The Effect of a Debtor's Awareness of a Contract Breach on a Creditor's Duty to Give Notice

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By professor, LL.D. Mia Hoffrén[1] *- University of Eastern Finland*

When a breach of contract occurs, the aggrieved party (creditor) is usually obliged to give notice of the breach to the breaching party (debtor) within a reasonable time. If the creditor neglects this duty, they lose their right to claim remedies for breach of contract.

Sometimes the debtor is aware of a breach even without notice. The article examines the question of how the debtor's knowledge of the breach affects the creditor's duty to give notice.

The author's conclusion is that the debtor's knowledge as such does not usually exempt the creditor from the duty to give notice. However, the debtor's knowledge, together with other facts, can give reason to consider the debtor's conduct reprehensible in such a way that the creditor may invoke a breach of contract despite the neglect of the duty to give notice. The debtor's conduct can be considered reprehensible, for example, when a seller has deliberately concealed defects from the buyer. In other cases, the debtor's knowledge of the breach can affect the assessment of whether the notice was given within a reasonable time and whether the content of the notice was sufficient.

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1. Introduction

In many cases, claiming remedies for a breach of contract requires that the party pleading the breach (also referred to as the creditor) informs the party in breach (also referred to as the debtor) of the breach within a reasonable time. This obligation is called the duty to give notice.[2]

The duty to give notice is part of the general doctrines of contract law. It is provided for in several statutes governing common types of contracts. The typical content of the rules on the duty to give notice is that the other party must notify the breaching party of a breach of contract within a reasonable time, with the risk of otherwise losing the right to bring a claim based on the breach (Sales of Goods Act 355/1987 (SGA) Sec. 32, Consumer Protection Act 38/1978 (CPA) Ch. 5 Sec. 16 a.1, Ch. 8 Sec. 16.1 and Ch. 9 Sec 16.1, Housing Contracts Act 843/1994 (HCA) Ch. 4 Sec. 19 and Ch. 6 Sec. 14 and the Land Code 540/1994 (LC) Ch. 2 Sec. 25). However, for many types of contracts, the duty to give notice is not regulated by law, either because there is no legislation on the type of contract in question or because the applicable statute does not contain provisions on the duty to give notice.[3] It is generally held that the duty to give notice also applies to types of contract other than those provided for by law, on the basis of general doctrines of contract law.[4] In addition, the duty to give notice may be specified in a contract.

Acknowledging the duty to give notice as part of the general doctrine of contract law does not mean that all types of contracts and breaches of contract are subject to the same duty to give notice. Although in case law the duty to give notice is regarded as a main rule even in situations not regulated by statutory law, there are exceptions to the rule, and the relevance of the general principle in the context of a particular type of contract and a particular type of breach has been assessed in the light of the specific characteristics of that type of contract and type of breach (see, for example, KKO 2021:69, in particular paragraphs 25-35). The need for an assessment by type of contract and breach is also emphasised in the legal

1 I would like to thank the anonymous reviewers for the relevant and useful feedback. The article refers to some Supreme Court decisions (KKO) in which I have acted as referendary (KKO 2016:69, KKO 2017:71, KKO 2018:38 and KKO 2019:94). As I have had extensive access to the court records of these cases, it should be explicitly mentioned that the discussion of these judgments in the article is based exclusively on published transcripts of the judgments. The opinions expressed in the article are, of course, my own.

2 The term notice (*reklamaatio* in Finnish) can be used in a narrower and broader sense. In the narrow sense, the term refers specifically to the notice of a breach of contract, which is a prerequisite for bringing a claim based on a breach of contract. In the broader sense, the term may also refer to other notices intended to bring the other party's own understanding of the legal situation to the attention of the other party. See, e.g., Marja Luukkonen Yli-Rahnasto, Reklamaatiovelvollisuus [The duty to give notice]. Alma Talent 2021, pp. 30–31. In this article, the term is used in the narrow sense, i.e. it refers specifically to a notice of a breach of contract.

3 Examples of laws that do not provide for the duty to give notice are the Act on the brokerage of real estate and rental housing (1074/2000) and the Investment Services Act (747/2012). On the duty to give notice in real estate brokerage contracts, see Mia Hoffrén, Virhevastuu asunnon ja asuinkiinteistön kaupassa [Liability for defects in the sale of dwellings and residential real estate], 2nd, revised edition. Alma Talent 2021, pp. 338–339, 344–347 and Luukkonen Yli-Rahnasto 2021, pp. 214–226. On duty to give notice in investment service contracts, see Luukkonen Yli-Rahnasto 2021, pp. 157–173.

4 See, e.g., Johan Bärlund, Reklamation i konsumentavtal: en kontraktsrättslig studie av konsumentens reklamation som en förutsättning för att konsumenten skall kunna åberopa näringsidkarens avtalsbrott [The duty to give notice in consumer contracts: a contract law study of the consumer's notice as a prerequisite for invoking the trader's breach of contract]. Juristförbundets förlag 2002, p. 126; Olli Norros, Velvoiteoikeus [Law of obligation]. Second, revised edition. Alma Talent 2018, p. 548 and Luukkonen Yli-Rahnasto, pp. 2–3 and from case law, e.g., KKO 2018:38, paragraph 22; KKO 2019:94, paragraph 7; KKO 2020:6, paragraph 12 and KKO 2021:69, paragraph 22.

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literature.[5] The requirements concerning the content of the notice also vary according to the type of contract and the type of breach. In general, a so-called neutral notice, i.e. a statement of the breach of contract on which the creditor wishes to rely, is sufficient in the first instance. Sometimes a so-called specific notice is required, in which the party claiming a breach of contract not only states the breach of contract but also specifies the remedies they seek.[6]

A duty to give notice is particularly important for the breaching party if they do not know that they have breached the contract. In such cases, the breaching party would not be able, without notification of the breach, to anticipate creditor's claims based on the breach of contract and to take measures to resolve the matter, to prevent the adverse effects of the breach or to prepare for possible litigation. In contrast, where the breaching party is aware of the breach, the need for a notice appears to be reduced. When a party is aware of a breach, they can anticipate that claims will be made and can therefore actively seek to resolve the matter, for example by taking steps to remedy the breach on their own initiative or by seeking the other party's views on how to resolve the situation. These considerations raise the question of how the debtor's knowledge of the breach of contract affects the obligation to give notice.

The debtor's knowledge of a breach of contract may, at least in combination with other factors, give rise to a finding that the debtor's conduct is dishonourable and unworthy or grossly negligent. Our legislation contains several provisions according to which a party who fails to give notice does not lose their right to bring a claim if the breaching party has acted in a dishonourable and unworthy or grossly negligent manner (see, for example, SGA Sec. 33, LC Ch. 2 Sec. 25.2, CPA Ch. 5 Sec. 16 a.2, CPA Ch. 8 Sec. 16.2, CPA Ch. 9 Sec. 16.2, HCA Ch. 4 Sec. 20 and HCA Ch. 6 Sec. 14.3).[7] According to the case law of the Supreme Court, these provisions reflect a general principle of contract law (KKO 2021:69, paragraph 24). Deliberately concealing defects in the sold object is a typical example of dishonourable and unworthy conduct.[8] Although certain conduct may typically be considered reprehensible, the case law has stressed the importance of a case-by-case assessment: in each individual case, it must be assessed whether the culpability of the seller's conduct can be considered sufficiently serious to override the need for a speedy resolution of the relations between the buyer and the seller that underlies the rule on the duty to give notice (KKO 2007:91, paragraph 5).

The exception for dishonourable and unworthy conduct is well established. It is more unclear to what extent the debtor's knowledge affects the duty to give notice in other cases. Some legal scholars have suggested that mere knowledge of a breach by the debtor of a breach of contract exempts the creditor from the duty to give notice.[9] However, this view has not received unreserved support, and it is often held that a notice is necessary regardless of the debtor's knowledge.[10]

The purpose of this article is to examine the impact of a debtor's knowledge of a breach of contract on the duty to give notice. It examines the effect of the debtor's knowledge in such types of breach which are generally covered by the duty to give notice.

Since the subject of this article is a matter of controversy, I will begin by briefly presenting the different views that have been expressed in the legal literature. What unites these different conceptions is that they have been justified in terms of the functions of the notice: the duty to give notice has been assessed according to whether the notice is necessary from the point of view of these functions. Therefore, before discussing the different views, I will discuss the functions that the rule on the duty to give notice has generally been considered to serve.

After presenting the positions expressed in the legal literature, I will examine formal sources of law: to what extent do statutes, legislative documents and case law support the view that the debtor's knowledge affects the duty to give notice. I then assess what ap-

5 Norros (2018, p. 549) considers it indisputable that the duty to give notice is part of the general doctrine of the law of obligations, but he sees the scope of the duty as rather limited. According to Norros, the core area of the duty to give notice is commercial contracts and other contracts for one-off performance, while the relevance of the duty to give notice for long-term performance obligations is unclear. He also considers that, as a general principle, the duty to give notice only applies to a defect in performance, not to a delay. In Sweden, the importance of a contract-specific assessment has been stressed in particular by Stefan Lindskog, Preskription: Om civilrättsliga förpliktelsers upphörande efter viss tid [Limitation: on the expiry of civil obligations after a certain period of time]. 5 uppl. Norstedts Juridik 2021, p. 731. Luukkonen Yli-Rahnasto (2021, pp. 50–55) considers it problematic from the point of view of the duty to know the law that the duty to give notice is often based on general doctrines of contract law instead of written law. She does not, however, question the *de lege lata*, which is based on general doctrines, but considers it desirable that the duty to give notice should as often as possible be laid down in legislation.

6 A neutral duty to give notice is also referred to as a narrow duty to give notice and a specific duty to give notice as a detailed or broad duty to give notice. Sometimes only a neutral duty to give notice is called a duty to give notice, and the time limit for specifying remedies sought is referred to as a separate phenomenon. See Luukkonen Yli-Rahnasto 2021, p. 11 footnote 16.

7 Dishonourable and unworthy or grossly negligent conduct is not the only such exception. Statutory exceptions to the duty to give notice include also, inter alia, certain breaches that endanger health or property (CPA Ch. 5 Sec. 16a; CPA Ch. 8 Sec. 16.2; CPA Ch. 9 Sec. 16.2 and HCA Ch. 4 Sec. 20). In the Supreme Court decision KKO 2021:69 (paragraphs 36–45), air passengers were held to have retained the right to claim standard compensation for flight delays despite the failure to give notice, because the airline had failed to fulfil its obligation to inform them of their right to compensation.

8 See, e.g., Government Bill to Parliament for a Sales of Goods Act 93/1986, p. 85; Government Bill to Parliament for legislation on the housing trade 14/1994, p. 103 and Government Bill to Parliament for a Land Code and some related laws 120/1994, p. 59.

9 See, e.g., Mika Hemmo, Sopimusoikeus II [Contract Law II]. 2nd revised edition. Talentum 2003, p. 164; Ari Saarnilehto, Velvollisuudesta reklamoida [On the duty to give notice]. Lakimies 1/2010, pp. 3–18 (Saarnilehto 2010a), p. 12 and Olli Norros, Reklamation och preskription vid långvariga kontraktsförhållanden [The duty to give notice and limitation periods in long-term contractual relationships]. Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) 6/2021, pp. 393–411, 398.

10 See, e.g., Lars Erik Taxell, Avtal och rättskydd [Contracts and legal protection]. Åbo Akademi 1972, pp. 468–469; Mia Hoffrén, Sopimusrikkomus ja velkojan passiivisuus [Breach of contract and creditor's passivity], pp. 188–204 in Antti Kolehmainen – Emmi Muhonen (eds.), Matti Ilmari Niemi. Juhlajulkaisu Matti Ilmari Niemi 1958 – 24/2 – 2018. Alma Talent 2018, p. 192, footnote 11 and Yli-Rahnasto 2021, p. 441–442.

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proach to the relevance of knowledge can be considered justified from the perspective of the functions of the duty to give notice.[11] In the last chapter, I present my conclusion on how the breaching party's knowledge of the breach of contract affects the duty to give notice.

2. The impact of debtor's knowledge according to legal literature

2.1. Functions of the duty to give notice

Case law, statutory analogy and teleological arguments often play a central role in the assessment of questions relating to the duty to give notice. Especially arguments relating to the purposes (functions) of the duty to give notice are emphasised in both case law and legal literature. These functions have also been relied upon in the arguments for the positions discussed in Chapter 2.2.

In case law, legal literature and the travaux preparatoires, several different functions for the duty to give notice have been identified. The main functions can be divided into those of (1) keeping the debtor informed and protecting their reasonable reliance, (2) preventing the creditor from acting in bad faith, and (3) facilitating an expeditious, smooth and reliable settlement of the breach.

From the point of view of keeping the debtor informed and protecting their reasonable reliance, the key issue is the debtor's need to know about the breach and the creditor's intention to seek remedies. This information has been considered essential, inter alia, to enable the debtor to investigate the matter, to take necessary steps to limit the damage caused by the breach and to prepare to defend against potential litigation, for example by gathering evidence.[12] It is common to emphasise that the breaching party's reasonable reliance should be protected: if the creditor were to remain inactive after the breach, the debtor could be under the impression that the performance was in conformity with the contract or at least that the creditor did not intend to seek remedies.[13]

From the point of view of preventing the creditor from acting in bad faith, the duty to give notice can prevent the creditor from speculating at the expense of the debtor, for example, when the economic fluctuations influence how favourable the different remedies appear to the creditor.[14] When a creditor has to react to a breach of contract within a reasonable time, they cannot wait for external circumstances to develop before deciding whether to invoke the breach and which remedies to seek.

In addition to protecting the debtor, the promotion of the settlement of a breach has more general objectives that go beyond the protection of a particular contracting party. A notice triggers a settlement between the parties. Often, a notice will lead to a settlement through negotiation between the parties and, even when this is not the case, the notice will serve as a first step towards a settlement. It is considered important, both for the parties and for the public interest, that contract breaches do not remain unresolved for long periods of time. The need for prompt resolution can be justified by the fact that cases often become more complex as they get older: for example, the presentation of evidence may become more difficult and the risk of incorrect judgments increases.[15] The duty to give notice reduces the need to be prepared to present evidence on old cases and can therefore generally reduce contracting costs.[16] Moreover, ending the conflict and thus achieving stability and certainty of legal relations can be seen as a goal in itself.[17]

2.2. Positions and arguments expressed in the legal literature

In the following, I will examine the scholarly opinion on the effect of the breaching party's knowledge of the breach in the Finnish legal literature of the 21st century. The rationale for this time frame is that the most important statutory provisions on duty to give notice were enacted in the last decades of the 20th century. In the literature written in the 21st century, it has been possible to take account of these provisions and of the relevant case law of the Supreme Court. However, I will make one exception and begin my examination of the subject by presenting the position taken by *Lars Erik Taxell* in the 1970s. Taxell's position is largely based on systemic and teleological arguments which have not diminished in importance over time but are considered relevant also in more recent case law and

11 The order of presentation is not intended to reflect the relative weight of different legal sources and arguments.

12 See, e.g., Taxell 1972, p. 470; Christina Hultmark, Reklamation vid kontraktsbrott [The duty to give notice regarding breaches of contracts]. Juristförlaget 1996, pp. 27–33; Saarnilehto 2010a, p. 4; Bärlund 2002, p. 493; Hemmo 2003, p. 155 and Luukkonen Yli-Rahnasto 2021, pp. 78–79.

13 See, e.g., Taxell 1972, pp. 468–469; Hultmark 1996, pp. 35–37; Bärlund 2002, p. 477; Johan Bärlund, Reklamation vid företagsköp [The duty to give notice and the acquisition of companies]. JFT 3/2003, pp. 317–337, 331; Hemmo 2003, pp. 154, 164; Norros 2018, p. 444; Olli Norros JFT 6/2021, pp. 393–411, 394 and Luukkonen Yli-Rahnasto 2021, pp. 78–79.

14 See e.g. Taxell 1972, p. 468; Hultmark 1996, pp. 33–34; Bärlund 2002, pp. 484–486; Saarnilehto 2010a, p. 4; Ari Saarnilehto, Kohtuullinen reklamaatioaika [Reasonable time for the duty to give notice]. DL 2/2010, pp. 148–156 (Saarnilehto 2010b), p. 148 and Luukkonen Yli-Rahnasto 2021, p. 88.

15 See the Government Bill to Parliament on the reform of legislation on the limitation of debts and public summons 187/2002, p. 16.

16 Taxell 1972, p. 469; Bärlund 2002, pp. 476–481 and Luukkonen Yli-Rahnasto 2021, pp. 78, 83.

17 The time limit for the duty to give notice and the loss of the right to seek remedies following a failure to give notice can be justified partly on the same grounds as many procedural time limits. According to Erkki Havansi, the need for procedural time limits is based on the objective of legal certainty and, ultimately, legal peace, a conclusive end to litigation. Whenever a time-limit expires without any procedural action having been taken, certainty as to certain aspects of the legal situation is achieved. If, on the other hand, the procedural measure in question is carried out within the time limit, the achievement of legal peace may be delayed, but in any case, the situation becomes clearer, the resolution of the conflict proceeds, and the achievement of legal peace is approached in a structured way. See Erkki Havansi, Määräajat ja oikeudenkäynti [Time limits and litigation]. Talentum 2004, p. 345. In the same way, the rules on the duty to give notice promotes dispute resolution in a timely manner: if a notice is not given within the time limit, the breach of contract can no longer be invoked, and the matter is closed. If, on the other hand, a notice is given in time, the conflict can be resolved without delay.

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literature. Although Taxell's study does not encompass all the relevant sources of law available today, it presents a thoroughly argued and still relevant understanding of the purpose and structure of the rules on notice and provides a good basis for an examination of more recent views.

Taxell stresses the need for a notice even when the debtor knows about the breach of contract. He argues that the duty to give notice is linked to the creditor's freedom of choice: the creditor can normally decide whether to invoke the breach of contract and which remedies to claim, but when they decide to claim remedies, they must act in accordance with the procedural rules governing the remedies. It is important for both parties that there are clear rules on the measures to be taken. These rules include the duty to give notice, the main aim of which is to bring clarity to the legal relationship between the parties. It serves to prevent the prolongation of an ambiguous situation and to avoid false expectations based on creditor's inaction. In order to protect their legitimate interests, the debtor needs to be promptly informed of the breach of contract, of the creditor's choice to invoke the breach and of the remedy claimed. A notice is not unnecessary even if the debtor is aware of the breach of contract, because even if they know of the breach, they also need to know whether the creditor wants to invoke the breach.[18]

In general, Taxell rejects the idea of reducing the scope of the duty to give notice by an expansive interpretation of the exceptions to the rule. The creditor is usually exempted from the duty to give notice only in situations where the debtor has acted fraudulently, because in such situations the debtor must know that remedies will be claimed. Taxell does not accept, for example, the interpretation that gross negligence would generally exclude the duty to give notice but considers that an exception to the duty to give notice can only be made on a case-by-case basis where the loss of remedy resulting from a failure to give notice would be manifestly unreasonable for the creditor.[19]

Taxell's position is based not only on the purpose of the notice, but also on the question of what kind of rules best ensure legal certainty, which is important for both the contracting parties and the public interest. Legal certainty requires general rules on the conditions for remedies. Furthermore, the rules must be clear. However, as a safety valve to supplement the formulaic rules, general clauses are needed to allow for case-by-case discretion in exceptional situations where the formulaic rules do not provide sufficient protection.[20] In line with this idea, it is justified that the duty to give notice is based on a general rule, not on a case-by-case assessment of when a notice is necessary. The rule cannot be deviated from solely on the grounds that the complaint does not seem to be very important to the parties in an individual case.

In more recent legal literature, *Mika Hemmo* and *Ari Saarnilehto* have supported the interpretation that the debtor's knowledge of a breach of contract usually renders a notice unnecessary. However, their arguments differ to some extent.

Hemmo underlines the importance of the debtor's right to information by starting his presentation on the duty to give notice and the closely related duty to inspect by stating that the debtor's need for protection varies depending on whether or not the debtor is aware of the breach. In his view, the duty to give notice of the breach is a matter of reasonable reliance similar to the principles of contract formation, according to which a notice must be given against misconceptions on the part of the other party as to the formation or validity of the contract, or the legal situation will otherwise be determined on the basis of those misconceptions.[21] The rules on the duty to give notice protect the debtor's confidence in the conformity of the performance with the contract and therefore no notice is necessary if the debtor already knows that the obligations have not been properly performed.[22] In all cases, however, knowledge does not render a notice unnecessary. The debtor may know of a minor deficiency in the performance without knowing if the creditor is willing to take claim remedies. Therefore, even if the debtor is aware of the defect, a notice may be necessary to inform the debtor that the deficiency in the performance is considered relevant by the creditor.[23]

According to Hemmo, knowledge of a breach of contract may be relevant both as an independent ground for exemption from the duty to give notice and as a factor which may render the debtor's conduct grossly negligent or dishonourable and unworthy.[24] He first sets out the rule that a notice is not necessary against a person who is aware of a breach of contract, and then states that the rule "may also be combined" with the principle of the effects of dishonourable and worthless or grossly negligent conduct. Hemmo's argument is mainly based on the functions of a notice, and he does not, for example, provide any case law to support his position. On the rule of grossly negligent or dishonourable and unworthy, he refers to the example in the Government Bill to the Sales of Goods Act[25] that a seller's attempts to conceal a defect constitute dishonourabley and unworthiness, and to Article 40 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), discussed later in this article.[26]

18 Taxell 1972, pp. 468–470.

19 Taxell 1972, p. 473. As regards the effects of gross negligence, Taxell's position does not comply with current law, because nowadays several statutes governing common types of contract provide that gross negligence on the part of the debtor means that the creditor may plead a breach of contract notwithstanding the failure to give notice (SGA Sec. 33; LC Ch. 2 Sec. 25.3; CPA Ch. 5 Sec. 16 a.2; CPA Ch. 8 Sec. 16.2; CPA Ch. 9 Sec. 16.2; HCA Ch. 4 Sec. 20 and HCA Ch. 6 Sec. 14.3). In the case law of the Supreme Court, the exception has also been held to be valid as a general contract law principle (KKO 2021:69, paragraph 24).

20 Taxell 1972, pp. 19–27.

21 Hemmo 2003, p. 154. In addition to the principle of reasonable reliance, Hemmo mentions the function of the notice as allowing the debtor to prepare for the settlement of the claim and the related evidentiary issues and to take steps to mitigate damages. See Hemmo 2003, p. 155.

22 Hemmo 2003, p. 164.

23 Hemmo 2003, p. 154 footnote 28.

24 Hemmo 2003, p. 164.

25 Government Bill 93/1986, p. 85.

26 Hemmo 2003, p. 164. Hemmo also refers to Hultmark's presentation of the kind of reprehensible conduct of the debtor that, under the CISG and the Swedish Sales of Goods Act, exempts the debtor from the duty to give notice. Hultmark 1996, pp. 131–132.

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According to Saarnilehto, the relevance of the absence or lateness of the notice should be assessed in accordance with the principle of the protection of good faith: in general, contract law protects reasonable reliance of a person in good faith, i.e. a person who neither knew nor should have known of a certain legally relevant fact, and a debtor cannot be protected in relation to a matter of which he is aware. In particular, Saarnilehto considers that two decisions of the Supreme Court (KKO 2002:50 and KKO 2009:61[27]) show that the failure to give notice does not lead to a loss of rights if the debtor knew or should have known of the fact that should be disclosed in the notice.[28] The burden of proving lack of good faith, i.e. debtor's knowledge of the breach of contract, lies with the party liable to give the notice.[29] Saarnilehto does not combine the absence of good faith with the exception relating to dishonourable and unworthy conduct and gross negligence, but regards it as a separate ground for exemption from the duty to give notice.

Also *Olli Norros* seems to think that there is – or at least has been in the past – a principle that a notice is not necessary if the debtor knows about the breach of contract, because in such a situation a notice would not bring any new information to the debtor. In support of his view, he refers to the above-mentioned positions of Saarnilehto and Hemmo and to the case law discussed by Saarnilehto.[30] However, Norros considers the status of the principle to be unclear after Supreme Court decision KKO 2017:71[31] and supports the interpretation that the debtor's knowledge is *at least* a circumstance to be taken into account when assessing on a case-by-case basis whether the creditor had an duty to give notice.[32]

Johan Bärlund, in his study on consumer contracts, considers that the debtor's knowledge of a breach of contract is a circumstance that allows the debtor's conduct to be considered fraudulent or dishonourable and unworthy in a way that exempts the creditor from the duty to give notice. In situations where it is difficult for the consumer to prove the trader's actual knowledge of a breach of contract, the trader's conduct could often be considered grossly negligent.[33] Bärlund considers that knowledge relieves the consumer of the duty to give notice in the case of both lack of conformity and delayed performance.[34] Bärlund bases his conclusions on the case law of the Consumer Complaints Board (now the Consumer Disputes Board), where the knowledge of lack of conformity by a tour operator exempted the consumer from the duty to give notice, as well as on Swedish legal literature[35] and travaux preparatoire of the Norwegian Sales of Goods Act[36][37]. It is worth noting that Bärlund's position is specific to consumer contracts, where it is often justified to assess the consumer's duties more leniently than in relations between equal parties.[38]

Luukkonen Yli-Rahnasto examines the relevance of knowledge about a breach of contract both in the context of the exception for dishonourable and unworthy conduct and as a separate factor affecting the duty to give notice. First, she takes a position on whether knowledge of breach may give reason to consider the debtor's

27 In KKO 2002:50, concerning the timeliness of a claim for the lapse of a payment scheme in a debt settlement, it was stated that according to a general principle, there is no need to give notice about a delay in payment as long as it continues, because (in translation) "in this case, the party liable to pay cannot normally be unaware of the failure to fulfil their obligations and can therefore, even without the express notice of the other party, be prepared for the latter to claim sanctions". In KKO 2009:61, the consumer was considered to have properly fulfilled their duty to give notice, considering the information that the trader had received at the same time as the consumer. According to the reasoning of the judgment, the consumer did not need to repeat to the trader what they had already heard from the veterinarian. These decisions are discussed in more detail in Chapter 3.3.

28 Saarnilehto also refers to the statement of the dissenting judge in KKO 2003:1. The dissenting opinion examines the right of the recipient to rely on the permanence of the performance where the performing party has remained inactive for a long period of time and has not claimed repayment. According to the opinion, reliance on the permanence of the performance can only be legally protected where the recipient has had no reason to doubt the durability of the performance.

29 Saarnilehto 2010a, pp. 12–14.

30 See Norros 2021, pp. 398–398. Norros also refers to his own earlier statement. However, the referenced passage (Norros 2018, p. 549) does not actually argue that knowledge is an independent ground for exemption from the duty to give notice. Instead, it states that, as a general principle, a notice is not required in the case of a delay, because the delay is usually also known to the debtor and the debtor would therefore not receive any additional information from the notice. For the same reason, Norros states that a notice is not required if a defect results from debtor's intentional or grossly negligent misconduct.

31 In KKO 2017:71, concerning adjustment of the price of a construction contract, the fact that the client had not informed the contractor of their views during the construction works, was taken into account as an argument against adjustment. According to the judgment (paragraph 59), the mere fact that A Ltd has knowledge of the fact that the price estimate in the contract had been exceeded did not render the notice unnecessary, but, as a general rule, a duty to give notice is necessary even if the contracting party could itself have discovered that it had failed to fulfil its contractual obligations. This solution is discussed in more detail in chapter 3.3.

32 Norros 2021, p. 398 and Olli Norros, Rakennusurakan taloudelliseen loppuselvitykseen liittyvä prekluusiovaikutus ja siitä poikkeaminen tapauskohtaisin syin [Preclusion effect and deviation from it on a case-by-case basis in relation to the financial statement of a construction contract]. Liikejuridiikka 1/2023, pp. 289–302, 298–299.

33 See Bärlund 2002, p. 259.

34 See Bärlund 2002, p. 113.

35 Tore Almén – Rudolf Eklund, Om köp och byte av lös egendom. Kommentar till lagen den 20 juni 1905. 4. delvis omarbetade upplagan [On the purchase and exchange of movable property. Commentary on the Act of 20 June 1905. 4th partially revised edition]. Norstedts 1960, p. 726.

36 Ot prp nr 80 (1986–87), p. 82.

37 See Bärlund 2002, p. 259.

38 Bärlund does not make a similar general statement in his article on the duty to give notice in a takeover. He considers that reprehensible conduct within the meaning of SGA Sec. 33 is involved if the seller gives a specific undertaking in respect of a characteristic of the object of the transaction, knowing that there is a defect in it. See Bärlund 2003, p. 327

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conduct dishonourable and unworthy in such a way that the creditor is exempted from the duty to give notice. She considers that a debtor who is aware of a breach of contract will normally have acted at least negligently, but knowledge of a breach does not normally in itself make the conduct reprehensible, even if it is a relevant factor for reprehensibility. If the debtor's conduct is not particularly reprehensible, Luukkonen Yli-Rahnasto considers that knowledge of the breach is relevant to the duty to give notice but not necessarily a factor that removes that duty completely. As arguments in favour of the relevance of knowledge, she refers to statements in the legal literature and to Article 40 of CISG, and as arguments against such an effect of information, to the above-mentioned decision KKO 2017:71.[39]

Luukkonen Yli-Rahnasto also analyses the issue from the perspective of the functions of the duty to give notice. She considers that the duty to give notice is primarily intended for situations where the party who has made a non-conforming performance is not aware of the non-conformity and its purpose is to make the debtor aware of the breach. However, this is not the only purpose of a notice: it is also intended to inform the debtor of the creditor's intention to rely on the breach and to enable them to prepare for creditor' claims and seek a negotiated settlement.[40] Taking these into account considerations and the reasoning in decisions KKO 2016:69 and KKO 2008:8[41], Luukkonen Yli-Rahnasto seems to support the interpretation that the debtor's knowledge does not completely release the creditor from the obligation to give notice, but extends the time frame available to the creditor.[42]

To summarize, there are two general approaches to the role of debtor's knowledge in the context of the duty to give notice. The more straightforward view is that the debtor's knowledge of the breach of contract would usually mean that there is no duty to give notice. According to the second view, the importance of knowledge depends more on the circumstances of the case: knowledge relieves the debtor of the duty to give notice if, taken together with other factors, it gives rise to a finding that the debtor's conduct was dishonourable and unworthy or grossly negligent. If this threshold is not exceeded in the overall assessment, a notice is usually necessary, but the debtor's knowledge may affect the requirements for a notice, for example the time limit.

Overall, the positions taken are based on a wide range of legal sources: they are justified to some extent by statutory provisions and legislative documents, but especially by case law and arguments relating to the functions of the notice. Interestingly, scholars have found support for two opposing views – that knowledge is a ground for removing the duty to give notice and that it is not – both in case law and on the functions of the notice. In the case law, this is partly explained by the choice of cases and by the fact that the arguments were written at different times: older arguments could not take account of more recent case law. The diversity of the functions of the notice also means that arguments based on these functions can advocate very different solutions, depending on which objectives of the notice are taken into account and how these objectives are assessed in relation to each other.[43] An emphasis on the purpose to inform debtor may lead to the conclusion that a notice is unnecessary, whereas an emphasis on the resolution of the conflict may lead to the conclusion that a notice is necessary, irrespective of whether the debtor would have known about the breach of contract even without it.

In the following chapters, I will examine to which extent the view that the debtor's knowledge of a breach of contract relieves the creditor of the duty to give notice is supported by other legal sources than legal literature. I will begin by examining the formal sources and then proceed to practical arguments based mainly on the functions of the duty to give notice.

3. The effect of debtor's knowledge according to formal sources

3.1. The importance of seller's knowledge according to the CISG

According to Article 40 of the CISG, the seller may not rely on a failure to give notice in respect of a lack of conformity if the if it relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. This article has been considered to reflect the principle of good faith and to act as a safety valve to protect the buyer in exceptional situations.[44] It also encourages the seller to inform the buyer of any known defects before the sale so that the risk can be priced into the contract.[45] It is not clear from the wording of the article at what time the seller should be aware of the relevant facts. There are different views on the relevant time point: the decisive time may be either at the time of delivery of the goods or before the end of the period for giving a notice.[46]

According to Article 1 of the CISG, the CISG only applies to transactions where the parties have their places of business in dif-

39 Luukkonen Yli-Rahnasto 2021, p. 439–442.

40 See also Hoffrén 2018, p. 192 footnote 11.

41 Both rulings concern the duty to give notice in real estate transactions. In KKO 2008:8 (paragraph 5), it is stated that the seller's knowledge of the defect affects the assessment of the correctness and propriety of the notice. In KKO 2016:69 (paragraph 10), the seller's knowledge of the defect is mentioned as one of the factors influencing the assessment of the time limit for giving the notice.

42 Luukkonen Yli-Rahnasto 2021, p. 439–442.

43 Bärlund has tried to solve the problem of the multiplicity of functions by converting functions into legal principles. See Bärlund 2002, pp. 11–12, 475 pp.

44 See, e.g., UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, http://www.cisg.sk/en/uploaded_files/UD%2040.pdf, p. 2 and Jan Ramberg – Johnny Herre, Allmän köprätt [General Sales Law]. Norstedts Juridik 2019, chapter 9.6.4.

45 See, e.g., Clayton P. Gillette, Advanced Introduction to International Sales Law. Edward Elgar Publishing 2016, chapter 5.2.2.

46 See, e.g., UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, http://www.cisg.sk/en/uploaded_files/UD%2040.pdf, p. 6 and Alejandro M. Garro, The Buyer's "Safety Valve" under Article 40: What Is the Seller Supposed to Know and When? Journal of Law and Commerce 25(1) 2005/2006, pp. 253–260, 256.

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ferent countries. Moreover, transactions between Nordic parties are excluded from its scope.[47] In assessing the relevance of the CISG outside its scope, it must be borne in mind that it is a compromise between Sate parties with very different legal systems. Indeed, when the Sale of Goods Act was enacted, it was considered that, due to the compromise nature of the CISG, not all of its provisions were suitable as models for domestic trade law and that they might be alien to Finnish law.[48] Especially the rules on notice differ considerably between the legal systems of the contracting states, in that the common law rules do not include any obligation to inspect and give notice, and that there are also differences between civil law countries as to whether the duty to give notice is accompanied by an obligation to inspect and how soon after the sale the goods must be inspected and a notice given.[49] The CISG rules on notice have generally been considered to be more favourable to the buyer than the provisions of the Sales of Goods Act.[50]

For the reasons mentioned above, it is not possible to draw analogous conclusions from the CISG rules on notice for other types of contracts in the same way as from the national rules on sales contracts and other common types of contracts. The fact that the seller's knowledge under Article 40 CISG relieves the buyer of the duty to give notice cannot therefore be taken to mean that knowledge also has that meaning under national law. Of course, in a situation where interpretation is uncertain, consistency between national and international commercial law regime is one of the aspects to be considered.

3.2. Statutory provisions on dishonourable and unworthy conduct and their travaux preparatoires

As mentioned in the introduction, the statutes governing different types of contracts provide that the debtor's dishonourable and unworthy or grossly negligent conduct exempts the creditor from the duty to give notice (see, for example, SGA Sec. 33 LC Ch. 2 Sec. 25.2, CPA Ch. 5 Sec. 16 a.2, CPA Ch. 8 Sec. 16.2, CPA Ch. 9 Sec. 16.2, HCA Ch. 4 Sec. 20 and HCA Ch. 6 Sec. 14.3). According to case law and legal literature, these provisions reflect a general principle of contract law.

The travaux preparatoires of the above-mentioned acts contain fairly similar statements as to what conduct can be considered dishonourable and unworthy.[51] They all mention either the failure to disclose defects known to the seller[52] or the attempt to conceal them[53] as examples. Other examples include organisation of the guarantee inspection in such a way that the buyer cannot reasonably participate[54], and the use of sold property as collateral for new loans by the seller.[55]

These examples illustrate what sort of conduct can be deemed dishonourable and unworthy. The case law, on the other hand, emphasises a case-by-case basis assessment of whether the conduct of the breaching party, all things considered, deviates from the acceptable conduct in the particular contractual situation (KKO 2007:91, paragraph 5). The acceptable conduct may vary not only according to the type of contract but also according to the circumstances of the particular contractual situation, such as the level of expertise and the balance of power between the parties.[56] It cannot therefore be inferred from the travaux preparatoires that the conduct described in them as has an exempting effect in all situations

47 See Art. 94 CISG and Sec. 2 of the Decree on the entry into force of the Act on the Implementation of the Convention on Contracts for the International Sale of Goods and on the Approval of Certain Provisions of the Convention (796/1988).

48 Government Bill 93/1986, p. 16.

49 See, e.g., Andre Janssén – Navin G Ahuja, Bridging the Gap: The CISG as a Successful Legal Hybrid between Civil Law and Common Law, pp. 137–162 in Francisco de Elizalde (ed.), Uniform Rules for European Contract Law? A Critical Assessment, Bloomsbury Publishing 2018, p. 150.

50 Björn Sandvik – Lena Sisula-Tulokas, Kansainvälinen kauppalaki [International Sales of Goods Act]. Lakimiesliiton Kustannus 2013, p. 25.

51 The travaux preparatoires also give examples of the types of activities that may be considered grossly negligent. The Government Bill to the Sales of Goods Act (Government Bill 93/1986, p. 85) mentions the manufacture, storage and transport of goods and the failure of the seller to detect a defect before delivery of the goods. According to the travaux preparatoires regarding consumer sales contracts (Government Bill 360/1992, p. 61), gross negligence may occur not only in the manufacture of the goods but also in the seller's pre-sale information. The travaux preparatoires to the Housing Contract Act (Government Bill 14/1994, p. 103) refer to negligence in construction and mentions, as an example, the use of building materials which the builder, based on their professional knowledge, must have considered to be of poor quality or dangerous to health.

52 Government Bill 93/1986, p. 85 and Government Bill 360/1992, p. 61. The Government Bill to the Sales of Goods Act (Government Bill 93/1986, p. 85) also states that Art. 40 of the CISG (discussed above)is essentially equivalent to Sec. 33 of the Sales of Goods Act. The reference to Art. 40 of the CISG cannot, in view of what has been said in chapter 3.1 above, be taken as a statement that Sec. 33 of the Sales of Goods Act should be interpreted in a manner consistent with Art. 40 of the CISG, which differs considerably from its wording, so that the seller's knowledge always implies dishonourable and worthless conduct. The Swedish legal literature has, however, considered it possible to interpret Sec. 33 of the Swedish Sales of Goods Act (köplag 1990:931) in a manner consistent with Art. 40 of the CISG, while pointing out that traditionally dishonourable and worthless conduct has been understood in a narrower sense. See Jan Ramberg – Johnny Herre, Allmän köprätt [General Sales Law]. Norstedts Juridik 2019, chapter 9.6.4.

53 Government Bill 14/1994, p. 103 and Government Bill 120/1994, p. 59.

54 Government Bill 14/1994, p. 103.

55 Government Bill 120/1994, p. 59.

56 For example, in KKO 2018:11 (paragraphs 37–42), the assessment of the seller's conduct was influenced by the fact that both the buyer and the seller were professionals in the real estate sector and there was no knowledge imbalance between them.

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covered by the statutes in question, or that even conduct which differs significantly from the examples given cannot be dishonourable and unworthy. However, it is interesting for the purpose of this article that almost all the examples involve not only the seller's knowledge of the defect or other breach but also other factors: it is reprehensible to knowingly conceal the defect or at least fail to disclose it before the sale.[57] The examples do not specify the relevant time point, but since the seller's duty of disclosure pre-dates the transaction, the statements presumably refer to information the seller had before the transaction. Of course, since these are only examples, this does not mean that the information received by the seller after the transaction will never be relevant. For example, concealing defects which the seller discovers before the transfer of the goods to the buyer may often be deemed reprehensible.

Under the above-mentioned rules and the general principle reflected in them, buyer can often be exempted from the duty to give notice, if the seller knowingly conceals known defects before the conclusion of the contract or the delivery of the goods or knowingly breaches his contractual obligations in a material way. However, the principle does not normally apply to situations where the seller becomes aware of the lack of conformity only after performance of the contract – unless, for example, the seller can be considered to have a duty to inform the buyer because the sold product has proved dangerous. Nor is it generally likely to be a case of dishonourable and unworthy conduct if the breaching party is aware of the relevant facts but does not understand that they constitute a breach of contract. This may be the case, for example, if the terms of the contract are ambiguous or if the seller has misunderstood the scope of their duty to disclose.

3.3. The effect of debtor's knowledge in the case law

The Supreme Court has explicitly stated the effect of the debtor's knowledge of the breach of contract on the duty to give notice in KKO 2017:71 and KKO 2021:69. In KKO 2008:8 and 2016:69, the importance of knowledge was briefly discussed.[58]

In KKO 2017:71, the Supreme court assessed the question of how the conditions for adjusting the price terms of a construction contract based on section 36 in the Contracts Act (228/1929 were affected by the late submission of the demand for adjustment. The claim for adjustment was based on the fact that the price of the work had risen significantly above the contractor's price estimate. According to the decision, the fact that the client had continued to pay contractor's invoices without complaint even after they knew that the price estimate had been exceeded was an obstacle to adjustment of price. The Court of Appeal had held that since the contractor knew that the price estimate was exceeded, the client had no duty to give notice. The Supreme Court held, contrary to the Court of Appeal, that the contractor's mere knowledge that the price estimate had been exceeded did not render the notice unnecessary. The Supreme Court referred to the fact that the purpose of the notice is to enable the debtor to prepare for the creditor's claims and to negotiate an amicable settlement and stated that the fulfilment of these objectives requires that the aggrieved party informs his counterparty of the breach of contract. According to the reasoning of the judgment, a notice is generally necessary also where the party to the contract could themselves have discovered that they have failed to fulfil their contractual obligations. However, it has been argued in the legal literature that far-reaching conclusions about the duty to give notice should not be made based on this ruling, since the case did not concern a normal breach of contract, but adjustment of price and the consequences of an unrealistic price estimate.[59]

The statement made in KKO 2017:71 has subsequently been referred to in KKO 2021:69 when assessing whether passengers claiming standard compensation for a delay caused by a flight cancellation were obliged to give notice or submit their claim to the airline within a reasonable time. The judgment held that, as a general principle of law, a party to a contract is in principle obliged to inform the other party of a breach of contract, even if this obligation is not laid down by law. Having established this premise, it was then assessed separately whether a notice was also a precondition for claiming standard compensation for flight delay.

Passengers argued that it was not necessary to give notice in the event of a cancellation or delay, because the airline is aware of the breach of contract anyway and can prepare for future claims and the need to provide an explanation. In the company's view, the absence of a notice gave the company reason to believe that the passenger had considered the flight to be in conformity with the contract or that the flight delay had been insignificant for the passenger. According to the company, a notice within a reasonable time was necessary in order not to allow the passage of time to prejudice the determination of the basis for liability and to make it possible for the airline to claim compensation from a third party responsible for the disruption.

The Supreme Court held that the mere fact that the airline had been aware of the cancellation and delay did not render the notice unnecessary. It justified its position by referring to the reasoning of KKO 2017:71, according to which a notice is generally necessary even if the contracting party could have discovered the breach of its contractual obligations itself, and to the reasons given by the airline. In its conclusion, the Supreme Court held that the duty to claim compensation or to notify a breach of contract within a reasonable time is not unnecessary for the airline or otherwise contrary to the general objectives underlying the consequences of inactivity or disproportionate to the position of the parties to the contract.[60]

It is somewhat unclear how the reasons given by the airline affected the outcome. According to the first interpretation, the reasons given by the airline for the necessity of a notice can be understood as a factual argument in favour of requiring a notice within a reasonable time in order to claim standard compensation, irrespective

57 The seller's knowledge is not mentioned as a criterium in the example of the use of sold property as collateral for new loans, but it is difficult to imagine a situation where the seller would unknowingly use the property as collateral.

58 Also other judgments on the duty to give notice than those concerning the relevance of the knowledge can be be relevant in assessing the issue. Judgments discussing the functions of the duty to give notice help to identify functions which are considered legally relevant, and which can also be used in the argumentation on the question at hand. From this perspective, the case law is discussed in Chapter 4.

59 Norros 2021, p. 399.

60 However, the judgment held that air passengers retained their right to claim compensation despite the failure to give notice, because the airline had failed to fulfil its obligation to inform passengers of their right to compensation.

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of whether the delay is known to the airline. According to this interpretation, the airline does not have to justify the need for a notice in each individual case. Another possible interpretation of the ruling would be that the relevance of the information to the duty to give notice varies according to the circumstances of the case – since the notice in the case in question was considered important for the debtor, the duty to give notice applied. Under this interpretation, there would be no duty to give notice if the notice did not appear to be of importance to the airline in the circumstances of the individual case.

The impact of information on the duty to give notice has been dealt with in a more limited way in two judgments on defects in real estate transactions. In KKO 2008:8, it was assessed how the validity of the notice was affected by the fact that the buyer had demolished the building on the property before the notice was given. According to decision, in assessing the timeliness and propriety of a notice, the nature of the breach of contract and the circumstances of the case and, of course, the seller's knowledge of the defect are relevant.[61] Since it is clear that the seller's knowledge of the defect cannot make the requirements for a notice more stringent, the decision seems to suggest that the seller's knowledge may have the effect of extending the time for giving a notice or otherwise mitigating the requirements for a notice.[62] In KKO 2016:69, the question was whether the buyers had notified the sellers of their claims based on defects within a reasonable time after the defects had been discovered. Referring to the reasoning in KKO 2008:8, the Supreme court stated that the circumstances of the case, including the nature and extent of the defects and the seller's potential awareness of the defect, would influence the assessment of how quickly a defect and its economic significance should reasonably be clarified and communicated to the seller.

As discussed in section 2.2. above, some scholars have claimed that the case law, in particular KKO 2002:50 and KKO 2009:6, show, that the absence of a notice does not lead to a loss of creditor's rights if the debtor was aware of the breach of contract. In my view, however, such a conclusion cannot be drawn from these decisions.

In KKO 2002:50, a decision concerning a debt settlement for a private individual, it was held that the creditor (bank) had lost the right to rely on the debtor's defaults when it had only pointed out the monthly defaults after about 1.5 years had passed since the first default. Furthermore, the creditor had only applied for the lapse of the payment scheme after 10 months had elapsed since the first warning. The Supreme Court held that the application had not been made without undue delay as required by Sec. 61.1 of the Debt Arrangement Act (57/1993). The reasoning refers to the "general principle of the law of obligations", according to which the creditor is not required to give the debtor specific notice or a statement in order to preserve their rights as long as performance is still outstanding. This general principle is justified by the Supreme Court on the ground that, in the absence of performance, the party liable cannot normally be unaware of the fact that they have failed to fulfil their obligations and can therefore, even without express notice from the other party, be prepared for the latter to claim sanctions. This is an argument which has been consistently used to justify the general rule that a creditor is not required to make a notice for delay as long as performance is still outstanding.[63] The reasoning of the judgment cannot therefore be read as a statement of the how the knowledge of a breach affects duty to give notice about a breach of contract which is generally subject to the duty to give notice.[64]

In KKO 2009:61, the question was whether consumers who bought a horse from a trader had informed the seller of the horse's defective condition within a reasonable time after the defect was discovered, in accordance with CPA Ch. 5 Sec. 16.1 (1258/2001). The horse had been kept in the seller's stables after the sale and, when it started to limp, the seller and one of the buyers had together taken it to a veterinarian for a check-up. The veterinarian had diagnosed osteoarthritis in the horse's hind leg, explained the nature of the osteoarthritis to the seller and the buyer and told them that the horse's condition could not be cured. Six months after the veterinary visit, the buyers had sent a letter to the seller demanding the cancellation of the sale.

The Supreme Court held that the duty to give notice had already been fulfilled at the time of the veterinary consultation when the osteoarthritis was diagnosed, even though no further evidence had been provided of the content of the discussions at the consultation. The decisive factor was that the buyer and the seller had been informed simultaneously by the veterinary surgeon of the horse's illness and, in those circumstances, the buyer did not need to repeat to the seller what they had already heard from the veterinary surgeon. The Supreme Court drew attention to the fact that the seller had acted in a professional capacity and that, having discovered the osteoarthritis, they must have realised that the defect was likely to progress and make it increasingly difficult for the buyer to use the horse as they intended. The information obtained at the veterinary surgery had therefore been sufficient to enable the seller to anticipate claims based on the defect.

The ruling was not so much that the seller's knowledge of the defect would have removed the duty to give notice, but that the duty to give notice was deemed to have been fulfilled in the circumstances of the case, when the horse's illness was diagnosed in the presence of both parties. This is also clear from the title of the judgment: "The veterinary surgeon, in the presence of the seller and the buyer of the horse four months after the sale, had diagnosed osteoarthritis in the horse's leg. *The buyer was thus deemed to have fulfilled their duty to give notice under the Consumer Protection Act and to have notified* [italics MH] the defect in such a manner that they preserved their right to claim subsequent rescission of the

61 This statement is repeated without further elaboration in KKO 2009:61 (paragraph 4).

62 For example, the seller's knowledge of the defect may influence the type of communication from the buyer that is considered to meet the substantive requirements for a notice. For example, in KKO 2009:61, discussed below, the fact that the seller and the buyer had simultaneously received information about the illness of the horse sold from a veterinarian was taken into account when assessing whether the consumer's duty to give notice had been fulfilled. In these circumstances, it was not necessary for the buyer to repeat to the seller what the seller had already heard from the veterinarian.

63 See, e.g., Taxell 1972, pp. 472–473 and Hemmo 2003, p. 164.

64 The significance of the judgment as a precedent on the duty to give notice is further diminished by the fact that the judgment did not concern the duty to give notice but the time limit under Sec. 61.1 of the Debt Arrangement Act, which, according to the the judgment, could not be interpreted in accordance with the principle the duty to give notice for late payment is unnecessary.

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sale." The judgment is concerned with the quality of the consumer's notice and does not justify a conclusion that the debtor's knowledge of the breach of contract renders the notice superfluous. Instead, it supports the conclusion that knowledge may influence the requirements for the content of the notice.[65]

Taken as a whole, the case law does not give much support to the view that the debtor's knowledge of a breach of contract generally relieves the creditor of the duty to give notice, since none of the decisions mentioned above has given such an effect to the debtor's knowledge.[66] On the other hand, it has been held that knowledge may have an impact on the length of the period for giving notice and on the requirements to be met as to the content of the notice. However, the ambiguous reasoning of KKO 2021:69 makes it somewhat unclear whether the decision supports the view that the debtor's knowledge could, in the circumstances of a particular case, completely exclude the duty to give notice where the notice is clearly unnecessary for the debtor.

4. Practical arguments based on the functions of notice

4.1. Protecting the debtor's reliance and access to information

In the Finnish legal literature of the 21st century, it has been emphasised that the duty to give notice serves to protect the debtor's reliance and to secure access to information. It enables the debtor to be informed of the breach of contract and to prepare for the creditor's claims.[67] This information enables them to take steps to resolve the dispute and to limit the damage.[68] The duty to give notice allows the debtor to rely in the conformity of the performance and the continuity of the status quo in the absence of a complaint by the creditor.[69] The case-law has taken these functions of the notice into account, inter alia, when assessing the length of a reasonable period for giving a notice (KKO 2008:8, paragraphs 4-6) and the requirements for the content of the notice (KKO 2009:61, paragraphs 4, 7 and 10).

From the point of view of the debtor's access to information, a notice may seem unnecessary if the debtor is aware of the breach of contract even without a notice. However, a counter-argument to this point is that even a debtor who is aware of the facts constituting a breach of contract may not know the creditor's attitude to the breach, and in particular whether the creditor will wish to pursue a claim based on the breach.[70] A notice is not a mere neutral statement of facts, but it is essential to make the debtor aware of the creditor's perception of the meaning of those facts – that the creditor considers the debtor to have breached the contract.[71] The importance of the creditor's perception is heightened in situations where there is uncertainty as to the contractual conformity of the performance. However, even where the performance is clearly in breach of contract, the creditor's inactivity is likely to create uncertainty as to whether the creditor intends to rely on the breach of contract and, where the inactivity continues for a long period, it will normally give rise to a presumption that the creditor is satisfied with the performance as such.[72]

A debtor who is aware of a breach of contract can also try to resolve the matter themselves, rather than waiting for the creditor to react. Since the debtor may also inquire about the creditor's position, it is not imperative to safeguard their right to information by

65 Also the opinion of the dissenting members in KKO 2003:1 has been used as an argument in favour of the idea that the debtor's knowledge of the breach of contract would remove the duty to give notice. The case concerned the question whether the the bankruptcy estate was entitled to recover the district heating connection fee paid to the heating company. The dissenting members voted for rejecting the claim for reimbursement on the grounds, inter alia, that the heating company had been entitled to rely on the durability of the payment because the estate had not informed the heating company within a reasonable time of its belief that the payment was unjustified. The opinion concluded from the legal principles governing the duty to give notice that the party who received the performance could reasonably rely on the durability of the performance if the party who made the performance had remained inactive for a long period of time. As a limitation to this principle, it was argued that reliance can only be legally protected if the recipient had no reason to doubt the durability of the performance in the circumstances. The opinion does not really concern the duty to give notice of a breach of contract, but the question of the impact of prolonged inactivity on the payer's right to claim that the payment is unfounded. As far as I can see, the dissenting opinion does not at all address the question of how the debtor's knowledge of the breach of contract affects the consequences of the failure to give notice.

66 The fact that the Supreme Court has not decided a case in which the debtor's knowledge would have released the creditor from the duty to give notice does not, of course, mean that such a situation could never arise.

67 See, e.g., Bärlund 2003, p. 331; Saarnilehto 2010a, p. 4; Saarnilehto 2010b, p. 148 and Ari Saarnilehto, Reklamaatio ja vanhentuminen [The duty to give notice and limitation]. Edilex 2010/2, www.edilex.fi/lakikirjasto/6729 (Saarnilehto 2010c), pp. 2–3.

68 See, e.g., Hemmo 2003, p. 155; Bärlund 2002, p. 493 and Luukkonen Yli-Rahnasto 2021, p. 78–79.

69 Bärlund 2002, p. 477; Hemmo 2003, p. 164; Norros 2018, p. 444; Norros 2021, p. 394 and Luukkonen Yli-Rahnasto 2021, p. 78–79.

70 See chapters 2.2. and 3.3. Also, in KKO 2008:8, the purpose of a notice was to inform the seller that the buyer does not consider the performance to be in conformity with the contract. The passage of time was found to give the seller reason to believe that the object of the sale was in conformity with the contract or that the defects found were insignificant for the buyer. Attention was also drawn to the need for the seller to be able to examine the alleged defects, take a position on the buyer's claims, possibly remedy the defect or make a compromise offer. In KKO 2018:38 (paragraph 25), it was held that the seller of the property may participate in the settlement of the case after the buyer has informed them of the defect and remedies sought.

71 See, e.g., Bärlund 2002, p. 240.

72 Hultmark points out that a debtor who is aware of a breach of contract can usually expect the creditor to react and that a short period of inactivity does not therefore give them reason to assume that the debtor has accepted performance. See Hultmark 1996, p. 37. This argument supports the view that knowledge can have an impact on the length of the notice period.

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imposing an obligation on the creditor to be active.[73] This argument can be linked to the idea that the party in breach of contract does not deserve protection: it is more justifiable to protect a creditor who has been passive in protecting their own interests than a debtor who has knowingly breached the contract.

Overall, a notice is less important than usual in terms of ensuring that the debtor is informed when the debtor knows about the error.

4.2. Preventing speculation at the debtor's expense

The fact that the creditor must notify the debtor of the breach of contract within a reasonable time reduces the creditor's ability to speculate at the debtor's expense. For example, the creditor cannot wait to see how the price of goods develops before deciding to invoke the defect.[74]

The debtor's need for protection against the creditor's disloyal conduct does not disappear even if the debtor knows of the breach of contract. The absence of a time limit for giving notice in such a case would increase the creditor's scope for speculation. However, the speculative potential is limited mainly to claims for cancellation of the contract, since other consequences of the breach, which do not involve termination of the obligation to perform or the obligation to return what has been performed, do not allow for the same possibility of profiting from price fluctuations.[75] In order to prevent speculation, it would be sufficient for a claim for cancellation to be brought within a reasonable time, but other remedies for breach of contract could be invoked at a later stage. From this point of view, it would not be too problematic if the creditor's knowledge generally exempted them from the duty to give notice but not the time limit for a claim for cancellation (see, for example, SGA Sec. 39.2).

4.3. Promoting the resolution of breaches of contract

As outlined above, the legal literature of the 21st century emphasises the link between the duty to give notice and the debtor's reasonable reliance. The emphasis in case law and the travaux preparatoires is somewhat different, in that the objective of a speedy and smooth settlement of the breach of contract is emphasised more strongly than in the literature, alongside the debtor's right to information.

Swift resolution of defects is mentioned as the objective of the notice in the Government Bill to the notice provisions of the Land Code and the Housing Contracts Act, among others.[76] Case law emphasises the importance of the notice as a means of ensuring the speed, smoothness and reliability of the settlement of a breach of contract. In KKO 2008:8, attention was drawn not only to the protection of the seller's reasonable reliance but also to the fact that the passage of time makes it difficult to settle liability issues. This point has been reiterated at least in KKO 2016:69 (paragraph 8), KKO 2018:38 (paragraph 24) and KKO 2020:6 (paragraph 14), where it has been argued, inter alia, that the passage of time makes it more difficult to present evidence and thus increases the costs of litigation and undermines the conditions for reaching a materially correct result (KKO 2016:69, paragraph 8, KKO 2018:38, paragraph 21 and KKO 2020:6, paragraph 14). The protection of evidence is also linked to the reasoning of KKO 2008:8, which held that the seller's legal protection requires that the seller be given the opportunity to examine the alleged defects. Allowing the seller the opportunity to examine the defects improves the seller's ability to obtain evidence.

The duty to give notice contributes to the speedy handling of cases of breach of contract, as a notice given triggers a settlement between the parties and a failure to give notice means the loss of the right to pursue remedies. The sooner the settlement starts, the sooner it can be expected to be concluded – also because it is often simpler to settle disputes before too much time has passed. The fact that the debtor is aware of the breach of contract does not eliminate the disadvantages of delaying settlement. As such, the debtor's knowledge of the breach of contract allows the debtor to enquire about the creditor's position on the matter and the settlement can be initiated without the creditor's initiative. However, if the debtor does not do so, the absence of a duty to give notice would mean that the breach of contract could still be invoked after a long period of silence.

A model where the settlement of a breach of contract is initiated quickly after the breach occurs is likely to reduce the costs of settling and preparing for settlement. First, the settlement of old cases may be more complex and entail higher costs, for example due to additional investigation work. Second, the fact that the rules on notice prevent unexpected claims based on old events already reduces the need for the parties to be prepared to provide evidence on old issues. Even though a debtor who is aware of a breach of contract may be better prepared to settle a breach of contract than a debtor who is unaware of the breach, there are still costs associated with being prepared.

In addition, by making it easier to resolve conflicts, the duty to give notice also reduces the risk that a contract dispute will end up in a materially wrong solution because time has made it difficult to present evidence. While knowledge of a breach of contract may help the debtor to prepare for the presentation of evidence, it does not eliminate the problem, for example, that if the breach leads to litigation, witnesses may no longer reliably recall old events, or it is otherwise difficult to provide evidence of the circumstances surrounding the breach of contract. The longer the time elapses since the breach, the more difficult it may become to establish, for example, the quality of the object of the sale or performance of the work immediately after the debtor's performance, or whether the defects in it were caused by the breach, by the creditor's own ac-

73 See, e.g., Hultmark 1996, p. 29.

74 The prevention of speculation has not been given as much weight in Finnish legal literature, travaux preparatoires and case law as the other functions. For example, it is not mentioned in the travaux preparatoires concerning notice provisions in key contract law legislation or in the decisions of the Supreme Court.

75 See, e.g., Hultmark 1996, pp. 33–34 and Bärlund 2002, pp. 484–485.

76 Government Bill 120/1994, p. 58 and Government Bill 21/2005, p. 16.

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tions or by external factors.[77] Such ambiguities can lead not only to substantively flawed decisions but also to increased litigation and consequent costs for both the parties and society.[78]

The cost and certainty of resolving a breach of contract can also be influenced by how clear the rules on duty to give notice are and how simple they are to apply. If the rules are unclear or require a very case-by-case approach, they may give rise to additional disputes between the parties: before the actual dispute over the breach of contract can be resolved, it must be determined whether the creditor still has a right under the notice rules to rely on the breach of contract. Ideally, the rules should be as simple as possible in this respect, e.g. no exception to the duty to give notice: if no notice has been given, it would be clear that there is no right to rely on the breach and that further investigation is unnecessary. On the other hand, rules that are unclear, require case-by-case judgement or are based on a difficult-to-decipher body of law are problematic.[79]

To give the debtor's knowledge an exonerating effect would be problematic precisely from the point of view of the smooth resolution of conflicts and legal certainty.[80] This would be an exception to the duty to notify, the legal source and precise content of which are unclear.[81] What facts should the knowledge cover and how certain would it have to be in order to exempt the creditor from the duty to give notice? If the debtor is a legal person, whose knowledge is decisive for the purposes of the duty to give notice? Furthermore, the debtor's knowledge of a fact is problematic as a criterion because it is difficult to find out and prove what the debtor knew.[82] There is a risk that in court the question of the existence of a duty to notify would become even more difficult to resolve than other issues relating to the breach of contract. In the worst case, the ambiguity of such a preliminary question could lead to it being litigated in several instances before other contentious issues could be resolved.[83] Another risk of linking legal effects to the debtor's knowledge is that, because of the difficulty of establishing the existence of such knowledge, in practice it could be what the debtor ought to have known rather than what he actually knew that could be decisive. Such a development would be likely to reduce considerably the scope of the duty to give notice, since it can often be argued that the debtor should know what they have done.[84]

5. Conclusions

In the legal literature, the impact of information on the duty to give notice has been understood in different ways. On the one hand, it has been argued that the debtor's knowledge of a breach of contract would relieve the creditor of their duty to give notice. On the other hand, it has been argued that knowledge alone does not have such an effect, but that information is one of the factors which may influence whether the debtor's conduct is considered dishonourable and unworthy and thus exempts creditor from the duty to give notice. Furthermore, the knowledge may also influence the content of the duty to give notice.

There is some support for both positions from legal sources. Art. 40 of CISG gives the seller's knowledge of the breach an exempting effect, but this provision, a result of a compromise between different views of the contracting states, does not allow us to draw very far-reaching conclusions about the relevance of knowledge according to domestic law. Otherwise, there are no statutory provisions of an

77 See, e.g., KKO 2008:8, where a notice about a real estate transaction was considered belated when the buyer complained only after demolishing the building on the property. It has been pointed out in the legal literature that, at least in consumer contracts, the effect of the passage of time in making it difficult to prove a claim could be considered in the allocation of the burden of proof, rather than the delayed notice leading to a loss of the right to claim remedies. Defects that become apparent within a certain period of time after the trader's performance would be presumed to have existed at the time of performance, and the trader would normally have the burden of proving that the defect arose later. The burden of proof would shift to the consumer if the consumer had failed to give notice in time. See Bärlund 2002, p. 493.

78 Hultmark (1996, pp. 30–31) is sceptical about the need to safeguard evidence through rules on notice, since, in general, the mere fact that the burden of proving that the goods are defective at the time of delivery lies with the buyer is an incentive for the buyer to settle the matter quickly enough. However, a situation of non-conformity often also involves disputed facts other than the existence of a defect. For example, in assessing the conditions for liability for damages, the debtor typically bears the burden of proving an obstacle that exempts them from liability.

79 Norros has advocated that the objective of clarity should be considered in the interpretation of the rules on the limitation of debts, which serve similar purposes to the rules on duty to give notice. According to Norros, this objective can be promoted, inter alia, by favouring simple and straightforward interpretations rather than fact-bound interpretations and by emphasising the main rules rather than the exceptions. See Olli Norros, Vahingonkorvausvelan vanhentuminen [Limitation of the right to damages]. Alma Talent 2015, pp. 231–232.

80 Luukkonen Yli-Rahnasto has already considered it problematic from the point of view of legal certainty that the duty to give notice is often based on general doctrines instead of explicit legislation, see Luukkonen Yli-Rahnasto 2021, pp. 52–55. However, the duty to give notice is so well-established and generally well known that its validity even in contracts not regulated by statutory law is unlikely to be problematic from the point of view of legal certainty, provided that the rules governing it are sufficiently clear.

81 As described above, the rule has little support from formal sources, although it has been advocated in the legal literature.

82 For example, Luukkonen Yli-Rahnasto (2021, p. 441) has drawn attention to the fact that proving the debtor's knowledge can be difficult and that the line between knowledge and the debtor's reprehensible conduct is "blurred".

83 This can happen, for example, if the district court dismisses a claim for breach of contract for failure to give a notice, but the Court of Appeal or the Supreme Court finds that there was no duty to notify and remands the case back to the district court.

84 For the sake of clarity, I must stress that I consider it undesirable to link the duty to notify specifically to the debtor's knowledge or to the information that the debtor should have in a particular case. It is a different matter that the content of the contract-type specific rules on the duty to give notice may may be influenced by the ability of each party, in a typical case, to detect and identify a breach of contract. For example, in consumer contracts (see, e.g., Bärlund 2002, pp. 181–184 and Luukkonen Yli-Rahnasto 2021, pp. 137–139) and professional services (see, e.g., Christina Ramberg, Reklamation mot advokater och revisorer [The duty to notify lawyers and accountants]. Svensk Juristtidning 2010, pp. 142–156, 152–153), differences in the expertise of the parties often argue in favour of the creditor not having an actual obligation to inspect and the time allotted for giving a notice not beginning to run until the creditor has actual knowledge of the breach of contract.

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exempting effect of knowledge, but in the travaux preparatoires concerning various types of sales contracts, it has been stated that knowing concealment of defects constitutes dishonourable and unworthy conduct. In other types of contracts, the silence of a defect known at the time of the conclusion or performance of the contract may often be regarded dishonourable and unworthy, whereas knowledge obtained after performance of the contract is less likely to be so relevant. However, the type of contract is an important factor in this assessment: if, for example, there is a special relationship of trust between the parties or a close and long-standing co-operation, the debtor can often be expected to take the interests of the other party into account to a greater extent than in a one-off contract such as a transaction, even in the event of a breach of contract.

There is little support in the case law of the Supreme Court for the principle that mere knowledge of a breach of contract by the debtor releases the creditor from the duty to give notice. Rather, the case-law has been against giving such a meaning to information. However, the reasoning in KKO 2021:69 can be understood in such a way that the debtor's knowledge could have such an effect where, in the circumstances of the case, a notice is not necessary in order to protect the debtor. However, for reasons of clarity of the rules and the smooth and certain settlement of contract breaches, as set out above, it would be problematic if the creditor's duty to give notice were to be determined by the importance of a notice for the debtor in a particular case. The creditor is usually not even aware of all the aspects of the debtor's organisation which affect the debtor's need for timely notice of a breach of contract. A better approach is to assess the duty to give notice in respect of a particular type of contract and a type of breach based on the arguments for and against the duty to give notice in that type of contract in general.

From the point of view of the functions of the duty to give notice, the creditor's knowledge of the breach of contract reduces but does not eliminate the importance of notice. Even if the debtor is aware of the breach of contract, they need to know the creditor's position on the breach, but they do not necessarily have to wait for the creditor to inform them; they can, instead, actively inquire about the creditor's position. The fact that there is a time limit for the claim for cancellation is generally sufficient to prevent the creditor from speculating at the debtor's expense. On the other hand, there is a strong argument against giving debtor's knowledge an exempting effect: requiring the creditor to be proactive will facilitate the speedy resolution of breaches of contract and thus reduce the disadvantages of delayed resolution for both the parties and society. From the point of view of legal certainty, it is desirable that the rules are clear and their application predictable. In this respect, it would be problematic if the debtor's knowledge were to be given an exempting effect without significant support in statutes or case law. Moreover, the linking of legal effects to knowledge is problematic because it is generally difficult to prove knowledge – or the lack thereof.

In the light of the above, I consider that the most reasonable conclusion is that mere knowledge of a breach of contract by the debtor is not normally a ground for exemption from the duty to give notice where such an effect is not expressly provided for in an applicable statute. However, such knowledge, taken together with other factors, may give rise to a finding that the debtor's conduct is dishonourable and unworthy. The knowledge may also be relevant in assessing the length of a reasonable period for giving notice and the requirements for the content of the notice. The circumstances of both the creditor and the debtor play a role in assessing the reasonableness of the time for giving a notice, and the debtor's knowledge of the breach of contract often reduces the importance of a speedy notice for the creditor. Such an assessment allows factors relating to the circumstances of both parties to be considered, such as differences in the knowledge and expertise of the parties, as opposed to a situation where the debtor's knowledge of the breach of contract would completely relieve the creditor of the duty to give notice. On the other hand, the content of the notice may be simpler, in particular as regards the description of the breach, where it is clear from the circumstances that the breach is already known to the debtor.

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