SCCL, the International and the Comparative: Outside Influences and Two Examples of Reception

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1. Introduction

The Stockholm Centre for Commercial Law (SCCL) is celebrating its 25th anniversary and my connection to SCCL goes back almost to its inception. *Jan Kleineman*, SCCL's initiator and also Advisor for the DCFR project's[1] tort law book, thought that the research associate of the project's working group at the University of Osnabrück should have a research position at SCCL during his stays in Stockholm. This position was also maintained during later research adventures abroad. However, my subsequent employment at the Department of Law at Stockholm University began outside SCCL's premises. The centre filled to capacity, and it was only a few years later with the latest (or last) expansion that I was given a place.

Several SCCL staff members have been active in various comparative law projects in different ways, e.g. as national rapporteurs for the Common Core project, as participants in the Nordic work, the Oxford collaboration, as participants in the DCFR work,[2] or as organisers of the Common Core project's

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1 The work was conducted under the name the Study Group on a European Civil Code, and the final result was presented as the Draft Common Frame of Reference (DCFR). Hereinafter, the 'prefix' DCFR is mainly used.

2 *Jan Kleineman* was a member of the Advisory Council until June 2003. *Johnny Herre*, now Chair of the SCCL Scientific Council, was a member of the Advisory Council for Sales, Services and Long-term Contracts, the Co-ordinating Group and the Compilation and Redaction Team. *Christina Ramberg* was a member of the Co-ordinating Group. *Lars Gorton* was a member of the Acquis Group. On the comparative law workshop floor in

annual General Meetings.[3] Consequently, a text that says something about comparative law concerns a number of people at SCCL.

That comparative law is difficult to grasp is a comment I often hear and my response is usually that the word – like the word sport – can encompass a lot. Sport includes martial arts, football, ice hockey, gymnastics, sumo wrestling, curling and chess, to name a few sports where the body and mind may seem to be involved to different degrees; some sports are more 'hands on' than others. My continuation of the answer is usually that one should therefore be more specific about what one does in one's comparative research and that it involves more than knowing a foreign case or a foreign statute (*legislation comparé* is often referred to pejoratively). A comparative approach to the subject can also be more 'hands on' and practical with a clear substantive link. This approach is easiest to understand for the general public. Substantive law is at the centre, but the perspective is broadened by extraneous elements. It is hoped that this will eventually move away from what is pejoratively referred to as 'law as rules'.[4] A more theoretical approach may be more interested in the comparison itself, or in more profound possible substantive law consequences, which may be linked to the fact that what may be seen as a *sui generis* issue in one legal system, may be more interwoven in a system in another legal system.

The DCFR work was clearly 'hands on'. An academic Civil Code was to be presented and the diversity of experts – a kind of 'wisdom of the crowd' – guaranteed its quality. At the same time, there was an exchange of ideas between the various participants and, as we know, good ideas know no national borders. With a suitable facilitator of the knowledge material, foreign solutions can take root in one's own legal system. The DCFR working group in Osnabrück on 'Extra Contractual Obligations' not only researched tort law, but also unjust enrichment and *negotiorum gestio*. For the other two areas of law, *Torgny Håstad* was Advisor. The three areas of law each resulted in a book of black letter rules, Comments and national Notes.[5]

Osnabrück, my predecessor was *Mårten Schultz* (2000–2001) and my successor *Philip Mielnicki* (2007–2009).

3 *Kelly Chen* and *Filippo Valguarnera* are the main co-ordinators and the organisation is managed in collaboration with the Department of Law and SCCL.

4 The words are taken from Legrand, Pierre, *A diabolical Idea*, in Hartkamp, Arthur/Hesselink, Martijn/Hondius, Ewoud/Joustra, Carla/du Perron, Edgar/Veldman, Muriel (Eds.), Towards a European Civil Code, 3rd ed., Nijmegen 2004, p. 245, at p. 260.

5 Bar, Christian von, *Principles of European Law. Benevolent Intervention in Another's Affairs*, Sellier, European Law Publishers, Munich 2006, ibid., *Principles of European Law. Non-*

In *Sections 2 and 3*, this article will focus on two examples of external influence – one explicit and one possible implicit example – where the DCFR work and other comparative law work have contributed to solutions in Swedish law before the DCFR books were even published. In both cases, it is about the influence of jurisprudence on case law. References to national literature regarding the judgments in question will, however, be fairly limited in this article.[6] The two sections will be – as with the DCFR work – 'hands on'. Finally, in *Section 4*, the former co-worker on the comparative law workshop floor will offer some thoughts on the two examples and on developments in comparative law and Swedish patrimonial law since the SCCL was founded.

2. Example 1: explicit external influence through jurisprudence – NJA 2005 p. 608 (*Max och Frasses*)

2.1 The legal context

Example 1, based on the Swedish Supreme Court's judgment in case NJA 2005 p. 608, can be said to relate to 'inducement to breach of obligation'. According to the case's preamble, it pertained to the following:

> A third party which has acted in concert with one of the parties to a contractual relationship in deceiving the other party has, since the act has been judged to be qualifiedly unfair, been held liable to compensate the pure economic loss caused by the act.

The group of cases presented here is familiar in many legal systems but was clearly confirmed in Swedish law in this judgment. To understand why, a few words about the legal context are needed – and this includes the historical background. In order for pure economic loss to be compensated, a contractual relationship, special legislation or the commission of a criminal offence is required as a starting point. We can disregard the first two here. What is

Contractual Liability Arising out of Damage Caused to Another, Sellier, European Law Publishers, Munich 2009 and ibid., *Principles of European Law. Unjustified Enrichment*, Sellier, European Law Publishers, Munich 2010.

6 The primary audience is not domestic. For literature on case law, the interested reader is referred to Regner, Nils/Berggren, Nils-Olof/Lindh, Ove/Herre, Johnny/Johansson, Svante O., *Rättspraxis i litteraturen – Nytt Juridiskt Arkiv 1930–2022* (JUNO Version 6, 2024).

of interest, however, is the formal link between criminal law and tort law, which in the shorter perspective can be traced back to the fact that prior to the enactment of the Swedish Tort Liability Act 1972[7] (TLA), the legal basis for the law of damages in tort was found in Chapter 6 of the Swedish Penal Code 1864, which was not repealed by the introduction of the Swedish Criminal Code[8].[9] However, tort law had long been regarded as part of civil law. The provisions of the Swedish Criminal Code may have been formally applied analogously. However, we see traces of the historical link in the provision governing pure economic loss in the TLA, now in Chapter 2, Section 2 of the TLA. The provision now states the following:

> Any person who causes pure economic loss as a result of a criminal offence shall compensate such loss.

The preparatory works to the TLA stated that the Act was to be seen as a framework statute, which would not prevent further development through case law and doctrinal works. The provisions were not to be interpreted *e contrario*.[10] After the entry into force, however, such an interpretation seems to have occurred to a large extent precisely with regard to pure economic loss.[11] It is against this background that the judgment in case NJA 2005 p. 608 should be seen as a major step in Swedish law and it was taken explicitly against the background of a large body of comparative law material.[12]

7 The Swedish Tort Liability Act (1972:207), in force since 1 July 1972.

8 The Swedish Criminal Code (1962:700), in force since 1 January 1965.

9 For a more detailed treatment of the historical background, see Kleineman, Jan, Ren förmögenhetsskada – Särskilt vid vilseledande av annan än kontraktspart, Juristförlaget 1987 p. 20 *et seq*.

10 See, for example, Government Bill 1972:5 (Proposal for a Tort Liability Act etc.), p. 568: "The new legislation is not intended either to entail any change in current law or to constitute an obstacle to legal development through case law in the direction of a broader liability for pure economic loss. This paragraph, like the other provisions of the proposal, cannot therefore be used as a basis for contradictory conclusions."

11 See Kleineman, supra n. 9, p. 247 *et seq*. See also the critical words in Bernitz, Ulf, Skadeståndsansvar för otillbörligt ingripande i avtalsförhållande och medverkan till kontraktsbrott; HD utvidgar ansvaret för ren förmögenhetsskada, JT 2005–06 p. 620, at p. 624 and Vängby, Staffan, Så här får man inte göra! – några ord om skadeståndsrättens utveckling genom Högsta domstolens praxis, in Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa, Volume II, Stockholm 2006 p. 1185, at p. 1199.

12 The material was provided by *Kleineman* in his expert opinions in the three instances.

2.2 Background to the case and the lower courts

The case started in Luleå in 1990. The northern hamburger chain Max had outcompeted the global giant McDonald's, which closed its Luleå restaurant. Max acquired the lease to the McDonald's premises, as it was in a better location than Max's existing premises. By February 1991, Max's business was open in the new premises while the old restaurant was also operating. Max did not want to transfer the contract for the old restaurant premises to a competitor. The subsequent defendant in the proceedings, the competitor Frasses, had shown an interest in the premises but had also been told that a transfer was out of the question.

On 23 January 1992, the lease was transferred to the company Lotsbåten[13]. The majority owner had declared that the premises would be used as an art gallery. The contract stipulated that Lotsbåten was not permitted to transfer or sublet the premises. It also provided that, in the event of termination of the lease, Max would have a right to acquire the lease.

Even before the conclusion of the agreement, the majority of the shares in Lotsbåten had been transferred to Frasses, so Frasses already exercised a decisive influence in Lotsbåten. Max did not know anything about the transfer of the shares or that the representative of Lotsbåten was a criminal and would be serving a prison sentence for corporate offences.

An art gallery was not opened on the premises. A few months later, the competitor Frasses opened a hamburger restaurant there instead. When Max learnt of the restaurant plans in February 1992, it sued Lotsbåten. Max asserted, among other things, that the contract between Max and Lotsbåten was void due to fraud.[14]

The District Court decided the case through an interlocutory judgment. The contract was void. The Court of Appeal confirmed the District Court's judgment. In January 1996, the District Court ordered Lotsbåten to pay SEK 2,100,000 in damages to Max. However, Lotsbåten was declared bankrupt and Max was thus only an unsecured creditor with little chance of receiving any dividend in the bankruptcy.

Max then sued Frasses for damages. The basis of the claim was that Frasses should pay damages for loss of turnover on the basis of the general law of

[13] Originally to Norrtraship AB, which later changed its name to Lotsbåten AB.

[14] See Section 30 of the Swedish Contracts Act (1915:218). It was also asserted that there was a priority right to the premises and that it should be vacated by Lotsbåten, plus damages. The action for a priority right and vacation was dismissed by the courts and is not considered further in this context.

damages, 'because Frasses, for its own benefit or for the benefit of Lotsbåten, caused Max damage'.[15] This ground was followed by a detailed description of both alternative subjective elements and alternative descriptions of the behaviour that caused Max's damage; we can disregard these details here.

2.3 The Swedish Supreme Court's solution

According to the Swedish Supreme Court, the case concerned the following:

> The main issue in this case is whether Frasses can be ordered to pay damages to Max for pure economic loss, where the parties were not in a contractual relationship and the loss was not caused by a criminal offence.[16]

After this introductory statement on the legal issue, the Swedish Supreme Court addressed, in turn, the statutory provisions on the issue – in particular Chapter 2, Section 2 of the TLA – followed by the statements in the preparatory works that the provision should not be interpreted *e contrario*, a review of previous case law and statements in legal literature.[17] The Swedish Supreme Court then turned its gaze outwards – which is what is important in this article – and stated the following:

> In many foreign legal systems, there are rules on liability in damages of those who improperly interfere with the contractual relationship of others and thereby cause pure economic loss to one of the contracting parties (*cf*. e.g. Christian von Bar, The Common European Law of Torts, vol. 1, (1998) 2003 p. 39 *et seq*. and 324 *et seq*., Koziol (ed), Unification of Tort Law: Wrongfulness, 1998, case 2, Lord Wedderburn in Clerk & LindselI on Torts, 18th edition, 2000 p. 1255 *et seq.*, Gomard, Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold, 1958 p. 56 *et seq.*, Saxén, Tort Law, 1975 p. 74 *et seq*. and Hagstrøm, Obligasjonsrett, 2003 p. 816 *et seq*.).[18]

After this review of the comparative law literature, the Swedish Supreme Court again turned its attention to Swedish law and stated:

[15] In the lower courts, two additional grounds were asserted: a front man ground and an identification ground. These were not asserted in the Swedish Supreme Court and are therefore not addressed here.

[16] NJA 2005 p. 608, at p. 639.

[17] NJA 2005 p. 608, at p. 639. The authors mentioned were, in turn, *Kleineman*, *Karlgren*, *Bernitz* and *Gorton*, and *Sjöman*.

[18] NJA 2005 p. 608, at p. 640.

> Under Swedish law, a party to a contract who suffers damage as a result of the other party's breach of contract must, as a general rule, turn to the other party in order to obtain compensation for his damage. That does not prevent Swedish law from providing, at least in particularly serious cases, for liability in damages in the case of a third party who interferes in a qualifiedly improper manner in the contractual relations of others, so that one of the parties to the contract takes unlawful measures to the detriment of the other party.[19]

This was followed by the Swedish Supreme Court's presentation of the background to the case, which in turn was followed by a longer review of the facts considered to have been clarified in the Court of Appeal's reasons for its judgment. From these, the following concluding assessment can be highlighted:

> The facts that the Court of Appeal has found established in the case mean that Frasses has acted in collusion with Lotsbåten when Max has been fraudulently induced to enter into an agreement that Max would not have entered into if Max had known of Lotsbåten's and Frasses' intentions. The fraud has been perpetuated by actions in breach of the terms of the contract which have led to Frasses gaining control of Max's premises and being able to operate a hamburger restaurant there to Max's detriment. Nothing has emerged in the case to suggest that competition law considerations would make Frasses' behaviour justifiable. On the contrary, it appears to be qualifiedly unfair; as the Court of Appeal has stated, Frasses' behaviour constitutes a clear departure from what must be required of a commercial operator. The case is so serious that Frasses should be ordered to compensate Max for the damage caused to Max by its behaviour.
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> In light of the foregoing, the question referred in the order granting permission to appeal must be answered in the affirmative. There are no grounds for granting permission to appeal in respect of the remainder of the case.[20]

By virtue of this conclusion, the legal concept of 'inducement to breach of obligation' was thus expressly established in Swedish law.

2.4 Some concluding remarks

In terms of substantive law, with case NJA 2005 p. 608, it can be stated that the legal concept of "inducement to breach of obligation" was expressly established in Swedish law. Here, however, the comparative aspects are important, and in the early 2000s a great deal had already happened. Con-

[19] NJA 2005 p. 608, at p. 640.
[20] NJA 2005 p. 608, at p. 640 *et seq*.

versations between lawyers from different legal systems had increased and some literature had already been published. For this comparative law material to be utilised, it requires someone to pass on the knowledge and then also a willing recipient. In this case, the recipient was not the legislator but, rather, the courts.

According to *Bernitz*, the information on foreign law and the content of studies presented in the field was an "important contributing factor" to the outcome of the case.[21] However, it is also important to note in this context that the Swedish Supreme Court's reasoning is largely reminiscent of *Karlgren's* earlier statements, which of course makes the solution more in line with Swedish law through domestic statements already made, rather than explicitly basing the solution on foreign law.[22] This is an important aspect in this context.[23]

Case NJA 2005 p. 608 has not only been recognised in the Swedish literature,[24] but has also found its way back to the DCFR project.[25]

[21] Bernitz, supra n. 11, at p. 628: "An important contributing factor to the Swedish Supreme Court choosing the line it did has certainly been the information presented in the case on the meaning of foreign law and the content of studies presented on the issue of harmonisation of European law of obligations."

[22] The quote is reproduced in NJA 2005 p. 608 (634) and in Bernitz, supra n. 11, at p. 626 (original source Karlgren, Hjalmar, Kollegium i allmän obligationsrätt I (Anteckningar efter professor Hj. Karlgrens föreläsningar, genomsedda och kompletterade av föreläsaren, utg. av Juridiska Föreningen i Lund) 1959 p. 13):

> 'However, in special circumstances, such as where the behaviour has, according to the common perception in society, appeared to be distinctly unfair – there is, for example, an intentional contribution by a third party in this form to the debtor's breach of contract ("collusion") – liability in damages on the part of the third party may not be excluded.'

[23] See briefly in relation thereto in Section 4 below.

[24] Alongside Bernitz, reference must be made to Håkan Andersson. He drew attention to the case early on in a commentary in Pointlex.se. He has later dealt with the case in detail in his book, *Ansvarsproblem i skadeståndsrätten – Skadeståndsrättsliga utvecklingslinjer*: Bok 1, Uppsala 2013 p. 273 *et seq*.

[25] Bar, supra n. 5 (*Non-Contractual Liability Arising Out of Damage Caused to Another*) p. 548 (illustration 4). The text belongs to VI – 2:211: Loss upon inducement of non-performance of obligation. In German, reference can also be made to Sandstedt, Johan, *Verleitung zum Vertragsbruch in Schweden*, Part 1, Versicherungsrecht Beilage Auslandsinformation 2007 p. 25 and Part 2 p. 44.

3. Example 2: implicit external influence through jurisprudence – NJA 2006 p. 206

3.1 The legal context

Example 2, based on the Swedish Supreme Court's judgment in case NJA 2006 p. 206, could more implicitly be said to concern unjust enrichment in a family law context. You get married and you get divorced – and in the latter case the court can decide which of the former spouses has a so-called right of residency,[26] i.e. the right to remain in the home until the division of property takes place, Chapter 14, Section 7, paragraph 1, item 1 of the Swedish Marriage Code (1987:230) (MC).[27] The provision states that the court, at the request of a party, may 'decide which of the spouses shall have the right to continue to live in the spouses' joint home, but for no longer than the time until the division of property has taken place'. The obvious corollary in this divorce situation – the parties are probably often at loggerheads – is whether the person who is allowed to continue to live there should pay compensation for the use of the property if the other person owns at least some of it or is a tenant. However, there is no explicit rule governing compensation for use.

As regards cohabitees, the issue may also arise when the cohabitation relationship ends. In relation to the termination of the cohabitation relationship, the right of residency arises in two different legal situations:

(1) In connection with the question of *the right to take over* (i.e. when division of property is not relevant) and in this case, there is a rule governing compensation for the use in cases where the party to whom the right of residence is granted does not have any tenancy or tenant-owner's right, see Sections 16 and 22 of the Cohabitees Act from 1987,[28] and Sections 22 and 31 of the Cohabitees Act from 2003[29]. The rule applies only to tenancies and tenant-owner rights.
(2) In connection with the *division of property*, but without a rule on compensation for use where the party to whom the right of residency is granted does not own the dwelling or have any tenancy or tenant-owner's right,

[26] The older term continued right of occupancy is also often used. Here, the term used by the Swedish Supreme Court in NJA 2006 p. 206 is used.

[27] The rule was carried over from Chapter 14, Section 11, paragraph 2 of the Swedish Marriage Code (1920:405). That provision was relevant in the older decision in NJA 1968 p. 197, which will be discussed below. The MC entered into force on 1 January 1988.

[28] The Swedish Cohabitees Act (1987:232), in force from 1 January 1988 until 1 July 2003.

[29] The Swedish Cohabitees Act (2003:376), in force since 1 July 2003.

see Sections 5 and 21 of the 1987 Act, and Sections 8 and 28(1) of the 2003 Act.

In case NJA 2006 p. 206, the issue of compensation linked to item (2) was raised.

The legal context also includes the Swedish Supreme Court's judgment NJA 1968 p. 197, which was decided under the MC's predecessor, the former Swedish Marriage Code.

In case NJA 1968 p. 197, the husband (claimant) was the sole owner of the property, to which the wife (defendant) was granted a right of residence.[30] He sued his former spouse and claimed compensation for her use. The claimant asserted that he should have been entitled to the proceeds of his matrimonial property (hence he had suffered a loss); in the alternative he argued that she would be unjustly enriched if she were to enjoy the proceeds without paying any compensation therefor. The defendant contested the action and asserted that there was no legal basis to award compensation and that there was no unjust enrichment. The District Court agreed with the defendant. There was no legal basis for an obligation to pay compensation. The action was dismissed. The Court of Appeal also dismissed the claimant's action. It is worth noting the Court's view of the claimant's alterative ground, namely that it was a matter of "damages due to the rules governing unjust enrichment".[31]

[30] It is clear from the case file that he owned two thirds of it himself. The last third he held with a free right of disposition. In case NJA 2006 p. 206, at p. 211 it was vaguely stated that the villa property belonged to him.

[31] Instead of treating unjust enrichment as something separate, it becomes a vague part of tort law, but then also with the tort law requirement of negligence. It is probably more common, however, to overlook a possible unjust enrichment argument and instead rely on tort law. NJA 1993 p. 13 is a clear example. In that case, a former subtenant had remained in the premises and used them without payment. The property owner tried to base the liability for compensation on damages for pure economic loss following the commission of a crime (see above in Section 2). There was no crime in this context, and the Swedish Supreme Court allowed the parties to argue the question of whether liability could exist in the absence of a criminal offence. The Swedish Supreme Court found that there was liability, but without explicitly mentioning unjust enrichment. However, the term unjust enrichment was used in the case register. Later, in case NJA 2007 p. 519, the Swedish Supreme Court interpreted its earlier decision and stated that "[t]he decision may be assumed to have been based primarily on general principles of patrimonial law concerning unjust enrichment". The aforesaid has now been mentioned in several contexts, see, e.g. Schultz, Mårten, *Hur skapas en allmän princip? Exemplet obehörig vinst*, in Lindskog, Stefan/Andersson, André/Calissendorff, Axel/Sluijs, Jessika van der (Eds.), Festskrift till Jan Kleineman, Jure 2021 p. 737, at p. 754 *et seq*.

> It is evident from the Swedish Supreme Court's judgment that the claimant had requested compensation for the use; however, the legal grounds for the request for relief were vague in the case summary. The Swedish Supreme Court stated the following regarding the legal aspects of the case:
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> 'An order under Chapter 15, Section 11, paragraph 2 [of the former Swedish Marriage Code] on the right of one spouse to remain in the home is generally of a temporary nature, since the division of property usually occurs without a long delay. In such cases, the order cannot be considered to create an obligation on the resident spouse to compensate the other spouse for the right to use a dwelling which he or she has acquired. On the other hand, where the order is made for an unusually long period of time, such an obligation to pay compensation may, depending on the circumstances of the particular case, be considered.'
>
> In the light of the above, the Swedish Supreme Court concluded that the obligation to pay compensation should arise from the date of the division of property, in this case less than a year after the separation judgment.

The important points in case NJA 1968 p. 197 are: (1) that it concerned a married couple; (2) that the spouse who was not allowed to remain in the property was the sole owner; (3) that the Swedish Supreme Court – based on the statement that the right to reside is normally of a temporary nature – stated that there is normally no obligation to pay compensation; but (4) that exceptions could be made in the event of a longer period of time and taking into account the circumstances of the particular case; and (5) that unjust enrichment terminology was used in the lower courts, but not by the Swedish Supreme Court. In the case in question, the obligation to pay compensation arose after less than a year in connection with the division of property.

Case NJA 1983 p. 255 must also be mentioned. The husband was the sole owner of the property, the wife was granted the right to reside and moved out of the property after seven months in connection with the divorce judgment. The District Court dismissed the husband's action, the Court of Appeal confirmed the District Court's assessment and the Swedish Supreme Court in turn upheld the Court of Appeal's judgment.[32] Consequently, seven months' residence did not give rise to any liability for compensation.[33]

[32] The fact that the Swedish Supreme Court only affirmed the Court of Appeal's judgment is perhaps the explanation for the fact that the 1983 case is only mentioned parenthetically by the Swedish Supreme Court in case NJA 2006 p. 206.

[33] The cases mentioned above are also recognised by Schultz, supra n. 31, at p. 756 *et seq*. The theme and the 1968 and 2006 cases are also dealt with by Walleng, Kajsa, *Att leva*

3.2 Background to the case and the lower courts

The man (claimant) and the woman (defendant) had previously cohabited and had two children. In 1996 they bought a tenant-owner's association apartment and in July 1998 they separated. On 22 July 1998, the defendant was granted the right to reside in the property with the claimant's consent. During the separation, the parties also disputed the dwelling, but the Swedish Supreme Court ruled in case NJA 2002 p. 3 that they were joint owners.

The claimant sued the defendant and claimed compensation for her use of the property from and including August 1999, i.e. one year after the separation, which corresponded to the time when a division of property should normally have been finalised.[34] The defendant contested the action arguing, *inter alia*, that there was no legal basis to award compensation after the end of the cohabitation relationship. The District Court upheld the claimant's action. The Court of Appeal's report also stated that the defendant questioned whether the judgments in cases NJA 1968 p. 197 and NJA 1983 p. 255 on family law were relevant in this case, since the cohabitation legislation was applicable, and the parties were co-owners. The Court of Appeal considered that these judgments could be extended to include cohabitation. The claimant's action was granted.

3.3 The Swedish Supreme Court's solution

After presenting the background, the Swedish Supreme Court, with *Håstad* as the reporting judge, stated the following:

> The case concerns the issue of whether there is an obligation for [the defendant] to pay compensation to [the claimant] for the use of the jointly owned tenant-owned apartment and – if so – what amount [the defendant] should be ordered to pay to [the claimant]. [The defendant] has not raised any objection *per se* to the date from which [the claimant] has claimed compensation, i.e. from 1 August 1999, which means approximately one year after the separation.[35]

The Swedish Supreme Court then addressed the applicable law – the Swedish Cohabitees Act from 1987 was applicable – but found that none of the

som sambo – En civilrättslig studie av det rättsliga skyddet för sambor och om det är i takt med sin tid, Iustus 2015 p. 213 *et seq*.

[34] The request for relief thus followed the Swedish Supreme Court's judgment in case NJA 1968 p. 197.

[35] Case NJA 2006 p. 206, at p. 210.

cohabitation statutes nor the MC had any compensation provision governing the present case. The Swedish Supreme Court noted that there was, however, case law on divorce. The 1983 case was only mentioned parenthetically.

The Swedish Supreme Court then examined the relationship between the rules governing marriage and cohabitation:

> To the extent that, as in the case of the right of residence, legislation has been introduced for cohabitants, the intention is that this should be similar to the regulation that exists for spouses in corresponding respects (see Government Bill 1986/87:1, pages 41 and 102). Accordingly, the same principles should apply to spouses and cohabitants as regards the obligation to pay compensation for the use of the other party's home from the time of separation until the division of property.

The Swedish Supreme Court then addressed the rule on compensation for use in the takeover case in Section 24 of the Swedish Cohabitees Act from 1987 (Section 31, paragraph 1 of the Swedish Cohabitees Act from 2003), before moving on to case NJA 1968 p. 197 and stating in connection therewith that the provision contained in the Swedish Cohabitees Act now mentioned should not prevent an obligation to pay compensation in this case as well.

In conclusion, the Swedish Supreme Court addressed the possible economic significance of the right of residence in order to arrive at the following *obiter dictum*, which is important in the context of this article:

> It is questionable whether it is appropriate to apply the law in such a way that, as in case NJA 1968 p. 197, the obligation to neutralise the economic effects of continued residence by paying compensation to the other party does not arise until the time of the division of property, even when the division of property is not carried out until one year after the separation. Reasons may be advanced in favour of limiting the period of non-payment to a few months or even of the principle that the person who continues to live in the other party's home should compensate the other for the use thereof from the date of separation, in both cases, of course, provided that the parties do not agree otherwise.[36]

The quote was also followed by a statement relevant to the specific case, with a view to the procedural framework:

[36] Case NJA 2006 p. 206, at p. 211 *et seq*.

> However, in view of the way in which [the claimant] has formulated his claim for compensation, there is no reason to take a position on the issue at hand.[37]

The preamble of the case can present the conclusion:

> A cohabitant who, after separation, has continued to live in a tenant-owned apartment shared with the other party in accordance with a court order, has been ordered to pay the other party compensation for the use.

In this judgment, I and a few other people – including the case's reporting judge – find traces of thoughts which may relate to the concept of unjust enrichment.[38]

3.4 Some concluding remarks

Regardless of whether the marriage or cohabitation relationship is dissolved and of whether the party who is required to move out is the sole owner of the property or whether they are joint owners, there is an obligation to pay compensation for the use of the property; the compensation is obviously affected by the ownership situation.

From when compensation is to be paid is now not entirely certain. In case NJA 1968 p. 197, the Swedish Supreme Court decided on the time for division of property, which took place after less than a year, and unfortunately the claimant claimed compensation in accordance with that judgment, while a unanimous Swedish Supreme Court was clearly in favour of a payment obligation arising earlier. It has been argued in academic literature that the Swedish Supreme Court can only deviate from case NJA 1968 p. 197 through a plenary judgment.[39] The question is whether this is really necessary. An older and a more recent judgment stand against each other. If the current Swedish Supreme Court agrees with the Swedish Supreme Court's statements in the more recent judgment, i.e. in NJA 2006 p. 206, a plenary session is not required, Chapter 3, Section 6, paragraph 2 of the Swedish Code of Judicial Procedure (1942:740).

It should be recalled that the solution was not supported by statute in both cases. That in itself could support an argument that the legislation in

[37] Case NJA 2006 p. 206, at p. 212.

[38] References in the next section.

[39] See Walleng, supra n. 33 p. 214, which in the note refers to Chapter 3, Section 6 of the Swedish Code of Judicial Procedure.

this area is exhaustive and that there is therefore no obligation to pay compensation. This was also argued in both case NJA 1968 p. 197 and case NJA 2006 p. 206. The above also explains why the Swedish Supreme Court stated that the rule governing compensation for use in section 24 of the Swedish Cohabitees Act from 1987 (Section 31, paragraph 1 of the Swedish Cohabitees Act from 2003) did not prevent an obligation to pay compensation in this unregulated case.[40]

From a comparative law perspective, it must be pointed out that the reception here was implicit. It seems likely to me that the DCFR work and the associated discussions influenced the case's reporting judge and that these thoughts thus found their way into the Swedish Supreme Court. The entire department was behind the statements *obiter dicta*; it was not about an addition as some form of personal reflection. It should also be noted that the term unjust enrichment was not used. Had it been, I am not sure that *Håstad* would have received the support of his colleagues. That such thoughts were involved is evident from *Håstad's* contribution to the discussion at the Nordic Lawyers' Meeting two years later:

> Furthermore, we have case NJA 2006 p. 206. According to previous case law, the cohabitant who, after the dissolution of the cohabitation, had the greatest need of the common home was allowed to use it until the time of the division of property without having to pay compensation to the other party for its use. This principle was no longer accepted except for a short transitional period.
>
> In the cases mentioned above, the remuneration was thus determined on the basis of a reasonable (market) consideration, not on the basis of the profit realised.[41]

It is clear from the statement that the compensation is not determined on the basis of a profit, but at a reasonable consideration.

[40] Case NJA 1968 p. 197 and the statements in the preparatory works that cohabitation law should be similar to that which applies in marriage law were of course also important for this statement.

[41] Håstad, Torgny, *Kommentar till "Uberettiget berikelse (obehörig vinst) som grunnlag for betalingskrav"*, NJM 2008, vol. II, Copenhagen 2010 p. 440, at p. 442. However, he does not mention the case in his article *Obehörig vinst som allmän rättsgrundsats i svensk rättspraxis*, in Iversen, Torsten/Edlund, Hans Henrik/Karstoft, Susanne/Liin, Birgit (Eds.), Festskrift til Palle Bo Madsen, Copenhagen 2021 p. 195 *et seq*. The case is also discussed in an 'unjust enrichment' context by Schultz, supra n. 31, p. 756 *et seq*. For my own part, I would only add that the implicit is easily overlooked.

4. Some final words from the comparative law workshop floor

The article is about external influence through jurisprudence. In the two examples, the addressees of this influence have been the courts, not the legislature. Some key words in these contexts are *legal transplants*,[42] *reception* and as part of reception also *path dependence*. The literature is extensive.[43]

In the two examples in this article, it has been a matter of external influence through jurisprudence; in the explicit case, it was a matter of clear influence from the outside through expert opinions, which made the assumed Swedish legal position appear particularly odd in an international comparison; in the implicit case, it was instead a matter of influence from the inside, in this case from the case's reporting judge in the Swedish Supreme Court and completely without references to what could be the case in a number of foreign legal systems.

The reception was packaged in familiar terms and in the explicit example in accordance with what had already been stated in the Swedish doctrinal works. In the implicit example, the solution was not packaged in unjust enrichment terminology, because that would hardly have facilitated the reception of the idea in Swedish law. The foreign idea must fit in with the recipient, and each legal system has its own history on which further development is based. We speak of *path dependence*. The foreign idea must be brought into line with the receiving legal system, both in terms of its historical background and in terms of legal culture and systems. The older generation's *path dependence* includes *Jan Hellner's* scepticism towards unjust enrichment.[44] Avoiding the terminology was thus wise. The implicit example

[42] The term legal transplant is today associated with *Alan Watson* (see Watson, Alan, *Legal Transplants: an approach to comparative law*, Edinburgh 1974), although other names could also be mentioned (*cf.* e.g. Cairns, John W., *Watson, Walton, and the History of Legal Transplants*, Georgia Journal of International & Comparative law (vol. 41), 2013 p. 637, at p. 665 *et seq*.) which mentions, *inter alia*, the then critic *Otto Kahn-Freund*), today also the vocal critic *Pierre Legrand* (see Legrand, Pierre, *The Impossibility of "Legal Transplants"*, Maastricht Journal of European and Comparative Law (vol. 4) 1997 p. 111 *et seq*.

[43] Here, a reference to Fedtke, Jörg, *Legal Transplants*, in Smits, Jan (Ed.), Elgar Encyclopedia of Comparative Law, 2nd ed., Edward Elgar Publishing Ltd., 2012 p. 550 *et seq*. and Graziadei, Michele, *Comparative Law, Transplants, and Receptions*, in Reimann, Mathias/Zimmermann, Reinhard (Eds.), The Oxford Handbook of Comparative Law, 2nd ed., Oxford University Press 2019 p. 442 *et seq*. with numerous references will suffice.

[44] See, e.g. Hellner, Jan, *Om obehörig vinst – särskilt utanför kontraktsförhållanden*, Almqvist & Wiksell 1950 p. 393: 'The explanation for the fact that in Swedish doctrinal works

also fits well with *Fedtke's* statements that '[l]egal transplants are more often than not difficult to identify' and that such '"undercover" transplants avoid criticism in the borrowing system', because they are not seen as an imposition of foreign ideas.[45] This is perhaps illustrated by the fact that several authors do not seem to have linked the implicit case to 'unjust enrichment'.[46]

Since the founding of the SCCL, much has happened in the field of *comparative law*. In 1998, the English translation of the last edition of the standard work on comparative law by *Zweigert* and *Kötz* was published.[47] The functional method – whatever its content – was considered by many at the time to be synonymous with comparative law.[48] Since then, we have moved from a monopoly of methods to a diversity of methods and theories.

Swedish patrimonial law has also developed during this time. External influences such as the DCFR project, but perhaps above all Europeanisation in general, are important contributing factors. Fundamental issues of patrimonial law – for a long time perhaps regarded as settled – are being addressed again. Unjust enrichment is one such theme.[49] Other issues that have been discussed more fundamentally in the 21st century include loyalty and abuse of rights.[50] Today's depictions often reach a more abstract level of principle. We also speak more clearly of a general patrimonial law and general prin-

and case law the terminology of profit has not been used is probably mainly that Swedish law has been so far freed from constructions in general and has been geared to finding practical solutions. The fact that Swedish courts have not used the terminology unjust enrichment to a greater extent must often be regarded as a pure advantage.'

45 Fedtke, supra n. 43, p. 552.

46 It is not mentioned in Ingvarsson, Torbjörn, Obehörig vinst, Uppsala 2024. Walleng, supra n. 33 p. 267 stated the following: 'The principle [=unjust enrichment] has not yet been tested in a family law context.'

47 Zweigert, Konrad/Kötz, Hein, *An Introduction to Comparative Law* (translation by Tony Weir), 3rd ed., Oxford University Press 1998.

48 Two supports in the literature (of many): Michaels, Ralf, *The functional Method of Comparative Law*, in Reimann, Mathias/Zimmermann, Reinhard (Eds.), The Oxford Handbook of Comparative Law, 2nd edition, Oxford University Press 2019 p. 345 *et seq*. Husa, Jaakko, *Traditional Methods*, in Siems, Mathias/Yap, Po Jen (Eds.), The Cambridge Handbook of Comparative Law, Cambridge 2024 p. 15 *et seq*., at p. 15: 'Comparative law has changed during the last two decades as it has grown out of its traditional theoretical, methodological and geographical boundaries'.

49 See, most recently, Ingvarsson, supra n. 46. See presentation of Swedish literature on p. 3 *et seq*. with note 8. See also Schultz, supra n. 31, at p. 737 *et seq*. with note 1 with presentation of Swedish literature. Much of the literature has been added during the 2000s, which indicates a growing interest.

50 See, e.g. Munukka, Jori, *Kontraktuell lojalitetsplikt*, Jure, 2007, which is only one of several treatises dealing with loyalty. For abuse of rights, see most recently Östberg, Jessica/

ciples of patrimonial law or the law of obligations. From there, the step is not far to deductions from these principles, and that would be a break with the older, more down-to-earth and inductive approach. Areas of law that may previously have been regarded as exhaustively regulated and thus *sui generis* may turn out to have a connection with the general patrimonial law. Construction law is one example and tenancy law another.[51] At the same time, the wind does not blow unambiguously in one direction. As far as unjust enrichment is concerned, it can be mentioned that the Swedish Supreme Court in case NJA 2019 p. 23 (*Den betalande sambon*) dismissed a claim for compensation based on the legal basis of unjust enrichment. Developments will continue, but we do not know in which direction. There is much more to discuss, but unfortunately not in this article.

Almlöf, Hanna, *Om rättsmissbruk i aktiebolagsrätten*, Parts I and II, SvJT 2024 p. 83 *et seq*. and 167 *et seq*.

[51] For tenancy law, reference can be made to recent Swedish Supreme Court judgments in which the general patrimonial law has been relevant in tenancy law disputes, see NJA 2022 p. 82 (*Lägenheten på Karlaplan*) and NJA 2023 p. 738 (*Lägenheten i Jämjö*). See also the latest judgment from the Swedish Supreme Court in NJA 2024 p. 657 (*Kylbaffeln*), where the Swedish Supreme Court held that a duty to provide notice of complaint did not apply in tenancy relationships. In this case, general patrimonial law (or contract law) had to take a back seat in view of the special features of tenancy law. Or so it might seem prima facie.