Civil Law Consequences of Corruption in Sweden

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A. General Remarks on Corruption and Anti-Corruption Measures

I. Corruption in Sweden and Swedish Behaviour Abroad

In comparison to several countries, Sweden has been spared from corruption. At least, the public opinion is that Sweden has a relatively low level of corruption,[1] and public officials are generally considered to be firmly law-abiding, carrying out their duties with a high degree of integrity.[2]

* I would like to thank docent, jur. dr Mårten Schultz, who wrote a first draft of answers to the questionnaire regarding the Swedish position in tort law. This report was made out during spring 2008. Some noteworthy legislative measures that has come into force since then are as follows: *New acts*: Commission Act (2009:865) (*kommissionslagen*); Marketing Act (2008:486) (*marknadsföringslagen*); Publicity- and Secrecy Act (2009:400) (*offentlighets- och sekretesslagen*); Competition Act (2008:579) (*konkurrenslagen*). *Repealed acts*: Commission Act (1914:45); Marketing Act (1995:450); Secrecy Act (1980:100); Competition Act (1993:20) (*konkurrenslagen*); Procurement Injunction Act (1994:615) (*lagen om ingripande mot otillbörligt beteende vid upphandling*). Also, the private international law regime under the 1980 Rome Convention has largely been replaced by the Rome I Regulation.

1 *Cf.* Transparency International, Global Corruption Report 2007: Corruption in Judicial Systems, Cambridge 2007, which presents a specially commissioned citizen survey of judicial corruption in Transparency International Global Corruption Barometer 2006, in which Sweden ranked as no. 3 of the polled 62 countries, and the annual Transparency International Corruption Perception Index 2006, where Sweden ranked no. 6 of 163 countries, and the annual Transparency International Bribe Payers' Index 2006, where Sweden ranked no. 2 of 30 countries. Statens offentliga utredningar (SOU) 2004:47, Näringslivet och förtroendet, 394.

2 Evaluation Report on Sweden. Second Evaluation Round (Greco Eval II Rep (2004) 9E), adopted by GRECO, Strasbourg 14–18 March 2005, 20.

Corruption is nonetheless present in Sweden. One sector often pointed out as very problematic is the building industry.[3] A specific type of situation that has generated some case law is that elderly people in medical care and nursing homes tend to donate (in life or by will) money or other property to the staff treating them. Accepting such donations is usually criminal,[4] or provides grounds for dismissal.[5] There are also concerns about lack of sufficient control mechanisms and lack of distinct ethical standards, which both serve as indicators of a fragile system. For instance, the Swedish National Audit Office (SNAO) (*Riksrevisionsverket*) has criticised the lack of sufficient internal supervision and division of duties within some audited governmental agencies and state owned companies.[6]

Some grey zone phenomena, such as the appointment of highly ranked government officials based on friendship and remuneration for former loyal support rather than objective criteria,[7] acquisition of lease contracts for highly appreciated city apartments based on political connections, friend- or kinship, and promotional travels for staff in purchasing departments and journalists,[8] are well known in the Swedish society.

Even if Sweden is known to have a low domestic level of corruption, this does not imply that Swedish companies, public officials and politicians act with integrity abroad. Large Swedish export companies have not so seldom been suspected of using bribes in contract negotiations. The Swedish weapons manufacturer Bofors has been accused of bribing public officials in India, and even Swedish politicians have been blamed for their involvement in this affair. At least nine Swedish companies are currently suspected of being involved in dubious dealings in the UN Oil-for-Food Program. The vehicle

3 Brottsförebyggande rådet (Swedish National Council for Crime Prevention, Brå) Rapport 2007:27, Organiserat svartarbete i byggbranschen, 12. *Cars*, Mutor, bestickning och korruptiv marknadsföring, 2nd ed., Stockholm 2001, *passim*. Ds 1999:62, Hederlighetens pris – en ESO-rapport om korruption, 95.

4 See *inter alia* the judgments of the Swedish supreme court, Högsta domstolen (HD), in the case report Nytt Juridiskt Arkiv, avd. I, (NJA) 1985, 477 and the appeal court judgments Rättsfall från hovrätterna (RH) 1988:13 and RH 1988:100. *Cf.* also NJA 1969, 690; NJA 1988, 696; but also NJA 1987, 604.

5 Judgments of the Swedish labour court, Arbetsdomstolen (AD), in the cases AD 1989 no. 81 and AD 1997 no. 28.

6 RiR 2006:8, Skydd mot korruption i statlig verksamhet, passim. (English Summary: Protection against corruption in government activities, 7 *et seq*.).

7 Cf. SOU 2004:47 (*op. cit.* fn. 1), 96 and 109.

8 See further *Sandgren*, Att bekämpa korruption – ett rättsligt perspektiv, Juridisk Tidskrift (JT) 2007–08, 283, 286.

manufacturer Saab is also suspected of bribery in the selling of the fighter jet JAS 39 Gripen to the Czech Republic. The two last mentioned affairs are subjects of investigations carried out by the National Anti-Corruption Unit (*Riksenheten mot korruption*). The audit office SNAO recently investigated 15 international development aid projects under the governance of Swedish International Development Cooperation Agency (Sida) and concluded that neither Sida nor the responsible auditors had managed to discover the irregularities that, according to SNAO, had occurred in five of these projects. Moreover, there was suspicion of irregularities in another two of the projects, and none of the audited 15 projects were able to evade criticisms relating to the accounting practices employed in the aid programme. In some of the cases, the domestic personnel of Sida were suspected of involvement in the irregularities.[9]

II. Attitudes on and Measures against Corruption

Even if some naiveté still exists in the Swedish society as a whole towards the existence of corruption, the international fight against corruption seems to have had some real impact on the attitude of the government and its agencies. Some of the latest annual Declarations of Government makes mention of both the international cooperation against international crime and the effectiveness of international development cooperation.[10] The annual Declarations of Foreign Policy also draws special attention to the issue of effectiveness in international aid.[11] Overall, there is quite some focus on the subject of corruption.

The above mentioned National Anti-Corruption Unit is a specialized branch which was established mid 2003 within the Public Prosecuting Authority (*Åklagarmyndigheten*). The unit handles all criminal suspicions of bribery in the country. It consists of five prosecutors and two forensic accountants. The unit also deals with suspicions closely related to bribery. In

[9] RiR 2007:20, Oegentligheter inom bistånd. Är Sidas kontroll av biståndsinsatser via enskilda organisationer tillräcklig?

[10] Regeringsförklaringen den 18 september 2007, 12. Regeringsförklaringen den 16 september 2008, 10 and 11. See also Regeringsförklaringen den 15 september 2009, 13, on the fight against organized crime.

[11] Regeringens deklaration vid 2008 års utrikespolitiska debatt i Riksdagen (utrikesdeklarationen) den 13 februari 2008, 18 *et seq.* Utrikesdeklarationen den 18 februari 2009, 3. Utrikesdeklarationen den 17 februari 2010, 11.

2007, the anti-corruption body of Council of Europe, GRECO,[12] concluded that the unit was no longer either over-burdened or ill-equipped.[13]

Sweden has ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997,[14] the Convention drawn up on the basis of Art. K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 1997,[15] the Council of Europe's Criminal Convention on Corruption of 1999,[16] with its Additional Protocol of 2003,[17] the Council of Europe's Civil Law Convention on Corruption of 1999,[18] and UN Convention against Corruption of 2003.[19]

The role of private law measures in the fight against corruption has been small,[20] perhaps with the exception of employee dismissal. One relies mainly on criminal prosecution. Alongside traditional punishments such as imprisonment and fines, sanctions such as business bans and business fines, that may be imposed by courts in accordance with the request of a prosecutor, also exist. Business bans are imposed on natural persons for a period of three to ten years for gross, but not necessarily criminal offences, disregard for special obligations associated with business activities or for consequential bank-

12 Group d'Etats contre la corruption; Group of States against corruption.

13 Compliance Report on Sweden. Second Evaluation Round (Greco RC-II (2007) 1E), adopted by GRECO, Strasbourg 29 May–1 June 2007, 2.

14 DAFFE/IME/BR(97)20. Konvention om bekämpande av bestickning av utländska offentliga tjänstemän i internationella affärsförbindelser (SÖ 1999:33).

15 O.J. 1997 C 195/2. Konvention, utarbetad på grundval av artikel K 3.2 C i Fördraget om Europeiska unionen, om kamp mot korruption som tjänstemän i Europeiska gemenskaperna eller Europeiska unionens medlemsstater är delaktiga i (SÖ 1999:32). See also Protocol drawn up on the basis of Art. K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests – Statements made by Member States on the adoption of the Act drawing up the Protocol, O.J. 1996 C 313/2, and Council Act of 26 May 1997 drawing up, on the basis of Art. K.3(2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, O.J. 1997 C 195/1.

16 European Treaty Series No. 173. Straffrättslig konvention om korruption (SÖ 2004:15).

17 European Treaty Series No. 191. Tilläggsprotokoll till den straffrättsliga konventionen om korruption (SÖ 2004:16).

18 European Treaty Series No. 174. Civilrättslig konvention om korruption (SÖ 2004:14).

19 I-XVIII, 18 UN Treaty Series. See further <http://www.regeringen.se/sb/d/3305/a/99305> on the issue of Swedish ratification.

20 *Sandgren*, JT 2007–08, 283, 289.

ruptcies.[21] Business fines are imposed on entrepreneurs (natural or legal persons) for criminal business behaviour if the entrepreneur has not done what could reasonably be required to prevent such behaviour, or, if the crime was committed by a person who had either a leading position with authority to act on behalf of the entrepreneur, or had a special responsibility for supervision or control of the business. The minimum fine is 5.000 Swedish crowns, the maximum 10 million.[22] If the fine is limited to 500.000 crowns, prosecutors may under some circumstances impose a summary penalty, for the approval of the entrepreneur, without submission to court.[23] Another important sanction, not the least when it comes to bribery, is forfeiture of criminal tools and earnings. This sanction will be described in greater detail later on.[24]

One should also take account of market law. Marketing can corrupt.[25] It can assume the form of the above mentioned promotional travels. Another form could be marketing methods directed at businesses that include special offers to employees. Such methods may conflict with good marketing practices, sec. 5 Marketing Act,[26] and may therefore be prohibited by the Market Court (*Marknadsdomstolen*) under the threat of a fixed penalty, on injunction actions brought by the Consumer Ombudsman (*Konsumentombudsmannen*), any entrepreneur affected by the marketing (typically competitors) or a coalition of consumers, entrepreneurs or employees (*i.e.* labour organisations), sec. 47 and 48. In minor cases, a summary injunction under the threat of a fixed penalty may be imposed by the Consumer Ombudsman for the approval of the marketer, without submission to court, sec. 28. If the marketer acts in breach of the injunction, the penalty will be imposed and the marketer may also be liable for damage caused to consumers and entrepreneurs, sec. 37. When estimating the damage caused to an entrepreneur, factors other than strictly economic may be considered, sec. 37(2), which may include the marketer's unjustified enrichment.[27]

21 Sec. 1and 2 lagen (1986:436) om näringsförbud and Regeringens proposition (Proposition of the Government, i.e. the Cabinet, cited as Prop.) 1985/86:128 om lag om näringsförbud m.m., 38 *et seq.*

22 Chapt. 36, sec. 7–8, Criminal Code and *Berggren et al.*, Brottsbalken. En kommentar på Internet, per 2009-07-01, at chapt. 36, §§ 7–8.

23 See chapt. 48, sec. 4(3) Procedural Code and Prop. 2005/06:59, Företagsbot, 53 *et seq.*

24 See below section E. Restitution and Forfeiture.

25 See *Cars* (*op. cit.* fn. 3), and *Pehrson*, Inköpspremier kan utgöra bestickning, JT 1993–94, 536, 536 for case law.

26 Marknadsföringslagen (2008:486).

27 *Levin*, in Karnov: Marknadsföringslag, per 2010-01-01, § 37, note 196.

Another important device to deter and otherwise prevent corruption is the administrative law measure of disqualification from participation in public procurement. According to Art. 45(1)(b) of the EC (classical) public procurement directive,[28] any candidate or tenderer who has been the subject of a conviction for corruption, by final judgment of which the contracting authority is aware, shall be excluded from participation in a public contract. Corruption is specified as "corruption, as defined in Article 3 of the Council Act of 26 May 1997[29] and Article 3(1) of Council Joint Action 98/742/JHA[30] respectively",[31] which means active corruption.[32] The same rule, with the same definition of corruption, has been enacted in Sweden, chapt. 10, sec. 1(1)(2) Public Procurement Act.[33]

There is also another EC procurement directive, the directive on procurement of utilities.[34] This directive makes reference to the classical procurement directive in the matter of exclusion, Art. 54(4). The same rules are intended to be applicable also in the area of utilities but only optional for contracting entities that are not public authorities. The Swedish enactment of the exclusion rules only applies to procurements with public contracting authorities, chapt. 10, sec. 1(1)(2) Utilities Procurement Act.[35]

[28] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. 2004 L 134/114.

[29] O.J. 1997 C 195/1.

[30] O.J. 1998 L 358/2.

[31] It seems like the reference to the first of these documents is slightly misleading. Given that the Council Act of 26 May 1997 (O.J. 1997 C 195/1) declares the need for a convention on the matter and suggests that Member States take measures to adopt such an instrument, the proper reference point should probably be the Convention itself, O.J. 1997 C 195/2. Compare the definition of corruption in Art. 3 of the Convention with Art. 45(1)(b) of the classical procurement directive. The Convention was incorporated into Swedish law by SÖ 1999:32.

[32] Art. 3(1) Council Act: "the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption."

[33] Lagen (2007:1091) om offentlig upphandling.

[34] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, O.J. L 2004 134/1.

[35] Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster.

In tax and taxation law, some steps have recently been taken to prevent active corruption, *i.e.* the offering or giving of a bribe. According to the Taxation Regulation, the tax authorities must report any suspicion of active bribery to a prosecutor,[36] and, in accordance with the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials of 1996,[37] the Income Tax Act explicitly forbids the deduction of bribes.[38]

In accordance with recommendations made by GRECO[39] and the OECD Directorate for Financial and Enterprise Affairs,[40] efforts aimed at implementing soft law models by declaring, spreading and educating about ethical standards for public officials, in order to complement legislation in the fight against corruption, were made by the Swedish authorities.[41] Also, the Foreign Ministry has published a translation of the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.[42] It has recently been suggested that large companies ought to adopt anti-corruption programmes on education and internal compliance revision.[43]

B. Definition of Corruption

I. Occurrences of the Word Corruption in Swedish Legislation

The word for corruption in Swedish, "*korruption*", has recently been introduced in some statutory texts.[44] The governmental regulation of 2007 (in force 2008) on instructions for the above mentioned international aid agency

[36] Sec. 22 taxeringsförordningen (1990:1236).

[37] Prop. 1998/99:32, EU-bedrägerier och korruption, 41 and 79 *et seq.*, noting that the 1996 OECD recommendation requests an abolishment of tax deductability and that it was unclear whether deduction was permissible under the then existing law.

[38] Chapt. 9, sec. 10 inkomstskattelagen (1999:1229).

[39] Addendum to the Compliance Report on Sweden. First Evaluation Round (Greco RC-I (2003) 11E, Addendum), adopted by GRECO 9–12 May 2006, 2 *et seq.*

[40] Sweden: Phase 2. Follow-Up Report on the Implementation of the Phase 2 Recommendations. Application on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, approved and adopted by the Working Group on Bribery in International Business Transactions on 9 October 2007, 3.

[41] Finansdepartementet/Sveriges Kommuner och Landsting, Om mutor och jäv – en vägledning för offentligt anställda, 2006.

[42] OECD's verktyg för riskhantering – en vägledning för företag och investerare i områden med svaga regeringar, UD07.030.

[43] SOU 2004:47 (*op. cit.* fn. 1), 40 and 395 *et seq.*

[44] *Leijonhufvud*, Korruption – ett svenskt problem?, JT 1996–97, 940, noting that, at the time of publication of the article (the beginning of 1997), the word "korruption" did not

Sida, not only demands especially that the agency should support the cooperating countries' fight against corruption. It also mandates it to counteract corruption in projects involving Swedish aid.[45] The word is also found in other statutes or governmental announcements but then only refers to non-domestic instruments whose titles bear the word "corruption": The Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union,[46] the Council Act of 26 May 1997 drawn up on the basis of Art. K.3(2)(c) of the Treaty on European Union, the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union and the Joint Action of 22 December 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on corruption in the private sector (98/742/JHA),[47] as well as the European Council's Criminal Law Convention on Corruption.[48]

II. Bribery and other Corruptive Behaviour

No authoritative definition of corruption exists in Swedish private law. The penal law provisions on the bilateral acts of active and passive bribery (*i.e.* bribegiving and bribetaking) are jointly considered to be the closest equivalent of a domestic statutory definition of corruption.[49] Broader concepts of corruption have been discussed, including unilateral acts and collective acts, such as organisations' funding of political parties.[50] Some closely related uni-

occur in Swedish statutes, but that this well could be expected soon with regard to the work in UN, Council of Europe, OECD, ICC and EU.

45 Sec. 3(1)(4) förordningen (2007:1371) med instruktion för Styrelsen för internationellt utvecklingssamarbete (Sida).

46 Chapt. 2, sec. 5(a) Criminal Code (as amended 2003, in force 2004).

47 Chapt. 10, sec. 1(1)(2) Public Procurement Act and chapt. 10, sec. 1(1)(2) Utilities Procurement Act.

48 Tillkännagivande (2005:1207) av överenskommelser som avses i lagen (2000:562) om internationell rättslig hjälp i brottmål. See also the older announcement, tillkännagivande (2004:745) av överenskommelser som avses i lagen (2000:562) om internationell rättslig hjälp i brottmål.

49 Brå Rapport 2007:21, Korruptionens struktur i Sverige. "Den korrupte upphandlaren" och andra fall om mutor, bestickning och maktmissbruk, 15 *et seq.*

50 *Leijonhufvud*, Korruption och partifinanser, JT 1998–99, 338 *et seq. Leijonhufvud*, [Book Review] Thorsten Cars, Mutbrott, bestickning och korruptiv marknadsföring. 2nd ed., Stockholm 2001, JT 2000–01, 152, 153, Ds 1999:62, 10 *et seq.* Brå Rapport 2007:21, 16. Brå Rapport 2005:18, Otillåten påverkan riktad mot myndighetspersoner. Från trakasserier, hot och våld till amorös infiltration.

lateral acts that are criminalised constitute misconduct in administering public authority, chapt. 20, sec. 1, and breach of principal's trust, chapt. 10, sec. 5 Criminal Code.

According to the Criminal Code,[51] active bribery, chapt. 17, sec. 7, and passive bribery, chapt. 20, sec. 2, are criminal acts. Active bribery constitutes extending, promising, or offering a bribe or other undue reward for the exercise of someone else's duties, whilst passive bribery constitutes the receiving, accepting a promise of, or demanding a bribe or other undue reward for the exercise of one's duties. Bribery has thus been divided into two different crimes, which are separate from each other, and which have also been criticised for contributing ambiguity to the definition of bribery.[52] The punishment for active and passive bribery extends from a fine to a maximum of two years imprisonment. Where the crime is gross, the punishment is imprisonment with a latitude of six months to six years.

It is no prerequisite of bribery that an offer or request of a bribe is later performed, or that any such behaviour has actually had any impact on the judgment of the bribetaker.[53] There must, however, have been an agreement on an undue benefit.[54] Even if the undue benefit were to be extended or received etc. in exchange for nothing else than the fulfilment of the bribetaker's duties, this would constitute no defence.[55] Thus, reciprocity of undue benefits is not required, and already committed attempts of bribery count as bribery proper. Unilateral preparatory acts of bribery are, however, not punishable, compare chapt. 17, sec. 16 Criminal Code.

The provisions make it explicit that it is of no importance whether the improper conduct took place before, under or after employment or engagement. In Sweden the postcontractual type of reward seems to be one of the most usual methods of bribery.[56] Also according to bribery provisions, the bribe does not have to be given directly to the person that is supposed to be influenced by the bribe.[57] It suffices that the bribed person has some real influence over the receiver's reception of the bribe.[58]

51 Brottsbalken (1962:700).
52 Institutet Mot Mutor (Anti-Bribery Institute), En kritisk analys av den svenska mutlagstiftningen, Stockholm 2006, 36.
53 *Leijonhufvud*, JT 1996–97, 940, 941.
54 *Berggren et al.* (*op. cit.* fn. 22), chapt. 20, § 2, Den brottsliga gärningen.
55 Active bribery, NJA 1956, 129. Passive bribery, NJA 1947, 362.
56 Brå Rapport 2007:21, 131.
57 *Berggren et al.* (*op. cit.* fn. 22), chapt. 20, § 2.
58 Prop. 1998/99:32, 94.

Since the reform of 1977, activities in both the public and the private sectors fall within the criminalised scope,[59] but the attitude of the courts towards public officials seems to have been harsher.[60] Moreover, an important difference between public and private bribe takers is that in some cases, private employees and agents are exempt from prosecution. The principal is required to file a report of the crime. Alternatively, public interest calls for intervention, chapt. 17, sec. 17, and chapt. 20, sec. 5(3). An exemption from prosecution is nonetheless only intended in cases of lesser, and somewhat excusable, transgressions within the private sector.[61] The headings of chapt. 17 (On Crimes against Public Activity etc.) and 20 (On Service Misconduct etc.) are somewhat misleading.[62] The "etc." in chapt. 17 has been added to cover acts within the private sector.[63]

Another punishable act, if it fell outside the scope of passive bribery, would be receiving, accepting a promise of or demanding some undue reward in a public matter for voting in some manner or abstaining from voting, chapt. 17, sec. 8 Criminal Code. The punishment is a fine or imprisonment for a maximum period of six months.

The border between allowed and forbidden behaviour is quite unclear. One clearly accepted benefit is tipping in restaurants and taxis, but it is hard to draw the line outside of these simple examples. In a case presided over by the Högsta domstolen (HD) in 1993, three company representatives in the private sector were found guilty of active bribery. The company had mailed its catalogue of office equipment to certain employees in both the private and public sectors, along with an offer of a portable cassette player/radio ("walkman") of a worth of 450 Swedish crowns as personal gifts, to those employees who ordered equipment for more than 3.300 crowns. Three of the five judges found the offer to be criminal.[64] Very low fines, 300 crowns, were imposed on each of the representatives.

[59] See further on the reform, *Berggren et al.* (*op. cit.* fn. 22), chapt. 17, § 7 and chapt. 20, § 2.

[60] Brå Rapport 2007:21, 19.

[61] *Berggren et al.* (*op. cit.* fn. 22), chapt. 17, § 17, chapt. 20, § 2, Straffet, and chapt. 20, § 5, Tredje stycket, with further references.

[62] Prop. 1975/76:176 om ändring i brottsbalken m.m., 26 *et seq.*

[63] Prop. 1975:78 om lagstiftning angående ansvar för funktionärer i offentlig verksamhet. See further *Berggren et al.* (*op. cit.* fn. 22), chapt. 17. Om brott mot allmän verksamhet m.m.

[64] It has been questioned whether this finding is not too harsh, *Pehrson*, JT 1993–94, 536, 540.

The criminal law definition of bribery is very wide. Any form of agreement, including silent offers and acceptances, of an undue, but not necessarily effected, reward of any kind to practically anybody in exchange for something beneficial from an employee or an agent, but not necessarily effected or more beneficial than what was due, falls within the definition.[65] There has been some criticism concerning this definition.[66] Some consider it as too harsh in some respects, and too mild in other. If one attempted to sketch a private law definition of corruption, one would probably not have to increase the scope of this definition, at least not when it concerns bilateral acts.

C. Validity of Contracts

I. Validity of Bribe Agreements

The issue of invalidity of a bribe agreement lacks a clear legislative basis.[67] The answer must be sought in general principles of contract law.[68] The agreement between the briber and the agent, as distinguished from the main contract, is unenforceable.[69] This means that the agent cannot rely on the promise of bribery to claim the bribe, and that the briber cannot rely on the agent's promise to grant undue advantages in exchange for the bribe.

The invalidity of an agreement ought to be considered *ex officio* if the invalidity is motivated by a public interest.[70] The fundamental question of

[65] See further *Cars* (*op. cit.* fn. 3), 29.

[66] *Cf.* SOU 2004:47 (*op. cit.* fn. 1), 40 and 394 *et seq.* (suggesting *inter alia* non-criminalisation under a fixed value limit), *Leijonhufvud*, JT 2000–01, 152, 153, and Institutet mot mutor (*op. cit.* fn. 52), 4.

[67] Although a legislative basis could arguably be found in the provision on invalidity founded on dishonesty, sec. 33 Contracts Act, the provision has knowingly never been applied or even discussed in connection with claims founded on bribe agreements.

[68] *Cf.* NJA 1997, 93, at 95, with further references, and AD 2005 no. 52 (unreported).

[69] *Cf. Karlgren*, Obehörig vinst och värdeersättning, av Fritjof Lejman översedd utgåva, Stockholm 1982, 96. Support for this conclusion seems strong, but is only indirect. See Prop. 1948:80 med förslag till lag om ändring i strafflagen m.m., 398, Prop. 2004/05:135, Utökade möjligheter att förverka utbyte av och hjälpmedel vid brott m.m., 80, and NJA 1977, 735, at 740, all concerning forfeiture of criminal earnings and containing discussions whether the criminal should be granted the right to deduct handed-out bribes in the calculation of the criminal earnings.

[70] NJA 1997, 93, at 96 with further references, where HD states that an invalid contract does not have to be totally devoid of legal effect. *Cf. Karlgren*, Ett gammalt tvisteämne: nullitet och angriplighet. En rättssystematisk undersökning, in: Festskrift til Henry Ussing, Copenhagen 1951, 247 *et seq.* on the possible versions of invalidity.

whether a commission granted by a counterparty to an agent is to be considered a bribe will, however, in practice depend heavily on the opinion of the principal. If the principal does not object to the reward given by the counterparty, it may be seen as a matter of double representation, and an acceptance of the agent's double remuneration.

Sec. 19 Commission Act[71] regulate the relation between agent and principal in case of double representation or the factually close situation of the agent entering into a sales contract with its principal, and thus becoming a counterpart to the principal not only in the contract of representation but also in the sales contract. The provision require that the double representation or the agent's self-contracting is either done in a competitive market context (e.g. stock market) or supported by the express consent of the principal. On the other hand, the principal's right to reject the deal, sec. 22, lapses after a short notification period, sec. 44. Some provisions on financial regulation in chapt. 8 of the Market for Financial Instruments Act[72] also deal with the issue.[73] Chapt. 8, sec. 21 states an obligation to avoid or inform about conflicts of interest, sec. 28 states an obligation of best execution, and sec. 29–33 specifies the latter obligation. According to sec. 31, the client must consent to a deal concluded outside of a regulated market or platform, and the consent must be given in advance.

The practice of placing the issue of social acceptance of the agent's behaviour at the principal's disposal conforms with the historical view on bribery and those current rules providing exemption from criminal prosecution, whereby the principal's disapproval, demonstrated by reporting the actions to the police, legitimises prosecution.

The legal foundation for treating bribery agreements as unenforceable is that they are considered to be immoral contracts, *pactum turpe*, as well as contracts in breach of statutory provisions and good practices (*cf. contra legem* and *contra bonos mores*). These norms have become part of Swedish law as a result of the reception of Roman law concepts from Continental Euro-

[71] Kommissionslagen (2009:865).

[72] Lagen (2007:528) om värdepappersmarknaden.

[73] Implementing the so called MiFID: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, O.J. 2004 L 145/1.

pean legal systems, particularly German law.[74] The features of these theoretically distinct legal categories are so similar in contemporary practice that they, at least in this context, may be described as one, under the joint concept of illegal and immoral contracts.[75]

In accordance with the intention which was declared during the preparatory process of the 1915 Contracts Act,[76] no single applicable rule concerning the treatment of illegal and immoral contracts has been stated in court practice.[77] The general approach of Swedish law towards supposedly invalid contracts on the grounds of illegality and immorality may be described as tolerant or liberal.[78] Nevertheless, it is undisputed that illegal and immoral contracts *may* be treated as lacking legal recognition and therefore unenforceable.[79] It is probably fair to say that invalidity cannot be presumed, neither as

74 *Andersson*, Legala förbud och ogiltighet – en teleologisk studie, Tidsskrift for Rettsvitenskap (TfR) 1999, 533, 547 *et seq. Ingvarsson*, Spel och osedliga avtal, Svensk Juristtidning (SvJT) 2004, 739, 749 *et seq.*

75 *Arvidsson/Samuelsson*, Om avtals uppkomst, in: Flodgren/Gorton/Nyström/Samuelsson (eds.), Vänbok till Axel Adlercreutz, Lund 2007, 1, 13 fn. 4. A category of "contracts contravening law and good practices/usages" (Sw: "*avtal i strid mot lag och goda seder*") is well established in Swedish law. See *e.g.* SOU 1974:83, Generalklausul i förmögenhetsrätten, 116, Prop. 2004/05:135 (*op. cit.* fn. 69), 80; *Axel Adlercreutz*, Avtalsrätt I, 12th ed., Lund 2002, 289 *et seq.*; *Andersson*, TfR 1999, 533, 541. One could, however, make the distinction that the concept of *pactum turpe* is often seen as a norm of procedural content, stating that claims based on immoral and illegal contracts of a quality that clearly lacks legal protection are to be denied assistance by the authorities. *Pactum turpe* in this narrower sense would then only apply to contracts for which claims must be dismissed without trial, as a procedural obstacle. In this direction, see the semiofficial heading to the judgment of HD in NJA 2002, 322. The heading begins with the sentence "*Pactum turpe? …*", although the case concerned a building contract including an agreement on partial tax evasion, which in itself of course is in breach of law and good morals). See also *Jan Ramberg/Christina Ramberg*, Allmän avtalsrätt, 8th ed., Stockholm 2010, 202 *et seq.* One could argue that since there is no general understanding of what is moral or immoral, a contract may only be legally defined as immoral where it is not protected to the same extent as contracts in general. The case concerning illegal contracts is different, since there is a concrete norm forbidding the contract (or those actions presumed by the contract). One must weigh the interest of upholding the prohibition with the interest of contractual effect. Paradoxically then, all immoral contracts are invalid, but not all illegal ones. In this direction, see especially *Ingvarsson*, SvJT 2004, 739, 750 *et seq.* See *contra Ramberg/Ramberg*, 203.

76 Lagen (1915: 218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

77 Förslag till lag om avtal och andra rättshandlingar på förmögenhetsrättens område, lag om avbetalningsköp m. m. avgivna den 31 jan. 1914 av därtill utsedda kommittérade, Stockholm 1914, 120.

78 *Adlercreutz* (*op. cit.* fn. 75), 289. See *e.g.* NJA 1953, 99 and NJA 1964, 80, but on the other hand NJA 1986, 258, NJA 1986, 402, NJA 1986, 741 and NJA 1987, 167.

79 *Adlercreutz* (*op. cit.* fn. 75), 289.

to illegal,[80] nor as to morally debatable contracts.[81] This contention becomes even clearer considering more recent case law, which indicates a tendency towards an accentuation of the need to perform a nuanced evaluation of the consequences of a contract being deemed illegal or immoral.[82] This may to some extent be explained by the fact that Swedish law does not recognise a law of restitution or unjustified enrichment, which means that invalidity otherwise could be misused to nullify contractual obligations towards the counterparty.

This recent tendency will however most certainly not affect promises of bribes yet unfulfilled. The agent's reliance on the briber's promises, from a private law point of view, is afforded no protection at all with the effect that such promises must be considered utterly unenforceable. This is most likely also true where the causal link between the promise and the agent's actions is weak. An argument from the agent that the bribe has in fact had no effect on the agent's activities would not be acceptable, *i.e.* where the agent has in fact not granted the briber *undue* advantages, but nonetheless accepted the bribe. The only probable way of making a binding promise to pay a bribe would be in the form of a negotiable instrument that is subsequently passed on to an acquirer in good faith. Only then would the material ground for invalidity be abstracted from the promise itself, see especially sec. 1 and 15 Act on Promissory Notes.[83]

The legal treatment of the remuneration of the bribe, the *undue advantages*, is of a legally more complex nature. The undue advantages are generally harder to discern from the main contract than the bribe from the main contract. If it were possible to separate the undue advantages from the main contract, the undue advantages could be considered as invalid as the bribe itself.

Since some contracts – commission contracts, indirect representation – between an agent and a counterparty are binding upon the agent and the counterparty, the main contract may be valid, but still be dismissible for the principal. This would generally be the case with bribery, since bribery will

[80] *Andersson*, TfR 1999, 533 *et seq.*, at 549 *et seq.*, citing a publication of Schrevelius from 1851, claiming that contracts contravening statutory prohibitions as a general rule used to be considered as having legal effect. *Cf. Ingvarsson*, SvJT 2004, 739, 750 *et seq.* See also *Ramberg/Ramberg* (*op. cit.* fn. 75), 202 *et seq.*, stating that nowadays a presumption for invalidity may not be claimed as to morally debatable contracts, but maybe as to illegal contracts.

[81] *Cf. Ramberg/Ramberg* (*op. cit.* fn. 75), 204.

[82] NJA 1989, 768, NJA 1992, 299, NJA 1997, 93, NJA 2002, 332, NJA 2004, 682.

[83] Lagen (1936:81) om skuldebrev.

most likely amount to either a material breach of the principal's interests, or an act of dishonesty, which are both grounds for rejection according to sec. 22 Commission Act. The principal's rejection will, however, not affect the validity between the agent and the counterparty. If, however, the bribery has not affected the principal's interests in the slightest way, it might be that grounds for dishonesty are not applicable.[84]

There is some disagreement concerning the general issue of the treatment of illegal and immoral contracts. There is support for the standpoint that the general rule attributable to payments made before or upon conclusion of contracts deemed immoral, may be restituted,[85] but there is also support for the opposite view.[86] For instance, gaming fees and gaming profits already paid may according to the traditional point of view not be restituted. The argument being that the legal order should not be employed as an aid in relation to such illegal or immoral activities, neither in their fulfilment, nor in their rescission.[87] There is nonetheless a precedent from 1989 of the Swedish Supreme Court, HD, that not only clearly opposes the traditional view but also makes gaming contracts comparable with illegal or morally debatable contracts in general.[88] In a compulsory execution case, money originating from bets in an illegal poker game (the game was interrupted by the police) was treated as the property of the person arranging the game, although the arranger had made the objection that the money did not belong to him. The case was not instigated by the arranger, so it could not be rejected on the ground of *pactum turpe*. HD rejected the view that the legal order should not be used as an aid and declared that the money be restituted to the participants of the game.

However, bribes cannot be immediately compared with gambling contracts. This uncertainty calls for cautious estimation of the situation at hand.

[84] *Gomard*, Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold, Copenhagen 1958, 155 *et seq.*, but see also *Munukka*, Kontraktuell lojalitetsplikt, Stockholm 2007, 265 *et seq.* with fn. 280.

[85] *Karlgren* (*op. cit.* fn. 69), 96, stating that the general rule must be a reciprocal return of performances. Also in support *Andersson*, TfR 1999, 712, and *Ingvarsson*, SvJT 2004, 750 with further references to other Nordic countries.

[86] *Ramberg/Ramberg* (*op. cit.* fn. 75), 202 *et seq.* See also *Karlgren* (*op. cit.* fn. 69), 96, claiming that the general rule does not apply when the performer self may be imputed the same moral turpitude as the receiver.

[87] *Agell*, Spelvinster, hedersskulder och väntjänster, in: Festskrift till Håkan Nial: Studier i civilrätt och internationell rätt, Stockholm 1966, 1 *et seq.*, at 8 and 10.

[88] NJA 1989, 768.

The reporter's guess would, however, be that if the agreement were deemed invalid, the briber may – as a general rule – probably not receive restitution of the benefits already transferred to the agent. The agent's illegal proceeds however, ought to be forfeited in accordance with criminal law, chapt. 36, sec. 1–5 Criminal Code.

As noted above, in a typical situation of bribery, a client of the principal may grant the agent a reward, not for a beneficial treatment in any legal, but in physical respect, often granted by the client as a token of appreciation. This frequently seems to be the case especially in the care of the elderly, where the old patient, often out of personal gratitude, rewards a member of staff by means of a will or a gift. In such cases, the validity of the main contract between the client and the principal is seldom questioned. The employment contract can often be voided, since the behaviour is contradictory to the terms of employment and damages the relationship of general trust to the employer.[89] Even if the acceptance of the reward were not deemed as bribery, such a contract might be challenged on grounds of undue influence, sec. 31 Contracts Act, or limited mental capacities.[90]

II. Validity of the Main Contract

The issue of validity of the main contract depends fundamentally on the nature of the agent's legal authority. Swedish law uses the distinction which also exists in German law between actions on behalf of the principal in the name of the principal – mandate, direct representation – and actions on behalf of the principal in the name of the agent – commission, indirect representation.[91]

1. Mandate

Where the agent acts on behalf and in the name of the principal, the relationship between the agent and the principal is thus classified as mandate, sec. 10(1) Contracts Act.[92] Employees usually act as mandate agents with apparent authority, sec. 10(2). The mandate agent does not become a party to the

[89] *Cf.* AD 2001, no. 24.

[90] Lag (1924:323) om verkan av avtal, som slutits under påverkan av en psykisk störning.

[91] *Cf.* Principles of European Contract Law, Chapter 2, Section 2 – Direct Representation, being the equivalent to the legal category of mandate in Swedish law, with Chapter 2, Section 3 – Indirect Representation, being the equivalent to commission.

[92] Lag (1915: 218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

contract but merely represents its principal. Instead, it is the principal and the counterparty who become parties to the contract. However, in a situation where the mandate agent grants undue advantages in exchange for bribes, the agent would most certainly be deemed *falsus procurator*, *i.e.* as having acted outside the scope of the mandate. Contracts and juridical acts made outside the scope of the mandate are voidable, sec. 10(1) Contracts Act. A counterparty who has relied on the mandate agent's authority in good faith, may not bind the agent to the contract but may instead claim damages equivalent to the expectation interest, *i.e.* the positive interest of the fulfilment of the void contract between the counterparty and the principal, sec. 25(1) Contracts Act. In cases of bribery, on the other hand, the briber would hardly be able to invoke good faith.

Therefore, an agent with mandate accepting a bribe without the permission of the principal is generally acting outside the scope of his or her authority. Unauthorised acts made by the agent on the behalf of the principal are not binding on the principal. The principal may however ratify or accept the acts of the agent and thus validate the contract, sec. 25(1) Contracts Act. The ratification or acceptance may be made implicitly,[93] but proof of this has to be rather strong.[94]

2. Commission

Where the agent acts on behalf of the principal, but still not in the name of the principal, the relationship between the principal and agent is classified as commission, sec. 1 Commission Act. The relationship between the commission agent and the counterparty is directly contractual. Apart from some exceptions in consumer relations,[95] the counterparty may not claim performance from any other subject than the agent, irrespective of the counterparty knowing or rightfully suspecting that the commission agent is acting on behalf of a principal, sec. 24(1) Commission Act. In the case of commission the agreement between the parties, *i.e.* the briber and the commission agent is therefore valid and enforceable.

[93] NJA 1925, 685. NJA 1949, 305. NJA 1949, 352. NJA 1970, 294.
[94] NJA 1990, 591. NJA 1992, 782. See also NJA 1998, 304.
[95] Sec. 25 Commission Act.

3. Brokerage

A third major category of agent action, brokerage, may be described as actions on behalf of the principal, but is limited to assistance in the negotiation process, and does not in itself comprise any authority to make binding, juridical acts on behalf of the principal. In respect of invalidity, the principal cannot invoke lack of authority, since it is the principal who has entered the contract. Neither is it possible for the principal to reject the contract as in the case of commission. However, the principal may invoke fraud, sec. 30 Contracts Act, or dishonest behaviour, sec. 33, to invalidate the contract. A prerequisite for the application of these provisions is that the counter-party not only acts objectively in bad faith concerning the circumstances invalidating the contract, but also subjectively, *i.e.* bad faith in fact.

4. Conditions and Effects of Invalidity

Invalidity does not depend on conditions such as the occurrence of damages. The right to invalidate the contract is probably not effected by the fact that the invalidation would cause greater losses than the choice of maintaining the contract. Even if there were some discussion as to whether the right to rescind might be indirectly limited due to the duty of mitigation of damage,[96] this would hardly be of any relevance concerning the right to invalidate (or to avoid) contracts induced by bribery and to claim damages in full.

Generally, invalidity produces effects *ex tunc*, *i.e. ab initio*, total invalidity.[97] This means that the parties are obliged to return whatever they have received from the other party. However, in cases of services, lease contracts, good faith acquisitions and loss of identity due to fusion or adaptation, this is not possible or economically practicable. As a result, the invalidity must assume the form of *ex nunc* not only in these cases,[98] but also for the future with the possibility of combining the rescission with substitutes and damages.[99] Contracts infringing competition rules are, according to legislation, always to be deemed invalid *ex tunc*,[100] but it is unclear if this is possible at all times.

[96] *Munukka* (*op. cit.* fn. 84), 362 with further references.
[97] *Cf. Bramsjö*, Om avtals återgång. En studie över innehållet i återgångspåföljden, Lund 1950, 10 *et seq.*
[98] *Cf.* sec. 21 and 25 Consumer Services Act (konsumenttjänstlagen (1985:716).
[99] *Cf.* NJA 2003, 302.
[100] Prop. 1992/93:56, Ny konkurrenslagstiftning, 32. *Cf. Andersson*, TfR 1999, 647.

The principal's consumption or resale of goods purchased by the bribed agent is not of any independent importance. Should the principal be obliged to return the goods, he or she would instead be obliged to substitute the goods with money.[101] If the principal was aware of the agent's actions but kept silent, ratification or acceptance may initially be inferred from the silence but more convincingly in combination with consumption,[102] compare sec. 25(2), and sec. 27(3) Contracts Act, and chapt. 18, sec. 3 Commercial Code.[103] Where the consumption cannot be construed as ratification or acceptance, the principal is only obliged to compensate the counterparty for the actual use rendered by the goods.

If the main contract is deemed invalid, this might affect contracts that are closely connected to this contract. Invalidity of illegal hazard gaming contracts may affect, "contaminate", other transactions connected to the gaming activity.[104] This is most probably also the case with agreements linked to bribery contracts. Even if there is *no* connection between the contracts, other than the identity of the parties to the contracts, lack of trust might furnish the principal with the right to terminate the other contract.[105]

A general problem with invalidity is that the loss of the contract might refrain the principal from choosing such a self-damaging option in the short run. However, corruption does not give rise to invalidity *ex officio* of the main contract, so the principal is still left with some options to consider the best outcome.

It may frequently be the case that the principal wants to invalidate a contract induced by bribery. In many cases however, it should be possible to maintain the main contract whilst repudiating the flawed sections. Partial invalidity is totally acceptable in Swedish law,[106] and the aggrieved party may

[101] *Karlgren* (*op. cit.* fn. 69), 45 and 96 *et seq. Andersson*, TfR 1999, 533 *et seq.*, at 712.

[102] *Hellner*, Om obehörig vinst, särskilt utanför kontraktsförhållanden. Ett civilrättsligt problem i komparativ belysning, Stockholm 1950, 329. *Tiberg/Dotevall*, Mellanmansrätt, 9th ed., Stockholm 1997, 71.

[103] Handelsbalken (1736:123 2).

[104] *Agell* (*op. cit.* fn. 87), 17.

[105] In NJA 1938, 524 an entrepreneur and a civil servant at the National Road Authority had jointly defrauded the authority to overcompensate the entrepreneur. When the authority became aware of this, it terminated all contracts between the parties, even those that were not influenced by the fraud. The terminations were upheld by the court. See further *Munukka* (*op. cit.* fn. 84), 440.

[106] Cf. Adlercreutz (op. cit. fn. 75), 228.

also choose between invalidity and rules on breach of contract.[107] The sanction of specific performance is generally available in Swedish law, however limited in service contracts.[108] If there is a right to choose contractual sanctions, there is thus a right to choose fulfilment of the contract. The advantage for the principal in doing this would be that there would be no need to go to court to claim expectation damages, since the principal would recover the amount through the fulfilment instead. This could for example be the case where the briber and agent have agreed on a price reduction, to be given to the briber, without the necessary consent of the principal. An amount which is equivalent to the undue advantage of a price reduction could in this case be extracted with the bribe. Some other advantages would be that the briber may be in a better financial position to fulfil the contract than pay expectation damages after rupture, to ensure that the briber has a less hostile attitude towards the principal, and that the principal is in a more favourable position as regards future negotiations.

Sometimes it is not possible to extract the briber's undue advantages from the main contract. This would be the case where the briber has convinced the agent to buy the briber's inferior goods or where the agent has been charged excessively for the goods. However, the principal ought to have the right to claim price reduction and contractual damages, since invalidity is only an option for the principal. It must also be possible for the principal to *avoid* the valid contract and claim contractual damages.

Would it then be possible to invalidate the contract but still claim damages amounting to the expectation interest? Bribery is a grave form of inducement of breach of contract. Under such circumstances the aggrieved party may be compensated for the expectation interest through a combination of rules of tort and the law of contract.[109]

5. Rights of and Effects on Third Parties

As a rule it is not possible for third parties to intervene by invoking invalidity, even in cases of bribery. As has been noted above, invalidity shall be considered *ex officio* by courts if there is a public interest of doing so, but this does not lead to the conclusion that anyone has the privilege to seek action in

[107] *Cf.* NJA 2007, 86 and *Hellner/Hager/Persson*, Speciell avtalsrätt II. Kontraktsrätt. 2 häftet. Allmänna ämnen, 4th ed., Stockholm 2006, 114.
[108] *Hellner/Hager/Persson* (*op. cit.* fn. 107), 155 *et seq.*
[109] NJA 2005, 608.

court. However, there are some exceptions to this rule. The Swedish Competition Authority (*Konkurrensverket*) may prohibit companies from acting in violation of the 2008 Competition Act[110] or Arts. 101 and 102 TFEU,[111] and such a decision may be challenged in the Market Court. In some cases a competitor may commence an infringement process before the Market Court, chapt. 3, sec. 2 Competition Act.

A tenderer in a licitation process is able to appeal the process, chapt. 16, sec. 1–2 Public Procurement Act and chapt. 16, sec. 1–2 Utilities Procurement Act. According to these provisions, it is however not possible to appeal if a contract has been concluded, if the value of the licitation is low. It must in any case be lower than the thresholds stated in the EC procurement directives. In addition, the contracting entity must have decided against undertaking a public procurement procedure. In other cases, an appeal is generally possible within ten days of the notification of the outcome of the licitation. A prerequisite for appeal is that there has been an infringement of the basic principles of the statutes. Only (potential) tenderers that have suffered or may suffer damage may appeal. Upon fulfilment of these requirements, an administrative court shall order a revocation of the procurement procedure or instalment upon rectification of the procedure, which may be supported by a threat of penalty.

Third party interests, especially third parties who have obtained prioritised security rights in property (movable or immovable), generally enjoy a high level of protection, Priority Rights Act.[112] In the case of invalidity of a main agreement, for example a contract of sale, the property rights founded on the buyer's actions will however, as a general rule, be deemed invalid too.[113] The validity of a suretyship is associated with the main debt.[114] If the main debt is considered invalid, so also is the suretyship, sec. 8(2) Limitation Act.[115] The surety is thus relieved from the obligation to the same extent as the debtor.

[110] Konkurrenslagen (2008:579).
[111] Treaty on the Functioning of the European Union, O.J. 2008 C 115/47.
[112] Förmånsrättslag (1970:979).
[113] *Andersson*, TfR 1999, 712.
[114] *Bergström/Lennander*, Kredit och säkerhet, 8th ed., Uppsala 2001, 40.
[115] Preskriptionslag (1981:130).

6. *Burden of Proof*

The placement of the burden of proof, as to the circumstances invoked for invalidity, depends on the circumstances. If a party is invoking a fundamental want of consensus, the party invoking the contract bears the burden of proof. This occurs in cases of alleged forgeries, for example where the aggrieved party claims that the signature has been falsified.[116] In other cases, the burden of proof generally lies on the party invoking invalidity. First and foremost, a party invoking a contract has to prove the existence of such a contract. If there is enough proof for an assessment *prima facie* of the existence, the party invoking invalidity has to prove invalidity on the ground that has been invoked. This would generally be the case with the principal's allegations of bribery. If the objection as to the validity concerns an agent's unauthorised actions, the case is different. The counterparty has to prove the agent's authority. The scope of authority is generally wider than what follows from the principal's instructions to the agent. The scope is somewhat dependent on the type of authority given. For agents acting in the capacity of employees or fiduciaries, the scope of authority is restricted – with some exceptions in case law (primarily of a recent date)[117] – to what follows from either statute (unusual) or usage in the particular area of business, sec. 10(2) Contracts Act. If the counterparty cannot prove that the agent acted within its authority on either of these grounds, there is no binding contract. In cases of alleged (civil) fraud by omission of facts, it is sufficient for the defrauded party to establish the lowest standard of proof as to the causal link between the omission and the result of the negotiation, sec. 30(2) Contracts Act. The allegedly fraudulent party may in turn prove that the omission had no effect on the terms of the contract.

The burden of proof in corruption cases is generally not alleviated. However, the burden is generally lighter in civil procedures than in criminal procedures.

III. Whistle Blowing

According to Swedish law, employees owe a far reaching *duty of loyalty*, a non-statutory covenant, towards the employer. This implies that the employee must not only put the employer's interests before his or her own interests, but

[116] NJA 1992, 263 with further references.

[117] NJA 1956, 656. NJA 1974, 706. AD 1977, no. 62. AD 1977, no. 108. NJA 2001, 191 I. NJA 2001, 191 II. *Cf.* NJA 1990, 591, NJA 1998, 304 and NJA 2002, 244.

also try to avoid situations where these interests may conflict. The duty of loyalty gives rise to a number of specific obligations, and one of such is the duty of confidentiality. The norms that apply in this regard differ considerably between the private and public sector.

An employee engaged in the private sector is not only forbidden to reveal internal enterprise secrets such as trade secrets, sensitive information on marketing or structural methods or plans, and customer or supplier registers, according to the Business Secrets Act of 1990,[118] but is also restricted as to the right to use media as a means whereby criticism is publicly directed at the employer. Moreover, he is also restricted from notifying authorities. As a rule, an employee is not entitled to go public, before first notifying the employer of the misconduct or mal administration.[119] Even if such a notification has not led to any improvement, this does not confirm the employee's entitlement to go public. If the employee, however, has good reason to believe that the employer's management is already aware of the problem but has still not taken action, the employee may not be obliged to notify the employer. The value of the information in the event of it becoming public has to be weighed against the value of confidence between the employer and the employee and the harm the information may cause the employer. An important factor is the employee's motive for going public. Actions of chicanery or vindictive nature are generally not to be tolerated. If, on the other hand, the actions are guided by a real concern of someone's due interests, the employee is more likely to be judged as having acted within the demands of loyalty. The most important factors are those interests that are threatened by the maladministration. Even though the employee's action is generally acceptable and, according to the employee's reasonable conception, acute risks of personal injury or grave environmental damage exist, a mere recording of the fact that the maladministration is unlawful, does not in itself provide justification for the employee's acts.[120]

In the public sector the employee enjoys better protection. The employee is afforded freedom of communication that gives the employee the right to reveal even classified information to the *media*, unless the information is of a qualified classified nature. The public employer is forbidden to investigate the source of the information. The employee's freedom of communication

[118] Lagen (1990: 409) om företagshemligheter.

[119] SOU 2004:47 (*op. cit.* fn. 1), 396 suggests that large companies establish compliance units, whereto employees anonymously may report suspicions of corruption etc.

[120] *Cf. Munukka* (*op. cit.* fn. 84), 215 *et seq.* with further references.

does not apply to the general public, only to the media. The employee's duty of confidentiality is defined by the Publicity- and Secrecy Act.[121] A breach of the duty may lead to sanctions, unless the employee has only exercised the constitutionally founded freedoms of press and expression according to the Freedom of Press Ordinance and the Freedom of Expression Constitutional Act.[122]

In the case of corruption, there is probably a wide margin of manoeuvre for any whistleblower, especially if the person involved in the corruption is highly ranked in the hierarchy of the employer. Revealing corruption would most likely be considered to be acceptable in almost any manner.

IV. Contractual Regulation of the Risk of Corruption

A principal or other stakeholder may want to regulate the risk of corruption in contract. This must generally be allowed. An example would be the possibility of using liquidated damages clauses. It might not be possible to use such clauses against a consumer, due to unconscionability according to the general clause, sec. 36 Contracts Act, and sec. 11 Consumer Contract Terms Act,[123] but they are regularly used and seldom challenged between businesses. Another example would be termination clauses in the event of even a slight delay of accounting on the part of the counterparty. Both types of these clauses may be monitored under the non-statutory covenant of abuse of rights and the general clause sec. 36, so that they are not misused as formalistic, opportunistic grounds for termination and self-enrichment. The use of such clauses to fight corruption would however most plausibly be considered to be such a socially well founded motive that it would grant the party insisting on such a sanction a better right than normally to demand payment.

D. Right to Damages

I. Causation

No particular causal test applies in situations of corruption. Moreover, the general approach to causation in Swedish tort law has been rather uncertain.

[121] Offentlighets- och sekretesslagen (2009:400).
[122] Tryckfrihetsförordningen (1949:105). Yttrandefrihetsgrundlagen (1991:1469).
[123] Lagen (1994:1512) om avtalsvillkor i konsumentförhållanden. See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. 1993 L 95/29, Art. 3 and Annex, subparagraph (e).

The traditional *conditio sine qua non*-approach (the but-for test) has not explicitly been employed by the courts, nor by scholars, in the past decades. The attitude towards causation can be described as flexible and pragmatic, even if the analytical framework behind the *conditio sine qua non*-approach is still often used. As far as particular problems of corruption related claims are concerned, one can observe that Swedish law does not acknowledge any general principle of *novus actus interveniens*. When it comes to legal causation, Swedish law generally operates with a special version of the adequacy doctrine, often emphasizing the importance of foreseeability.[124]

II. Calculation of Damages

No cases have directly dealt with the calculation of damages issue in situations where a bribe has resulted in damage to a principal. Thus, no special presumptions apply in these situations. Special provisions exist in chapt. 5 Tort Liability Act[125] on the estimation of damages, or, rather, on the evaluation of the consequences of the damage. However, there are no special provisions on the evaluation of economic damage. Instead, the provisions focus on the calculation of damages in cases of personal injury and property damage.

As no special case law exists in relation to these cases, a reliance on general, uncodified principles will be necessary. That means that the burden of proof lies with the plaintiff. However, where it is impossible or only possible with (great) difficulty to prove damage, a court may award a reasonable estimate for damages, chapt. 35, sec. 5 Procedural Code.[126] The same rule applies even where it is not (greatly) difficult to prove the damage, but it would be unreasonably costly or burdensome to do so, not only in relation to the extent of the damage, but also the size of the claim. This provision is applicable in both tort and contract.[127]

[124] *Schultz*, Kausalitet. Studier i skadeståndsrättslig argumentation, Stockholm 2007, *passim*, *cf.* 483 *et seq.*

[125] Skadeståndslagen (1972:207).

[126] Rättegångsbalken (1942:740).

[127] See NJA 1973, 717, NJA 1982, 757, NJA 1984, 34, NJA 1985, 143, NJA 2000, 325 and NJA 2005, 180, and also NJA 2006, 367. The provision has been discussed since the promulgation and there is still major disagreement on the application. *Cf. Danielsson*, Några anmärkningar till kap. 35 § 5 rättegångsbalken, in: Skadeståndsrättsliga spörsmål, Stockholm 1953, 5 *et seq.*, *Nordh*, 35:5 rättegångsbalken. En rättsfråga om vad?, SvJT 1994, 319 *et seq.*, *Fitger*, Rättegångsbalken. En kommentar på Internet, per 2010-03-15,

If the injured party can establish an adequate causal connection between the act and the person responsible for the commission of the act, such party would be entitled to "full compensation". This means that all costs and losses are recoverable. In cases of valid contracts, the injured party is generally entitled to compensation for the expectation interest. In cases of invalid contracts the general rule is compensation for the reliance interest, but in cases of the promisor's negligent omission of discovering original impossibility, fraud and other behaviour in bad faith, and maybe even qualified negligent behaviour in general, redress may include the positive interest.[128]

III. Other Compensatory Remedies

Swedish law does not provide any other remedies than compensation in money. Precautionary measures of injunction type may be used in order to ensure redress of the economic damage. It is also possible to obtain a court order forbidding harmful activities under the threat of pecuniary penalties. Neither of these types of injunctions are of a compensatory nature. There is, however, one exception, which is not applicable in these situations. In cases of defamation, the tortfeasor may be obliged to pay for the publication of the judgment, chapt. 5, sec. 6(2) Tort Liability Act. The wordings of the provision do not oblige the tortfeasor to publish the judgment, only to pay the publication costs. However, such a remedy was accessible in NJA 2003, 567, where the tortfeasor was a national newspaper. If the injured so demanded, the newspaper would have to print the judgment in its own paper.

IV. Liability in Tort and Contract

In Swedish law, it is generally possible to bring actions in tort and contract concurrently. The type of action which is likely to succeed depends on the circumstances. In cases where the main contract remains valid it should be possible to claim damages with reference to both.

If, however, the main contract is deemed invalid, maybe due to immorality or the agent's lack of authority, it would not be possible to hold the bribing third party liable in contract. However, the possibility of the principal receiving compensation for the positive interest is not completely ruled out in

chapt. 35, § 5, and *Heuman*, Bevisbörda och beviskrav i tvistemål, Stockholm 2005, 84 *et seq.*, with further references.

[128] NJA 1989, 671 with references.

extra-contractual type of actions. This seems especially feasible where a third party has induced a breach of contract,[129] a factor that may be said to be present in every case of corruption, even in cases where the briber is left with little choice.

As a rule, the principal may claim full compensation from either the bribing counterparty or the bribed agent or from both, if the general conditions for liability are fulfilled. Liability would in such case be joint and several.

V. Contributory Negligence, Mitigation of Damages and Liability of Principal

The general rule in situations where the damage relates to property or a pure economic loss is that the victim's contribution to or aggravation of the damage may result in a reduction of damages, if the victim acted negligently, chapt. 6, sec. 1 Tort Liability Act and sec. 70(1) Sale of Goods Act.[130] If the action that resulted in liability was criminal, the court will seemingly be generous towards the victim in its assessment – only in exceptional cases will compensation for a victim of a crime be reduced as a result of the victim's negligence.[131]

According to chapt. 3, sec. 1 Tort Liability Act an employer is liable for personal injuries and property damages occasioned by the employees during the course of their employment. This is not a strict liability in the true sense of the expression since liability presumes negligence, albeit the negligence of the employee is reflected on the employer. A reason behind this legislation is that the employer should include the risk of liability as a business cost.

The employer is also liable for pure economic loss that was caused by the employee if the requirements for such liability are fulfilled. This means that in general, the employer will be liable for pure economic loss that was caused by the employee's criminal behaviour, but only to the extent that this criminal behaviour could be considered as having occurred during the course of employment.[132] This could apply in situations of corruption.

[129] NJA 2005, 608.
[130] Köplagen (1990:931).
[131] *Cf.* RH 1997:77.
[132] NJA 2000, 380.

VI. Public Procurement Damages

A competitor who has lost a licitation due to a bribing competitor will probably not be able to claim compensation from the bribing competitor. However, such a possibility cannot be excluded in its entirety when considering recent case law.[133]

A tenderer that has wrongfully lost a licitation procedure has a right to damages, chapt. 16, sec. 5–6 Public Procurement Act, and chapt. 16, sec. 6 and 8 Utilities Procurement Act. This remedy is also available to potential tenderers who have been excluded from a procurement procedure for alleged bribery. A contracting entity that is a public authority is obliged to exclude tenderers that have knowingly been convicted for corruption. Tenderers who have lost a licitation to a convicted tenderer have the right to be compensated on this ground.

The tenderer generally has the right to be compensated with the positive interest,[134] provided that he can at least establish some probability that the contract was lost due to an infringement of procurement regulations.[135] This implies a fairly low standard of proof, exceeding only a probability of 50 percent. In other cases, the level of compensation is lowered to compensation of incurred costs.[136] In such cases, it is not necessary for the tenderer to prove that the contract should have been awarded to him. It is enough to demonstrate that the probability of being awarded the contract was reduced by procedural fault. This is applicable to all procurement processes,[137] but has only been laid down in statute in the utilities area, chapt. 16, sec. 7 Utilities Procurement Act. In cases where the breach of procurement rules lies in the contracting entity's decision not to initiate a procurement procedure at all, there are often difficulties in estimating what company should have been awarded the contract under a due course of procurement. In these cases, a higher level of compensation may be granted.[138]

[133] NJA 2005, 608 (which did not concern licitation).
[134] Prop. 1992/93:88, Offentlig upphandling, 102 *et seq.* NJA 1998, 873.
[135] NJA 2007, 349.
[136] NJA 2000, 712.
[137] Prop. 2006/07:128, Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster, 565.
[138] NJA 2007, 349. See also Prop. 2006/07:128 (*op. cit.* fn. 137), 444 *et seq.* and *Höök*, Skadestånd vid offentlig upphandling, JT 2007–08, 452 *et seq.*, 457.

E. Restitution and Forfeiture

The legal category of restitution or unjustified enrichment has traditionally had a weak position in Swedish law,[139] albeit given some credit in contractual relations,[140] some quasi-contractual relations[141] and in cases of payments made in error, *condictio indebiti*.[142] A payment *sine causa* gives generally the payer *solutio indebiti*, a right to reclaim the payment.[143] However, as dis-

[139] *Hellner* (*op. cit.* fn. 102). *Hellner*, Betalning av misstag, JT 1999–2000, 409 *et seq.*

[140] Statutory provisions preventing unjustified enrichment can be found in not so few statutory instruments regulating contracts (sales of goods, consumer sales, consumer servises, apartment leases). See *e.g.* sec. 65(1) Sale of Goods Act, which state that the buyer in case of avoidance, must not only restitute the goods (in the best possible condition, sec. 66) and the derived yield from the goods, but also pay for the benefit arising from the use of the goods, even if such use has not resulted to any decrease in value. Compare UN Convention on Contracts for the International Sale of Goods (CISG) Art. 84(2). See also unjustified enrichment as a counter argument for reform in Prop. 1994/95: 14, Ny fastighetsmäklarlag, 30: It had been suggested that unregistered real estate brokers should not receive payment for their services, but this suggestion was rejected primarily under the argument of unjustified enrichment. Should however the principal rely on the fact that the broker was registered, this fact will normally justify a reduction of the commission to the broker, NJA 2000, 629. For a non-statutory case see *e.g.* NJA 2004, 682, but compare RH 2004:62 (invoice with too low an amount received and paid in good faith). For more cases and further debate, see *Munukka*, Är obehörig vinst en svensk rättsprincip?, Ny Juridik 3:09, 26 *et seq.* and *Schultz*, Nya argumentationslinjer i förmögenhetsrätten, SvJT 2009, 946 *et seq.*

[141] Chapt. 18, sec. 3 Commercial Code, which explicitly applies in cases of *falsus procurator*, where the principal is not bound because of an agent's actions outside the scope of the mandate, sec. 27(3) Contracts Act: The principal is not bound but must in any case pay for the benefits of the invalid agreement, if any. Unjustified enrichment may arise where a tenant has been declared bankrupt, and the estate, which has no contract with the landlord, does not vacate the premises. This issue has recently been dealt with in legislation, chapt. 12, sec. 31(5) Land Code (jordabalken (1970:994), as amended 2004). Even where this provision cannot be applied, remuneration may be afforded on the grounds of unjustified enrichment, NJA 1993, 13 and NJA 2007, 519, but see NJA 1999, 617 (where HD explicitly refrained from anticipating the abovementioned legislative amendment). See also *e.g.* NJA 2006, 206 (ex-partner, but still cohabitor, liable for half the rent after the break up of the relationship), and NJA 2005, 510 (bankruptcy estate's royalty liability towards artist for the sale of material protected by copyright).

[142] NJA 1989, 224. But see NJA 2001, 353, where the receiver of the payments (staff pension payments) had received the overcompensation in good faith and acted justifiably in relying on the payer's disposition of the payments.

[143] See NJA 1999, 575. A bank had been defrauded to pay a sum of more than 9 million Swedish crowns to a creditor who in fact had a real claim of that amount against the alleged payer. HD stated *inter alia* that a usual factor pointing towards repayment is the el-

cussed in greater detail above under C, this does not necessarily lead to the conclusion that the briber has a right to repayment of the bribe.

The principal's right to claim the bribe is seldom discussed in Swedish law but might be constructed on the grounds of fiduciary law. According to sec. 20(1) Commission Act, the agent has to account for all monies received under the contract with the third party. Whether this statutory provision may be used for the purpose of constructing a right for the principal is, however, highly unclear. Instead, the bribe may be forfeited by the State in accordance with criminal law, chapt. 36, sec. 1–5 Criminal Code. The court shall, unlike cases involving business bans and business fines, consider forfeiture ex officio.[144] There is, however, no guarantee that a state prosecutor will commence criminal proceedings against the agent.

The principal's claim for restitution of a bribe would most likely not be construed as a confirmation of the contract, at least not as a concession of the right to invoke nullity later on. From a theoretical-systematic point of view, one could claim that the principal cannot choose to have his cake and eat it by rejecting the contract in the case of commission, or not ratifying the agent's agreement, in the case of mandate, *and* claiming a right stemming from the non-binding agreement. In Swedish law, however, these kinds of thresholds are maintained at a lower level than in many other legal orders. If there is a socially accepted need for exceeding such a threshold, the persistence of the legal constructs is placed under teleological scrutiny. The teleological test, however, most often results in upholding the theoretical framework, out of mere practical reasons. One could argue that there is a statutory basis for such a transmission of property in the Commission Act, either based on the best execution rule as to the price stated in sec. 5 or on the duty to account for all revenue according to sec. 6(2) and (3), 20 and 21.[145] If these provisions entitle a principal of a commission agent in this way, the provisions will probably also be applicable by analogy to other types of agency.

ement of the receiver's unjustified enrichment and concluded that since this element was not present in the case, there would be no repayment. See also NJA 1999, 793 for similar reasoning.

144 See *Berggren et al.* (*op. cit.* fn. 22), chapt. 36, §§ 7–10 a, Bakgrund.

145 NJA 1930, 207, applying the closest equivalent to sec. 5 (sec. 9 in the old Commission Act, 1914:45) in the case where the agent had two principals, one seller and one buyer. The agent did not have to account for "normal" provision from the buyer, but for a higher provision, as part of the purchase price. See *Munukka* (*op. cit.* fn. 84), 251 *et seq.* on the possible applicability of sec. 13 Commission Act (1914:45), now sec. 20 Commission Act (2009:865).

These provisions would probably not support a right for the principal to collect more than has actually been awarded to the agent and not from any other than the agent. If the principal has a right to the monies under the above mentioned provisions, it would probably be adjusted to the actual size of the bribe. If, however, a decrease or increase has a remote connection with the bribe itself, this will not be taken into consideration in the calculation.

The agent probably faces no risk of double restitution. If the civil matter is settled before the criminal matter and the agent had already been obligated to pay the illegal gains to the injured, there would be no state interest in claiming the money from the agent again. If, on the other hand, the illegal gains have been forfeited under criminal law before the civil matter is settled, the State will cover the liability towards the injured up to the forfeited amount and the agent has a right to set-off the forfeited amount, chapt. 36, sec. 17 Criminal Code.[146] If at the time of decision of forfeiture, there is reason to believe that liability for damages will be imposed, forfeiture should not be based on the same amount and the defendant should be given the benefit of doubt in this respect.[147]

The principle of *compensatio lucri cum damno* would most probably be applied, to prevent double compensation of the principal, directly if the question of damages would arise later, and more broadly or indirectly, if the question of restitution would arise after damages had been awarded under tort or contract.[148]

As of today, the rules of evidence applied in cases of forfeiture are the same as in penal law in general, which means a heavy burden of proof. An alleviated burden of proof concerning the connection between the criminal activity and the possession has been proposed,[149] in order to implement the EC Council decision on the matter.[150]

[146] *Cf.* HD decision of 26 January 2004, case no. B 2153-03, dismissing the injured principal's appeal since the appellate court's forfeiture decision did not infringe the principal's right to damages, especially not when regarding chapt. 36, sec. 17 Criminal Code.

[147] Prop. 1986/87: 6, Regeringens proposition om förverkande m. m., 38.

[148] *Karlgren* (*op. cit.* fn. 69), 28 *et seq.*, 38 with fn. 10, and 41 *et seq.*

[149] Prop. 2007/08:68, Förverkande av utbyte av brottslig verksamhet.

[150] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, O.J. 2005 L 68/49. See also Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, O.J. 2006 L 328/59, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O.J. 2001 L 182/1, and Joint Action 98/699/JHA of 3 December 1998 adopted

F. Aspects of Private International Law

There are no special arrangements in Swedish law preventing the parties from using choice-of-law or jurisdiction clauses in order to escape anti-corruption supervision. These issues are largely regulated by the EC Regulation on the law applicable to contractual obligations (Rome I).[151]

According to Art. 3(1) of Rome I, the parties to a contract are free to choose what law should govern their contractual relationship. There are some exceptions. Where all relevant elements point to a certain domestic law, the mandatory rules of that law will apply, Art. 3(3). It is therefore not possible to derogate from the mandatory rules of *lex contractus* where that connection is particularly strong. Jurisdiction clauses, and most probably arbitration clauses,[152] are not considered to be relevant elements within the meaning of this article.

Art. 6, 8 and 11(4) protect consumers and employees. The mandatory rules of the weak party's *lex domicilii* are accorded priority before the chosen law. It is hard to imagine any practical situation where an employee could be afforded protection against corruption under these rules. The consumer situation presents more practical problems. If a consumer entrusts an agent with a task, and the agent abuses such trust by engaging in corrupt dealings, the consumer may invoke the mandatory rules of the home country. The cumulative *lex loci actus/lex contractus* requirements to this rule, however, diminish the importance of the rule in cross border transactions.

Other mandatory rules than the types dealt with in Art. 3, 6 and 8 may be relevant even if they do not affect the choice of applicable law as such. If mandatory rules exist in another legal order, and the issue has a close connection with such legal order, effect *may* be given to those rules, Art. 9.

Art. 21 refers to an *ordre public* exception. The application of a rule of the law of the country specified by the Convention may be refused only if such application is manifestly incompatible with the public policy of the law of the forum. The *ordre public* exception is narrow in Swedish law.[153]

by the Council on the basis of Art. K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, O.J. 1998 L 333/1.

151 Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008, O.J. 2008 L 177/6.

152 *Bogdan*, Svensk internationell privat- och processrätt, 5th ed., Stockholm 1999, 239.

153 *Bogdan* (*op. cit.* fn. 152), 73. *Cf.* NJA 1987, 885: A Swedish transport trade union put a Panama registered ship with a Polish crew in a Swedish port under a blockade, in order to

If a party challenges the existence or validity of a contract or a term of contract on the grounds of substantive law, the question of existence or validity is to be addressed by the law which the parties appear to have chosen, Art. 3(5), 10, 11 and 13. This also applies to choice-of-law clause. As a result, a party who invokes lack of consent to such a clause must establish such under the law designated by the clause. There is, however, an exceptional possibility of choosing the *lex domicilii* of the person challenging the validity of a contract on grounds of lack of consent where it would not be reasonable to apply the general rule, Art. 10(2). Reasonableness could perhaps be questioned in cases where a bribed agent, acting within its authority in this respect, has accepted a choice-of-law clause which bars the principal from invoking invalidity.[154] The question of whether an agent is able to bind its principal, however, falls outside the scope of Rome I, Art. 1(2)(g).

Rome I and private international law in general do not deal with public law.[155] The title of Rome I and Art. 1(1) serve as the bases for this conclusion, which can also be discerned from the preamble and other articles. This means that the freedom of choice of law under Rome I cannot affect which penal law is to be chosen. However, not only non-mandatory contract rules, but also tort rules, may be altered by contract, chapt. 1, sec. 1 Tort Liability Act. The EC Regulation on the law applicable to non-contractual obligation (Rome II)[156] gives the parties pursuing a commercial activity freedom to choose the applicable law, Art. 14(1)(b),[157] but has the same type of general safeguards as Rome I.[158]

compel the shipowner to enter into a collective agreement with the International Transport Workers' Federation. A collective agreement was entered into and new individual contracts were signed with the crew members and the blockade ceased. Later, the shipowner rejected the crew's claim for wages in accordance with the new contracts. The crew took the matter to court in Sweden. HD not only found that Panama law was to be applied, and that the blockade was unlawful and that all the agreements were induced by intimidation according to Panama law, and thus void. This outcome was considered not to be contrary to the *ordre public* of Sweden.

154 See *Bogdan* (*op. cit.* fn. 152), 88 *et seq.* on *fraude à la loi*.

155 *Bogdan* (*op. cit.* fn. 152), 79 and 87 *et seq.*

156 Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007, O.J. 2007 L 199/40.

157 See also Art. 4(3), 5(2), 10(1), 10(4), 11(1), 11(4), 12(1) and 12(2)(c).

158 See *inter alia* Art. 14(1)(b) ("freely negotiated"), 14(2), 16 (mandatory provisions) and 26 (*ordre public*).

In relation to crimes committed abroad, the principle of double jeopardy is applied, chapt. 2, sec. 2(2) Criminal Code.[159] Some exceptions to this principle are not applicable in cases of corruption. This means that behaviour that is not regarded as a criminal act in the foreign country cannot be punished. According to sec. 2(3), the punishment cannot exceed the maximum penalty stated in the foreign law. If the crime is currently committed in more than one state, the lowest maximum penalty will apply.[160] It has been maintained that bribery concerning larger values cannot be deemed as non-punishable under the defence that bribes are common practice in the foreign country.[161]

G. Conclusions

The importance traditionally attributed to private law in the fight against corruption is only a minor one. This attitude might nonetheless soon change. There are a number of reasons pointing to this direction.

Contract law is flexible enough to provide for a variety of sanctions towards the persons involved in bribery. One can look beyond invalidity, and seek a more direct way of compensation by applying the rules on breach of contract instead. Furthermore, the burden of proof is somewhat lower in civil procedure. If liability is founded on contract law, as a rule, one does not have to prove intent or knowledge. Instead one operates with obligations determined either by a specific result or reasonable care (or something in between), and to obtain contractual damages, it is – almost without exception – sufficient to show either breach of contract (strict liability) or negligence. Contract law may also be used pre-emptively: in protecting oneself from corruption, it is generally possible to use clauses which incorporate liquidated damages in case of corruption or late accounting of entrusted means.

Tort law is not well equipped to provide for anti-corruption measures. However, recent case law opens up for extra-contractual compensation in cases of inducement of breach of contract, and the level of compensation might even be equal to the contractual expectation interest.

It would be difficult to invoke the *law of unjustified enrichment* as a single ground for remuneration in Swedish law. However, there has also been a sub-

[159] See further *Berggren et al.* (*op. cit.* fn. 22), chapt. 2, §§ 2–3.
[160] NJA 1993, 292.
[161] *Leijonhufvud*, JT 2000–01, 152 *et seq.*, at 154.

stantial shift in recent case law in this area: from being explicitly rejected, unjustified enrichment has now become an argument which occurs so often, in so many different settings, that one could plausibly argue that it has assumed the form of a legal principle. Therefore, unjustified enrichment could perhaps be used to afford the aggrieved person's interests at the expense of the person that has been enriched in an unjustified manner. The policy reasons for this are probably particularly strong in cases of corruption.

Even if criminal law continues to play the most important role in the fight against corruption, private law – with contract law, tort law and perhaps even a law of restitution – can also be appreciated as a useful instrument, alongside market law and administrative procurement rules. One may, for instance, emphasise freedom of contract, and the possibilities of establishing barriers to corruption and supervisory measures, and – not the least – regulating the effects of corruption contractually.