Adjustment of Commercial Contracts between Equal Parties – reflections on Sec. 36 of the Swedish Contracts Act based on some recent legal rulings

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This article presents a few observations from Swedish general contract law. It focuses on the recent application of the ever-current Sec. 36 of the Act (1915:218) on Contracts and other Legal Acts of Private Law, the so-called Contracts Act, on commercial contracts. My observations lead to the conclusion that the strong restrictiveness in the application that the preparatory works of Sec. 36 called for no longer applies.

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1. Background and scope of the article

The basic rule in contract law is that contracts must be honoured and performed, *pacta sunt servanda.* However, this rule has never been unconditional.[2] In situations where, for example, a contract is contrary to good business practice or if the application of a contractual term or the contract as such is "blameworthy" (Swedish: otillbörligt), it has always been possible to declare the contractual term or the whole contract invalid. In addition, Swedish contract law has for a long time contained general clauses authorising the courts to adjust or set aside contract terms or the whole contract.[3] The most important clause was Sec. 8 of the Act

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[2] See, *e.g.* Statens offentliga utredningar (SOU) 1974:83, Generalklausul i förmögenhetsrätten [Swedish Government Official Reports (SOU) 1974:83 General Clause in Private Law], p. 31 *et seq.* and Regeringens proposition 1975/76: 81 med förslag om ändring i lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, m. m. [Government Bill 1975/76:81 with proposals for amendments to the Act (1915:218) on agreements and other legal acts in the field of property law, etc.] p. 100 *et seq.*

[3] Which these were, until 1976, when the current Sec. 36 of the Contracts Act was introduced, See SOU 1974:83, p. 15 and p. 41 et seq. There have also been opportunities for the courts, on the basis of general principles of law, to modify contracts or adapt contractual terms without direct statutory support, for example

(1936:81) on Promissory Notes (Sw: Skuldebrevslagen). It provided that if the application of a term included in a promissory note was obviously contrary to good business practice or otherwise blameworthy, the term could be adjusted or disregarded. The provision was applied by analogy, outside of the promissory note relationship, and was regarded as a general legal principle.[4] With the introduction in 1976 of the general clause on adjustment of unreasonable/unconscionable contract terms in Sec. 36 of the Contracts Act, all previous civil law general clauses on adjustment in statutes other than the Contracts Act were abolished and replaced by this general clause.[5] According to Sec. 36, a contractual term may be adjusted or disregarded if the term is unreasonable/unconscionable (Sw: oskälig) with regard to the content of the contract, the circumstances at the time of the conclusion of the contract, subsequent events and the circumstances in general. The adjustment may also lead to the entire contract being declared void. The provision requires an overall assessment of the contract as a whole and of the circumstances of the particular case.

In the past, the parties, whoever they were, were seen as, by and large, equal. However, with the emerging awareness of the typically weaker position of the consumer in relation to the trader, the possibility of adjustment has acquired a specific consumer protection profile, which is expressed in the second paragraph of Sec. 36, which speaks of "the need to protect the person who, in his capacity as a consumer or otherwise, is in an inferior position in the contractual relationship".

This article is limited to commercial contracts and thus does not deal with consumer contracts. However, something should be said at the outset about the changes in consumer law over the last 50 years or so. It is now justified to ask whether Sec. 36 of the Contracts Act any longer has any particular significance as consumer protection. The protection of consumer rights has been significantly expanded, not least through the proliferation of mandatory rules in favour of the consumer, and through the creation of consumer protection institutions such as the Consumer Ombudsman and the National Board for Consumer Disputes (Sw: Allmänna reklamationsnämnden). The consumer is today surrounded by – in addition to Sec. 36 of the Contracts Act – a comprehensive protective regulatory framework which did not exist in 1976 and which has come into being primarily on the initiative of the EU.[6] The importance for the consumer of the protection under Sec. 36 of the Contracts Act has thereby diminished (which I have not, however, specifically examined).[7] The consumer

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through the doctrine of assumptions (Sw: förutsättningsläran) and the doctrine of unethical contracts (*pactum turpe*) and also through so-called hidden control in the form of, for example, interpretation (Prop. 1975/76:81, p. 30).

[4] SOU 1974:83, p. 26. See also Jan Hellner, Konsumentskydd och generalklausuler [Consumer Protection and General Clauses], Tidsskrift for Rettsvitenskap (TfR) 1976, p. 148 *et seq*.

[5] Prop. 1975/76:81 p. 115. Sec. 33, the so called "small general clause", which is a rule of invalidity and not an adjustment rule, was retained in the Contracts Act.

[6] Another example of how consumer protection within the scope of Sec. 36 of the Contracts Act has been extended by legislation is Sec. 6 of the Arbitration Act (1999:116, lag om skiljeförfarande), which invalidates arbitration clauses in consumer contracts concluded before the dispute arose. Previously, the Supreme Court in several cases (see e.g. Nytt Juridiskt Arkiv (NJA) 1981 p. 711, NJA 1981 C57 and NJA 1982 p. 800) has declared such arbitration clauses invalid because they were considered unconscionable. See also Claes-Robert von Post, Studier kring 36 § avtalslagen med inriktning på rent kommersiella förhållanden [Studies of Sec. 36 of the Contracts Act with Focus on Commercial Relationships], 1999 p. 234 *et seq*.

[7] In his commentary on Sec. 36 of the Contracts Act in the database Lexino, section 3.3.4, professor Jori Munukka expresses an opinion that seems to give Sec. 36 more importance than I do, but I do not think he has examined the issue in detail either: "Consumer protection has been strengthened since Sec. 36 was introduced which means that many ordinary situations are now covered by mandatory law, but several unregulated

protection regulation is now left aside in this article which focuses on contracts between traders, i.e. commercial contracts.

Neither do I in this short article cover commercial contracts in which one trader is in a clearly inferior position vis-a-vis the other party in the contractual relationship. Such cases are more akin in nature to consumer cases.[8]

The case law of our neighbouring Nordic countries is of great interest for us in Sweden as well, since an essentially similar adjustment rule exists in these countries.[9] However, such a comparison is not possible within the scope of this article.

Since its introduction, the adjustment rule in Sec. 36 of the Contracts Act has been the subject of intense interest from legal scholars. This has resulted in academic theses, scientific articles and extensive textbook texts. I shall not go into all these here. The purpose here is limited and is to share, based on some recent court cases and arbitration awards, my reflections on the question of whether the possibility of adjustment as it is applied today to *commercial contracts between equal parties* has changed in relation to how it was described almost 50 years ago when it was introduced.[10]

The application of Sec. 36 is normally based on two steps, the first of which is to determine the content of the disputed clause, *i.e.* to interpret the contractual terms or to fill a gap in the contract.[11] The second step is then to assess the possible unreasonableness of the contractual term on the basis of an overall assessment of the contract and other circumstances. In this essay I do not deal with the first step, *i.e.* the interpretation/gap filling of the contract, but simply note that the importance of the counterparty's "justified perception/expectation/reliance" is often considered decisive for how the contract is to be

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situations remain, why Sec. 36 with its auxiliary regulation in Sec. 11 of the Act (1994:1512) on Contract Provisions in Consumer Relationships (Sw: Lag om avtalsvillkor i konsumentförhållanden) may still be needed." Accessed on 15 June 2023. In the textbook by Jan Ramberg & Christina Ramberg, Allmän avtalsrätt [General Contract Law] (2022) the authors express the following opinion on this issue: "As a result of EU Directives and the case law of the Court of Justice of the European Union (CJEU), one ought to be extremely cautious about applying Sec. 36 of the Contracts Act to consumer contracts." Quote from p. 160.

[8] Regarding the protection of small businesses, see von Post 1999 p. 109 *et seq*. where he also refers to the article 1987 by Ulf Bernitz on protection of small businesses. See also Dan Lindmark´s article about the Swedish case NJA 1979 p. 483 (the so-called Bergman&Beving case) in Boel Flodgren et al. (eds), Avtalslagen 90 år [The Contracts Act 90 Years of Age] 2005 p. 281, particularly p. 285 *et seq*.

[9] See e.g. for accounts of Sec. 36 of the Danish and Norwegian Contracts Acts, Lennart Lynge Andersen, Aftalelovens § 36 – fra kontraktfrihed til urimelighedskontrol [Sec. 36 of the Contracts Act – From Freedom of Contract to Control of Unconscionability] (2018), and Johan Giertsen, Avtaler [Contracts] (2021).

[10] As for the situation today, Jori Munukka in his commentary on Sec. 36 in Lexino, section 1, gives the following "round-up": "The provision has achieved the status of a central norm with a broad scope, see for instance the cases NJA 2009 p. 408, NJA 2011 p. 67, NJA 2017 p. 113 and The Supreme Court case 2020-07-09, T 1413-19. Lately, it has also been applied in arbitrations involving large amounts of money." Accessed on 15 June 2023.

[11] The Swedish Supreme Court sometimes uses only one step and then makes the issue purely into a question of interpretation (so-called hidden control), see e.g. NJA 2005 p. 142, referred to as "Ränteskruven" [The interest rate screw]. Former Supreme Court Justice Torgny Håstad – in a conversation – has explained that he participated in an arbitration just before NJA 2005 p. 142 was decided by the Supreme Court, in which there was a dispute (between other parties) concerning the same standard terms and conditions as were the issue in NJA 2005 p. 142. According to Håstad, in the arbitration, the case was instead decided with the application of Sec. 36 and the leasing fee clause in question was adjusted on the grounds that it was considered unconscionable.

understood[12] and that when determining the content of the contract, as a general rule, the distribution of risk in the contract as a whole as determined by the parties should be respected.

As Sec. 36 of the Contracts Act is based on the open concept of unreasonableness/ unconscionability and also stipulates that the assessment of unreasonableness/ unconscionability must be made on the broadest possible ground ("the content of the contract, the circumstances at the conclusion of the contract, subsequent circumstances and other circumstances") it is clear that Sec. 36 has the weakness characteristic of general clauses, namely lack of clarity regarding the scope and application of the provision. Instead, the preparatory works were left to deal with the need for guidelines for the application and delimitation of the adjustment rule.[13] The Council on Legislation (Sw: Lagrådet) cautioned that this should not be seen as

"using the preparatory works as a tool for introducing detailed regulation regarding how the general clause should be applied. The stated guidelines and comments in the preparatory works must therefore not be taken for more than what they are, namely statements intended to provide guidance for the application of the adjustment rule. It should also be noted that circumstances and values are constantly developing and changing. It is therefore likely that the statements made by the Council on Legislation will gradually lose some of their meaning."[14]

The adjustment rule in Sec. 36 has its basis in the changed view of freedom of contract in the 1970s (with demand for increased consumer protection). The aim was to curb the risk of abuse against "the weaker party" that came with freedom of contract, but the rule was given a general formulation that also included contracts between equal parties. An important reason why the adjustment rule was formulated as a general clause was that what constitutes "unreasonable" conditions in contractual relationships should be given a broad, principle-based meaning and follow developments in society. The view on what is unreasonable was not to remain as it was in the 1970s but should follow the developments that could be expected to take place in the future as regards the perception of what constitutes unreasonable terms in contractual relationships. It was about a kind of societal control of contractual relationships. The courts should be able to make a legal policy assessment, *i.e.* have extensive discretionary powers to adjust agreements by, for example, taking into account values expressed in dispositive legal rules motivated by legal policy or in mandatory rules in a certain area when assessing what is unreasonable within a related, non-regulated area. The legislative process thus very consciously focused on an "open" concept, unreasonableness, which, through the courts' future decisions, was expected to be able to take on not only a principled form[15] but also a gradually – in line with societal changes – changed content without the need to change the Sec. 36 regulation. In other words, since what is considered unreasonable can change over time, the legislation can move with the times.

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[12] See, for example, Ramberg & Ramberg 2022 p. 220.
[13] Prop. 1975/76:81 p. 40. For criticism that the wording of Sec. 36 and the preparatory works to it make it "difficult to specify the legal situation (Sw: rättsläget), see Ola Svensson, Lagstyre inom avtalsrätten [Legislative control in contract law], in the collection of articles Tankar om kontraktsrättens teori och metod [Thoughts on contract law theory and methodology] 2017 p. 80.
[14] Prop. 1975/76:81 p. 166.
[15] SOU 1974:83 p 130.

The preparatory works of Sec. 36 clearly emphasized in several places that the adjustment possibility should be used restrictively as regards commercial contracts.[16]

Over the last 50 years, general contract law has absorbed phenomena such as increased consumer protection, increased importance of the duty of loyalty, constitutional protection of human rights and the importance of the recognition of human rights in contractual relations, the increasing use of standard term contracts, the growing importance of EU law and its principles, digitalisation, the spread of soft law, etc. The principle of "justified reliance", *i.e.* that the meaning of legal acts is not determined by the subjective will/intention of the party to the legal act but by the objectively justified perception/reliance of the other party, as well as the principle of "legitimate expectations" have been clearly recognized in contract law.[17]

In society, over the past 50 years, general values have also shifted towards greater demands on companies to take social responsibility, for example as regards consideration for the environment and requirements for reduced climate impact. The EU, in particular, is imposing mandatory rules on companies regarding environmental and climate responsibility. Have such shifts in values affected what is considered unreasonable in a contractual relationship between commercial parties if, for example, a company breaches its environmental responsibility obligations?[18] Surely the counterparty can be expected to have legitimate expectations that the company/contracting party will live up to society´s requirements for environmental resposibility without this having to be explicitly included in the parties' contract? The question of whether the general "social responsibility" that a company has (e.g. as regards its environmental responsibilities under EU law) can be considered to be included as a presumption underlying a commercial contract and thus to be relevant in a discussion of what is "unreasonable" contractual content, is, however, too large to fit into this short article and must therefore be left aside here.

The preparatory works to Sec. 36 – SOU 1974:83, the so-called General Clause Inquiry (Sw: generalklausulsutredningen), here called "the Report", with professor Jan Heller as the sole investigator, and Government Bill (Sw: Prop.) 1975/76:81 – are highly regarded as legal sources and – it must be admitted – are still regarded as relevant legal sources by legal scholars, practitioners and courts when Sec. 36 is examined.[19] In general, as preparatory

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[16] See, for example, Prop. 1975/76:81 p. 105 and p. 108 *et seq*.

[17] NJA 2013 p. 659, referred to as "Reseföretagsrepresentanten" [Travel company representative], NJA 2014 p. 684, "Divisionschefen" [Head of Division], and NJA 2021 p. 1017, "The loan agreement with Svea Ekonomi", on power of attorney based on justified reliance (Sw: tillitsfullmakt). "… it is the recipient's *justified perception of what was intended* that is decisive for the legal effects." Quote from Joel Samuelsson, Joel, Svensk avtalsrätt: Fullmaktsläran [Swedish Contract Law: The Doctrine of the Power of Attorney] 2023 p. 27.

[18] "The problem is that rules on approaching this new conflict between the common interest – understood as a third party interest – and the interests of the parties to the contract have not yet been established… Contract law, being designed to balance interests of the parties, is a poor instrument for protection of these values [protection of the environment and sustainability, my addition] where they contradict the interests of both parties to the contract." Quote from Katarzyna Poludniak-Gierz, Eco-Reasonableness. Possibilities of Incorporating Green Principles into General Private Law Clauses, in Mads Andenæs & Maren Heidemann (eds.), Quo vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in Emerging Law and Practice of Global Commerce, 2023 p.107. Quote from p. 124.

[19] Jori Munukka, in his commentary on Sec 36 in Lexino, section 3.1, notes in this regard the following: "From the point of view of legal sources, it is interesting to note that the report of the General Clause Report [SOU 1974:83, my addition] … has retained its authority… It is also of interest to note that a substantial body of case law has been built around Sec. 36 of the Contracts Act." Accessed on 15 June 2023. Another legal scholar, professor Per Samuelsson (statement from 2011) is of the same opinion: "The… General Clause Report… still

works age, they are usually accorded progressively less importance and this is then reflected in the application of the law. Has this in fact also happened rather unnoticed with the preparatory works to Sec. 36 of the Contracts Act?

The question here is thus whether and, if so, how the view of commercial contractual relations has changed in any way that is relevant to what is regarded as unreasonable terms in a contract between traders.[20] The preparatory works have existed for almost half a century, and the legislative text is the same. Court decisions and arbitral awards will be the main source of information when seeking the answer to the question. The influence of the courts on commercial contract law is small, since most contractual disputes between equal commercial parties are dealt with in arbitration.[21] Arbitral awards are therefore of great interest as illustration of and answer to the question of how Sec. 36 is applied to commercial contracts today.[22]

In order to determine whether the application of Sec. 36 has changed it is necessary to start by clarifying how Sec. 36 was intended to be applied when it was introduced.

2. Applicability of Sec. 36 of the Contracts Act to commercial contracts according to the preparatory works

In the report SOU 1974:83, here referred to as "the Report", preceding the introduction of Sec. 36,[23] it is made clear that the possibility of adjustment as such was not new, but rather that it was a question of modernising the legislative text, which was to contain a common general clause directly applicable within the whole area of private law and to make the courts more prone to adjust contract terms. What was new was the wording in the second paragraph of the general clause, which clearly stated that, in applying the general clause, particular

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occupies a special position in terms of authority, primarily by virtue of Jan Hellner's contribution to its creation and role in the Inquiry." Quote from Entreprenadavtal. Särskilt om ändrade förhållanden [Construction contract. Specifically regarding changed circumstances], note 52, p. 242.

[20] "It is also presumed in legal theory that in a somewhat longer perspective the provision will have consequences for the doctrine of contract law in that the duty of loyalty which is built into Sec. 36 will come into play as a factual ground (Norwegian: reelt hensyn) in the interpretation of contracts." Quote from Trine-Lise Wilhelmsen, Avtaleloven § 36 og økonomisk effektivitet [Sec. 36 of the Contracts Act and economic efficiency], TfR 1995, p. 1.

[21] Dan Lindmark, Om jämkning av kommersiella avtal, NJA 1979 s. 483 [On the adjustment of commercial agreements, NJA 1979 p. 483], in Boel Flodgren et al. (eds,) Avtalslagen 90 år [The Contracts Act 90 Years of Age] 2005 p. 281 *et seq.*

[22] The question regarding the authority of arbitral awards as legal sources is the topic of a separate discussion. I see it this way. If the arbitral tribunal in the individual case consists of arbitrators who enjoy great legal authority, the arbitral award will de facto also have high authority, which is evidenced not least by the importance attached to the award in the ProfilGruppen arbitration (mentioned below, see the text at footnote 40). The arbitrators involved in the two arbitral awards which I refer to in this article enjoy, in fact, such high authority and the awards therefore have a high value as sources of law, or at least as legal judgments that provide evidence of the content of applicable law. Another point is that it is difficult – if not impossible – to get an overview of what relevant decisions exist since arbitral awards are not public. But you can live by the principle "you take what you have", *i.e.* you can base your legal analyses on the arbitral awards which you happen to have access to. It is better to have access to a few arbitral awards (on the subject in question) than none.

[23] SOU 1974:83.

account should be taken of the need to protect the weaker party in the contractual relationship.[24]

The question is whether Sec. 36 has not come to be too strongly perceived and described as a consumer protection rule.[25] Consumer protection under contract law was a novelty and required a great deal of explanation – and focus – in the Report SOU 1974:83 and in the Government Bill Prop. 1975/76:81[26] but is important to remember that the general clause was not in fact limited to the area of consumer protection but that it was primarily concerned with unreasonable contract terms in the entire area of private law.[27] Most of the Bill's proposals apply generally, *i.e.* relate to both consumer contracts and commercial contracts, although

"... the general clause ought to be applied more restrictively in purely commercial relationships than in consumer relationships."[28]

Sec. 36 focuses on *individual terms* of the contract and not on the contract in general (even if the unreasonableness of the term shall be assessed based on an overview of the contract):

"... the general clause should be able to be used to deal with terms which in a blameworthy (Sw: otillbörlig) way place decisions relating to a contractual relationship in the hands of one of the parties. Examples cited include terms which completely alter the contractual mechanism adopted in the Contracts Act so as to leave questions of who is to be bound and what the contract is to contain to be decided discretionarily by the stronger party. Other examples cited include clauses which leave it to one party to decide unilaterally whether changed circumstances justify a price increase, and force majeure clauses and clauses which provide that it is for the seller to decide whether a defect in the goods implies lack in conformity with the contract. Furthermore, according to the Report, an assessment of impropriety should take into account the relationship between the value and the benefits on either side and also take account of the relationship between the breach of contract and the legal consequence (Sw: påföljd).There are, according to the Report, ample evidence that a certain balance is upheld in private law so that a minor breach of contract does not lead to a too severe consequence. The fact that one of the parties abuses a right could also have an impact on the assessment. Furthermore, under long-term contracts, consideration could also be given to supervening events. There should also be some possibility to use the general clause to remedy older terms that are clearly contrary to important principles in new legislation."[29]

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[24] SOU 1974:83, p. 27 *et seq*.
[25] When Claes-Robert von Post wrote his thesis Studies on Sec. 36 of the Contracts Act with a Focus purely on Commercial Relationships (published in 1999), he found that – for those who had not had a reason to look closer into the matter – it was reasonable to say that Sec. 36 of the Contracts Act "is simply one of many other rules designed to protect consumers". See p. 26. As regards the current situation, Jori Munukka in his commentary to Sec. 36 in Lexino, section 2.2, states the following: "The general clause is nowadays, in the case law of the Supreme Court, more often used in business relationships with small businesses than in consumer relationships". Accessed on 15 June 2023.
[26] Much space was required both in the Report and the Bill to clarify the relationship between the market law (Sw: näringsrättsliga) prohibition rules in the (then applicable) Act on Consumer Contract Terms (Sw: avtalsvillkorslagen) and the proposed general clause of private law. Accessed on 15 June 2023.
[27] SOU 1974:83, p. 29.
[28] Prop. 1975/76:81, p. 108 *et seq*.
[29] SOU 1974:83, p. 18.

The legislation does not contain any examples of situations that may give rise to adjustment of contractual terms under Sec. 36.[30] The Report provides general guidelines regarding the type of circumstances that may give rise to the application of Sec. 36, but leaves it to the courts to formulate in more detail the principles for when adjustment of contractual terms or the setting aside of the contract or contractual terms can be done, for example by analogy with mandatory legislation.[31] Dispositive legal rules may also be of significance as expressions of a standard of reasonableness, but in this case attention should be given above all to such dispositive rules which are to be regarded as direct expressions of the legislator's legal policy.[32]

The fact that the assessment of unreasonableness must be made through an overall assessment of the contract and of the circumstances (pleaded by the parties) in the particular case is emphasized in many places in the preparatory works,[33] since the question of whether a term is to be considered unconscionable often depends on how the contract as a whole is formulated.

Norms corresponding to "good business behaviour", "good practice" and the like may determine what is not "unreasonable" (Sw: oskäligt) under Sec. 36. In the Bill the reporting minister addresses this issue in several places and tries to clarify how the assessment of different aspects is to be made. He summarizes the reasoning as follows:

"If a contract term is contrary to what is considered good business practice, there are, as the Report points out, often strong reasons to adjust the term or disregard it. On the other hand, it is … by no means self-evident that a term should be accepted because it is consistent with what is considered good business practice. Even if the term is consistent with established practice, it may be drafted in a way that unilaterally favours one party. This is particularly true in the case of contracts between traders and consumers. In some sectors, what is considered good business practice may be the result of long-standing practice which has not been affected at all by the more consumer-friendly approach to contractual terms which has been expressed in the legislation in recent years."[34]

Other types of situations where adjustment may be considered are those where there is a mismatch between the parties' benefits, but

"it is clearly out of the question to adjust all contracts which cannot be said to contain a fair trade-off between the parties. This especially applies, of course, to purely commercial relationships, where there is often a certain amount of deliberate risk-taking by one or both parties."[35]

As regards the relationship between the breach of contract and the legal consequences, there is ample evidence in private law that the legislator has wanted to maintain a balance between

[30] Prop. 1975/76:81, p. 131.
[31] *Op. cit*., p. 135.
[32] *Op. cit*., p. 138.
[33] See, *e.g.,* Prop. 1975/76:81, p. 110 and p. 111.
[34] Quote from *op. cit.,* p. 120.
[35] Quote from *op. cit*., p. 118 et seq.

breach of contract and the legal consequences that follow from the breach. A minor breach shall not cause a severe consequence.[36]

The Bill 1975/76:81 makes it fairly clear how the difference in the application of the clause to, on the one hand, contracts with "weaker parties", *i.e.* consumers and small businesses, and, on the other hand, contracts between equal parties, *i.e.* normal commercial contracts, is intended to be realized. I will only quote here what applies to contracts between (equal) traders.

"In a commercial context it is particularly important to be able to presume that agreements are valid and thus be able to foresee the consequences of the agreements. It should also be borne in mind that agreements between traders often imply deliberate risk-taking by one or both parties. In other words, the agreements often imply a degree of speculation. Obviously, to some extent this fact needs to be accepted…

Contractual terms might need to be adjusted also for other reasons than the fact that one party has used its stronger position to obtain advantages at the expense of the other party. Even in situations where the parties are equal, a contract or contractual term may have been drafted in such a way that it does not seem reasonable to enforce it strictly. A variety of circumstances may come into play. A term might have been given an unfortunate formulation by pure oversight. When using standard terms, it may easily happen that a term slips into the contract without being appropriate for the contract in question. A contracting party may be pressed for time or in other ways in a stressful situation and, as a result, enter into a contract which does not meet reasonable requirements of fairness between the parties. Not least, supervening events may lead to a contract having completely different repercussions from those assumed when the contract was concluded.

Thus, even in purely commercial relationships, situations may arise which justify the adjustment of contracts. For the achievement of an acceptable result, one cannot be satisfied with the adjustment possibilities provided by the current general clauses. Instead, in accordance with the Report, I recommend that the new general clause be made applicable also to agreements between traders.

Even if, in accordance with the above, a general clause is introduced which is to apply to both consumer relations and in relations between traders, clearly it must be applied with significantly greater caution to purely commercial relations than to contracts between traders and consumers."[37]

3. The beginning of an expansion of Sec 36's scope of application

As stated above, the preparatory works give various examples of contractual clauses and circumstances that may give rise to an adjustment under Sec. 36, and it is emphasized that the application to commercial contracts shall be restrictive. The preparatory works are still the most important source of law for the clarification of the more detailed content of Sec. 36 in Swedish private law, but current case law and arbitration awards seem to have opened for a

[36] SOU 1974:83, p. 153 and Prop. 1975/76:81, p. 119.
[37] Prop. 1975/76:81, p. 104 *et seq*.

less restrictive application. In scholarly work (Sw: doktrin) as well, one can now notice the beginning of the opinion that the possibility of adjusting contracts between equally strong parties has expanded during the time Sec. 36 has been in force.[38]

Without any deep dive into older sources of law, there is presumably reason to state that the scholarly writing from the last century primarily emphasizes the consumer protection aspect of Sec. 36 and that it is only in the 21st century that one has started talking of an expansion (in relation to the preparatory works) of the application of Sec. 36 as regards commercial contracts.[39] Even the courts seem to have been focused on the consumer protection aspect during the last century. Such can be the understanding of the cases NJA 1979 p. 483 "Bergman&Beving", where requested adjustment was not granted, and NJA 1989 p. 346 "Pälsbolaget" [Ther fur company] where the Supreme Court did not expressly mention the requirement of restrictiveness in the application of Sec. 36 to commercial contracts, but where the circumstances were at the same time so special that "overwhelming reasons" indicated that it would be "considered unreasonable to invoke the limitations in the insurance terms against the claimant Pälsbolaget". The wording of this judgment does not support the conclusion that the restrictiveness in the application of Sec. 36 recommended in the preparatory works had been abandoned, because the circumstances in this case were so special. Even the case NJA 1992 p. 782 "Stadshotellet i Södertälje" [the City Hotel in Södertälje] concerned adjustment of insurance terms between traders. In that case, the Supreme Court expressly took note of the restrictive approach to the application of Sec. 36 stipulated in the preparatory works, but at the same time emphasized that, if there are special circumstances, adjustment may also be considered in relationships between traders. In this case, however, adjustment was not granted.

A case that opened for a new discussion regarding the application of Sec. 36 to commercial contracts is the arbitral award between ProfilGruppen AB and KPMG AB from 2010.[40] In that case, Sec. 36 was used to adjust a contractual exemption of liability clause in a consultancy agreement (Sw: uppdragsavtal) between equal parties. "This provision (Sec. 36,

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[38] In the textbook Allmän avtalsrätt [General Contract Law] by Ramberg & Ramberg from 2022 one reads on p. 220: "Generally speaking, it is difficult to obtain adjustment under Sec. 36 of the Contracts Act in contractual relations between equally strong traders if it is not a question of blameworthy behaviour in the contractual negotiations" (which statement is contrary to arbitration practice, see below in the text at footnote 58). On p. 158 one reads that "[m]aybe one can notice an increased tendency to invoke Sec. 36 of the Contracts Act in relationships between traders of equal strength." However, there is no reference given to support the statement. In a review of a contract law thesis, Professor Lars Gorton says that "… Sec. 36 of the Contracts Act, although not in itself a rule of contract interpretation, has gradually become increasingly important in practice in the resolution of contract law disputes, not only in consumer law relationships." Quote from Juridisk Tidskrift (JT) 2022-23, No 2, p. 472. And in a fairly recent Festschrift article, one finds the following: "The strong link between unwritten passivity principles and the contractual principle of loyalty entails a certain parallelism between passivity principles and the general clause in Sec. 36 of the Contracts Act. Those who wish to argue for a loss of rights due to passivity therefore often have reason to consider also arguing for a loss of rights in the form of adjustment on the ground that the retained right appears unreasonable. In our opinion, the Supreme Court in NJA 2018 p. 171, "Leksaksaffären i Vimmerby" [The toy shop in Vimmerby], should perhaps have considered this route instead of creating a special passivity rule." Quote from Niklas Arvidsson & Lars Gorton, Passivitet inom avtalsrätten [Passivity within Contract Law], Festskrift till Göran Millqvist, 2019, p. 97, quote from p. 123.

[39] See the statement of e.g. von Post above in footnote 25. In Andreas Norléns thesis Oskälighet och 36 § avtalslagen [Unreasonableness and Sec. 36 of the Contracts Act] from 2004 it is said on p. 38 (with reference to a statement by Jan Hellner from 2001) that "[t]he consumer protection aspect of Sec. 36 seems … to have become less prominent than was originally assumed to be the case".

[40] The award was challenged and was published in Svea Court of Appeal case T 1085-11.

my addition) allows for a more flexible balancing of what is a reasonable sharing of risk, when the allocation of risk inherent in the exemption of liability must be considered unreasonable (or unconscionable) with regard to a particular damage claim."[41] Regarding the restrictiveness requirement in the preparatory works, the arbitral tribunal held that the fact "[t]hat the Contracts Act should only be applied to commercial relationships in exceptional cases does not prevent it from being justified to adjust an exemption of liability clause … The issue of adjustment must then be decided after an overall assessment."[42] Former Justice and President of the Swedish Supreme Court Stefan Lindskog, who chaired the arbitral tribunal, has written about this arbitral award and reflected on the application of Sec. 36 more generally between equal parties.[43] He sees Sec. 36 as a rule for correcting the effects of the contract when the contractual mechanism for one reason or another has not functioned in the way that – from any perspective – it ought to have done. He is of the opinion that the correction of a commercial contract that the adjustment rule makes possible should be based on the market ideology which forms the basis for the whole private law system.[44] Among other things he states:

"In purely commercial contexts between equal parties, I think … that one should try to avoid court interventions based on concepts of what is fair. This does not mean that deontologically tinted arguments would be completely irrelevant …, but it is usually more appropriate to build on good actual practice in business (customary practice) and not normative practice (i.e. that the practice should not be established normatively but be proven as established by serious actors)."[45]

And that:

"there is usually no reason to come to the rescue of a commercial party when it has misjudged an identifiable market risk."[46]

But if:

"a relationship changes in a way that could not reasonably have been foreseen by the affected party and on the one hand it significantly disrupts the equivalence of the contract, and on the other hand the risk of the occurrence would have been borne by the other party if there had been no contract, then the contract ought to be adjusted so that the equivalence is restored, provided that it is not the type of risk that naturally is borne by the party designated by the contract as the risk-bearer."[47]

This is a different type of reasoning from what the reader encounters in the preparatory works, and which suggests that Sec. 36 is opened for a wider application.

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[41] Quote from p. 41 of the arbitral award.
[42] Ibid.
[43] See Jämkning i kommersiella avtalsförhållanden [Adjustment in commercial contractual relations], in Mads Bryde Andersen, et al. (eds.), Aftaleloven 100 år [The Contracts Act 100 years], 2015 p. 305.
[44] *Op. cit*., p. 315.
[45] *Op. cit*. at footnote 19 on page 314.
[46] *Ibid.*
[47] *Op. cit*., p. 320.

4. The application today of Sec. 36 to commercial contracts between equal parties. Conclusions from a few recent court cases and arbitral awards

4.1 Court cases

As stated above, there are not very many cases from the Swedish Supreme Court as regards the application of Sec. 36 to contracts between equally strong commercial parties. The Supreme Court's case law, which mainly concerns consumer contracts but often also contracts between commercial parties where one of them is in an inferior position in relation to the other, has been the subject of considerable interest from legal scholars.[48]

As regards cases concerning the application of Sec 36 between equal commercial parties, I shall discuss a few such cases here in order to try to find an answer to the question whether there is ground for claiming that the legal position has changed as a result of case law compared to what the situation was when the provision was introduced in 1976. Most of the cases have concerned exemption of liability clauses (Sw: friskrivningsklausuler). It started with the arbitration award in the ProfilGruppen case, mentioned above. In the Supreme Court's case law, the principle that exemption clauses should primarily be assessed under Sec. 36 was established in the case NJA 2017 p 113, referred to as "Den övertagna överlåtelsebesiktningen" [The transfer inspection taken over] (which is actually a consumer case). The Supreme Court which also referred to international soft law principles, among others referring to "good faith and fair dealing" (para. 26) stated (para. 24):

"Since the enactment of Sec. 36 of the Contracts Act the view has gradually been accepted that the question whether there is reason for setting aside an exemption of liability clause as a consequence of a tortfeasor´s blameworthy behaviour, including his possible gross negligence or willful misconduct, most appropriately should be dealt with under Sec. 36."

The most recent case (at the time of writing in 2023) in which Sec. 36 has been applied to adjust a commercial agreement between equal parties is NJA 2022 p. 354, referred to as "Skatterådgivarens ansvarsbegränsning" [Tax advisor's limitation of liability]. The case concerned the question of whether an exemption of liability clause in a commercial consultancy agreement regarding tax advice could be adjusted. It was established in the case that the tax advisor had been negligent, but not grossly negligent (the exemption clause expressly did not apply to gross negligence). The Supreme Court gave the following guidance on how Sec. 36 should be applied today:

"The application of Sec. 36 shall always be done in a nuanced way, on factual grounds and with a certain restraint (Sw: återhållsamhet). In its application, it should be noted that the provision is mainly intended for consumer relations. In commercial contract law, the principle of freedom of contract should be given particular weight. Against this background,

[48] An updated account of the doctrine can be found in Ramberg-Ramberg, Allmän avtalsrätt (2022), chaps. 8 and 9.

significantly more would be required for considering a contract clause unconscionable in a commercial relationship, at least between equally strong parties.

It says here that "significantly more" is required for a contractual term to be considered unreasonable in commercial relations between parties of equal strength, and maybe this can be seen as a certain softening in relation to the requirement of "restrictiveness" called for in the preparatory works. However, no further explanation is given as to how this expression relates to the old requirement of "restrictiveness". At the same time the Supreme Court refers to the old General Clause Report SOU 1974:83 (but also to NJA 2017 p. 113) when the Court in the next passage (para. 34) states that

"the assessment of the unreasonableness of an exemption of liability clause under Sec. 36 basically aims at the question of whether the exemption, considering all circumstances, constitutes an unreasonable balancing of risk between the parties."

The Court then makes a general observation (para. 36) on the content of Sec. 36 (as regards exemption of liability clauses in particular):

"However, the decisive issue in an assessment under Sec. 36 of the Contracts Act is whether the exemption of liability clause hits in an unreasonable way in the current situation."

The majority of the Supreme Court Justices carefully considered whether the circumstances of the case favoured or opposed an adjustment of the exemption clause and finally arrived at the conclusion that adjustment was not justified, primarily because the negligence attributable to the consultant was "relatively limited".

A minority (two Justices) wanted to adjust ("break through") the exemption clause on the basis of Sec. 36 considering that the negligence, even if it could not be considered gross, nevertheless must be considered "clearly blameworthy" (Sw: klart klandervärd). Also, the minority referred to the old Report and described the restrictivity requirement in the following way:

"the provision in Sec. 36 of the Contracts Act is primarily intended for consumer relations but it is in and of itself applicable also to commercial contracts. To a certain extent, however, other considerations come into play when it is applied to purely commercial contracts (see SOU 1974:83 p. 109 et.seq.). Considering the fundamental importance that freedom of contract ought to be given in the legal system, significantly more is generally required for a contract clause to be considered unreasonable, at least between equally strong parties."

The minority used the same expression, arguing that "significantly more" would be required to allow the application of Sec. 36 to a commercial contract. What this meant was not explained, but rather they proceeded directly to the question of the unreasonableness of the exemption of liability clause and found that adjustment was justified.

NJA 2022 p. 354 has caused debate, where one can notice that some commentators seem open to the development of Sec. 36 towards a more generous application to commercial

contracts,[49] while others have expressed the view that the case has created even more unclear boundaries for the possibility of adjustment in commercial contractual relations, which in and of itself also expresses the view that one sees a development away from a clear restrictiveness requirement.[50] The case signals that there is disagreement on how to assess the negligence requirement in cases regarding exemption of liability clauses. According to the minority, it was not a matter of gross negligence, when the exemption clause would have been immediately disregarded according to the consultancy contract, but about "ordinary" negligence, albeit of the more serious degree ("clearly blameworthy", "not insignificant negligence"). That adjustment of exemption of liability clauses may also occur in the case of negligence that is not classified as gross seems to be an extension of Sec. 36 and something that – perhaps – signals changes in the view of what is unreasonable in commercial contractual relationships. And even as regards the majority´s reasoning – which did not lead to an adjustment – the view has been expressed that "the bar for adjustment seems relatively low".[51]

4.2 Arbitration practice

Sec. 36 has also been applied in arbitration proceedings. Here, for obvious reasons, it is not possible to present a comprehensive survey, but it will have to be a question of the limited number of arbitral awards that are available for one reason or another. I here refer to two different arbitral awards. Both cases concern disputes relating to contracts for the sale and supply of natural gas and the disputes involve billions of euros. A gas contract is often long-term and provides the seller with constant cash-flow and guaranteed sales for a long time. It also gives incentives for the seller to invest in the necessary infrastructure to produce and transport natural gas. For the buyer, on the other hand, the gas contract guarantees access to specified volumes of gas for the duration of the contract. The buyer often must commit himself to paying for a certain minimum volume of gas per year, *e.g.* 80 per cent of the agreed annual volume, regardless of whether the buyer needs such large volume ("take-or-pay"). As gas contracts run for a long time and as changes in the outside world occur during the contract period, take-or-pay clauses can be burdensome for the buyer, for example if the gas price on the market as a whole suddenly and unexpectedly drops dramatically.

One of the awards, which I refer to here, is from 2017. It was challenged and thus became public.[52] The challenge was unsuccessful. The arbitrators there were competent, highly regarded, internationally experienced jurists, a Danish advocate, a Swedish advocate and the former President of the Swedish Supreme Court, Justice Johan Munck. The arbitrators were unanimous in their assessment. The second award, from 2022, has also been challenged and has been made public in parts. The arbitrators there, one from Spain, one from France and

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[49] "Time will tell whether "Skatterådgivarens ansvarsbegränsning" [Tax advisor's limitation of liability] marks the beginning of a shift in the view of Sec. 36 of the Contracts Act and its application to commercial relations." Quote from Andrea Algård & Niklas Arvidsson, Skadeståndsansvar för juridisk rådgivning [Liability for damages in connection with legal advice], SvJT 2023 p. 1. Quote from p. 20.

[50] "Perhaps … a development is beginning to emerge in which the use of Sec. 36 of the Contracts Act takes precedence over the more traditional contract interpretation" and "… it now seems clear that the use of Sec. 36 can hardly be said to contribute to greater predictability in contract law disputes." Quote from Lars Gorton & Eva Lindell-Frantz, Skatterådgivarens ansvarsbegränsning [Tax advisor's limitation of liability], JT 2022-23, p. 97. Quotes from p. 106 and p. 109 where the authors discuss the applicability of Sec. 36 to commercial contracts.

[51] See Algård & Arvidsson, footnote 49, p. 20.

[52] Svea Court of Appeal judgment 2019-11-27, T 10191-17.

one from Germany, were also well established, highly regarded, internationally experienced jurists. Here too, the arbitrators were unanimous. Both cases concern disputes related to gas purchase contracts between state-owned companies. The purchasing company in each case claimed to be considered an inferior party, but this was not accepted by the arbitral tribunals. Neither party was Swedish but Swedish law was applicable under the contracts´ choice of law clauses. Both cases involved several different legal issues, but I will focus only on the parts dealing with the application of Sec. 36.

Both awards are written in English and, to avoid the risk of misunderstanding, I keep the text in English when I reproduce the content of the awards. I include a generous selection of text from the arbitral awards, partly because they are not so easily accessible, and partly for the purpose of giving the reader insight into how the arbitral tribunals ("the Tribunal") explain in detailed, pedagogical manner the content, purpose and applicability of Sec. 36.[53] The account of the awards is concentrated and not so easy to digest, but I have not found a better way to – at the same time – include both the facts and the legal reasoning.

In the first case, the Ukrainian energy company Naftogaz, which was the claimant, claimed that certain clauses in the contract it had with the Russian energy company Gazprom for the purchase and supply of gas, valid from 2009 to 2019, were unreasonable and should be adjusted under Sec. 36 of the Contracts Act, which the other party, Gazprom, rejected. The dispute concerned, among other things, a take-or-pay clause. In the dispute, Naftogaz had brought its claim along various legal grounds, including the claim that the gas contract with Gazprom meant that Gazprom was in breach of competition law. According to Naftogaz, various provisions in the gas contract violated competition law, for example, there was a so-called "destination clause",[54] which prohibited Naftogaz from reselling the gas (what is considered a *hard-core restriction* in competition law). The competition law track was unsuccessful because the arbitral tribunal found that it lacked jurisdiction to apply competition law (EU competition law, the European Energy Treaty and Ukrainian competition law), due to, among other things, the domicile of the parties, but this, in turn, was of relevance for the application of Sec. 36.

Here I focus on what the arbitral award states more generally about the applicability of Sec. 36 of the Contracts Act. Three provisions of the contract were adjusted with the help of Sec. 36. One was about volumes (Art. 2.2 of the contract), another was a take-or-pay clause (Art. 2.2.5 of the contract) and the third was a so-called destination clause (Art. 3.10 of the contract). Just as the ProfilGruppen arbitral award (which was also challenged and made public) had great impact and was of importance for the development of Swedish law regarding the application of Sec. 36, this arbitral award – in which also a former Swedish Supreme Court President participated – has great authority and deserves attention in the discussion on the development of Sec. 36 of the Contracts Act.

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[53] In one of the cases, the arbitral tribunal explains the concept of unconscionability as follows: "Sec. 36 is based on the general (and very broad) concept of 'unconscionability'. It is a concept particular to the Scandinavian countries, based on fundamental principles of law, such as vigilance, good faith, fair dealing, etc. … Sec. 36 clearly permits adaptation of contract and even termination of contract by order of the adjudicator." Quote from p. 49 of the award.

[54] The clause stated:" The Natural Gas delivered herunder [sic] is intended for consumers in Ukraine and the Buyer may not sell it outside Ukraine."

From the award I quote the following, starting from paragraph (3846):

"Competition law questions has [sic] been dealt with above. Since these questions have significance when considering the Section 36 defense, the Tribunal will however come back to them in this connection. Section 36 is of general application and allows courts to set aside or modify contractual terms or contracts in their entirety on the basis of unconscionability …

(3850) Section 36 is primarily applied in disputes between consumers and commercial parties. The second paragraph of Sec. 36 expressly provides that when assessing whether or not a contract term or condition is unconscionable, it is especially important whether one of the parties, due to being a consumer or otherwise, is in an inferior position in the contractual relationship. Though the principle of unconscionability is technically applicable in relationships between commercial parties, the principle pacta sunt servanda ('agreements must be kept') and rigor commercialis (freedom of contract) are fundamental in Swedish Contract Law, and Sec. 36 is therefore seldom applied. … The Supreme Court has expressly stated that particular restrictiveness shall be observed in application of Section 36 to commercial relationships.

(3851) As mentioned above, Section 36 is however of general application. It has in practice been applied by courts to set aside or to modify commercial contracts, albeit not at all as frequently as in relation to business-to-consumer contracts. …

(3852) The use of Section 36 is dependent on various considerations (such as events in connection with the making of the contract and the use of the parties´ own contract practice), and the overall purpose is to achieve better balance between the parties than follows from the original contract. It has been repeatedly emphasized that the rule gives wide discretion to courts, which they have used cautiously particularly in business-to-business contracts. A court may also consider events occurring after the making of the contract. In NJA 1989 p. 346, the Supreme Court applied Section 36 in a business-to-business situation to set aside a contractual provision. NJA 1994 p. 359, is another example of the Supreme Court applying Section 36 in a business-to-business context.

(3853) In legal literature, Section 36 has been considered to be of particular importance in connection with long term contracts. One decision is NJA 1979 p. 731, in which the Supreme Court used Sec. 36 to create a better balance in the contractual relation between the parties. If a contracting party has managed to impose certain conditions in order to circumvent the mandatory rules or achieve benefits at the expense of the other contracting party, Sec. 36 may no doubt be used to set aside or to modify commercial contracts. …

(3856) According to Naftogaz, the Take or Pay clause in this case operates as a penalty clause and the penalty is far higher than Gazprom´s loss, if any at all. The Tribunal would agree to this; in fact, this particular Take or Pay clause is very similar to a penalty clause. The Tribunal notes that in NJA 2012 p. 597 the Supreme Court pointed out that the total compensation under a penalty clause could be so great that this can be a reason for modifying such condition in a commercial contract.

(3857) Of even more importance are the arguments by Naftogaz that the provisions now discussed exceed what is market practice and allowed under competition law. The destination clause is according to Naftogaz a hard-core restriction on competition, prohibited in every conceivable market. Thus, the three interacting clauses – volume, destination and Take or

Pay – were, already at the date of the Contract, exceptional and clearly deviated from industry practice. Naftogaz has pointed out that Section 36 allows courts and tribunals to adjust and align a contract and its application with commercial administrative law (such as competition law) and its underlying rationale even if these rules do not in themselves invalidate a clause or do not formally apply.

(3858) As follows from the above, the Tribunal has already dealt with the competition law questions and has found that it lacks jurisdiction to apply neither EU competition law, nor the EnCT competition law or the Ukrainian competition law.

(3859) However, the Take or pay Provision together with the destination clause and the volume clause clearly affect trade between EU countries, as it gives Gazprom an advantage in the sale of gas to customers in Ukraine. As a result, not only Naftogaz but potential suppliers from EU countries such as Slovakia, Poland and Hungary are put at a disadvantage, which affects trade patterns between EU countries. On the same basis, trade patterns within the EnCT are affected. If the Tribunal were to apply EU competition law or the EnCT competition provisions these provisions should clearly be set aside. The same result should be the case if the Ukrainian competition law were to be used.

(3860) Hence, the situation is that the Take or Pay provision rules deviate from generally accepted principles of competition law, but there is no competition law to be applied. The Tribunal considers that this is a such special situation where Section 36 would actually be applied in a commercial relation to achieve the balance that would otherwise have been obtained by applying the competition law provisions. The Tribunal holds that Articles 2.2 and 2.2.5 as these articles are now formulated shall be declared invalid. Even taking into account that the EnCT was not binding on Ukraine until 1 February 2011 the Tribunal holds that the invalidity shall have effect from 19 January 2009 until the date for this Award.

(3861) Consequently, Gazprom´s claim for payment based on the Take-or-Pay provisions must fail.

(3862) With respect to past time, there is no need to complete the Contract further. For the future, however, the Contract must be adjusted to obtain an appropriate context. ...

(3864) Section 36 itself ... gives the Tribunal a wide discretion to partly rewrite an agreement when needed. ... Naftogaz has requested a modified wording of Articles 2.2 and 2.2.5. For the eventuality that the Tribunal were to find for Naftogaz, Gazprom has pleaded that the Tribunal should limit the effects of invalidity so far as possible, and has also suggested different modifications of these Articles. The Tribunal finds that new Articles 2.2 and 2.2.5 shall be based on a modified wording of Article 2.2, ... and Article 2.2.5 shall be based on ... The details of the Volume and Take or Pay provisions to be determined by the Parties in agreement, or, failing such agreement, will be decided by the Tribunal after further proceedings in the Arbitration."

A couple of additional clauses, which were linked to the take-or-pay clause and one of which was the destination clause, were also declared invalid under Sec. 36.

In my opinion, the arbitral award is of great interest and constitutes an authoritative ruling on the content of Sec. 36 of the Contracts Act today. The arbitral award contributes to the understanding that Sec. 36 can also be applied to contracts between strong commercial

parties, *i.e.* parties that are not only equally strong, but also strong in the sense of being well equipped with legal competence, market knowledge and experience of taking and assessing risks. The arbitral tribunal noted (3850) that "particular restrictiveness shall be observed in application of Section 36 to commercial relationships", but after this finding the tribunal noted (3851) that "Section 36 … is of general application" and " … has in practice been applied by courts to set aside or to modify commercial contracts …". The notification of the restrictive application requirement does not seem to have had any restraining effect on the further assessment of the unreasonableness of the contractual clauses in question. Instead, the tribunal held (3852) that the purpose of Sec. 36 is to achieve a better balance between the parties than their original contract implies, that (3853) long-term contracts may be particularly vulnerable to the need for adjustment, that (3856) the Supreme Court in the so-called Fortum case (NJA 2012 p. 597) has said that the total compensation under a "penalty clause" can be so large that it justifies adjustment of commercial contracts. Even (3857) contract terms that are unusual and clearly deviate from "industry practice" and (3860) are contrary to "generally accepted principles of competition law", when no competition regulation can be applied, can be adjusted. The terms in question were considered to be in breach of competition law, but competition law could not be applied for formal reasons. Via Sec. 36, the terms breaching competition law were classified as unreasonable and could thus be adjusted and/or declared invalid in their entirety.

It should also be noted that Naftogaz also had claims for adjustment of other contractual terms, but these claims were not accepted by the tribunal.

The arbitral award from 2022 also concerns a gas contract ("the sale and purchase of natural gas") between two state-owned companies where Swedish law was to be applied under the choice of law clause. This meant that the International Sale of Goods Act (1987:822), the CISG, was to be applied, but as regards the question of adjustment in particular, which is not regulated by the CISG (see CISG Art. 4), Sec. 36 of the Contracts Act was to be applied. The parties had had a long-standing contract for the purchase/supply of gas and the contract now in force contained many addenda, specifying the total annual volume of gas to be supplied by the seller and received by the buyer ("Annual Contract Quantities", "ACQ") under normal conditions, but the contract also contained terms regarding the minimum quantities of gas which the buyer was in any event obliged to accept or – if the buyer was unwilling or unable to accept the gas – at least had to pay for.[55] The dispute was about these clauses, known as take-or-pay clauses, relating to the minimum annual quantity of gas ("MinAQ Obligation"), and the minimum daily quantity of gas ("MinDQ Obligation"). The contract contained a hardship clause, giving the right to renegotiation in the event of "material hardship", and a *force majeure* clause. The buyer, who previously had had a gas monopoly in his own country, wanted, among other things, due to world-wide changes (deregulation of the energy markets, outbreak of war with consequences for prices, preferences and payments on the energy markets, *etc.*) to get out of the contract or at least to have his obligations under the contract reduced by way of adjustment. Prior to the commencement of the arbitration, the parties had, on the request of the buyer (invoking the hardship clause), negotiated on various occasions and changed the terms of the contract through various addenda. The seller had also demanded changes of the payment terms of the contract because of government-dictated regulatory changes for foreign buyers regarding gas payments to the seller. The seller had further

[55] The contract also contained a right for the buyer to so-called Make-Up Gas, but for the sake of simplicity we can disregard this here, even though it came to be of importance in the adjustment issue.

explained that if the buyer did not accept the changes, the seller would be prevented from continuing to supply gas under the contract. The buyer had not accepted the amended payment terms, whereupon the seller had been prohibited by the decision of the authorities and subsequently ceased to supply gas to the buyer.

In this arbitration, initiated by the buyer (here referred to as the Claimant) against the seller (here referred to as the Respondent), Sec. 36 played an important role and was a main line of argument for the Claimant, but both parties used Sec. 36 in their legal argumentation, the Claimant, however, significantly more than the Respondent. Here, I only address the part of the case that concerned the fact that the *force majeure* clause in the contract could lead to a deadlock. The arbitral tribunal declared the new payment rules and the governmental decision invoked by the seller to be *force majeure* and, at the buyer´s request, adjusted the *force majeure* clause using Sec. 36: "[t]o avoid un unbearable deadlock". The tribunal also – which meant an adjustment of the contract – gave the *force majeure* clause a wording according to which either party had the right to terminate the contract unilaterally. The tribunal further stated, starting at paragraph (377) *et seq*.:

"The Tribunal´s power to declare this right to unilateral termination of the Contract derives from Section 36 of the Contracts Act.

Section 36 of the Contracts Act authorizes the Tribunal to modify a contractual 'term or condition' if it is unconscionable:

'A contract term or condition may be modified or set aside if such term or condition is unconscionable having regard [sic] the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. …'

The Tribunal finds that the provision of Art. 9.4. in fine ('the deadlock', my addition) in the Contract is indeed unconscionable.

In coming to this conclusion, the Tribunal finds the following reasons compelling:

First, both Parties agree that application of Section 36 may be warranted when there are developments over time that are different from what the parties were able to foresee when they concluded the agreement – and in this case the issuance (of the amended payment obligation, my addition) was totally unforeseeable.

Second, … (383) Third, a contract cannot be suspended sine die. Parties cannot be bound by a contract indefinitely when performance is legally impossible. There is no certainty when (the Respondent's government, my addition) will derogate (the amended payment regime, my addition) and when the legal impossibility for the performance of the Contract will disappear.

(384) Fourth, the present situation of uncertainty is highly detrimental to both Parties: (Claimant) cannot sign supply contracts with other sellers, to procure the gas it needs, while (Respondent) is unable to enter into long-term contracts with other takers of gas for the quantities which are already allocated to the Claimant under the Contract."

Against this background, the arbitral tribunal decided to modify the contract pursuant to Sec. 36 in a manner that eliminated the deadlock.

The buyer further claimed that the MinAQ clause should be set aside or adjusted for the years 2020-2023 and onwards on the grounds that it had become unconscionable due to the buyer having lost almost half of its market share as a result of the deregulation of the gas market, large price increases on the gas market, etc. The buyer argued that he had been under pressure when he accepted the MinAQ obligations for the years mentioned and that the seller had a superior position in the negotiations. The buyer argued that all this had made it impossible for the buyer to accept even the agreed minimum volume. The seller rejected the buyer´s claim. The tribunal carefully reviewed what had happened in the contractual negotiations between the parties to find out if there were any basis for the unconscionability alleged by the buyer. For the years 2020 and 2021, the tribunal found that the buyer had not been in an inferior bargaining position and further emphasized that, for these years, the buyer had voluntarily agreed to waive the possibility of requesting adjustment of the MinAQ obligation by accepting a special waiver clause in the contract. The tribunal, as an explanation, stated why the adjustment of the 2020 MinAQ obligation could not be made:

"(453) Claimant´s conduct proves beyond any doubt that Claimant fully understood what it was agreeing to, i.e., that it was waiving all its claims regarding the 2020 MinAQ Obligation, which could also not be recalculated or modified in the framework of subsequent arbitration...

(455) Claimant is barred from bringing a claim to modify or set aside the MinAQ Obligation for the year 2020 due to the changes provoked by the liberalized market, because it willingly waived such claims when agreeing to introduce waiver clause 2020…"

Similar reasoning was used by the tribunal with respect to the MinAQ obligation for 2021, *i.e.,* after careful review of the facts the tribunal did not find anything that justified an adjustment under Sec. 36. The buyer argued that the waiver clause should also be set aside, but this argument was not accepted by the tribunal, which held that Sec. 36, which no doubt is mandatory, could be waived since the buyer already knew the facts on which his possible rights could be based when he agreed to the waiver clause:

"(460) Claimant … agreed to waive any potential claims regarding the MinAQ Obligation. It also agreed that this provision could not be the object of modification through subsequent arbitration. Claimant knew or ought to have known that by waiving any potential claim it was also waiving claims under Sec. 36 of the Contracts Act – otherwise it should have specified that this was not its intention." (This conclusion may possibly be questioned, but this is not the place for such a discussion, my comment.)

For 2022, however, the tribunal found grounds for adjustment of the MinAQ obligation as there was a *force majeure* situation that was unforeseeable, that completely changed the balance in the contract, that was beyond the Claimant´s control and for which the Claimant had not assumed the risk:

"(596) Therefore, the Tribunal finds the MinAQ Obligation for 2022 has become unconscionable due to subsequent circumstances (the force majeure situation, my addition) and must be set aside in accordance with Section 36 of the Contracts Act."

There were various claims about what should apply for the future under the contract. The tribunal decided, *inter alia*:

"(637) Using the powers vested in it by Section 36, the Tribunal finds that the Parties´ agreement, established in (an amendment, so-called addendum, to the original contract, my addition) that the MinAQ Obligation … has indeed become unconscionable due to subsequent circumstances and must be modified."

The tribunal then adjusted the contract according to (638) "the same pattern of previous amendments agreed upon by the parties regarding the ACQ and the MinAQ", after which the tribunal instructed the parties to seek to agree on new volumes for ACQ and MinAQ from the year 2024 and onwards. The tribunal also stated that if an agreement could not be reached, (640) the parties could initiate a new arbitration on this matter.

As regards the MinDQ clause, the buyer claimed that it was unconscionable, which the seller rejected. Here, the tribunal concluded that the clause was not unconscionable because of what had occurred at the time of the conclusion of the contract, nor because of what had occurred after the conclusion of the contract, but (708) "having regard to both the contents of the agreement and other relevant circumstances", the tribunal concluded that

"(709) [t]he MinDQ Obligation … is an unconscionably severe penalty.

(710) The Parties agree that a penalty is a payment obligation, triggered by a default of a contractual obligation, which does not correspond to an actual economic loss…

(712) In the Tribunal´s opinion the MinDQ Obligation is indeed a penalty …

(714) The situation of Respondent is exactly the opposite: it never delivers the gas but it still obtains … But that is not the end of the story: Respondent can resell that gas to another client on that same day, or it can direct it into storage, and resell it later, either to Claimant or to a third party …"

The tribunal continued:

"(721) The MinDQ Obligation is not the only penalty for the failure to off-take gas on a given year. At the end of the year, a second penalty looms …

(722) Respondent has confirmed that the quantities paid by Claimant under its MinDQ Obligation are not taken into consideration in the calculation of Claimant´s MinAQ Obligation.

(723) There is thus a double penalty for the gas not off-taken on a given day. The Tribunal´s initial opinion that the MinDQ Obligation is an excessive penalty, is reinforced by the existence of a second penalty, the MinAQ Obligation, which again sanctions the same breach."

The tribunal also referred to the arbitral award in the above-mentioned arbitration between Naftogaz and Gazprom as support for the view that penalty clauses involving overcompensation may be deemed unreasonable and subject to adjustment:

"(727) In the arbitral case NJSC Naftogaz v. Gazprom, the tribunal found that the take-or pay clause was very similar to a penalty and declared it unconscionable under Section 36 of the Contracts Act. In that case the tribunal found, inter alia, that: 'According to Naftogaz, the Take or Pay clause in this case operates as a penalty clause and the penalty is far higher than Gazprom's loss, if any at all. The Tribunal would agree to this; in fact, this particular Take or Pay clause is very similar to a penalty clause. The Tribunal notes that in NJA 2012 p. 597 the Supreme Court pointed out that the total compensation under a penalty clause could be so great that this can be a reason for modifying such condition in a commercial contract'".

The tribunal found the MinDQ clause unreasonable and noted that

"(731) Sec. 36 of the Contracts Act provides the Tribunal with discretion to either modify or set aside unconscionable contract terms,"

after which the tribunal

"(743) using the powers bestowed (upon it, my addition) by Sec. 36 of the Contracts Act"

adjusted the clause and further declared (747) that no MinDQ obligation would apply as long as the *force majeure* situation was still ongoing.

It is clear from the arbitral awards that Sec. 36 can be broadly applied as an adjustment rule in contracts between equal, strong commercial parties. The two cases referred to here concern the adjustment of different types of contractual clauses, firstly the connection of Sec. 36 with *force majeure* situations, secondly its applicability to penalty clauses involving overcompensation, and thirdly its applicability to clauses that create a deadlock and prevent the parties from getting out of the contract.

5. Final comments

When Sec. 36 of the Contracts Act was introduced, the courts were encouraged in the preparatory works to be more generous in adjusting contracts. At that time, focus was on the need to protect the consumer as the weaker party in the contractual relationship; it was above all the consumer who needed the protection afforded by the new possibility of adjustment under Sec. 36. The signal was therefore that, while the courts should feel freer to adjust contracts, they should nevertheless be restrictive in applying Sec. 36 to commercial contracts between equal parties. The courts took notice of this for a long time and very few cases led to an adjustment.

The view now seems to be emerging among Swedish legal scholars – and this little survey seems to support that view – that the applicability of Sec. 36 to commercial contracts between equal parties is no longer hampered very much by the statements in the preparatory works concerning the need for restrictiveness. It is true that it is often said in the rulings that that restrictiveness must be observed and that significantly more is required to apply the provision to commercial contracts than is required to apply it to consumer contracts, but once this is stated in the judgment or arbitral award, the statement does not seem to have any particular restraining effect either on the reasoning or on the final decision.

Court cases from the Swedish Supreme Court are few and mainly concern exemption of liability clauses. Nevertheless, there is – not least with the support of the minority vote in NJA 2022 p. 354 and in the fact that even the majority vote in that case seems to have been stumblingly close to passing the "adjustment threshold" – reason to conclude that there are signs that the possibility of adjustment under Sec. 36 can be used more generously today than was prescribed in the 1970s. Increased importance of the duty of loyalty in contractual relations, an increasing fusion of interpretation and adjustment in legal reasoning,[56] the connection between the principles of passivity and Sec. 36,[57] and other trends in the legal development in contract law may gradually contribute to Sec. 36 also becoming a natural part of the arsenal available to create good contractual relations between equally strong traders.

The arbitral awards, especially the most recent one, contain detailed reasoning on the content of Sec. 36 and its applicability to commercial contracts between equally strong parties and, not least, how the line can be drawn between what is reasonable and unreasonable, *e.g.* with regard to the significance of a party having voluntarily and knowingly agreed to a term that is disadvantageous to that party. The foreign arbitrators in the latest arbitration seem to take a solemn – and perhaps a somewhat unaccustomed – view of their role as lawmakers under Sec. 36. They often start their conclusion with phrases like "using the powers vested in it by Section 36, the Tribunal finds that …" and "the Tribunal, using the powers bestowed upon it by Section 36 of the Contracts Act, decides to …". This shows that they have understood that they have wide discretionary powers and a great responsibility when it comes to assessing what is unreasonable in contractual relations.

In the most recent arbitral award, reference is made to the Naftogaz-Gazprom decision regarding the assessment of penalty clauses. This shows how an earlier award is used as reference for deciding a similar case in a later arbitration, giving the first award the character of "source of law" and strengthening its authority as expression of applicable law.

There is no doubt that the arbitral awards contribute to the understanding of the general clause in Sec. 36 and how it can be used as a fundamental principle of law to adjust contractual clauses in order to rebalance contracts. The arbitral tribunals here had great authority and have used the powers bestowed upon them by Sec. 36 in an initiated and for the development of the law conscientious manner. The requirement of restrictiveness (as stated by the preparatory works) has been noted by the arbitral tribunals but does not seem to have been a particularly restraining factor in their application of the general clause.

It is urgent that arbitral awards like these become known and included in our knowledge of how the important and rather unclear Sec. 36 has been applied – and thus can be applied – in commercial disputes. If the legal development in arbitration practice (with a high degree of authority) concerning the important Sec. 36 of the Contracts Act remains unknown in large parts of the legal community, this constitutes a problem of legal certainty. By making arbitration practice regarding the application of Sec. 36 generally known, it becomes clear, for example, that statements made in textbooks, *e.g.* that it would generally be difficult to obtain an adjustment under Sec. 36 in contractual relations between equal traders unless there

[56] See footnote 38 above.
[57] See footnote 38 above.

has been blameworthy behaviour in connection with the contract negotiations,[58] are not correct.

[58] See footnote 38 above.