is a complex reality it is not sufficient to find a simple or general solution.

In conclusion, all the examined legal systems, except for the Swedish, acknowledge a necessity and an ambition to balance the contract freedom against a contractual stability in order to strengthen commercial life. Contract freedom can in these legal systems be defined as a freedom to contract without undue interference. The Swedish legal system, in contrast, can be observed to pay no or slight attention to this balancing of contract freedom against contractual stability. Furthermore, Swedish law seems to show no concern for or interest in quality nuances, individual cases or socially unacceptable behaviour unless they constitute a crime. The Swedish tort system

can, therefore, be held to be extremely rigid and strict in its approach. Moreover, it can be held that the Swedish exclusionary rule, being absolute in its character, does not favour or uphold contractual stability and, as a consequence, this rule can contribute to a weakening process of the contract as a legal instrument. To some extent this fact has been acknowledged in case-law which has sought a solution when certain cases have seemed to result in unacceptable or reprehensible decisions. However, the solution has not been sought in tort law but the idea has been to draw the third party, not a party to the contract, in to the contract sphere. As argued, this has not contributed to help come to terms with pure interference cases. In Sweden, contract freedom is, accordingly, a freedom to contract even through means of undue interference.

5 Contract views

In the previous chapter I have argued that liability for interference with contractual relations depends on the attitude as regards pure economic loss. Moreover, I have to some extent indicated that the view of pure economic loss depends on the attitude towards the contract as a legal instrument. In this chapter I will therefore, in a comparative light, focus on some of the different aspects concerning the views of the contract and its connection to interference with contractual relations. To begin with, I will take a closer look at contractual freedom and contractual stability. Then, I will go on to study the difference between a so-called inner contract sphere perspective and an outer contract sphere perspective. In this connection, I will also look at the consequences of these two different contract perspectives.

5.1 Contractual freedom and Contractual stability

It has been argued that "contractual freedom is a main principle of the market economy system" and, furthermore, that it is "the freedom to decide whether and with whom to conclude a contract and to give that contract such content as the parties to it may agree upon".⁶⁰ Nevertheless, this contractual freedom is not, and has for that matter never been, an absolute freedom. The contractual freedom, thus, cannot be conceived of as unlimited. On the contrary, "the law must, for polity, social or similar reasons forbid certain forms of agreement".⁶¹ For example, agreements which restrain trade or can be considered to be an abuse of a dominant position are forbidden in all of the previous mentioned legal systems. These restrictions have in many cases originated from the belief that the binding effect of the contract and contract stability are important values worth defending and safeguarding. A Norwegian author has through an enlightening and illustrative utterance emphasized this matter: "What an enormous step forward in human history it was when the rule was established that contracts are binding. That was the rule that made trade and turnover possible".⁶² This statement indicates that contract stability is the foundation or the basis of trade and competition.

Bearing this in mind, one can, moreover, argue that contractual freedom would not be of great value unless contracts were granted legal protection so that breaches of contract in some way are sanctioned. Accordingly, there is no doubt that "contractual freedom in reality includes a *requirement for active support* from the legal system: that the sanctity of the contract be upheld

⁶⁰Bernitz, Svensk marknadsrätt, p 14

⁶¹Bernitz, Marknadsrätt, p 27

⁶²Stang, Innledning till formueretten, p 4

by the legal machinery”.⁶³ In other words, ”‘Contractual freedom’ is consequently not merely a *freedom* from public intervention: it is also a *claim* for public action”.⁶⁴ Hence, one can, admittedly, discern an interaction between contractual freedom and contractual stability, since contractual freedom demands a certain degree of contractual stability. Certainly, contractual stability is a necessity in order for contractual freedom to function. Accordingly, contractual stability is not only the basis for trade and competition, it is, additionally, the foundation for contractual freedom. It can, thus, be concluded that contractual freedom and contractual stability are not in a state of opposition, but rather co-operate in order for trade and competition to function satisfactory and, therefore, a balancing of these freedoms is desirable. As shown in previous chapters, this balancing of contractual freedom and contractual stability is recognized in all the legal systems compared except for the Swedish legal system which more clearly emphasizes the contractual freedom. The Swedish system, thus, seems to consider contractual freedom and contractual stability to be in a state of opposition rather than to acknowledge the interaction between them. In the other systems, and especially in the Common Law system which seems to be the strongest contract protector, the contract can be regarded as a stronger legal instrument with a stronger position in commercial life due to this balancing act.

As already stated, contractual freedom can never be unlimited. Accordingly, even though contracts are free as to form with a few exceptions, contractual freedom does not imply a freedom to agree on any content whatsoever. Consequently, in all legal systems there are regulations which forbid and try to prevent certain content which is considered morally or socially-ethically reprehensible. Again, agreements which restrain trade or are an abuse of a dominant position can serve as examples. In addition, in all legal systems compared, except for the Swedish system, it is considered wrong to enter an agreement which, according to its content, makes another known contract, to which one of the contracting parties is also a party, impossible to perform in part or completely. The English Common law system and the French system are most severe, since mere knowledge of the other contract will suffice to make the new contract content unlawful while, for instance, the German system, in addition, requires a lack of consideration or decency. The Swedish system, in contrast, supports and tries to uphold the idea that a contractual freedom is a freedom to, as far as possible, give the contract such content as the parties to it may agree upon. This Swedish approach to contractual freedom, therefore, excludes support for contractual stability, since it allows interference content which might weaken the contract as a legal instrument.

5.2 Inner contract sphere perspective vs Outer contract sphere perspective

One can argue that there are two different ways of looking at the contract, namely, what I will here call, ”the inner contract sphere perspective” and ”the outer contract sphere perspective”. To begin with, the inner contract sphere perspective is distinguished by the fact that it sees the contract as an isolated phenomenon. Accordingly, the contract is considered a separate unit clearly secluded from any surrounding events or incidents. This view protects from attacks

⁶³Strömholm, The freedom to contract - a complex cluster of rules, Scandinavian Studies in Law 1989, p 208

⁶⁴Strömholm, The freedom to contract - a complex cluster of rules, Scandinavian Studies in Law 1989, p 208

within the contractual sphere but does not protect from attacks from outside this inner contractual area. Furthermore, the contract is not put in a context. On the contrary, it is detached and disconnected from any existing context or coherence. Even though one contractual relation can be interacting or be intertwined with other contractual relations, this is completely irrelevant from an inner contract sphere perspective, since each contractual relation is considered an isolated unit.

In contrast, the outer contract sphere perspective does not view the contract as an isolated or secluded phenomenon. On the contrary, the contract is put in its context and outside events can be recognized to influence the contractual relation. As a consequence, undue attacks on the contractual relation can be dealt with even if the attack derives from outside the contractual sphere. There is, accordingly, an existing loyalty between the party not a party to the contract and the contracting parties. This loyalty is, consequently, a loyalty not to interfere with the contractual relation. In clear contrast to the inner contract sphere perspective, the outer sphere perspective includes a possibility to impose liability for interference with contractual relations, since it has a wider protection area and, thus, upholds the contract as a legal instrument with greater stress.

The outer contract sphere perspective can be held to be found in Common law and French law while German law and the Nordic law systems all share an inner contract sphere perspective. However, the German, Finnish, Danish and Norwegian law have recognized that the inner contract sphere perspective is not sufficient to protect the contract from undue interferences, and this fact is not satisfactory since such interferences might weaken the contract as a legal instrument. Therefore, these systems have produced rules which allow exceptions whenever this is considered necessary. Swedish law, however, has not followed their example and produced such rules. Instead, Swedish case-law has developed a particular doctrine which tries to squeeze undue behaviour from the outer sphere into the inner contractsphere by expanding the contractual sphere as described in the previous chapter.

An interesting consequence of these two different contract perspectives is the fact that the responsibility to protect the contractual relation from undue interference attacks falls on different parties depending on which perspective is prevailing. Consequently, the inner contract sphere perspective implies that if the interest of an undisturbed relation is great then this should be procured through the terms of the agreement. This argument puts a great burden of responsibility on the parties to the contract which not seldom have neither the time, the resources, nor the possibility to negotiate such terms in each and every case. The outer contract sphere perspective, on the other hand, puts the responsibility for an undisturbed relation on the party not a party to the contract. This party, consequently, has a loyalty to refrain from interference if the contractual relation is known to him. If not, this party should bear the consequences for interfering. This perspective, certainly, implies that it is unreasonable for contracting parties to safeguard from a stranger to the contract and that, instead, the stranger has better opportunities to safeguard the contractual relation, since he actually has knowledge of his counterpart.

5.3 Contract views - a summary

To sum up, there is no doubt that the attitude towards liability for pure economic loss regarding interference with contractual relations to a large extent depends on the emphasis put on the importance of the contract as a legal instrument. Accordingly, if a legal system finds the contract to be important as a means to promote trade and competition in commercial life then this fact is shown in the contract view. Consequently, a legal system which tries to balance contractual freedom with contractual stability is, certainly, trying to uphold and strengthen the contract in order to strengthen trade and competition. Furthermore, a legal system which prefers an outer contract sphere perspective in front of an inner contract sphere perspective can also be said to underline the importance of protecting the contract as a legal instrument and, thus, uphold it and strengthen its function.

6 The underlying interest

After having studied the interference with contractual relations tort, its applicability in different legal systems, the different prevailing approaches to pure economic loss and, finally, the different views of the contract as a legal instrument, it is about time to examine the underlying interest of the interference tort. Hopefully, the following study will show what has so far only been hinted in this essay, namely, which value it is necessary to protect through the interference doctrine in

order to procure a strong and credible contract instrument. Certainly, I must first acknowledge the fact that there is more than one single valuable interest which the law embraces and shelters so that the contract as a legal instrument can be upheld and function in commercial life. However, these interests are protected through other legal acts or doctrines and are, therefore, not protected through the interference tort in particular. The mode of procedure I have chosen to follow when exploring these interests is to take a closer look at the Swedish legal system with its inner contractsphere perspective, since this system does not recognize the interference doctrine, to find out if there is any interest left unprotected in the tri-partite situations in question.

6.1 The competition interest

The value of competition is probably indisputable. Society has a great interest in striving for an efficient resource allocation in order to reduce costs and to lower prices for consumers. However, the idea of free competition has been abandoned and replaced with the idea of a workable competition.⁶⁵ Undoubtedly, this is due to the acknowledgement that it is necessary to regulate the market to prevent abuse of competition. This in order to bring it closer to the ideal. Intervention has, thus, been considered necessary to preserve real choice for consumers and to protect and make it possible for small traders to exist on the market.⁶⁶ As a consequence, the competition interest is protected through competition law which has introduced prohibitions of, for example, joint efforts to restrain trade and unilateral abuse of market power. There is, therefore, no doubt that interference with contractual relations which consists of agreements between undertakings which may distort competition or of abuse of a dominant position can constitute liability under competition law. This is also true in the Swedish legal system. Consequently, liability for such interference can be imposed according to § 33 of the Swedish Competition Act. The actual interest of competition is, thus, already safeguarded through careful consideration and balancing in competition law.

6.2 Society's interest in crime prevention

Certainly, society's interest in crime prevention is recognized in all the compared legal systems. Therefore, it is also undisputed that interference with contractual relations which amounts to a criminal offence is reprehensible. As an example of such interference I will give an account of a case consisting of deliberate spreading of lies and defamation.

The company American Express decided to buy the Trade Development Bank of Geneva. This was mainly in order to benefit from the prominent business skills of its founder, Edmond Safra, who had unique and valuable connections with moneyed persons. However, the parties parted since their management styles proved incompatible. American Express were greatly annoyed when they learned that valuable executives were leaving them to reconnect with Safra who was to resume banking in Geneva if he obtained a Swiss permit. Some other executives in American Express, therefore, procured, for \$1 million, the services of a shady character who planted statements in newspapers around the world that Safra's bank was guilty of laundering drug money and even accused Safra of murder. It took great effort to discover the true circumstances

⁶⁵Nordell, *Konkurrensteori och konkurrensbegränsning*, p 14

⁶⁶Steiner & Woods, *EC Law*, p 171

behind it all but when it was brought to light American Express in 1989 produced a press release in the form of a letter to Edmond Safra:

”This effort was totally contrary to the standards of conduct of American Express as well as common standards of decency and ethics. While I believe in vigorous competition, there is no room in our organization for actions which could cause unjustified harm to a competitor. Therefore I want to apologize to you and your organization”.⁶⁷

The Swedish Tort Law Act also acknowledges the fact that interferences which amounts to a criminal offence is reprehensible. In § 2:4 it states, as indicated earlier, that ”Whoever causes pure economic loss through a crime shall compensate that injury...”.⁶⁸ Accordingly, society’s interest in crime prevention is already recognized in tort law.

6.3 The contract interest

The contract interest can be defined as a contractual creditor’s right that a certain result be achieved, namely, the performance of the contract. Accordingly, the parties to a contract should ascertain that what they have agreed upon will be executed. All according to the principle *pacta sunt servanda* - contracts are binding. If either of the contracting parties does not perform according to the contract or breaches the contract, the other party is, undoubtedly, to be compensated. This is all established in contract law. In Sweden this is not regulated in any article but follows from general contract law principles. One can, thus, argue that the contract interest is a legal right which emerges at the closing of the agreement. This right, as argued in the previous chapter, would be of little value unless it was granted legal protection so that breaches of contract in some way are sanctioned. Contract law is, therefore, protecting this legal right that a certain result be achieved. The contract interest is, accordingly, already safeguarded by contract law.

6.4 The legal-ethical interest

Beside the competition interest, the contract interest and society’s interest in crime prevention there is an additional interest which is only protected in tort law and which can be traced if examining the legal systems which permit liability for interference with contractual relations. Undoubtedly, this interest is difficult to summarize in one word, however, I will here call it the legal-ethical interest. So, when glancing at the previous chapters certain closely connected words and phrases frequently recur. These are, for instance, ”improper means, behaviour considered wrongful and socially unacceptable, behaviour which offends ethical principles or good morals, illoyal behaviour, fundamental concepts of morally acceptable conduct, minimum standards of conduct required by legal and social ethics, and collusion”. These words and phrases all indicate that there is a moral or ethical interest which requires protection. The interference tort has, accordingly, been held to protect from interferences constituting, for example, deception, dishonesty, lying, seduction, misinformation, blackmail, deliberately prejudicial conduct, and skulduggery.

⁶⁷Weir, *Economic Torts*, p 17

⁶⁸Gerven, *Tort Law*, p 44

It is a central circumstance in the legal-ethical interference tort that the economic harm in question is deliberately caused. Consequently, it is a matter of great difference between "the plaintiff as target and as by-blow victim".⁶⁹ It is considered morally reprehensible to use the contractor as a means of hurting the plaintiff. The moral core in interference with contractual relations can, therefore, be said to be the intention of the defendant. Or put in another way: "If I persuade someone, whether by stick or carrot, to conduct himself at variance with his duties under a contract, I have altered his conduct, I have perverted him, or converted him to my use as a *means* of inflicting harm which otherwise would not occurthis seduction is in itself a wrong..."⁷⁰

The legal-ethical interest can thus be said to consist of two parts. Firstly, there is a focus on the behaviour. Wrongful and socially unacceptable behaviour is to be prevented. Secondly, there is a focus on the primary wrongdoer. It is considered that the behaviour of the primary wrongdoer, C, and the secondary wrongdoer, B, is a joint responsibility and therefore there should be a joint liability to compensate the plaintiff, A. Consequently, it is morally right to impose a liability on the primary wrongdoer.

It is interesting to observe, that tort law and contract law have two different visual points or rather concentrate on different directions when it comes to protecting interests. While the contract law, as mentioned, is concentrating on protecting a legal *right*, the tort law is instead focused on the actual *wrong*. Thus, tort law is scanning for behaviour which can be criticized and corrected. Tort law and contract law, therefore, serve two different purposes. The contractual creditor's right is that a certain result be achieved not that the debtor behaves in a morally impeccable way. Certainly, the debtor can behave as an angel but will still be liable to compensate the creditor if he is in breach of the contract. Behaviour or conduct are simply not matters which are necessarily relevant in contract law. In tort law, though, it is a matter of great concern. This concern is dealt with through different methods in the different legal systems. Accordingly, English Common law has established that it is an immoral act performed by the defendant to interfere in a contractual relation if he has knowledge of the relation. In German law all factors of the individual case are considered when deciding whether an interference is contra bonos mores while in Danish and Norwegian law there is a weighing of the benefit of the conduct against the injury of the conduct to decide whether the behaviour is unlawful. By focusing on the actual behaviour, thus, a legal system can safeguard the legal-ethical interest. Denying this interest or paying no or little attention to it can result in a weakening of the contract as a legal instrument since the plaintiff cannot count on being protected from morally and socially unacceptable behaviour and, therefore, has to put a lot of time, effort and resources into procuring such protection himself. It is, in this light, peculiar that Swedish law, as the only legal system of the compared, has shown no interest in protecting the legal-ethical interest. The right forum for such an interest would certainly be tort law, since tort law serves the possibility of focusing on the conduct and behaviour of the defendant.

7 Arguments against liability

⁶⁹Weir, *Economic Torts*, p 13

⁷⁰Weir, *Economic Torts*, p 34-35

It has, so far, been shown that different legal systems, certainly, have different approaches to interference with contractual relations. Depending on the attitude towards pure economic loss and the importance of the contract as a functioning legal instrument, different legal systems have chosen different methods or techniques to deal with interference situations. However, it has also been shown that an absolute exclusionary rule and an inner contract sphere perspective do not allow a legal system to protect the legal-ethical interest which otherwise can be sheltered and upheld by the interference tort. Accordingly, a legal system based on an absolute exclusionary rule and an inner contract sphere perspective, with its lack of concern for legal-ethical interests, has chosen *not* to support the contract as a legal instrument with a complete protection. Certainly, a logical and natural question following this statement is the question *why* a legal system chooses not to implement such complete protection. What reflections and well-reasoned considerations lie behind such a standpoint? Are there any conflicting interests? Since the Swedish legal system is the only system of the compared which has consistently refused to acknowledge liability for interference with contractual relations, the following arguments have been searched for and found in Swedish doctrine.

7.1 The simple rule argument

To begin with, the simple rule argument turns up frequently in the doctrine. This argument has its roots in the fear that a rule allowing third parties to claim compensation might open the gate for a flood of claims for compensation.⁷¹ To avoid this risk it is simply easier to create a rule which allows all or nothing to be claimed. Of course, the latter has been preferred. An absolute exclusionary rule is, therefore, considered to be a very simple and easily applied rule and even though it has been acknowledged that the results of such a rule sometimes may turn out or prove to be arbitrary, this is a fact one simply has to accept if one is interested in having easily applied rules.⁷² One author has argued that the existence of a simple and easily applied rule is often highly appreciated by those who can, thanks to such a rule, without bringing a case to court decide in a particular case whether a claim for compensation can be forwarded and accepted by the parties. Furthermore, it has been argued that sometimes one has simply to accept a rule without the existence of any rational motives supporting it⁷³. Thus, one can discern process economic and technical reasons for accepting a simple rule. Since there are often very complicated facts and relations involved in tri-partite cases it can be valuable to have a simple rule which draws up clear limitations. The simple rule argument, moreover, implies that it is possible to regulate liability for pure economic loss in completely different areas through one single and generally applicable rule. These arguments lead to the conclusion that there is no liability for interference with contractual relations in Swedish tort law simply because there is not!⁷⁴

Undoubtedly, the simple rule argument can in many respects be rejected. Firstly, a simple rule is not always the remedy for complicated cases. This method of grasping a complex and nuanced reality to squeeze and force it into a "fits all" tin is, certainly, a way of closing one's eyes to the true nature of reality. Secondly, a simple rule can be rejected since it excludes claims which can be considered motivated.⁷⁵ The value of simplicity cannot be valued more than the value of justice.

⁷¹Andersson, *Trepartsrelationer i Skadeståndsrätten*, p 38

⁷²Andersson, *Trepartsrelationer i Skadeståndsrätten*, p 43

⁷³Kleineman, *Ren Förmögenhetsskada*, p 121

⁷⁴Kleineman, *Ren Förmögenhetsskada*, p 282

⁷⁵Andersson, *Trepartsrelationer i Skadeståndsrätten*, p 45

This might lead to the unsatisfactory result that formality and chance may rule. Thirdly, a simple rule, certainly, excludes uncomfortable discussions. However, such an exclusion implies "a return to the unashamed pragmatism which believes that it is better that lawyers should be able to tell their clients what the law is, even if they cannot assert any rational justification for its consequences".⁷⁶ Surely, there is a false sound in such a pragmatism. Finally, one must certainly remember that the purpose of law is not to be simple, but rather to function and serve as a tool in conflicts to bring some kind of justice to the world. However, there might be some truth involved in the statement that "Lawyers in general and judges in particular are conservative by nature; they prefer the devil they know (injustice and artificiality in some cases) to the devil they do not know (uncertainty)".⁷⁷

7.2 The legal certainty argument

An argument closely linked to the simple rule argument is the idea that a simple rule which excludes liability for interference with contractual relations benefits legal certainty. Thus, the importance of foreseeability is underlined and stressed. Consequently, it is argued that a liability for interference with contractual relations would cause great uncertainty in practical business life.⁷⁸ This argument implies that it is better to cling to a principle, even if it in some cases results in misery, than to allow exceptions to cause uncertainty, since if "such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases".⁷⁹ In Swedish doctrine it is, furthermore, argued that liability for pure economic loss might result in discretionary judgements and, thus, supply the judge with too much power. One can also in this context acknowledge the fact that German law, with its § 826 which imposes liability when the interference is performed in a manner *contra bonos mores*, has been much criticized from a legal certainty perspective. For instance, it has been questioned: "Is the judge simply to consult his conscience, the inner forum? Does he go in for sociological investigation or speculation and ask what other people would think immoral?"⁸⁰

The legal certainty argument must of course be taken seriously. However, it is inevitable that all matters of law involve matters of judgement and this duty always falls on the judge. This is nothing unique to interference cases. Moreover, it would not be wise for a legal system not to allow case-law development when this is found necessary or to prevent change when the state of society changes with reference to legal certainty. A legal system must, consequently, continuously be shaped according to the requirements of reality. Hence, reality must not be shaped according to the requirements of the legal system merely to promote foreseeability.

7.3 The freedom of competition argument

The freedom of competition argument implies that since competition between business men is something desirable and worth striving towards, tort law should not be used as a means to compensate the injured party. On the contrary, "the right to cause losses to others through competition is said to demonstrate that society not only accepts but even approves of such

⁷⁶Jones, *Economic Loss - A Return to Pragmatism*, p 18

⁷⁷Markesinis-Deakin, *Tort Law*, p 57

⁷⁸Andersson, *Trepartsrelationer i Skadeståndsrätten*, p 44

⁷⁹Lord Brandon in *Leigh and Sillivan ltd v. Aliakmon Shipping Co Ltd (1986)*

⁸⁰Weir, *Economic Torts*, p 53

losses”.⁸¹ It is part of the game so to speak and once you’ve started you must take the consequences. Accordingly, no rule is necessary to separate the lawful from the unlawful⁸² since such a rule would limit the freedom of competition in an unacceptable way which might restrain trade.

Furthermore, it is argued that there is a certain interdependence of individual rights in a legal system. Consequently, freedoms such as freedom of establishment, freedom of association and, also, freedom of competition interact with the ”key freedom” of contract. This implies that far-reaching interference in the freedom of competition ”may in practice deprive contractual freedom of a large part of its content”.⁸³ But, it does also imply that without a certain degree of contractual freedom, freedom of competition ”is impossible to maintain or is for practical purposes without content”.⁸⁴ However, even if there is no doubt about the fact that freedom of competition is an extremely important phenomenon, one must still pay attention to the fact that some reprehensible and improper behaviour in a competition situation can actually amount to an abuse of competition and is, therefore, not at all to be considered to fall under the concept freedom of competition. Such abuse has a detrimental influence and effect on competition, since it causes a misallocation of resources. Accordingly, undue interference with contractual relations can be considered to be an abuse of competition. To allow such behaviour can twist and distort competition, since the resources are not allocated where they would be allocated if proper competition methods were used. Moreover, to allow socially unacceptable behaviour in business relations invites abuse of economic power. This cannot be acceptable in a society which supports and forwards a freedom of competition. Therefore, I believe it is desirable to define freedom of competition as a freedom to compete without undue interference with contractual relations and not as a freedom to compete even with means of undue interference. Or as an English author has expressed it:

”Freedom to compete effectively depends partly on knowledge that validly made contracts cannot lightly be interfered with; hence ‘the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle on which it rests’”.⁸⁵

7.4 The self-regulation argument

This argument implies that competition is not to be regulated by law, but rather by the participants on the market through their agreements. Consequently, the regulation and demarcation of which behaviour is to be considered lawful in competition and which behaviour is to be considered unlawful is to be decided by the businessmen themselves. This self-regulation is said to produce efficient companies and is cost-efficient to society, since the legal system with its courts is not involved. It is according to this argument better to have supervising authorities to clear the market of the worst competition conduct than to have the legislator drawing up the limits for and thereby governing business activities. Certainly, this idea does not put the individual case in focus but rather implies that if a business or company continuously indulges in

⁸¹Kleineman, *Ren Förmögenhetsskada*, p 586

⁸²Kleineman, *Ren Förmögenhetsskada*, p 280

⁸³Strömholm, *The freedom to contract - a complex cluster of rules*, *Scandinavian Studies in Law* 1989, p 218

⁸⁴Strömholm, *The freedom to contract - a complex cluster of rules*, *Scandinavian Studies in Law* 1989, p 218

⁸⁵Heydon, *Economic Torts*, p 38

objectionable conduct it will not survive on the market, since the other participants will condemn its behaviour and refuse to do business with it and in this way keep it out of the market.

In my opinion, this self-regulation argument can be refuted by two arguments. Firstly, on the basis that it shows little concern for the individual businessman. Certainly, he will not benefit or be helped by the fact that, eventually, the wrongdoer might disappear from the market, since this will be too late for the individual who has already been damaged or ruined by the wrongdoer. Secondly, small and medium-sized enterprises with little economic strength and power will not participate or have a voice when deciding what kind of behaviour is acceptable or not on the market. Hence, economic power will regulate the market and decide the character of the existing and prevailing conduct. Companies equipped with economic power will, thus, be able to interfere with contractual relations using any reprehensible and socially unacceptable behaviour in order to damage or bring a party to ruin. Accordingly, self-regulation signifies that economic power sets the standards on the market, which is far from acceptable or desirable.

7.5 The insurance argument

Since the Nordic countries, compared to the other countries in Europe, have been very eager to integrate into their law of tort regards for insurance law and methods of mitigating damage⁸⁶, it is perhaps not so surprising to find this insurance argument in Swedish doctrine. Thus, the insurance argument implies that, since the third party can provide his own protection through an insurance and since he has a better possibility to calculate and form an opinion of his own risks and of a suitable insurance, he has, consequently, to procure such protection for himself through an insurance if he has a great interest in an undisturbed relation.⁸⁷ Regulation in law is thus superfluous and in case the third party has not acquired an insurance he only has himself to blame. Furthermore, the incentive to mitigate and limit damage is considered to be stronger if the third party is to carry the loss.⁸⁸ However, these arguments can be contradicted, since the existence of an insurance reduces the motivation for the defendant to avoid damages.⁸⁹ Thus, the preventive purpose is ineffective. In addition, it is not self-evident that a third party shall carry insurance costs simply in order to protect himself from interferences. Finally, it is not possible at present to take out an insurance policy on interference with contractual relations. The insurance argument is, therefore, not a real option.

7.6 Pro and against Interference with contractual relations

Having ploughed through the different and diverse arguments against a liability to compensate pure economic loss due to interference with contractual relations one can, certainly, ascertain that the different arguments are more or less advanced and more or less convincing. In my opinion the legal certainty argument carries a certain convincing force while the simple rule argument is a regrettable phenomenon. Strangely enough though, the simple rule argument is the most frequently found argument in Swedish doctrine besides the freedom of competition argument. It is, certainly, a peculiar attitude to deny a complete protection for the contract as a legal

⁸⁶Gerven, Tort Law, p 46

⁸⁷Andersson, Trepartsrelationer i Skadeståndsrätten, p 51

⁸⁸Andersson, Trepartsrelationer i Skadeståndsrätten, p 51

⁸⁹Andersson, Trepartsrelationer i Skadeståndsrätten, p 52

instrument due to the fact that it is simple to deny such protection. According to such an argumentation one can actually even argue that it is simplest not to offer any protection at all!

Thus, as we have seen the Swedish legal system has due to the simple rule argument, the legal certainty argument, the freedom of competition argument, the self-regulation argument and the insurance argument chosen not to introduce any liability for interference with contractual relations. This attitude, as we have seen, can, due to the fact that it doesn't protect the legal-ethical interests, weaken the contract as a legal instrument and in the prolongation have a weakening effect on competition and trade. The Swedish legal system, however, stands on its own with this attitude and prioritization. All of the other above-analysed legal systems have in some way with different methods and techniques acknowledged the fact that it is important to protect the legal-ethical interest in order to uphold the contract and promote competition and trade. Certainly, this has not been an easy task. On the contrary, it can only be achieved through a careful balancing of contractual freedom and contractual stability, but since this balancing act is a complicated matter and demands an advanced thoroughness, uncomfortable discussions and much consideration there is always an option to play it the simple way!

It has been shown that liability for interference with contractual relations calls for a constant and continuous adjustment of competing interests. Consequently, "opposed to the plaintiff's demand for protection against injury is invariably the defendant's countervailing interest not to be impeded in the pursuit of his own wants and desires".⁹⁰ Thus, the interest in contractual freedom stands against the interest in contractual stability and "the administration of law involves a weighing of these conflicting interests on the scales of social value, with a view to promoting a balance that will minimise friction and be most conducive to the public good".⁹¹ A legal system without a liability for interference with contractual relations does not acknowledge the importance of such a balancing act. Instead of embracing both contractual freedom and contractual stability there is a preference in favour of contractual freedom. The contractual freedom can, therefore, in such legal systems be defined as a freedom to contract even with undue means of interference. In legal systems which acknowledge liability for interference with contractual relations, however, contractual stability is strengthened and emphasized and contractual freedom can be defined as a freedom to contract without undue interference.

It has, thus, been shown that the attitude towards liability for interference with contractual relations depends on the emphasis put on the importance of the contract as a legal instrument. Accordingly, if a legal system finds the contract to be important as a means of promoting trade and competition then this fact is shown by an acceptance of the interference tort. An acceptance of liability for interference is, consequently, a balancing of contractual freedom and contractual stability in order to strengthen and uphold the contract as a legal instrument and to promote trade and competition.

It has, furthermore, been shown that the interest protected by the interference tort is the legal-ethical interest. In addition one can, therefore, establish that by protecting the legal-ethical interest a legal system upholds the contract as a legal instrument and, as a consequence, it promotes trade and competition. These interests are, thus, connected. One can, therefore, argue that a legal system which does not protect the legal-ethical interest through an interference tort weakens the contract as a legal instrument and, as a consequence, weakens trade and competition. There are, admittedly, as we have seen arguments in favour of such a weakening process. However, as has been shown, these can all be refuted or contradicted.

My conclusion is, therefore, that it is important to stand up for and protect legal-ethical values by imposing a liability to compensate pure economic loss caused by interference with contractual relations. There is, undoubtedly, a legal-ethical value in acknowledging a liability for the the primary wrongdoer, the original initiator of breaching the contract, and not only to acknowledge a liability for the secondary wrongdoer. Or can anyone deny the fact that the serpent was worse than Eve?⁹²

⁹⁰Fleming, *The Law of Torts*, p 6

⁹¹Fleming, *The Law of Torts*, p 6

⁹²Weir, *Economic Torts*, p 35