The Interpretation of Commercial Contracts in European Private Law

Swedish Report
Cases

NJA 1921 p. 511
NJA 1933 p. 260
NJA 1948 p. 620
NJA 1949 p. 87
NJA 1949 p. 134
NJA 1950 p. 86
NJA 1951 p. 282
NJA 1964 p. 85
NJA 1964 p. 152
NJA 1964 p. 454
NJA 1974 p. 526
NJA 1979 p. 666
NJA 1979 p. 483
NJA 1978 p. 628
NJA 1980 p. 398
NJA 1981 p. 269
NJA 1981 p. 323
NJA 1984 p. 229
NJA 1985 p. 178
NJA 1985 p. 397
NJA 1989 p. 269
NJA 1990 p. 24
NJA 1991 p. 319
NJA 1992 p. 403
NJA 1992 p. 439
NJA 1993 p. 436
NJA 1996 p. 410
NJA 1997 p. 382
NJA 1998 p. 3
NJA 1999 p. 35
NJA 1999 p. 629
NJA 2006 p. 53
NJA 2006 p. 638
NJA 2007 p. 35
NJA 2010 p. 416

Legislation

Contracts Act (1915:218)
Promissory Notes Act (1936:81)
Sale of Goods Act (1990:931)
# Abbreviations

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Case 1 Jewellers King

Question 1
Under Swedish law, the preamble will be considered relevant – as part of the text or the immediate context.¹ The preamble can hardly be overlooked in the textual analysis – and, in this case, textual analysis will be the natural starting point when interpreting the contract. However, it is not possible to specify beforehand exactly what role the preamble will play – simply because, even though it might seem to corroborate Premier’s interpretation of Clause 12(d), it does not do so conclusively.

It is certainly possible to construe the relation between clause and preamble in other ways. For instance, considering that the language of the fifth recital of the preamble is rather vague, at least assessed from the viewpoint of the doctrine of formation of contracts – there is talk of the intentions of one of the contracting parties –, and considering the nature of preambles (they tend to be composed of fairly lofty statements) it could well be argued that the fifth recital is no more than a non-binding declaration of intent. On this reading, Premier has declared its intent to lease to no more than five jewellers, but has promised Jewellers King not to lease to more than three. Proponents of this interpretation will, of course, have to produce an alternative explanation of the occurrence of this “declaration of intent” in the preamble – seeing as the result is a somewhat less coherent text. Whether or not this can be accomplished will depend on the circumstances. The ancient dictum that the text is to be regarded as a coherent whole provides, as is generally acknowledged, but a presupposition,² and carries no real normative force. And, as we all know, contracts are, more often than not, quite incoherent. In addition, there is a normative trait in the general doctrine of interpretation of contracts and other juridical acts – a most indeterminate body of principles on occasion referred to by the Swedish Supreme Court as ‘vanliga principer för avtalstolkning’ [the usual principles of interpretation of contracts]³ –

¹ Though it could be argued that, strictly speaking, this is not a matter of law at all – not once it has been settled that the aim of the interpretive activity is to ascertain the meaning of the contract.
² This principle, or rule of thumb, has been referred to by the Swedish Supreme Court in a series of cases – see NJA 1990 p. 24, NJA 1992 p. 403 and NJA 2007 p. 35.
³ See e.g. NJA 1997 p. 382. Though on occasion referred to, these principles have never
working against Premier here. Even though we are dealing with the preamble to a bilateral juridical act, the declaration under consideration, in the fifth recital, has a unilateral flavour to it, and in as far as the wording is considered inaccurate, the courts will tend to read it against the stipulating party, especially when the stipulation in question can be understood as a would-be attempt to delimit an obligation of that party defined elsewhere. Whether or not it can be so understood is an open question. The fifth recital of the preamble will have to be read against Clause 12(d) and vice versa. All will depend on how clear, or unclear, Clause 12(d) is deemed to be, and this can be decided only with reference to the context – there is, after all, no such thing as pure ambiguity, or ambiguity plain and simple. Basically, if Jewellers King is, all relevant matters (such as the economical stakes) considered, justified in concluding from Clause 12(d), that Premier is prohibited from leasing to more than three jewellers, then the declaration of Premier's intent, in the preamble, to lease to no more than five, is of no consequence. Should, however, Clause 12(d), in the final analysis, be deemed to be radically ambiguous, or if the reading preferred by Premier is, to any degree, considered to be more sound, then, most likely, the fifth recital will form an integral part of the interpretation that the court will forge in order to decide the case.

Put another way, to say of the fifth recital of the preamble, that it is of no or little consequence when assessing the correct understanding of Clause 12(d), is to say, more or less, that Jewellers King is justified in believing that Premier is prohibited from leasing to more than three jewellers, and to say, that the fifth recital of the preamble is decisive when making that assessment, is to say, more or less, that Jewellers King is not justified in sustaining that belief. This, it could be said, is the basic anatomy of the interpretive problem in this case. Swedish law, as such, sides with neither party. All it decrees is that there are no formal constraints on interpretive data. Everything relevant shall be considered. Preambles are typically relevant. What role they will play is a matter of the interpreters' discretion. And, this is an important point, it is not possible to decide on the role of the

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4 The concept of juridical acts (‘rättshandlingar’) is part of the intellectual heritage of Swedish contract law. On the typical attitude towards this concept, see e.g. Adlercreutz-Gorton, Avtalsrätt I p. 24.
5 Cf. for instance NJA 1951 p. 282; on this case see Vahlén, Avtal och tolkning p. 294 ff.
6 The primary legal source here is an oft cited passage in the preparatory works of the Contracts Act (1915:218) – see Förslag till lag om avtal (1914) p. 140.
7 In NJA 1993 p. 436 the Supreme Court held that an enunciation – a statement of fact – found found in a preamble to a sales contract was not to be treated as a contract term. Cf. NJA 1990 p. 24.
preamble in this case – or of the role of any matter relevant to any interpretive question arising under Swedish law – without actually engaging in interpretation. The question is not theoretical, but practical.

**Question 2**

Yes, that would change things.\(^8\) An explanatory note is closer to the actual contract terms and is more likely to be considered part of the ‘egentliga avtalsinnehåll’ [content of the contract, in the proper sense].\(^9\) Placing this same text in an explanatory note makes its unilateral character less tangible, and the courts will, accordingly, be more inclined to hold both parties responsible, jointly, for the wording – for instance, vagueness will be less important, as a factor, in deciding in whose favour the contract should be read.

Still, this does not entail that the explanatory note will be decisive when interpreting the contract, not necessarily.\(^10\) There are – as is well known in the theory of interpretation of contracts – limits to what can be achieved by including, in the contract itself, explanations, definitions and other attempts at controlling the interpretation of the contract.\(^11\) Context is everything, and the decision is always, in the end, in the hands of the interpreter.

**Question 3**

‘Avtalets syfte’ [the purpose, or objective, of the contract] has definitely, if possible to establish, a role to play – especially in circumstances like these, i.e. in a commercial context, where there are no direct indications of what content the parties might have envisioned, where the wording is ambiguous and where there is little hope of doing away with the ambiguity by means of textual analysis in a stricter sense.\(^12\) Indeed, Swedish courts are quite fond of constructing contracts teleologically, where the approach is appropriate.\(^13\)

However, it should be borne in mind, firstly, that the “purpose” of the

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\(^8\) It is acknowledged by the Supreme Court that the location of a proposition within the contract text matters when assessing its import; see NJA 1964 p. 152 and NJA 1985 p. 397.

\(^9\) See e.g. Adlercreutz–Gorton, Avtalsrätt II p. 52 ff.

\(^10\) Cf. NJA 2007 p. 35, where an explanatory note was accorded some weight by the Supreme Court.

\(^11\) See e.g. Samuelsson, Tolkningsslärans gåta p. 163.

\(^12\) See generally Adlercreutz–Gorton, Avtalrått II p. 66; Lehrberg, Avtalstolkning p. 112 ff; J Ramberg–C Ramberg, Allmän avtalsrätt p. 156 ff.

contract is a construction, arrived at by means of interpretation, and not in itself a fact, somehow objectively given – and, hardly surprising, where the notion of “purpose” is employed by the courts, it is typically in order to affirm a reading aligned with the particular purpose thus ascribed to the contract – and secondly, that the purpose of the contract will typically reflect the reciprocality of the contract instrument. To resort to a tautology: The purpose of a contract is the point of a mutual agreement. This implies, for instance, that the interpreter must cover a lot of ground if he wants to equate a unilateral declaration of intent, such as the one found in the fifth recital in the preamble in Question 1 above, with the purpose of the contract.
Case 2  Botanical Fruits

Question 1
Swedish courts will, no doubt, attribute the so-called ordinary meaning to Clause 8(g). The general aim of interpretation is to establish the common intention of the parties.\(^1\) The horizon from which the meaning of the contract is to be assessed is, consequently, intersubjective. Interpretation regularly proceeds on the assumption that the language employed by the parties conforms to a shared linguistic standard.\(^2\) Whoever wants to deviate from such a standard needs to make that sufficiently clear to the other party. He has a ‘klargörandeplikt’ [duty of clarification] which flows from the general ‘lojalitetsplikt’ [duty of loyalty] binding contracting parties vis-à-vis each other.\(^3\) Botanical Fruits should have reacted when first confronted with the wording of Clause 8(g). In the present case, there is really nothing – short of the name of the lessee – indicating that the technical meaning in question should be taken into consideration when interpreting the contract. There is no connection to the commercial context.\(^4\) And the fact that the mall already includes a vegetable vendor, in conjunction with the limited size of the mall, strongly supports the reading preferred by the lessor.

Does this rejection of the technical terminology turn on a matter of fact or matter of law? To be able to answer that question, one would need to resolve one of the most controversial issues of Swedish contract law theory. Traditionally, there was a distinction made between ‘tolkning’ [interpretation] (a matter of fact) and ‘utfyllning’ [complementary construction] (a matter of law).\(^5\) This distinction had its roots in early 20\(^{th}\) century realist theory. During the course of the last one hundred years it came to lose much of its appeal, and its worth is now definitely under doubt

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\(^2\) See especially Vahlén, Avtal och tolkning p. 43 ff. and 270 f.
\(^3\) See e.g. NJA 1981 p. 323.
\(^4\) In NJA 1921 p. 511, technical language prevailed. However, even though the technical language in question was firmly embedded in the commercial context at hand, the ruling has been considered somewhat harsh; see Lehrberg, Avtalstolkning p. 97. Cf. NJA 1978 p. 628.
— and this development mirrors the decline of the fact/value dichotomy in Western thinking in general. Presently, it is not possible to say, with any confidence, that interpretation is a matter of fact, a matter of law … or a matter of something else.6

Question 2

No, the outcome would be the same. There is no reason to believe that the food retail industry uses botanical terminology. And the fact that the director of Imperial has a mastery of botanical terminology does, naturally, not in itself mean that he should have understood the term “vegetables” in the strict botanical sense when concluding the contract. In Swedish law, the line here is drawn by means of the so called ‘dolusregel’ [dolus rule, rule of qualified bad faith].7 According to this rule, a contracting party is bound to the other party’s understanding of a contract term at the time of conclusion of the contract if he in fact was aware, or must have been aware, of that understanding. In principle, this rule makes the requirement of bad faith a matter of fact, to be distinguished from the normative question prompted by the requirement of “ordinary” bad faith found in many other rules of Swedish private law (dolus distinguished from culpa by means of the fact/value dichotomy).8 Now, it should be clear that, even though Botanical might have understood the terms “vegetables” and “vegetable products” in the technical, botanical way (we do not know that for a fact, albeit there are strong indications) we are, as interpreters, not entitled to conclude that the director of Imperial actually was aware, or must have been aware, of that.

6 On this theme, see Samulesson, Tolkning och utfyllning.
8 See Adlercreutz–Gorton, Avtalsrätt I p. 43 f.
Case 3  Cocktail Parties

Question 1

The e-mail correspondence between Jill and John will most likely play a decisive role when interpreting Clause 8 of the contract according to the principles of Swedish contract law.

As there are no formal constraints on what circumstances may be accorded weight by the interpreter – everything relevant shall be considered1 – there is no reason to dismiss the e-mail communication in question out of hand.2 True, this correspondence precedes the conclusion of the contract, and is in this sense preliminary, but this does not in itself make the data irrelevant – even though we should be cautious.3 The interpreter is free to ask himself, and should ask himself, what might be deduced from the e-mail exchange when ascertaining the meaning of the contract. What matters here is, first and foremost, the wording of the e-mails, the wording of Clause 8 of the agreement and the temporal dimension, i.e. the fact that the e-mail exchange took place just days before the conclusion of the contract. Considering the time frame, the courts will, no doubt, hold Afloat to the reading suggested to Jill by John’s e-mail reply.

Question 2

If the e-mail exchange took place after the conclusion of the contract, that would change things quite a bit. Normally, the conduct of the parties after the conclusion of the contract may be taken as an indication of how the contract was understood at the time of conclusion,4 but this does not apply in a case like this. What Jill and John are discussing, via e-mail, is the correct interpretation of the contract. If such a discussion were to precede the conclusion of the contract it might, as we have seen, very well throw

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1 See the answer to Case 1, Question 1 above, at footnote 6.
2 A classic case, in which the preliminaries proved decisive, is NJA 1964 p. 454.
3 On preliminaries and interpretation see Adlercreutz–Gorton, Avtalsrätt II p. 71 ff., Lehrberg, Avtalstolkning p. 118 ff., J Ramberg–C Ramberg, Allmän avtalsrätt p. 164 ff. Generally, the idea that preliminaries should be treated with caution has no real hold on Swedish contract law scholars. If anything, the importance of preliminaries is stressed (see, however J Ramberg–C Ramberg, Allmän avtalsrätt p. 165).
4 See Lehrberg, Avtalstolkning p. 133 ff.
some light on what the parties intended the contract to mean, whereas the link between intention and discussion is much weaker, if not broken altogether, in cases where the discussion is subsequent to the conclusion of the contract. The very fact that the interpretation is made the subject of a discussion indicates that the parties did in fact not, at the time of conclusion, entertain any specific understanding of their agreement on the point of discussion. Thus, the question that Jill asks implies that she, on her part, did not think that PartyMax, under the contract, had the right to end the agreement whenever it wanted after the first week. So, there was no common understanding of Clause 8. John’s answer might indicate that he thought, at the time of conclusion, that there was such a right, but that is immaterial. And that he now, after the fact, is inclined to understand Clause 8 in this way, rather than in any other, is of no real consequence either. When the meaning of a text is in question, the author is just another reader – his opinion carries no extra weight. Under the conditions set up in Question 1, John is free to say whatever he wants in the matter.

Question 3

Pace the law of evidence, that would make no difference whatsoever. That is, assuming that the nuances of conveyed intent separating e-mails from handwritten letters from orally made comments – in this day and age, a handwritten letter signals that the matter in question has been considered quite seriously – cannot be made to bear on the interpretive question. But I cannot see how.
Case 4 Animal Waste

Question
On those assumptions, the fact that Meat ‘n’ Bones filed the request under consideration will be decisive when interpreting the contract.\(^1\) Actually, that is an understatement. In this case, we won’t even need to engage in any interpretive activity, seeing as the aim of interpretation is to ascertain something which here is already given, namely the common intention of the parties.

The thing is, though, that the “common intention” is never really given beforehand, but rather the outcome of the interpretive process. The interpreter is basically telling the parties that, all things considered, this (or that) is what you agreed on, and the law will hold you to it. Thus, the conduct of the parties following the conclusion of the contract will typically be but one component in the matrix of fact constituting the material (objective side) on which the interpreters report on the parties’ intention (subjective side) will be based.\(^2\)

\(^1\) Cf. Høgberg, Kontraktstolkning p. 96.
\(^2\) How the relation between the objective and the subjective elements of interpretation is to be understood is, hardly surprising, the subject of much debate in Swedish contract law theory. Out of tradition – realist heritage and all – there is a strong tendency to favour the objective side. Critics have claimed that some moderation is called for, considering that interpretation remains subjectively oriented, i.e. striving for ascertaining the common intention of the parties, where possible. Recently, a third position has been established around the claim that the relation between subjective and objective aspects can only be understood dialectically. See e.g. Grönfors, Avtalsgrundande rättsfakta p. 18 ff., 27, Grönfors, Tolkning av fraktavtal, Høgberg, Kontraktstolkning p. 99 ff., Lehrberg, Anm av Grönfors, Avtalsgrundande
Case 5  Shower Valves

Question 1
Again, the weight to be accorded to any fact possibly relevant to the understanding of the contract is a function of the nature of that fact and its relation to the other circumstances of the case, i.e. something that can only be assessed by actually engaging in interpretation. In the present case, in order to assess the weight of Clause IX of the general conditions, one will have to consider the wording of that clause, its relation to the wording of Clause 6 – bearing in mind that Clause IX is to be found among the general conditions applicable to the contract – as well as any other relevant matters, such as, perhaps, the nature and purpose of the agreement.

It can immediately be established that the interpretive question cannot be settled simply by means of a reference to Clause IX of the General Conditions. For instance, that clause might, being found in the applicable general conditions, be taken to state a general rule, from which the parties, in agreeing on Clause 6, have made an exception. On that reading, Engineering Solutions would be prohibited from supplying intermediate products within the area of operation of Bath & Shower, but not outside of that area. That makes some kind of sense, and we would not have to explain why the parties, when deciding on the wording of Clause 6 of the contract, did not take greater care to actually make the distinction between intermediate products and end products. That reading, however, presupposes that the parties agreed, wilfully or not, to contradict the General Conditions on the matter of competition, and they haven’t been very clear on that either. Then again, one should perhaps not assume that the parties have read and understood the general conditions. And individually negotiated terms typically take precedence over standardised terms.1 And so on.2

It is for the interpreter to decide which reading is to be preferred. (The law does not make that decision for him.) And that decision will, unavoidably, contain a decision on the weight of Clause IX of the General Conditions.

1 See e.g. Bernitz, Standardavtalsrätt p. 85, Vahlén, Avtal och tolkning p. 200 (cf. p. 262).
2 On the interplay between individual and standardised terms see e.g. NJA 1964 p. 85, NJA 1980 p. 398, NJA 1990 p. 24.
Question 2

Yes, certainly. Interpretation is always, on one level or another, about allocating responsibility, and, naturally, when interpreting standardised terms it matters, in that respect, who drafted, supplied or used the terms in question. All the more so when the terms are vague. If such vagueness cannot be dealt with by means of interpretation in a stricter sense, the courts may resort to the ‘oklarhetsregel’ [rule of unclarity] according to which ambiguous terms are to be interpreted against the party responsible for the wording.

3 In Swedish contract law debate this notion was first introduced by Folke Schmidt in a pair of highly controversial papers; see Schmidt, Typfall, partsvisk och partsculpa, Schmidt, En culperegel vid avtalstolkning.
4 See e.g. NJA 1998 p. 3, where the Supreme Court made explicit mention of the fact that the terms under consideration had been agreed upon by organisation representing the interests of both parties.
5 See e.g. NJA 1950 p. 86, NJA 1979 p. 483, NJA 1981 p. 323. Cf. NJA 2006 p. 53, NJA 2010 p. 416, where the Supreme Court emphazises that the ‘oklarhetsregel’ is to be used with caution.
Case 6 Call Centre

Question

When assessing the scope of Magnificall’s obligation to conduct quality tests under the contract, the meaning attributed to Clause 16(k) by Print Master and PPS will, under Swedish law, be accorded decisive weight. There can be no doubt. This conclusion follows, firstly, from the fact that, according to a settled principle, called ‘den gemensamma partsviljans företräde’ [the priority of the common intention], the contract is to be interpreted according to the common understanding of the parties at the time of conclusion of the contract, if such an understanding can be established,¹ and secondly, because a transferral of rights does not affect the content of the rights transferred – this general principle can be regarded as a consequence of the privity of contract (contracts do not bind third parties) and follows ex analogia from the Promissory Notes Act (1936:81) sec. 27, which states that, when a ‘enkelt skuldebrev’ [a simple note, a note that is not negotiable] is assigned to a new creditor, the creditors’ right against the debtor is not improved by the assignment.²

Deciding on this issue is a matter of law, not of fact. And it is not, strictly speaking, a matter of contract interpretation (we know what the parties intended).


² See Mellqvist–Persson, Fordran och skuld p. 151, Rodhe, Obligationsrätt p. 134 ff. and 739.
Case 7  Biscuit

Question
The courts will, without hesitation, conclude that Clause 1 is to be read in accordance with the understanding shared by Ian and John at the time of conclusion of the contract. The fact that they were, in one sense, mistaken, is, in other words, immaterial. This follows from ‘den gemensamma partsviljans företräde’ [the priority of the common intention]1 – and at this point it is customary to refer to the old Roman maxim falsa demonstratio non nocet.2 Obviously, the fact that Ian later was replaced by Barton has no impact on the content of the contract.

1 See above under Case 6, footnote 1.
Case 8  Crates of Beer

Question
The manner of performance of the previous contracts between Carryon and Goldwater will be accorded weight in the interpretation of Clause 8 to the extent that is appropriate given the stability and length of their business relationship and all other matters deemed relevant by the interpreter. If the pattern developed between the parties – the ‘partsbruk’ [practice of the parties] – is stable enough, i.e. if that pattern has engendered an understanding that Carryon is entitled to rely on, it will be decisive in the interpretation of Clause 8.1 But, please note, to phrase it like that, is to beg the question.

However, assuming that this same wording has been used by the parties throughout their relationship, and considering that Goldwater has performed in identical fashion on every occasion, it is difficult to escape the conclusion that Clause 8 will have to be construed in accordance with the norm thus established. In order to reach a different conclusion, the interpreter will have to attribute an alternative meaning to Goldwater’s behaviour. The first alternative one would consider in a case like this, is the possibility that the behaviour in question should be understood as an act of, or, rather, a series of acts of, good will. If what Goldwater has done, rightly understood, is to grant Carryon ‘kulans’ [a concession not giving rise to any obligation], then, conversely, Goldwater is not entitled to rely on that behaviour.2 However, it is hard to see how the behaviour of Goldwater in this case reasonably could be understood in that sense. All we know is,

basically, that to make the beer available at the front of the entrance requires *some* work, but, arguably, not enough to make it clear that, in performing that work, Goldwater does more than it considers itself required to do under the contract.
Case 9  Crystal Vases

Question

In order to determine the weight of the local custom of trade in interpreting Clause 4 of the contract the court will have to consider the relation obtaining between the wording of the individual norm, interpreted in the light of all relevant circumstances, and the content of the general norm, i.e. the local custom.

To elaborate, it is without question that a local custom of trade very well might be relevant when assessing the content of the contract by means of interpretation\(^1\) – there are, as stated previously, no formal constraints in this regard\(^2\) – but the question what relevance, to be precise, can only ever be answered case by case, taking the individual circumstances at hand into consideration. A general norm, such as a local custom of trade – the same applies to every single objective norm, be it ordinary language, rationality ( economical or not), ‘sakens naur’ [the nature of things], customs, at any level, the practice of the parties or whatever – only takes hold where the interpretive data does not allow the interpreter to construct an understanding that is singular to the specific agreement interpreted. And even then, the general norm applies on the assumption that it represents the individual understanding of the parties. We assume that the parties are, for instance, rational. And, of course, this manoeuvre is only justified where both parties actually are subject to the norm under consideration. In the present case we will need to know whether Murray and OnTrack are part of the trade community in which the custom in question is observed.

When discussing these matters, it should be borne in mind that interpretation is seldomly simply about resolving the tension between general norm and individual understanding. There is rather, typically, a complex interplay between the individual and the general – the courts make use of, refer to, general norms in order to arrive at an individual understanding.

Now, are there solid reasons for assuming that the parties intended to handle the question of delivery in accordance with the local custom of trade in question? It is constitutive of the interpretive problem the court faces in

\(^1\) See e.g. NJA 1989 p. 269.
\(^2\) See the answer to Case 1, Question 1 above, at footnote 6.
this case, that Clause 4 is, *prima facie*, unambiguous. It is not, then, to begin with, a matter of resolving an ambiguity. The question is, rather, if the circumstances will allow the court to construct a reading going against the grain of the wording. Sustaining such a reading is a), the nature of the goods, i.e. the complexity of carrying them, b) the fact that Murray has undertaken to carry the goods in accordance with Clause 4 (implying that they will have devised a means of dealing with the complexity involved, which is relevant assuming that it is possible to employ those means in order to cover the final distance up to the actual terminal), c) the local custom of trade. (We are not allowed to accord any importance to the geographical conditions on site – specifically the distance between entrance and terminal – unless it is shown that they were known to both parties at the time of conclusion.) Will this suffice? Only the court can decide; which is to say that the interpretive judgment is not precluded by any kind of legal standard. The decision will be a decision on, among other things, the weight of the local custom concerned.
Question

Most likely, Swedish courts will not consider this to be a matter of interpretation at all. The problem lies, one could say, too deep within the implicit dimension of the agreement. As has been pointed out previously, the style of Swedish contract law thinking is realistic. In interpretation, this realist tendency is manifested in the conviction that there should be something palpable – something real – to interpret, in order for there to be interpretation at all. To engage in interpretation where there is no factual basis is to commit the principal vice, namely to turn to fictitious legal reasoning, concealing the legal judgment in ‘tolkningens täckmantel’ [the cloak of interpretation (not a technical term, but a telling and oft-used phrase)].

The crux of the problem in the present case is that the answer required necessitates a decision on a point which the parties clearly did not consider. The difficulty is accentuated by the fact that the court must, unless it wants to reject Bingham’s claim altogether, which might seem overly formalistic, deliver an answer in quantitative terms – a fixed figure – that can only be arrived at through considerations of what is fair and reasonable. To say, under such circumstances, that the answer follows from the contract, properly interpreted, is too much of a stretch.

Most likely, a Swedish court will prefer to construe the problem in this case as a matter of ‘motivvillfarelse’ [error of motive], to be dealt with by means of ‘utfyllning’ [complementary construction], rather than ‘tolkning’ [interpretation], i.e. by supplying a legal norm to fill the gap in the contract. A ‘motivvillfarelse’ is, by definition, a mistake of fact (say x on the presupposition that y is the case, while, in fact, z is true), as opposed to a ‘förklaringsmisstag’ [mistaken declaration of will], which is a mistake regarding the content of the contract (say x while intending to say y) and is

1 See the answer to Case 2, Question 1, at footnote 6 and Case 4, footnote 2. Interested non-Swedish speaking scholars may find the essay on Swedish contract law by Jan Hellner in the Festschrift for Atiyah helpful; see Hellner, Scandinavian Legal Realism in the Law of Contract.
3 On this distinction see the answer to Case 2, Question 1, at footnote 5.
to be handled through interpretation⁴ – the matter in question being that Peel would actually be using the programme provided by Bingham. That supposed fact constitutes a ‘felaktig förutsättning’ [faulty presupposition] in the terminology of the ‘förutsättningslära’ [doctrine of tacit presuppositions], which is the principal rule employed by the courts when dealing with problems of ‘motivvillfarelse’.⁵

However, the only legal consequence made available through application of the ‘förutsättningslära’ is ‘overksamhet’ [ineffectiveness], which is to say that those terms of the contract that are based on the faulty presupposition will be considered to be without effect.⁶ In order to gain access to a positive legal consequence the courts will need to resort to ‘individuell utfyllning’ [individual complementary construction], which is the process of filling a gap in a contract with an individual, tailor made, solution or norm⁷ or to ‘jämka’ [adjust] the content of the contract by making use of Section 36 of the Contracts Act (1915:218), which contains the general clause on unfair terms in Swedish contract law.⁸

Either way, all relevant circumstances should be considered, and, either way, reference might be made to the general principle of contract law holding that the seller, of goods or services, is entitled to a fair price when the contract is silent on the matter (see Section 45 of the Sale of Goods Act (1990:931)). That is not to say that, quite simply, Bingham will be entitled to a fair price, set by market standards. No, the solution will have to do the specific problem at hand justice.

The question will be, if Bingham has the right to further compensation for their services, in a situation where a) the contract is silent, b) which is an effect of the fact that Bingham, and possibly Peel as well, negotiated under the faulty presupposition that Peel would actually use the programme, c) and even if Peel did not share that presupposition it could not have been unaware of the fact that Bingham did enter the contract under it; d) what is more, it was Peel’s behaviour that falsified the presupposition. Simply put,

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⁶ See Lehrberg, Förutsättningsläran p. 564 ff.

⁷ On ‘individuell utfyllning’ see Adlercreutz–Gorton, Avtalsrätt II p. 29 ff.

⁸ The case law on this provision is quite rich. In the present context reference might be made to early cases NJA 1979 p. 483, NJA 1979 p. 666, and NJA 1984 p. 229, where the Supreme Court had to deal with the question to what extent Section 36 is applicable in business to business-relations. It is clear, from the wording of the provision and from these cases, that Section 36 is indeed applicable, in principle, but that it is necessary to show restraint out of respect for the freedom of contract.
Peel took advantage of a lacuna in the contract text. Or so it would seem. But the contract was, perhaps, badly drafted. Should, for instance, Clause 2 be taken to mean that Peel was obligated to use the programme for five years, even if, say, a better option presented itself? Hardly.

The question of the price to be paid by the buyer is poorly regulated in this contract. Deciding the case is ultimately about allocating the risks associated with this deficiency. And the advantage of having recourse to ‘individuell utfyllning’ or ‘jämkning’ is that the risk may be evenly distributed between the parties, or distributed in whatever way the court finds appropriate. What distribution the court will prefer and how much weight the court will attach to the factors in play is not possible to ascertain beforehand.
Bibliography


