

# Would You Like to Update Your Swedish Contract Law App Now or Later?

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## Introduction

*A new version of your Swedish Contract Law App is available. Would you like to update now or later or would you like information about the updates?*

I click: “*I would like information about the updates*”.

*New in this update: We regularly update and constantly strive to improve the Swedish Contract Law App. In this update we have upgraded performance, fixed bugs, resolved crashes and made improvements. Would you like to update now or later or would you like more detailed information about the updates?*

I click: “*I would like more detailed information*”

## Upgraded performance 1: Unfair contracts, Sec. 36

The rule on unfair terms in the Contract Act Sec. 36 has been split up in three separate parts: Unfairness due to

- (i) the contents of the agreement,
- (ii) the circumstances prevailing at the time the agreement was entered into,  
and
- (iii) subsequent circumstances.

The reason for this separation is that the relevant prerequisites and the legal argumentation are totally different under the three separate parts. The relevant arguments are now explained in more detail.

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## Upgraded performance 2: The means to establish the content of the contract

The Swedish Contract Law App has a new feature: A three-step means to establish the content of the contract. Step 1 is the parties' common intention, Step 2 is the dolus rule and Step 3 is the overall objective assessment.

## Upgraded performance 3: Fine tuning of construction/interpretation of contracts

The Swedish Contract Law App now provides four typical situations for disputes regarding the content of the contract (instead of the previous two typical situations: interpretation and gap-filling). The four typical situations are:

1. Unclear text (for example the meaning of "floor")<sup>1</sup>
2. Contradictory text (for example a lease contract that stipulates in one clause that the rent is a fixed sum and in another clause that the rent shall equal the rent decided by a third party (different than the fixed sum))<sup>2</sup>
3. A necessary gap (for example a frame agreement without express regulation of whether the supplier has exclusive rights to supply the buyer)<sup>3</sup>
4. A possible implied term (for example that a buyer of a company must act loyally towards the seller when the seller is entitled to an additional purchase sum)<sup>4</sup>

The reasons for this upgrade are twofold. First, it creates a better basis for arguing that there is an implied term. Second, it limits the risk that a contractual gap is automatically but incorrectly filled by default law.

Please note that the same three-step means to establish the content of the contract applies to all the four typical situations.

## Improved performance 4: Implied waiver

The Swedish Contract Law App now clearly separates the rule on notice of breach (Sw. reklamation) from the rule on implied waiver (Sw. underförstådd

<sup>1</sup> NJA 2020 s. 822 "Knoppens golvvärmesystem".

<sup>2</sup> NJA 2011 s. 316.

<sup>3</sup> NJA 2021 s. 643 "Ramavtalet".

<sup>4</sup> NJA 2021 s. 943 "Omsättningsmålet".

eftergift).<sup>5</sup> The improvement will contribute to avoiding the common misunderstanding that these two rules are the same.

### Improved performance 5: Non-statutory principles

Descriptions of some main principles underpinning the rules have been added to the Swedish Contract Law App, namely the principles of freedom of contract, *pacta sunt servanda*, intention, trust, vigilance, loyalty and the principle of equivalence. These principles are not rules but merely function as an aid to understanding the rules and to provide convincing argumentation as how to apply the rules.<sup>6</sup>

### Bug fix 1: Mistake in assumption theory (Sw. förutsättningsläran)

The bug, that that there is an independent non-statutory rule regarding mistake in assumptions, has been removed. Instead, the mistake in assumption theory has been transformed into a principle that underpins the rule on establishing the content of the contract and the rules on unfair terms (Sec. 36) due to the circumstances prevailing at the time the agreement was entered into and due to subsequent circumstances.

### Bug fix 2: Unfair contracts in B2C

The bug that unfair business-to-consumer contracts may be modified has been removed.<sup>7</sup> Now it is made clear that there are only two legal effects of unfair terms in business-to-consumer contracts: Either that the contract as a whole is deemed invalid or that an individual unfair term is excluded from the contract (and replaced by default law).

<sup>5</sup> NJA 1973 s. 315 “Nilcons tele-abonnemang”, NJA 1991 s. 3 “Mjölby-Svartådalens elleveranser”, NJA 2018 s. 171 “Leksaksaffären i Vimmerby”, NJA 2024 s. 657 “Kylbaffeln”.

<sup>6</sup> NJA 2019 s. 23 “Den betalande sambon”.

<sup>7</sup> ECJ decisions: 14.6.2012, C-618/10, Banco Español de Crédito, ECLI:EU:C:2012:349; 30.5.2013, C-397/11, Jörös, ECLI:EU:C:2013:340; 30.5.2013, C-488/11, Brusse, ECLI:EU:C:2013:341; 1.1.2015, C-482/13, C-484/13, C-485/13 och C-487/13, Unicaja Banco och Caixabank, ECLI:EU:C:2015:21; 21.12.2016, C-154/15 and C-307/15, Gutiérrez Naranjo, ECLI:EU:C:2016:980; 26.1.2017, C-421/14, Banco Primus, ECLI:EU:C:2017:60).

### **Bug fix 3: Gross negligence and limitation of liability**

The bug that grossly negligent breaches of contract entail that a limitation of liability clause is excluded from the contract has been removed.<sup>8</sup> The Swedish Contract Law App now clearly provides that a grossly blameworthy breach of contract is one relevant fact (among other facts) when determining whether a limitation of liability clause is unfair according to Sec. 36 (the contents of the agreement).

### **Bug fix 4: The contra stipulatorem rule**

The bug that a person who has written or provided a contract text always loses all disputes regarding the interpretation of the contract (the *contra stipulatorem* rule) has been removed.<sup>9</sup> The rule on *contra mercator*, i.e. that a business-to-consumer contract shall be interpreted against the business, remains unchanged.<sup>10</sup>

Please note that the fact that a party has been unclear in expressing that it intended to limit its liability as compared to default law, is relevant when establishing the content of the contract in Step 3 (the overall assessment).<sup>11</sup> Also please note that this fact is relevant irrespective of which of the parties formulated or provided the text.

### **Bug fix 5: Coherent contract law terminology**

All bugs consisting of non-contractual terminology have been deleted.

- “Damage” (Sw. skada) has been replaced by “breach” (Sw. avtalsbrott)
- “Tortfeasor” (Sw. skadevållare) has been replaced by the “party in breach” (Sw. avtalsbrytande parten)
- “Injured party” (Sw. skadelidande) has been replaced by “the aggrieved party” (Sw. den part som drabbats av avtalsbrott)
- “Negligence” (Sw. vårdslöshet) has been replaced by “non-professional” (Sw. ej fackmässig) or “blameworthy” (Sw. klandervärd)

<sup>8</sup> NJA 2017 s. 113 “Den övertagna överlätelsebesiktningen”, NJA 2022 s. 354 “Skatterådgivarens ansvarsbegränsning”.

<sup>9</sup> NJA 2010 s. 416, NJA 2001 s. 750 “Självrisken”, NJA 2021 s. 597 “Mätarställningen”.

<sup>10</sup> The Contract Terms Act Sec. 10 § (Sw. avtalsvillkorslagen).

<sup>11</sup> NJA 1981 s. 552, NJA 1989 s. 269.

- “Gross negligence” (Sw. grov vårdslöshet) has been replaced by “grossly non-professional” (Sw. allvarligt bristande fackmässighet) or “grossly blameworthy” (Sw. kvalificerat klandervärd)

The reason for this change in terminology is to avoid misleading associations to rules in tort law and instead to guide associations in the right direction towards contract law.<sup>12</sup>

### **Resolved crash 1: Authority, Chapter 2**

The Swedish Contract Law App has replaced the rule on authority by position (Sw. ställningsfullmakt) with the rule on authority by legitimate reliance (Sw. tillitsfullmakt).<sup>13</sup>

### **Improvement 1: Formation of contract, clarification in addition to Chapter 1**

The Swedish Contract Law App now clearly indicates that contracts may be formed by other means than the exchange of offer and acceptance. The Swedish Contract Law App also clarifies what kind of communications constitute a unilaterally binding offer.

### **Improvement 2: The legal effects of invalidity**

The Swedish Contract Law App now clearly indicates the legal effects of invalidity.

### **Improvement 3: Threat, fraud, usury, mistake in expression in relation to unfair contracts**

The Swedish Contract Law App now clearly indicates that the rules on threat (Secs. 29 and 29), fraud (Sec. 30), usury (Sec. 31) and mistake in expression (Sec. 32) are all included in the rule on unfair contracts (Sec. 36) and that there is never any reason to invoke Secs. 28–32 in parallel to Sec. 36.

<sup>12</sup> NJA 2024 s. 369 “Flyttstädningen” is an example of misleading terminology.

<sup>13</sup> NJA 2013 s. 659 “Reseföretagsrepresentanten”, NJA 2014 s. 684 “Divisionschefen”, NJA 2021 s. 1017 “Låneavtalet med Svea Ekonomi”.

End

*We do not have any further information about the updates in the new version. Please consult [www.avtalslagen2020.se](http://www.avtalslagen2020.se) for more details. Would you like to update now or later?*

I click: “*Update later*”.

*Are you sure? We warn you that providing legal advice without an update may constitute a breach of your contractual duties as an attorney or solicitor, which in turn may entail substantial liability in damages, including modification of your contracted limitation of liability.<sup>14</sup> Would you like to update now or later?*

I click: “*Update now*”.

<sup>14</sup> NJA 2022 s. 354 “Skatterådgivarens ansvarsbegränsning”.