Helsinki Law Review

2009

Helsinki Law Review is published and edited by Finnish undergraduate law students. Its primary purpose is to provide Finnish law students with a forum for practicing their skills in academic writing and assessment as well as an opportunity to follow and participate in the work of their peers and seniors.

Helsinki Law Review is supervised by an Academic Council that consists of a number of senior academic staff members in the Faculty of Law. Each article is evaluated anonymously by a referee chosen among academic professionals in different Finnish Universities. A referee evaluating an article written by an undegraduate student is advised of the author's background.

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Articles in Finnish

Articles in English

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In co-operation with:

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Articles in Finnish

Articles in English

An English Abstract is provided in the beginning of each article.

On the Review

Helsinki Law Review is published and edited by Finnish undergraduate law students. Its primary purpose is to provide Finnish law students with a forum for practicing their skills in academic writing and assessment as well as an opportunity to follow and participate in the work of their peers and seniors.

The *Review* is currently planned to be published twice a year. The *Review* is prepared to publish articles and other contributions in Finnish, Swedish and English. English Abstracts are provided for content not fully written in English. At the present, the Review is not available for subscription, and printed copies are distributed for free.

Helsinki Law Review is supervised and counselled by an Academic Council that consists of a number of senior academic staff members in the University of Helsinki Faculty of Law. Each article is evaluated anonymously by a referee chosen among academic professionals in different Finnish Universities. A referee evaluating an article written by an undegraduate student is advised of the author's background.

The *Review* may be cited as *Hel. L. Rev*.

From the Editors

As the first undergraduate-staffed law review in Finland, *Helsinki Law Review* seeks to encompass contributions from all branches of law. Again we can be proud of the variety of articles in this issue of the *Review*. Even with limited visibility, we received submissions from three different universities and the topics ranged from competition law reform in Finland to a scholarly assessment of a recent Finnish Supreme Court decision. All our articles can now be found from our recently launched website at www.helsinkilawreview.fi.

It is our intention that the *Review* will not only serve as a forum for all law students and scholars who are interested in practicing their skills in academic writing but that it will also form an integral part of the legal education at the University of Helsinki. Once again, we are grateful to the many people who made this possible: the referees who remain anonymous but yet find the time to give constructive critique, the writers who patiently revise their papers under tight deadlines and especially the Faculty members and the people at law firm Dittmar & Indrenius, our sponsor, who have encouraged and had faith in us from the very beginning of the *Review*. The Editors truly appreciate this help.

Finally, we encourage all students and scholars to keep sending their submissions to us. As always, we look forward to reading them.

Antti Salonen
Editor-in-chief

Helsinki Law Review 2009 p. 5–23

Case Comment: KKO 2008:24 (Finnish Supreme Court)

Ida-Sofia Mäki

English Abstract

The member states of the European Convention on Human Rights (the Convention) are engaged to guarantee the fundamental rights and freedoms specified in the Convention. If the European Court of Human Rights (ECHR, the Court) finds a violation of the Convention, it nevertheless cannot change the final domestic judgment, as the judgments of the Court are simply declaratory in nature. The reversal of a final domestic judgment based on a violation of the Convention is therefore exclusively a matter for the member state to decide.

In the case KKO 2008:24, the Finnish Supreme Court had to decide whether the final judgment of a Court of Appeal should be reversed based on a violation of Article 10 of the Convention, i.e., the freedom of speech. In the case, the Court of Appeal had convicted a journalist of libel and fined her. The journalist then appealed for the criminal judgment to be reversed on the grounds that according to the ECHR, she had exercised her freedom of speech. The Supreme Court, however, rejected the journalist´s appeal.

Unlike in many other member states of the Convention, in Finland there are no specific rules in the law about a reversal of a final judgment based on a violation affirmed by the ECHR. Thus in the case KKO 2008:24, the Supreme Court had to apply the rules of extraordinary channels of appeal regulated in Chapter 31 of the Finnish Code of Judicial Procedure. Based on the provision of a reversal to the benefit of the defendant in a criminal case, the Supreme Court had to take a stand on whether the violation of the Convention was to be regarded as a fact that had not been presented previously or if the domestic judgment was manifestly based on misapplication of the law.

The Supreme Court came to the conclusion that the violation of the Convention should be held as a misapplication of the law. It did not, however, regard the misapplication of the law so manifest that the final domestic judgment should

have been reversed. It stated that over six years had passed since the judgment of the Court of Appeal had become final until the journalist made her application of reversal. In addition, the Supreme Court regarded the compensation permitted by the ECHR to be sufficient and that the crime itself and the sanction thereof were minor. Overall, the Supreme Court considered the validity of the domestic judgment very important.

In my opinion, the reasoning of the Supreme Court was not very convincing. First of all, it gave no acceptable reason as to why the violation of the Convention should not be regarded as a fact not presented previously. What is worse, the Supreme Court did not grasp the meaning of the previous case law of the ECHR in cases concerning freedom of speech and thus failed in its obligation to interpret domestic legislation in a manner compatible with the Convention. It is also important to notice that the person convicted was a professional journalist. Generally speaking, the ECHR has considered journalists as having a very important role in a democratic society as public watchdogs. Finally, the case was also about reversing a criminal judgment to the benefit of the defendant, a case where the existing domestic provisions are usually interpreted in a flexible way. This is based on the fundamental rule that people not shown guilty should not be convicted either.

As a conclusion, I find the current situation in Finland unclear due to the case KKO 2008:24. Thus, a specific rule in regard to a violation of the Convention is needed as it would at least clarify the current situation and end continuous speculation with the provisions regulating the reversal of judgments. As an example of how to form such an article, we could learn from the Norwegian regulation.

Full Article in Finnish

Tuomion purkaminen rikosasiassa – ihmisoikeuslouk-kaus – KKO 2008:24

Hakusanat: tuomionpurku, rikosprosessi, ihmisoikeudet

1 Aluksi

Euroopan ihmisoikeussopimuksen (EIS) osapuolina olevat valtiot ovat sitoutuneet takaamaan jokaiselle lainkäyttövaltaansa kuuluvalle sopimuksessa määritellyt oikeudet ja vapaudet. Mikäli yksilö kokee jonkin jäsenvaltion

loukanneen näitä oikeuksiaan, voi hän viedä asiansa Euroopan ihmisoikeustuomioistuimeen (EIT). Edellytyksenä valituksen tutkittavaksi ottamiselle kuitenkin on, että valittaja on ensin turvautunut kaikkiin tehokkaina pidettäviin kansallisiin valituskeinoihin. Asian vieminen EIT:een on siis vasta kaikkein viimesijaisin oikeussuojakeino. Tästä huolimatta EIT ei kuitenkaan ole mikään varsinainen muutoksenhakuelin (”neljäs oikeusaste”) eikä edes ylimääräinen muutoksenhakukeino siinä mielessä, että se voisi purkaa, poistaa tai muuttaa kansallisen tuomioistuimen antaman tuomion, vaan nämä toimenpiteet kuuluvat aina kunkin jäsenvaltion omaan harkintaan. Lähtökohtaisesti EIT:n lopulliset päätökset ovat siis ns. vahvistustuomioita, joissa yksinkertaisesti todetaan, onko sopimusta rikottu. Lisäksi EIT voi tarvittaessa myöntää loukatulle osapuolelle kohtuulliseksi katsomansa hyvityksen.[1]

Lainvoimaisen kansallisen tuomion uudelleenkäsittely on kuitenkin Euroopan neuvoston (EN) ministerikomitean eli EIT:n tuomioiden täytäntöönpanoa valvovan elimen taholta nähty siinä määrin tärkeänä, että se antoi vuonna 2000 asiasta suosituksen No. R (2000)2.[2] Suosituksessa kehotetaan jäsenvaltioita varmistamaan lainsäädännöllään mahdollisuus kansallisen tuomion muuttamiseen EIT:n antaman ratkaisun perusteella. Euroopan neuvoston tekemän selvityksen[3] mukaan useissa jäsenvaltioissa EIT:n langettava ratkaisu onkin säädetty nimenomaiseksi perusteeksi asian ottamiselle uuteen käsittelyyn kansallisessa tuomioistuimessa. Myös ilman erityistä säännöstä on lainvoimaisen kansallisen tuomion purkaminen ainakin rikosasioissa katsottu suurimmassa osassa jäsenvaltioita mahdolliseksi.[4]

1 Pellonpää 2005, s. 131–133, 193–196; Virolainen – Pölönen 2003, s. 69–70.

2 EN:n ministerikomitean suositus No. R (2000)2. Committee of Ministers´ recommendation R (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, hyväksytty 19.1.2000.

3 EN:n selvitys DH-PR (99) 10. Draft survey of existing legislation and case-law. Reopening of proceedings before domestic courts following findings of violation by the European Court of Human Rights.

4 EN:n vuonna 1999 tekemän selvityksen mukaan nimenomainen säännös yksilön oikeudesta saada asiansa uudelleen käsitellyksi EIT:n toteaman sopimusrikkomuksen perusteella on Itävallassa, Norjassa, Saksassa, Bulgariassa, Kroatiassa, Puolassa, Luxemburgissa, Sloveniassa, Sveitsissä, Venäjällä ja Espanjassa. Myös Turkissa on vuonna 2003 tullut voimaan laki, jolla ihmisoikeussopimusta loukkaava rikostuomio voidaan purkaa ja käynnistää uusi prosessi edellyttäen, että purkua haetaan vuoden kuluessa EIT:n tuomiosta. Pellonpää 2005, s. 196. EN:n selvityksen mukaan ainoastaan neljässä maassa eli Kyproksella, Italiassa, Liechtensteinissa ja Alankomaissa ei asian uudelleenkäsittely ollut mahdollista edes rikosasioissa.

Suomen lainsäädäntöön ei sisälly nimenomaisia määräyksiä lainvoimaiseen tuomioon puuttumisesta EIT:n toteaman ihmisoikeusloukkauksen perusteella. Oikeudenkäymiskaaren (OK, 1734/4) 31 luvun ylimääräistä muutoksenhakua koskevien kantelu- ja purkuperusteiden[5] on kuitenkin tulkittu soveltuvan myös tällaisiin tilanteisiin.[6] Esimerkiksi tapauksessa 1998:33 korkein oikeus vahvisti, että EIT:n tuomio voi toimia purkuperusteena. Sen sijaan tapauksessa KKO 2008:24 korkein oikeus omaksui päinvastaisen kannan. Tämän perusteella ei siis voida päätellä, että kotimainen ratkaisu olisi aina automaattisesti purettavissa EIT:n toteaman sopimusloukkauksen johdosta, vaan asia on harkittava itsenäisesti kunkin tapauksen olosuhteiden valossa[7]. Tapauksen KKO 2008:24 lopputuloksesta voidaan kuitenkin perustellusti olla toistakin mieltä, joten on nimittäin aiheellista kysyä, onko oikein, että EIT:n toteaman sopimusloukkauksen jälkeen valtionsisäinen rikostuomio kaikesta huolimatta jää lainvoimaiseksi.

2 Tapauksen KKO 2008:24 pääpiirteet

Tapauksessa KKO 2008:24 Vaasan hovioikeus tuomitsi toimittaja X:n 26.5.1999 potilasturvallisuutta käsittelevien lehtiartikkelien kirjoittamisen perusteella vastoin parempaa tietoa tehdystä herjauksesta sakkorangaistukseen. Korkein oikeus epäsi X:ltä valitusluvan ja hovioikeuden tuomio jäi lainvoimaiseksi. X valitti hovioikeuden tuomiosta EIT:een, joka tuomiossaan 16.11.2004 totesi, että X:n tuomitseminen oli tapahtunut riittämättömin perustein ja että rikosoikeudenkäynti X:ää vastaan oli merkinnyt val-

5 Kantelun ja purun rajanveto perustuu menettelyllisten ja aineellisten virheiden erottelulle: kantelu kohdistuu oikeudenkäynnissä tapahtuneisiin menettelyllisiin virheisiin, kun taas purussa on kyse tuomiossa esiintyvien asiavirheiden korjaamisesta. Käytännössä kantelu- ja purkuperusteiden soveltamisalojen rajat voivat kuitenkin olla epäselvät ja ne voivat osittain peittää toisensa (ks. esim. KKO 1997:14). Välimaa 1998, s. 162–164.

6 Myöskään Ruotsin lainsäädäntöön ei sisälly nimenomaisia säännöksiä kansalliseen lainvoimaiseen tuomioon puuttumisesta EIT:n toteaman sopimusloukkauksen perusteella, vaan tällainen tilanne voidaan ratkaista ainoastaan ylimääräisten muutoksenhakukeinojen (Rättegångsbalken 1942/740, 58–59 luvut) avulla. Ylimääräisen muutoksenhaun järjestelmä Suomessa vastaa pitkälti Ruotsin vastaavaa järjestelmää, sillä ylimääräisiä muutoksenhakukeinojamme uudistettaessa 50 vuotta sitten katse suunnattiin nimenomaan Ruotsiin, ks. Välimaa 1998, s. 126. Ks. ylimääräisistä muutoksenhakukeinoista Ruotsissa Welamson 1994, s. 191–259.

7 Ks. myös Pellonpää 2005, s. 199; Virolainen – Pölönen 2003, s. 70.

tion puuttumista EIS:n 10 artiklassa turvattuun sananvapauteen.[8] Sopimusloukkauksen toteamisen lisäksi EIT määräsi Suomen valtion maksamaan X:lle korvausta taloudellisesta vahingosta X:n maksamien sakkojen ja kulukorvausten osalta sekä X:lle itselleen aiheutuneista oikeudenkäyntikuluista. Näiden lisäksi valtio velvoitettiin maksamaan X:lle korvausta hovioikeuden tuomion aiheuttamasta henkisestä kärsimyksestä.[9]

X vei asian tämän jälkeen korkeimpaan oikeuteen vaatien hovioikeuden tuomion purkamista EIT:n langettavan tuomion perusteella.[10] KKO sovelsi tapaukseen OK 31 luvun 8 §:ää, jossa säädetään lainvoimaisen rikostuomion purkamisesta syytetyn eduksi. Pykälässä mainittujen purkuperusteiden nojalla KKO:n oli ensin pohdittava, oliko EIT:n langettava tuomio miellettävissä sen 3 kohdan mukaiseksi *uudeksi seikaksi* vai oliko kyse 4 kohdassa tarkoitetusta *ilmeisen väärästä lain soveltamisesta*. KKO päätyi soveltamaan jälkimmäistä, mutta painotti kuitenkin, että hovioikeuden tuomion lainvoimaiseksi tulosta aina purkuhakemuksen tekemiseen saakka oli kulunut yli kuusi vuotta. KKO katsoi myös, että hovioikeuden tuomion vaikutukset olivat tosiasiassa jo poistuneet EIT:n myöntämän rahallisen korvauksen perusteella, eikä X:n myöskään voitu hänen syykseen luetun rikoksen tai siitä tuomitun rangaistuksen laatu huomioon ottaen katsoa enää kärsivän kielteisiä seurauksia hovioikeuden tuomion johdosta. Näillä perusteilla KKO totesi, ettei tapauksessa ollut sellaisia lain edellyttämiä painavia perusteluita, joiden johdosta lainvoiman saanut tuomio olisi tullut purkaa ja hylkäsi X:n hakemuksen.

8 Kyseessä on EIT:n tapaus *Selistö v. Suomi* (16.11.2004). Tapauksessa EIT katsoi äänin 6–1, että EIS 10 artiklaa oli rikottu. Vähemmistöön jääneen tuomarin *Sir Nicolas Bratzan* (joka toimi myös jutussa puheenjohtajana) mukaan kotimaiset tuomioistuimet eivät olleet ylittäneet valtiolle kuuluvaa harkintamarginaalia. Tapausta on oikeuskirjallisuudessa kommentoinut esim. Viljanen, LM 4/2005, s. 636–650.

9 Suomen valtion oli maksettava X:lle korvausta taloudellisesta vahingosta 3.500 euroa, henkisestä kärsimyksestä 5.000 euroa ja oikeudenkäyntikuluista 23.000 euroa.

10 Mainittakoon, että herjausrikosasiassa asianomistajana ollut A kuoli prosessin kestäessä ja tuomionpurkuasiassa vastineen antoi hänen kuolinpesänsä.

3 Lainvoimaisen tuomion purkaminen syytetyn eduksi

3.1 Tuomion lainvoimasta ja lainvoimaisen tuomion purkamisesta

Korkeimman oikeuden tapauksessa KKO 2008:24 on siis kyse hovioikeuden lainvoimaisen rikostuomion osoittautumisesta asiallisesti vääräksi EIT:n langettavan tuomion johdosta ja tällaisen ihmisoikeussopimuksen vastaisen tuomion purkamisesta syytetyn eduksi OK 31 luvun 8 §:n nojalla. Perinteisesti kysymys lainvoimaisen tuomion purkamisesta on jäsennetty yhtäältä oikeusrauhan ja oikeusvarmuuden, ja toisaalta aineellisen totuuden ja oikean laintulkinnan väliseksi ristiriidaksi. Koska lainkäyttö perustuu inhimilliseen toimintaan, on olemassa vaara siitä, että lainvoimainenkin tuomio voi myöhemmin osoittautua vääräksi. Tällaiset lainkäytössä tapahtuneet virheet voidaan korjata viime kädessä tuomionpurkujärjestelmän avulla. Purkua harkittaessa on kuitenkin otettava huomioon, että kyseessä on ylimääräinen muutoksenhakukeino, jota on tarkoitus käyttää vain hyvin poikkeuksellisesti ja suppea-alaisesti. Siten vain erittäin tärkeät syyt voivat oikeuttaa lainvoimaiseen tuomioon puuttumisen.[11]

Toisaalta nimenomaan syytetyn eduksi tapahtuvan tuomion purkamisen on yleensä katsottu olevan hyvinkin laajalti mahdollista.[12] Esimerkiksi tapauksessa KKO 2000:127 korkein oikeus tulkitsi OK 31:8:n 3 kohdassa säädettyä purkuperustetta eli uutta seikkaa joustavasti syytetyn eduksi ottamalla huomioon seuraamusjärjestelmämme kehittymisen ja muuttumisen monipuolisemmaksi. Yleisesti ottaen tällaisen syytetylle edullisen laintulkinnan taustalla voidaan nähdä rikosasioissa vanhastaan noudatettu pyrkimys aineelliseen totuuteen. Sen mukaisesti rikosprosessissa on pyrittävä välttämään ns. oikeusmurhia eli tapauksia, joissa syytön tuomitaan rangaistukseen. Väärät syyksi lukevat tuomiot ovat omiaan järkyttämään paitsi yksilön oikeusturvaa myös yleistä oikeustajua erittäin vakavasti. Tästä syystä lainvoimaisen tuomion purkamista syytetyn eduksi voidaan hakea määräaikojen estämättä.[13]

11 HE 14/1958, s. 1; Rautio 2007, s. 1015; Välimaa 1998, s. 124–126.
12 Rautio 2007, s. 1039; Välimaa 1998, s. 126.
13 HE 14/1958, s. 5; Virolainen – Pölönen 2003, s. 171, 212–213.

Myös edellä mainitussa Euroopan neuvoston ministerikomitean suosituksessa sekä sitä selventävässä muistiossa[14] on painotettu kansallisen lainvoimaisen tuomion uudelleen käsittelyn tärkeyttä nimenomaan rikosasioissa. Suosituksen mukaan asian uudelleen tutkiminen jäsenvaltiossa on osoittautunut tehokkaimmaksi keinoksi hakijan aikaisemman aseman palauttamiseksi erityisesti silloin, kun ihmisoikeustuomioistuimen tuomiosta voidaan päätellä, että kansallinen tuomio on ollut asiaratkaisultaan ihmisoikeussopimuksen vastainen. Nimenomaisena esimerkkinä tästä muistiossa mainitaan tapaukset, joissa kansallisessa tuomioistuimessa rikollisiksi luonnehditut lausumat ovat EIS 10 artiklassa turvatun sananvapauden ilmentymiä. Kyseinen esimerkki soveltuu siis suoraan nyt käsillä olevaan tapaukseen.

Tapauksessa korkein oikeus otti kuitenkin selkeästi lähtökohdakseen, että lainvoiman saaneet tuomiot on tarkoitettu pysyviksi ja että niihin voidaan puuttua vain poikkeuksellisesti laissa tarkoin määritellyin painavin perustein. Seuraavassa näitä korkeimman oikeuden esille tuomia purkuperusteita eli uutta seikkaa ja ilmeisen väärää lain soveltamista tarkastellaan lähemmin. Hallituksen esityksessä 9/2005 sekä muutoksenhakutoimikunnan jatkomietinnössä 2002:8 esitetyn kannan mukaisesti kyseiset purkuperusteet on katsottu riittäviksi myös EIT:n mukanaan tuomia tilanteita silmällä pitäen[15]. Käytännössä ne eivät kuitenkaan ongelmitta sovellu tällaisiin tilanteisiin, vaikka purkuperusteita tulkittaisiin hyvinkin joustavasti. *Ihmisoikeusystävällisen laintulkinnan* nimissä tällaista joustavaa tulkintaa voidaan lainkäyttäjältä toisaalta edellyttää.

3.2 Uusi seikka purkuperusteena

Uudesta seikasta purkuperusteena syytetyn eduksi säädetään OK 31:8:n 3 kohdassa[16], jonka mukaan lainvoiman saanut tuomio voidaan purkaa, jos

14 Euroopan neuvoston ministerikomitean suositusta No. R (2000)2 selventävä muistio. Explanatory memorandum on the Committee of Ministers´Recommendation No. R (2000)2 on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights.

15 KM 2002:8, s. 28 ja s. 70; HE 9/2005, s. 25–26.

16 OK 31:8 3 kohta kuuluu kokonaisuudessaan: ”lainvoiman saanut tuomio rikosasiassa voidaan syytetyn eduksi purkaa, jos vedotaan seikkaan tai todisteeseen, jota ei aikaisemmin ole esitetty, ja sen esittäminen todennäköisesti olisi johtanut syytetyn vapauttamiseen tai siihen, että rikokseen olisi ollut sovellettava lievempiä rangaistussäännöksiä, tahi on erittäin painavia syitä, katsoen siihen mihin näin vedotaan ja mitä muutoin käy ilmi, saattaa uudelleen tutkittavaksi kysymys, onko syytetty tehnyt sen rikollisen teon, joka on luettu hänen syykseen.”

vedotaan sellaiseen *seikkaan, jota ei ole aiemmin esitetty, ja sen esittäminen olisi todennäköisesti johtanut syytetyn vapauttamiseen*[17]. Tässä yhteydessä seikalla tarkoitetaan välittömästi relevanttia tosiseikkaa eli oikeustosiseikkaa. Kysymyksessä on siis empiirisen maailman tosiasia, jolla on jutussa oikeudellista merkitystä. Tällöin uutena seikkana syytetyn eduksi voidaan pitää myös aikaisempaa oikeusvoimaista tuomiota, jos tuon tuomion esittäminen jälkimmäisessä lainvoimaiseen tuomioon päättyneessä jutussa olisi johtanut toisenlaiseen lopputulokseen.[18]

Tapauksessa KKO 2008:24 korkeimman oikeuden mielestä ihmisoikeustuomioistuimen tuomiota ei voitu pitää OK 31:8:n 3 kohdan tarkoittamana uutena seikkana. Tähän korkeimman oikeuden enemmistö päätyi yksinkertaisesti toteamalla, että ”on vakiintuneesti katsottu, ettei uusi tuomio ole OK 31:8:n 3 kohdan tarkoittama uusi seikka.” Asia ei kuitenkaan ole aivan näin yksiselitteinen. On kyllä totta, että yleensä uusi myöhemmin annettu tuomio eli ns. jälkisattumus ei voi toimia purkuperusteena[19]. Näin on todettu ainakin korkeimman oikeuden tapauksessa KKO 1998:30, jossa lainvoimaisen tuomion *jälkeen* annettua toista tuomiota ei voitu pitää lain tarkoittamana uutena seikkana. Tapauksessa oli kuitenkin kyse myöhemmin *toisessa* jutussa annetusta tuomiosta, joka ei millään tavoin liittynyt samaan asianosaiseen tai samaan asiaan[20]. *Lappalainen* onkin tapausta kommentoidessaan asianmukaisesti todennut, etteivät jälkikäteiset analogiat myöhempiin ratkaisuihin voi horjuttaa lainvoimaista tuomiota; jos tällainen purkuperuste hyväksyttäisiin, jouduttaisiin mitä ilmeisimmin laajaan purkuhakemusten tulvaan.[21]

Mikäli uusi tuomio sen sijaan liittyy välittömästi *samaan asiaan*, ei voida yhtyä korkeimman oikeuden näkemykseen vakiintuneesta tulkinnasta. Tältä osin voidaan viitata paitsi oikeuskirjallisuudessa esitettyyn[22] kantaan, myös

17 Ruotsissa RB 58:2:n 4 kohta on identtinen OK 31:8 3 kohdan kanssa. Uudesta seikasta purkuperusteena Ruotsissa ks. Welamson 1994, s. 217–230.
18 Välimaa 1998, s. 141–142.
19 Rautio 2007, s. 1043; Välimaa 1998, s. 142.
20 Tapauksessa KKO 1998:30 purun hakija, joka oli lainvoimaisella tuomiolla tuomittu rangaistukseen, vetosi tuomion purkamiseksi siihen, että KKO oli toisessa vastaavanlaisessa jutussa arvioinut näyttöä toisin kuin viimeiseksi oikeusasteeksi jäänyt hovioikeus hänen omassa jutussaan ja vapauttanut syytetyn.
21 Lappalainen 1998, s. 192.
22 Määttä 2008, s. 3; Rautio 2007, s. 1043; Välimaa 1998, s. 142.

korkeimman oikeuden aikaisempaan ratkaisuun KKO 2006:3, jossa tuomio purettiin syytetyn eduksi, kun aiemmin puretulla tuomiolla oli merkitystä toisessakin asiassa. Tapauksessa A oli vuonna 1997 tuomittu rangaistukseen törkeästä veropetoksesta. Vuonna 2004 A puolestaan tuomittiin rangaistukseen velallisen epärehellisyydestä, kun hänen oli katsottu veropetosjutussa annetun tuomion jälkeen hävittäneen omaisuutensa ja aiheuttaneen maksukyvyttömyytensä. Myöhemmin korkein oikeus purki vuonna 1997 annetun tuomion. Tämän jälkeen korkein oikeus joutui pohtimaan, tuliko myös vuonna 2004 annettu velallisen epärehellisyyttä koskeva tuomio purkaa. Perusteluissaan korkein oikeus totesi, että koska A:n ei ollut katsottu syyllistyneen törkeään veropetokseen, ei hänen myöskään voitu katsoa syyllistyneen velallisen epärehellisyyteen. A oli siis syytön siihen rikokseen, josta hänet oli tuomittu. Tämän vuoksi myös myöhempi tuomio oli syytetyn eduksi purettava. Purku toteutettiin OK 31:8:n 3 kohdan perusteella.

On myös syytä huomata, että tapauksessa KKO 2008:24 esittelijä olisi ollut valmis pitämään EIT:n tuomiota uutena seikkana. Perusteluissaan esittelijä onkin aiheellisesti todennut, ettei tässä tapauksessa ole kysymys sellaisesta tuomioistuimen *toisessa asiassa* antamasta tuomiosta, jota ei perinteisesti ole katsottu OK 31:8:n 3 kohdan tarkoittamaksi uudeksi seikaksi. Muutoinkaan esittelijä ei nähnyt mitään estettä tämän lainkohdan soveltamiselle. Myös korkeimman oikeuden presidentti, silloinen oikeusneuvos *Pauliine Koskelo* on muutoksenhakutoimikunnan mietinnössä vuonna 2002 KKO:n nimissä katsonut, että tapauksissa, joissa toimivaltainen kansainvälinen elin on todennut tuomioistuimen ratkaisun sisältävän ihmisoikeusloukkauksen, voidaan purkuhakemus tutkia uuteen seikkaan perustuvana[23]. Tämän valossa korkeimman oikeuden näkemykset uuden seikan merkityksestä purkuperusteena näyttävät vaihtelevan.

Oikeuskirjallisuudessa käsillä olevaa tapausta ovat kommentoineet sekä *Turunen* että *Määttä*. Turunen on katsonut, että korkein oikeus on oikeassa nimenomaan siinä, että varsinkaan myöhempää tuomiota ei mielletä uudeksi seikaksi prosessioikeuden terminologiassa.[24] Edellä esiintuotujen seikkojen perusteella on kuitenkin selvää, ettei *Turusen* näkemykseen voida varauksit-

23 KM 2002:8, s. 122.
24 Turunen 2008, s. 194.

ta yhtyä. *Määttä* sen sijaan on todennut, että EIT:n *samassa asiassa* antamaa tuomiota ja siinä vahvistettua tosiseikkaa (eli ihmisoikeusloukkausta, josta seuraa, että syytettyä ei olisi tullut tuomita) olisi perustellusti voitu pitää OK 31:8:n 3 kohdan tarkoittamana uutena seikkana.[25] Tältä osin *Määttä* viittaa jo aiemmin mainittuun korkeimman oikeuden tapaukseen KKO 2000:127, jossa uuden seikan laventavaa tulkintaa pidettiin suotavana, koska kyse oli nimenomaan syytetyn eduksi tapahtuvasta tuomion purkamisesta. *Määtän* näkemys on aiheellinen. Yleisesti ottaen EIT:n langettava tuomio on mielestäni kuitenkin turhan hankalasti sovitettavissa 3 kohdan tarkoittamaksi uudeksi seikaksi. Korkeimman oikeuden tavoin olenkin taipuvaisempi pitämään EIT:n langettavaa tuomiota ennemmin OK 31:8:n 4 kohdan mukaisena ilmeisen vääränä lain soveltamisena. Näin siitä syystä, että kyseinen lainkohta on uuteen seikkaan verrattuna jokseenkin luontevampi ja selkeämpi purkuperuste. Kuten seuraavasta kuitenkin ilmenee, ei OK 31:8:n 4 kohtakaan aivan ongelmitta sovellu nyt käsillä olevan tapauksen kaltaisiin tilanteisiin.

3.3 Ilmeisen väärä lain soveltaminen purkuperusteena

Tuomion purusta syytetyn eduksi *ilmeisen väärän lain soveltamisen* perusteella säädetään OK 31:8:n 4 kohdassa[26]. Kun EIS on Suomessa voimassa laintasoisena, on selvää, että sopimuksen määräysten vastaisesti annettu tuomio perustuu väärään *lain* soveltamiseen. Eri asia sen sijaan on, onko virheellinen lain soveltaminen ollut niin *ilmeistä*, että purkamisen edellytykset ovat olemassa. Kynnys on perinteisesti ollut hyvin korkealla. Riittävää ei ole, että lain soveltaminen on ollut väärää, vaan sen tulee olla ollut *ilmiselvästi* väärää. Siten OK 31:8:n 4 kohdan on vakiintuneesti katsottu soveltuvan vain tilanteisiin, joissa mitään tulkinnanvaraisuutta ei voi esiintyä. Jos tuomitsemiseen liittyy harkinnanvaraisuutta ja laissa tarjotaan useita ratkaisuvaihtoehtoja, ei purkuperustetta voida soveltaa.[27]

25 Määttä 2008, s. 3.
26 Ruotsissa vastaava säännös on RB 58:2:n 5 kohdassa, jonka mukaan ”Sedan en dom i brottmål vunnit laga kraft, får resning beviljas till förmån för den tilltalade, om den rättstillämpning, som ligger till grund för domen, uppenbart strider mot lag.” Ks. ilmeisen väärästä lain soveltamisesta purkuperusteena Ruotsissa Welamson 1994, s. 230–234.
27 Rautio 2007, s. 1045–1046; Välimaa 1998, s. 147–149.

Tapauksessa korkein oikeus siis päätyi soveltamaan OK 31:8:n 4 kohtaa, tätä mieltä olivat sekä korkeimman oikeuden enemmistö että vähemmistöön jäänyt oikeusneuvos. Purkuhakemus kuitenkin hylättiin, koska enemmistö katsoi, ettei lain soveltaminen tässä tapauksessa ollut *ilmeisen* väärää. Tätä kantaansa enemmistö perusteli sillä, ettei OK 31:8:n 4 kohdan nojalla ollut tapana purkaa ratkaisuja, joihin tuomioistuin oli päätynyt sille kuuluvan harkintavallan rajoissa. Tapauksessa hovioikeus ja ihmisoikeustuomioistuin olivat punninneet vastakkain kahta eri perusoikeutta eli toimittajan sananvapautta ja kirjoittelun kohteena olleen henkilön yksityisyyden suojaan kuuluvaa oikeutta maineensa loukkaamattomuuteen. Toisaalta korkeimman oikeuden enemmistö totesi, että koska EIT:n ratkaisut olivat Suomea sitovia, tuli ne ottaa huomioon harkittaessa tuomion purkamisen mahdollisuutta OK 31:8:n 4 kohdan nojalla. Kyseisen purkuperusteen soveltamisen katsottiin siis olevan mahdollista, kun lain oikea sisältö täsmentyy EIT:n ratkaisulla, ja kun tuomion purkamisen edellytykset muuten täyttyvät.

Korkeimman oikeuden ratkaisu ei sinänsä ole yllättävä, koska ilmeisen väärän laintulkinnan kynnys on perinteisesti ollut korkea. Vähemmistöön jäänyt oikeusneuvos, esittelijä sekä oikeuskirjallisuudessa *Turunen* ovat kuitenkin perustellusti tarkastelleet tapausta nimenomaan *ihmisoikeusystävällisestä* näkökulmasta. *Turusen* mukaan EIS ei ole rinnastettavissa tavalliseen kansalliseen lainsäädäntöön, vaikka sopimus onkin Suomessa voimassa tavallisen lain tasoisena. Myöskään EIS:n loukkausta ei ole syytä rinnastaa tavallisen, Suomessa säädetyn lain loukkaukseen, kuten korkeimman oikeuden enemmistö on tapauksessa tehnyt. EIS asettaa yksittäisen ihmisen oikeuksille vähimmäistason, jolloin ihmisoikeusloukkaus merkitsee yksilön oikeusaseman perustaan kohdistuvaa merkittävää loukkausta. Kansallisen tuomioistuimen virheellistä lain soveltamista olisi tällöin pidettävä vähintäänkin selvänä tai ainakin erityisen haitallisena, mikä tulisi ottaa huomioon arvioitaessa ilmeisen väärän lain soveltamisen kriteerin täyttymistä. Näin tulisi tehdä myös silloin, kun kyse on punnintatilanteesta.[28]

On myös otettava huomioon, että kansallisen tuomioistuimen on EIS:n lisäksi tunnettava sen pohjalta syntynyt vakiintunut oikeuskäytäntö, sillä lainkäyttäjä on velvollinen noudattamaan myös EIT:n ratkaisuista ilmeneviä

28 Turunen 2008, s. 194.

oikeusohjeita[29]. Tapauksessa korkein oikeus ei kuitenkaan ottanut lainkaan kantaa siihen, mikä merkitys EIT:n aikaisemmille samantyyppistä tulkintatilannetta koskeville ratkaisuille oli annettava. Näin ei aikoinaan tehnyt myöskään hovioikeus. EIT:n langettavasta tuomiosta ilmenee kuitenkin selvä yhteys sen antamiin aikaisempiin ratkaisuihin[30], joita tutkimalla sopimusloukkaus tuntuu itse asiassa hyvinkin loogiselta ja ennakoitavalta[31]. Yleisesti ottaen EIT on muutoinkin pitänyt sananvapautta yhtenä demokraattisen yhteiskunnan peruspilareista, jolloin se on korostanut joukkoviestinten ja toimittajien laajaa oikeutta levittää tietoja ja mielipiteitä sallien jopa tiettyyn liioitteluun ja provokaatioon turvautumisen[32]. Ratkaisu on siis EIT:n vakiintuneen oikeuskäytännön mukainen, eikä lain oikea sisältö voinut täsmentyä vasta EIT:n antamalla ratkaisulla, kuten korkeimman oikeuden enemmistö asian ilmaisi. Tapauksessa lain soveltaminen oli nähdäkseni *ilmeisen* väärää.

Lopuksi on vielä syytä viitata korkeimman oikeuden tapaukseen KKO 1998:33, jossa EIS:n määräysten vastainen tuomio purettiin OK 31:8:n 4 kohdan nojalla. Tapauksessa purkuperusteena vedottiin EIT:n ratkaisuun, jossa hovioikeuden tuomion todettiin loukanneen siinä annettujen salassapitomääräysten osalta EIS 8 artiklaa.[33] Mielenkiintoista ratkaisussa on erityisesti se, että hovioikeuden tuomion antohetkellä kotimaisen säännöksen sinänsä oikea soveltaminen oli korkeimman oikeuden mukaan EIT:n ratkaisun valossa kuitenkin objektiivisesti ilmeisesti väärää. Näin siitäkin huolimatta, että tapauksessa EIT:n ratkaisukäytäntö oli siinä määrin avointa, että EIT:n myöhempi ratkaisu oli huomattavasti vaikeammin ennakoitavissa kuin tapauksessa KKO 2008:24. Toinen mielenkiintoinen seikka on, ettei tapauksessa ollut kyse tuomion purkamisesta syytetyn vaan rikosasian todistajan eduksi. Kaiken kaikkiaan korkein oikeus siis tulkitsi OK 31:8:n 4

29 Pellonpää 2005, s. 61–62.
30 Tuomiossaan EIT viittasi kaikkiaan 12 aikaisemmin antamaansa tuomioon, joita olivat mm. *Thorgeir Thorgeirson v. Islanti* (25.6.1992), *Jersild v. Tanska* (23.9.1994), *Prager and Oberschlick v. Itävalta* (26.4.1995), *Fressoz and Roire v. Ranska* (21.1.1999), *De Haes and Gisels v. Belgia* (24.2.1997) ja *Bladet Tromso and Stensaas v. Norja* (20.5.1999).
31 Näin on todennut *Viljanen* EIT:n tapausta kommentoidessaan. Viljanen 2005, s. 643.
32 Tiilikka 2007, s. 175.
33 Tapauksessa KKO 1998:33 rikosasian todistajan yksityiselämästä tietoja sisältävät oikeudenkäyntikirjat olisivat tulleet julkisiksi hovioikeuden määräämän 10 vuoden salassapitoajan jälkeen, minkä EIT katsoi rikkovan EIS 8 artiklaa tapauksessa *Z. v. Suomi* (25.2.1997). KKO purki HO:n salassapitomääräyksen ja määräsi oikeudenkäyntiaineiston salassa pidettäväksi 40 vuodeksi.

kohtaa hyvinkin joustavasti, mutta toisaalta ihmisoikeusystävällisen laintulkinnan nimissä aivan oikein.[34]

4 KKO:n hylkäävään ratkaisuun johtaneista perusteluista

Korkeimman oikeuden enemmistö perusteli purkuhakemuksen hylkäävää kantaansa useilla eri seikoilla, joiden mukaisesti X:n *purkuintressiä* ei voitu pitää riittävänä. Enemmistö toisin sanoen katsoi, että hovioikeuden tuomion vaikutukset olivat tosiasiassa jo poistuneet, ja ettei tuomion purulla ollut X:lle enää mitään käytännön merkitystä. Näin oli ensinnäkin siitä syystä, että hovioikeuden tuomion lainvoimaiseksi tulosta aina purkuhakemuksen tekemiseen saakka oli kulunut yli kuusi vuotta. Purkuhakemuksen tekemiselle syytetyn eduksi ei ole kuitenkaan laissamme säädetty mitään määräaikaa. Vanhassa hallituksen esityksessä tätä perustellaan nimenomaan sillä, että syytetyn vahingoksi annettu väärä tuomio on paitsi yksilön oikeusturvan myös julkisen edun kannalta erityisen vahingollinen, minkä vuoksi väärä tuomio on voitava purkaa pitkänkin ajan kuluttua[35]. Tässä tapauksessa X on hovioikeuden tuomion jälkeen vienyt asiansa EIT:een, missä asian käsittely on vienyt vuosia. X itse ei ole voinut vaikuttaa siihen, miten kauan hänen asiansa käsittelyssä menee aikaa. Ajan kuluminen sinänsä ei voi tarkoittaa sitä, etteikö X:llä edelleen olisi ollut intressi saada EIT:n toteaman sopimusloukkauksen vastainen kansallinen tuomio puretuksi. Ajan kulumista ei siten voida pitää X:n purkuintressiä heikentävänä tekijänä.

Toiseksi, korkeimman oikeuden enemmistö totesi perusteluissaan, että X:n saama rahallinen korvaus käytännössä poisti tuomion taloudelliset vaikutukset ja lisäksi X sai vielä rahallista hyvitystä hovioikeuden tuomion aiheuttamasta henkisestä kärsimyksestä. Enemmistö siis katsoi, ettei hovioikeuden väärästä tuomiosta voinut enää olla haittaa X:lle, koska häntä oli jo hyvitetty rahallisesti. Yleisesti ottaen on tietysti totta, että rahallisella korvauksella yksilö voidaan palauttaa ainakin siihen taloudelliseen asemaan, jossa hän oli ennen ihmisoikeusloukkausta. Tässäkin tapauksessa on luonnollisesti otettava huomioon X:n saamat korvaukset, jotka todennäköisesti ovat lieventä-

34 Tapausta on oikeuskirjallisuudessa kommentoinut esim. Leppänen, KKO:n ratkaisut kommentein I 1998, s. 208–210.
35 HE 14/1958, s. 1 ja 5.

neet hovioikeuden tuomiosta aiheutuneita haitallisia seuraamuksia. EIT:n myöntämä rahallinen korvaus ja kysymys kansallisen rikostuomion purkamisesta eivät kuitenkaan ole samaistettavissa toisiinsa. Myönnetty korvaus ei nimittäin ole muuttanut sitä tosiasiaa, että valtionsisäisellä tuomiolla X:n todetaan edelleen syyllistyneen herjaukseen. X ei siis vieläkään ole siinä asemassa, missä hän oli ennen kansallista rikosoikeudenkäyntiä. Ainoastaan tuomionpurulla tilanne olisi voitu palauttaa entiselleen.

Kolmanneksi, korkeimman oikeuden enemmistö kiinnitti huomiota siihen, ettei X:n hänen syykseen luetun rikoksen (herjaus) tai siitä tuomitun rangaistuksen laatu (sakko) huomioon ottaen voitu enää katsoa kärsivän kielteisiä seurauksia hovioikeuden tuomion johdosta. Vähemmistöön jäänyt oikeusneuvos otti sen sijaan aiheellisesti huomioon, että X tuomittiin rikoksesta rangaistukseen hänen *ammatinharjoittamiseensa* liittyvässä asiassa. Onkin muistettava, että X on ammatiltaan toimittaja, jonka nimenomaisena yhteiskunnallisena tehtävänä on välittää kansalaisille tietoa, paljastaa epäkohtia ja herättää keskustelua. Vastaavasti kansalaisilla on oikeus vastaanottaa tällaisia tietoja ja mielipiteitä. Kaiken kaikkiaan toimittajalla on siis tärkeä rooli demokraattisessa yhteiskunnassa.[36] Tämän valossa on selvää, että syyllistyminen herjaukseen on toimittajille vakavampi asia kuin mitä se olisi muille henkilöille. Myöskään se seikka, että X on tuomittu herjauksesta vain sakkorangaistukseen, ei voi olla tuomion purkamisen esteenä. Syytetylle rikostuomiolla on nimittäin usein merkitystä muutoinkin kuin vain välittömästi virallisten seuraamusten kautta. Rikoksesta voi aiheutua myös ns. epävirallisia seuraamuksia, joita ovat esimerkiksi työpaikan ja ansion menetys, rikoksen saama julkisuus sekä ystävien ja työtovereiden rikoksen johdosta osoittama paheksunta. Joskus tällaiset epäviralliset seuraamukset saattavat olla syytetylle huomattavastikin merkittävämpiä kuin itse viralliset seuraamukset.[37] Tässä tapauksessa juuri nämä epäviralliset seuraamukset ovat epäilemättä keskeisessä asemassa, onhan herjaustuomiolla kyseenalaistettu X:n ammatillinen osaaminen.

Neljänneksi, korkeimman oikeuden enemmistö totesi, ettei tuomion purkua voitu pitää tarpeellisena siitäkään syystä, että ihmisoikeustuomioistui-

36 Tiilikka 2007, s. 175.
37 Lappi-Seppälä 2002, s. 187–188.

men tuomio ja siinä todettu ihmisoikeusloukkaus olivat tulleet Suomessa yleiseen tietoon. Tälle seikalle ei nähdäkseni voida antaa juuri minkäänlaista painoarvoa. Olennaista sen sijaan olisi ollut, että ihmisoikeusloukkaus olisi todettu kansallisella tasolla virallisesti. Yleisestä tietoisuudesta huolimatta rikostuomion purkamisella olisi nimittäin ollut merkitystä X:lle itselleen pelkästään symbolisessakin mielessä[38]. Tavallisesti hakijan purkuintressille ei olekaan langettavan rikostuomion osalta asetettu kovin ankaria vaatimuksia[39]. Tältä osin voidaan viitata korkeimman oikeuden mielenkiintoiseen, vaikkakin jo vanhaan tapaukseen KKO 1956 II 78. Siinä tuomio purettiin, vaikka hakija oli ennen purkupäätöksen antamista jo kuollut. Tästä huolimatta merkitystä annettiin hakijan maineen puhdistamiselle ja rikoksentekijän leiman poistamiselle.[40] Tällaiset seikat olisi pitänyt ottaa huomioon myös X:n tapauksessa – olihan kyse sentään ihmisoikeusloukkauksesta.

5 Lopuksi

Kirjoituksen alussa esitettiin kysymys, onko oikein, että EIT:n toteaman sopimusrikkomuksen jälkeen valtionsisäinen rikostuomio kaikesta huolimatta jää lainvoimaiseksi. Kaiken edellä sanotun perusteella on selvää, että pidän tällaista tilannetta purunhakijan kannalta erittäin epäoikeudenmukaisena ja kohtuuttomana. On tietysti totta, että mitään nimenomaista velvoitetta tuomion purkamiselle EIT:n toteaman ihmisoikeusloukkauksen perusteella ei ole asetettu, vaan kansallisen tuomion purkaminen on harkittava itsenäisesti kunkin tapauksen olosuhteiden valossa. Tapauksessa KKO 2008:24 kansallinen rikostuomio olisi kuitenkin tullut purkaa ottaen huomioon, että kyse oli nimenomaan syytetyn eduksi tapahtuvasta tuomionpurusta, jonka oikeuskäytännössä on yleensä katsottu olevan hyvinkin laajalti mahdollinen. Kaiken rikosprosessuaalisen sääntelyn tavoitteenahan on, että syyttömiä ei tule tuomita[41]. Tapauksessa olisi ollut selvä tilaus ihmisoikeusystävälliselle laintulkinnalle.

Kuten tapauksesta KKO 2008:24 voidaan havaita, vuodelta 1960 peräisin olevat lainvoimaisen tuomion purkamista koskevat säännökset eivät

38 Turunen 2008, s. 194–195.
39 Rautio 2007, s. 1028.
40 Ibid., s. 1028.
41 Näin myös Määttä 2008, s. 4.

aivan vaikeuksitta sovellu EIT:n mukanaan tuomiin tilanteisiin. Hallituksen esityksessä 9/2005 sekä muutoksenhakutoimikunnan jatkomietinnössä 2002:8 esitetyn kannan mukaisesti purkuperusteiden on kuitenkin katsottu soveltuvan riittävästi tällaisiin tilanteisiin[42]. Tämän on todennut myös Euroopan neuvosto vuonna 1999 tekemässään selvityksessä. Siinä Suomen lainsäädännön katsottiin mahdollistavan kansallisen tuomion purkamisen EIT:n langettavan tuomion perusteella, minkä lisäksi korkein oikeus oli tapauksessa KKO 1998:33 myös osoittanut halukkuutensa toimia sen mukaisesti.[43] Tapauksen KKO 2008:24 jälkeen tilanne vaikuttaa kuitenkin mielestäni epämääräiseltä.

Miksi korkein oikeus sitten päätyi kyseessä olevassa tapauksessa hylkäävään ratkaisuun, vaikka se tuomiossaan viittasikin esimerkiksi Euroopan neuvoston ministerikomitean antamaan suositukseen No. R (2000)2 ja siinä esitettyihin näkemyksiin kansallisen lainvoimaisen rikostuomion purkamisen tarpeellisuudesta? Taustalla voi otaksua olevan ajatuksen siitä, ettei kaikkea sitä, mitä EIT ratkaisuissaan pitää oikeana, ole syytä alkaa muuttaa kansallisella tasolla. Tältä osin voidaan nähdäkseni kiinnittää huomiota erityisesti siihen, että tuomionpurun kohteena olevassa rikosasiassa oli kyse kahden ihmisoikeuden välisestä punnintatilanteesta, joka on usein hankala tilanne ratkaista, olipa ratkaisijana sitten suomalainen hovioikeus tai EIT. Selvänä osoituksena tästä on se, ettei asian ratkaiseminen EIT:ssa ollut yksimielinen, vaan äänestysratkaisu 6–1. Tälle seikalle en kuitenkaan antaisi sen suurempaa painoarvoa. Kun Suomi liittyi EIS:een, se samalla sitoutui myös takaamaan sopimuksessa taatut oikeudet ja vapaudet jokaiselle lainkäyttövaltaansa kuuluvalle. Tällöin EIT:n antamaa langettavaa tuomiota on kunnioitettava ja sopimuksessa taattujen oikeuksien ja vapauksien on toteuduttava kansallisella tasolla myös tosiasiallisesti.

42 KM 2002:8, s. 70; HE 9/2005, s. 25–26.

43 EN:n selvitys DH-PR (99) 10, kohta *Finland*. Ruotsin tilannetta ei selvityksessä sen sijaan nähty yhtä hyvänä, vaikka tuomion purkamisen katsottiin EIT:n antaman langettavan tuomion perusteella olevan mahdollista samansisältöisten purkuperusteiden nojalla kuin Suomessa. Ruotsin huonompi tilanne johtui siitä, ettei selvityksen tekemisen aikaan ollut annettu yhtään korkeimman oikeuden päätöstä, jossa tuomio olisi purettu nimenomaisesti EIT:n toteaman sopimusloukkauksen perusteella. EN:n selvitys DH-PR (99) 10, kohta ”Sweden”. Selvityksen jälkeenkään Ruotsissa ei ole purettu yhtään tuomiota EIT:n antaman tuomion perusteella.

Lopuksi on vielä otettava kantaa siihen, tulisiko Suomessa olla nimenomainen säännös EIT:n langettavasta tuomiosta purkuperusteena. Mielestäni tämä olisi järkevää, sillä se selkiyttäisi nykyistä tilannetta huomattavasti ja lopettaisi vanhoilla purkusäännöksillä spekuloinnin.[44] Mallia voitaisiin hakea esimerkiksi Norjan rikosprosessilain 391 §:n 2 (a) kohdasta, jonka mukaan ”Til gunst for siktede kan gjenåpning kreves når en internasjonal domstol eller FNs menneskerettskomité i sak mot Norge har funnet at avgjørelsen er i strid med en folkerettslig regel som Norge er bundet av, og ny behandling må antas å burde føre til en annen avgjørelse”[45]. Tämäntyyppinen säännös ei tietenkään tarkoittaisi sitä, että kansallinen tuomio olisi automaattisesti purettavissa EIT:n langettavan tuomion perusteella. Nimenomaisen pykälän säätäminen olisi kuitenkin omiaan edelleen vahvistamaan ihmisoikeuksien merkitystä ja asemaa Suomessa.

44 Myös esim. Jokela on ollut sitä mieltä, että tällainen purkuperuste olisi aihetta lisätä lakiin, Jokela 2008, s. 779.

45 Norjan rikosprosessilain (Straffeprosessloven Strpl 22.5.1981/no.21) 391 §:n 2(b) kohdassa säädetään puolestaan asian käsittelyssä todetusta menettelyllisestä virheestä: ”Til gunst for siktede kan gjenåpning kreves når en internasjonal domstol eller FNs menneskerettskomité i sak mot Norge har funnet at saksbehandlingen som ligger til grunn for avgjørelsen er i strid med en folkerettslig regel som Norge er bundet av, hvis det er grunn til å anta at saksbehandlingsfeilen kan ha innvirket på avgjørelsens innhold, og gjenåpning er nødvendig for å bøte på den skade som feilen har medført”.

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The New Sanction System of Competition Infringements According to the Finnish Competition Act 2010 Working Group's Proposal – Perspectives for Criminalization

Tuuli Suomela

English Abstract

This article examines the new Competition Act 2010 proposal which has been published on 29 January 2009 and is set to come into force in 2010. This article assesses the arguments the working group has put forward relating to the possible use of criminal sanctions in the new Competition Act. Even though many European countries have implemented criminal sanctions in their competition legislation, it seems that Finland will continue to rely on administrative sanctions in the foreseeable future. The working group does not see criminal sanctions as the solution that prevents infringements of competition law in the future, and argues that administrative sanctions are strict enough for this purpose. Administrative sanctions are also considered a more flexible and procedurally easier option from the point of view of the Finnish legal system. However, there are several arguments supporting the notion that administrative sanctions are too lenient and that profits earned from cartels, for example, exceed them. In these situations, criminal sanctions are the only solution for preventing competition law infringements effectively. The sanction options presented in the proposal are not well argued; the working group does not sufficiently take into account the advantages and disadvantages connected to criminalization, and gives scant explanation for its opinion on the topic. It is therefore clear that different options should be examined more carefully.

Furthermore, this article covers arguments to be taken into account when assessing the possibility of criminal sanctions, such as the need to consider traditional criminalization principles. These principles could provide the needed rationalization for criminalizing competition law infringements in Finland, but the working group has not addressed them. This article promotes the idea that, among others, the ultima ratio principle should be examined in this context in order to determine whether it weighs for or against criminalizing competition law infringements in Finland.

Full Article in Finnish

Kilpailunrajoitusten uusi seuraamusjärjestelmä Kilpailulaki 2010 –työryhmän mietinnössä – näkökulmia kriminalisointimahdollisuuteen

Hakusanat: kilpailuoikeus, rikosoikeudelliset seuraamukset, kriminalisointiperiaatteet

1 Johdanto

Kauppa- ja teollisuusministeriön 13.6.2007 asettaman työryhmän mietintö uudeksi kilpailulaiksi on saatu valmiiksi 31.12.2008 ja luovutettu kilpailuasioista vastaavalle ministerille 29.1.2009. Työryhmä ehdottaa, että nykyinen 1. syyskuuta 1992 voimaan tullut kilpailunrajoituksista annettu laki (480/1992) kumottaisiin ja korvattaisiin uudella kilpailulailla. Perusteluina uudistustarpeelle mainitaan muun muassa lukuisten uudistusten aiheuttama systematiikan heikentyminen, yhteisölainsäädännön kehitys ja kilpailullisen toimintaympäristön muutos.[1]

Mietinnössä käsitellään kilpailulain kolmea osa-aluetta. Ensimmäisessä osassa tarkastellaan menettelyä koskevia säännöksiä, joissa esitetään muutoksia liittyen menettelyn nopeuttamiseen, asiakirjajulkisuuteen sekä Kilpailuviraston tutkintavaltuuksiin. Mietinnön asiakirjajulkisuutta koskevat lausumat ovat mielenkiintoisia, sillä asiakirjajulkisuutta koskevat kysymykset ovat olleet ongelmallisia erityisesti kilpailunrajoitukseen perustuvissa vahingonkorvausprosesseissa, joissa vahinkoa kärsineen elinkeinonharjoittajan on ollut vaikeaa saada riittävää näyttöä kilpailunrajoitukseen osallisen yrityksen syyllisyydestä. Asiakirjajulkisuutta koskevien kysymysten käsittelyyn ei kuitenkaan tässä ole mahdollisuutta.[2] Mietinnön toisessa, seuraamusjärjestelmää koskevassa osassa työryhmä selvittää seuraamusmaksuun liittyviä kysymyksiä, rikosoikeudellisten sanktioiden käyttöönoton mahdollisuutta

1 Työryhmän mietintö, s. 4.

2 Ks. asiasta työryhmän mietintö, s. 30–36 sekä aiheesta muualla mm. Hautamäki 2004 sekä KHO 2002/90, KHO 2006/891 ja KHO 2006/883. Korkein hallinto-oikeus on esimerkiksi päätöksessään *Metsäliitto Osuuskunta v. Kilpailuvirasto, 12.4.2006/883,* ottanut kantaa erityisesti asianosaisten tiedonsaantioikeuden ajankohtaan. Ks. myös komission tiedonanto 2005 C 325/07 sekä OECD:n "Study on the conditions of claims for damages in case of infringement of EC competition rules", ns. Ashurst-raportti, 31. elokuuta 2004.

sekä liiketoimintakieltoa koskevien säännösten soveltumista kilpailunrajoituksiin. Lisäksi vahingonkorvausjärjestelmää ehdotetaan uudistettavaksi siten, että tulevaisuudessa yksityisetkin henkilöt voisivat hakea korvauksia kilpailunrajoituksen johdosta kärsimistään vahingoista kilpailunrajoitukseen osalliselta yritykseltä. Viimeisenä asiakokonaisuutena mietinnössä käsitellään yrityskauppavalvontaa koskevia uudistustarpeita.

Tässä artikkelissa käydään läpi ja kommentoidaan työryhmän näkökantoja nimenomaan rikosoikeudellisten seuraamusten toteuttamismahdollisuuksista uuden kilpailulain järjestelmässä. Kirjoituksessa pyritään tuomaan esille argumentteja, joihin nojautuen kriminalisointia voitaisiin perustella tai vastustaa ja joita lainvalmistelussakin voitaisiin nostaa esille. Työryhmän mietinnössä perustelut käsillä olevassa asiassa on onnistuttu – jos näin voidaan sanoa – puristamaan viiteen sivuun, joissa käydään läpi ulkomaista lainsäädäntöä (Saksa, Ruotsi, Norja, Tanska) ja keskitytään pääasiassa siihen, voisiko tarjouskartelli toteuttaa petoksen tunnusmerkistön. Mietinnössä viitataan vuoden 1992 kilpailunrajoituslain esitöihin (HE 162/1991 vp), joissa rikosoikeudellisten seuraamusten käyttöönottoa on edellisen kerran punnittu. Kuten vuoden 1991 hallituksen esityksessä, nyt käsillä olevassa työryhmän mietinnössä kriminalisoinnin mahdollisuutta käsitellään suppeasti, ja johtopäätelmät seuraamusjärjestelmän pitämisestä hallinnollisten sanktioiden rajoissa jätetään toteamisen varaan. Katsoisin, että asiassa on syytä vielä lähemmin tarkastella eri vaihtoehtoja ja perustella tarkemmin niiden tuottamia etuja ja haittoja Suomen kilpailuoikeusjärjestelmälle.

2 Voimassa oleva lainsäädäntö

Tässä artikkelissa kilpailunrajoituslailla tarkoitetaan voimassa olevaa lakia kilpailunrajoituksista. Kilpailulailla puolestaa tarkoitetaan työryhmämietinnössä säädettäväksi ehdotettua uutta kilpailulakia. Kilpailunrajoituslain 7 §:n mukaan EY:n perustamissopimuksen 81 tai 82 artiklan taikka kilpailunrajoituslain kieltojen rikkomisesta on sanktiona hallinnollinen seuraamusmaksu, *kilpailunrikkomismaksu,* joka lainkohdan 2 momentin mukaan voi olla enintään 10 prosenttia kunkin kilpailunrajoitukseen osallistuvan elinkeinonharjoittajan tai näiden yhteenliittymän edellisen vuoden liikevaihdosta.

Tätä lakia ennen kilpailunrajoitukset oli kriminalisoitu vuoden 1988 kilpailunrajoituslain (709/1988) järjestelmässä. Lain 24.1 §:n mukaan vertikaalisista määrähinnoista ja tarjouskartelleista voitiin tahallisina tekoina tuomita rangaistukseen, jonka asteikko oli sakkoa tai enintään yksi vuosi vankeutta. Lievemmät teot olivat kilpailunrajoitusrikkomuksena rangaistavia (24.2 §).

Nykyisiä talousrikossäännöksiä valmisteltaessa otettu kanta oli, ettei varsinaiselle rikosoikeudelliselle järjestelmälle vaihtoehtoisia rankaisullisia hallinnollisia maksuseuraamuksia kehitetä rikoslakihankkeen osalta.[3] Näin ollen myöhemmin muun muassa kilpailunrajoituksia varten käyttöön otettuja rankaisullisia maksuseuraamuksia ei selvitetty muiden rangaistusten vaihtoehtoina.

Voimassa olevan kilpailunrajoituslain esitöissä (HE 162/1991 vp) perustellaan rikosoikeudellisista seuraamuksista luopumista ja siirtymistä hallinnollisiin seuraamuksiin seuraavasti:

”Rikosoikeudellisia seuraamuksia ei ole pidettävä tehokkaana eikä tarkoituksenmukaisena seuraamuksena kilpailunrajoitusasioissa. Tuomioistuimessa käsitellyt harvat kilpailunrajoitusrikokset ovat johtaneet vain lieviin sakkorangaistuksiin, joilla ei voida katsoa olevan paljoakaan yleisestävää vaikutusta. Lakiin sisältyvien kieltojen rikkomukset voidaan joustavimmin käsitellä hallinnollisessa järjestyksessä sellaisissa viranomaisissa, jotka ovat erikoistuneet kilpailuasioiden käsittelemiseen. Kilpailunrajoituksiin liittyvän taloudellisen tosiseikaston ja elinkeinoelämässä vallitsevien lainalaisuuksien arviointi on ilman erityisasiantuntemusta vaikeaa. Toisaalta kiellettyä kilpailunrajoitusta arvioitaessa on enemmän painoa kiinnitettävä teon elinkeinoelämälle tuottamaan vahinkoon kuin sen tekijän toimenpiteiden subjektiiviseen moitittavuuteen.”[4]

Lainsäädäntöuudistuksen tavoitteena 1990-luvun alussa oli myös lähentää Suomen kilpailulainsäädäntöä EY:n kilpailusääntöihin.[5] Hallituksen esi-

3 Rikoslain talousrikossäännösten ja eräiden näihin liittyvien lakien uudistus 1.4.2003 lukien (HE 53/2002 vp ja LaVM 18/2002). Rikoslain kokonaisuudistuksesta ks. Lahti 2007, s. 4–6.

4 HE 162/1991 vp, s. 4.

5 EY:ssä aihetta koskevat keskeiset säännökset ovat EY:n perustamissopimuksen 81 ja 82 artiklat, vuonna 2002 annettu asetus n:o 1/2003 perustamissopimuksen 81 ja 82 artiklassa vahvistettujen kilpailusääntöjen täytäntöönpanosta (EYVL L1, 4.1.2003), vuonna 2006 annetut täsmentävät suuntaviivat asetuksen n:o 1/2003 artiklan 2 kohdan a) alakohdan mukaisesti määrättävien sakkojen laskennasta (sakkosuuntaviivat, EYVL C210/2, 1.9. 2006) sekä *leniency* –tiedonanto (EYVL C 298/06, 8.12.2006).

tyksen argumentaatiota ei ole katsottu erityisen laajaksi ja kaikenkattavaksi analyysiksi, minkä lisäksi on myös huomattava, että vuoden 1992 siirtyminen hallinnolliseen seuraamusjärjestelmään ei tapahtunut täysin vapaassa sääntelytilanteessa, vaan merkittävää oli se, että EY:n piirissä operoidaan hallinnollisilla maksuseuraamuksilla.[6] Mainitun hallituksen esityksen perustelut voidaan nähdä tämän kehityskulun toteamisena ilman laajempaa punnintaa muutoksen tosiasiallisista vaikutuksista.

Työryhmä on esittänyt yhtenä argumenttinaan kilpailunrajoituslain esitöissä mainitut perustelut kilpailunrajoitusten dekriminalisoinnille.[7] Jos kuitenkin otetaan huomioon kilpailuoikeudellisessa ajattelutavassa viime vuosina tapahtuneet muutokset, voidaan kysyä, mikä painoarvo 17 vuotta sitten esitetyillä perusteluilla on tämän päivän kilpailuoikeustodellisuudessa.[8] Tähän kysymykseen ei työryhmän mietinnössä oteta kantaa, vaan todetaan ainoastaan, että ”vuoden 1992 lain esitöiden perusteella voidaan päätellä, että tarkoituksena oli luopua rikosoikeudellisista seuraamuksista ja siirtyä kokonaan hallinnolliseen seuraamusjärjestelmään.”[9] Näkisin kommentin, ei niinkään hallinnollista seuraamusjärjestelmää yleisesti puoltavana, mutta mahdollisesti sitä ilmentävänä, että kertaalleen dekriminalisoidun teon uudelleenkriminalisointi Suomen kilpailunrajoituslain järjestelmässä nähdään tällä hetkellä hankalaksi toteuttaa. Kyse on tällöin lähinnä siitä, että lainvalmistelijan mukaan ongelmalliseksi nähdään sanktiojärjestelmän toimivuuden ja yritysten näkökulmasta se, jos rikosoikeudelliset seuraamukset on yhdessä lainsäädännössä dekriminalisoitu, mutta toisen lainsäädännön

6 Matikkala 2008, s. 260 ja 269.
7 Työryhmän mietintö, s. 46–47.
8 Kuten Claus-Dieter Ehlermann Firenzessä kesäkuussa 2001 pidetystä konferenssista ”Competition Law and Policy Workshop at the EUI” toteaa, muutoksia on EU:n piirissä huomattavissa mm. seuraavissa suhtautumistavoissa: kriminalisoinnissa ei vuonna 2001 tehty selvää jakoa EU- ja kansallisella tasolla, sillä EU:n kilpailuoikeuspolitiikan toteuttaminen on vasta nyttemmin asetuksen n:o 1/2003 myötä hajautettu jäsenvaltioiden velvoitteeksi. Kriminalisointia pidettiin tuolloin myös varsin futuristisena ja eksoottisena vaihtoehtona, toisin kuin tänä päivänä useiden jäsenvaltioiden säädettyä rikosoikeudelliset seuraamukset kilpailulakeihinsa. Lisäksi leniency -ohjelmat ovat todellisuudessa alkaneet toimimaan vasta vuoden 2002 tiedonannon (komission tiedonanto sakoista vapauttamisesta ja sakkojen lieventämisestä kartelleja koskevissa asioissa, 2002/C 45/03, EYVL C 45, 19.2.2002) myötä. Tämä ja muita edellä mainitun konferenssin lausumia teoksessa Cseres, Katalin J. - Schinkel, Maarten Pieter – Vogelaar, Floris O.W (toim.): Criminalization of Competition Law Enforcement.1990-luvun lopun jälkeen myös yksittäisille yrityksille tuomittavien sakkojen määrät ovat olleet selkeässä kasvussa. Näiden muutosten mahdollista vaikutusta myös Suomen kilpailuoikeusjärjestelmään ei ole syytä jättää huomiotta.
9 Työryhmän mietintö, s. 47.

mukaan mahdollisia. Tällöin, mikäli rikosoikeudelliset sanktiot halutaan ottaa käyttöön kilpailunrajoituslain (kilpailulain) kieltojen tehosteena, siitä tulisi olla selkeä säännös rikoslaissa.[10]

Työryhmän mietinnössä on nostettu esille petostunnusmerkistön täyttymismahdollisuus tarjouskartellien kohdalla.[11] Petoksena rangaistavaa voisi tällöin olla tarjouskartellissa sovitun mukaisen hintajärjestelyn käyttäminen taloudellisen hyödyn tavoittelemiseen konkreettisen, tarjouskartellista sopimisen aikaan tiedossa olleen tarjouskilpailun yhteydessä.[12] Implisiittisesti mietinnöstä voidaan lukea, että tarjouskartellitapauksissa petosrikoksen tunnusmerkistön täyttyminen edellyttää, että tarjouskartellista sovittaessa tiedossa ovat ne tahot, jotka ovat vahinkoa kärsivän asemassa.[13] Edellytykseksi mainitaan lisäksi taloudellisen vahingon täyttymisen huomioon otettavaa tai todellista vaaraa.[14] Tarjouskartellin voitaisiin katsoa täyttävän nämä edellytykset, kun taas kartelli yleisesti ottaen pitää sisällään ajatuksen suuren ihmisryhmän tai tietyn kohderyhmän erehdyttämisestä jostain taloudellisesti merkityksellisestä ja olennaisesta seikasta.[15] Näissä muissa kartellityypeissä ”uhritahon” määräytyminen ei työryhmän mukaan näyttäisi olevan rikoslain (39/1889) 36 luvun 1 §:n petossäännöksen (24.8.1990/769) valossa riittävän selvää.[16]

Muiden kartellien osalta petoksen tunnusmerkistön täyttymistä ei siten ole työryhmän mietinnössä harmillisesti laajemmin pohdittu. Tässä yhteydes-

10 Rihto-Kekkonen, Johanna: Kommenttipuheenvuoro lainvalmistelijan näkökulmasta, Kilpailuoikeuden rikosoikeudelliset aspektit, Helsinki 2.12.2008.
11 Petostunnusmerkistön täyttymistä on valtionsyyttäjän mukaan voitu pohtia mm. ”sopupeleihin” liittyvän tapauksen kohdalla (Helsingin hovioikeus 6.2.2003, nro 333). Valtionsyyttäjä Ari-Pekka Koivisto, Kilpailuoikeuden rikosoikeudelliset aspektit, Helsinki 2.12.2008.
12 Työryhmän mietintö, s. 47.
13 Mietinnössä lausutaan sivulla 47: ” […] tahot, jotka tarjousten perusteella päättävät sopimuksen syntymisestä jonkin tarjouksen antajan kanssa.” Koska petostunnusmerkistön täyttymisen edellytyksenä on taloudellisen vahingon aiheutuminen toiselle, voidaan päätellä, että mietinnössä tarkoitetaan tarjouksen antajalla tällaista taloudellisen vahingon ennalta tiedossa olevaa kärsijää.
14 Työryhmän mietintö, s. 47.
15 Ibid.
16 RL 36:1.1 kuuluu: ”Joka hankkiakseen itselleen tai toiselle oikeudetonta taloudellista hyötyä taikka toista vahingoittaakseen, erehdyttämällä tai erehdystä hyväksi käyttämällä saa toisen tekemään tai jättämään tekemättä jotakin ja siten aiheuttaa taloudellista vahinkoa erehtyneelle tai sille, jonka eduista tällä on ollut mahdollisuus määrätä, on tuomittava *petoksesta* sakkoon tai vankeuteen enintään kahdeksi vuodeksi.”

sä on kuitenkin perustelua nostaa esille petossäännöksen esitöissä[17] todetut asiat:

”Ehdotettu säännös ei tee eroa sillä perusteella, kohdistuuko petos yksityiseen vai julkiseen talouteen.”

Sekä lisäksi hyötymistarkoituksesta:

”Petos on nykyisinkin rangaistava myös vahingoittamistarkoituksessa tehtynä. Tällaisia petoksia on tullut vain harvoin tuomioistuinten käsiteltäväksi. Joskus saattaa olla vaikeata vetää rajaa hyötymis- ja vahingoittamistarkoituksen välille, esimerkiksi silloin, kun elinkeinonharjoittaja pyrkii kilpailusyistä vahingoittamaan toista samalla alalla toimivaa. Säännöksen toimivuuden varmistamiseksi vahingoittamistarkoitus on haluttu edelleen säilyttää petoksen tunnusmerkistössä.”[18]

Näistä lausumista voitaisiin päätellä, että petossäännöstön on alun perin katsottu voivan soveltua myös kilpailutapauksiin ja ”erehtyjän” roolissa voisi olla myös julkinen talous muissakin kuin tarjouskartelleissa. Tämän lisäksi tarkkaa hyötymistarkoitusta ei vaikuttaisi olevan alun perin edellytetty, jolloin vahingoittamisedellytyksen olemassaolo riittäisi täyttämään tunnusmerkistön tältä osin myös muissa kartellitapauksissa.

Työryhmä on joka tapauksessa arvioinnissaan jättänyt edellä mainitun seikan avoimeksi ja päätynyt olemaan puoltamatta tarjouskartellienkaan katsomista petoksen täyttäviksi toimenpiteiksi. Johtopäätökseen ei kuitenkaan ole päädytty sillä perusteella, etteikö petoksen tunnusmerkistö voisi täyttyä tarjouskartellitapauksissa, vaan kilpailulainsäädännön tehokkuutta, valvontajärjestelmää ja tulkintaongelmia koskevien argumenttien nojalla.[19] Sinänsä lienee totta, että kriminalisoinnin käyttöönotolla aktualisoitaisiin monia käytännön kysymyksiin liittyviä ongelmia, mutta kriminalisointimahdollisuuden selvittämistä tekojen rikosoikeudellisen luonteen näkökulmasta ei pitäisi voida piilottaa yleisen hallinnollisen seuraamusjärjestelmän tehokkuusargumentoinnin taakse.

17 HE 66/1988 vp, s. 131–132.
18 HE 66/1988 vp, s. 131–132.
19 Työryhmän mietintö, s. 50.

Mietinnössä on käyty läpi muiden maiden lainsäädäntöihin perustuvia ratkaisuja[20], kuten Saksan järjestelmää, jossa tarjouskartellit on rikosoikeudellisesti sanktioitu (Strafgesetzbuch, § 298) ja asia siirtyy syyttäjälle, mikäli Saksan kilpailuviranomainen havaitsee selvityksissään, että kyseessä on rikos.[21] Ruotsalaisessa säädösratkaisussa vakavissa kilpailunrajoitustapauksissa voidaan osallistuneille henkilöille määrätä liiketoimintakielto.[22] Tätä on perusteltu luonnollisten henkilöiden vastuuseen saattamisen tarpeella. Muutoin Ruotsin 1. marraskuuta 2008 voimaan tulleen kilpailulain perusteluissa ja esitöissä (En ny konkurrenslag, SOU 2006:99) kriminalisointia vastustetaan yleisesti. Myös Ruotsissa perusteluina tälle on esitetty, että hallintoprosessia ja rikosprosessia koskevien menettelyjen yhteensovittaminen on haasteellista.[23] Norjassa ja Tanskassa on omaksuttu eräänlaiset välimuodot, joissa sekä hallinnollinen että rikosoikeudellinen prosessi tulevat kysymykseen, joko rinnakkain (Norja) tai toistensa vaihtoehtoina (Tanska).

Näin ollen havaitaan, että useissa jäsenvaltioissa on päädytty ainakin jollain tasolla kilpailunrajoitusten kriminalisointiin, joskin malleissa on huomattavia variaatioita. Tässä valossa kysymyksen perusteleminen Suomessa pelkkiin menettelyllisiin ongelmiin nojautuen ei vaikuta uskottavalta.

Sen sijaan kysymys siitä, voisiko kilpailunrajoitus muulla tavoin tulla rikosoikeudellisesti sanktioiduksi, on työryhmän mietinnössä jätetty avoimeksi. Tätä kysymystä voidaan lähestyä tarkastelemalla sitä, mitkä ovat rikoslainsäädännön tarkoitus ja tavoitteet talousrikollisuuden saralla ja millä perusteilla nykyisiä kilpailunrajoituslain sisältämiä kiellettyjä yhteistoiminnan

20 Tässä esitetty muutamia otteita työryhmän mietinnöstä. Ks. tarkemmin kyseinen mietintö, s. 47–50.

21 Ks. Saksan rikoslaki, Strafgesetzbuch, sekä työryhmän mietintö, s. 47, jossa todetaan, että Saksassa tarjouskartelleihin on sovellettu myös rikoslainsäädännön yleisiä petossäännöksiä.

22 Liiketoimintakieltoa koskevat säännökset sisältyvät Suomessa lakiin liiketoimintakiellosta (1059/85). Kuten valmistelutyöryhmäkin on todennut (s. 51–53), laki ei edellytä, että kyse on rangaistavaksi säädetystä laiminlyönnistä. Liiketoimintakielto voidaan sen sijaan määrätä sopimattoman ja vahingollisen liiketoiminnan estämiseksi sekä liiketoimintaan kohdistuvan luottamuksen ylläpitämiseksi (1 §). Liiketoimintakieltoon voidaan määrätä yksityinen henkilö (2 §). Liiketoimintakielto ei siten ole yhteisölle määrättävä rangaistusseuraamus. Tästä seuraa, että liiketoimintakiellon määrääminen kilpailunrajoitustapauksissa edellyttäisi jonkinlaisen henkilökohtaisen vastuun kohdentamisen määrittämistä. Lisäksi liiketoimintakieltoa on viime aikoina kritisoitu sen käytännössä ilmenneiden puutteiden vuoksi. Ks. esim. http://www.edilex.fi/uutiset/19628.html.

23 Kriminalisoinnista Ruotsin lainvalmistelussa, ks. SOU 2006:99, s. 509–572.

muotoja voidaan luonnehtia sillä tavalla huomattavan vahingollisiksi, että niiden katsotaan olevan rikoslainsäädännöllä torjuttavia toimenpiteitä.

3 Kriminalisoinnin tarkoituksenmukaisuus kilpailunrajoituksissa perinteisten kriminalisointiedellytysten näkökulmasta

Kilpailuoikeudella pyritään suojelemaan tehokasta kilpailua markkinataloudessa. Tavoitteena on lailla estää ja poistaa sellaista yritysten toimintaa, joka rajoittaa kilpailua markkinoilla. Rikosta taas voidaan kutsua laissa säädetyksi inhimilliseksi teoksi.[24] Jotta joku inhimillinen teko voidaan säätää rikoslaissa rangaistavaksi, on kriminalisoinnille löydettävä tietyt edellytykset, joiden nojalla rangaistavaksi säätäminen on perusteltua. Näitä perusteluita voidaan rangaistusteoreettisesta näkökulmasta esittää kriminalisointiperiaatteiden muodossa.[25] Tässä artikkelissa on valittu ratkaisu, jossa kilpailurikkomusten kriminalisoinnin puolesta ja vastaan puhuvia argumentteja esitetään osittain kolmen kriminalisointiperiaatteen – oikeushyvien suojelu, hyöty-haitta punninta ja ultima ratio – näkökulmasta. Työryhmän mietinnössä ei kriminalisointiperiaatteita ole erikseen nostettu esille, mutta perusteluissa on havaittavissa näihin kriteereihin viittaavia kommentteja. Tarkoituksenani on esittää näkökohtia, joita on perusteltua ottaa huomioon käsillä olevaa asiaa punnittaessa.

3.1 Oikeushyvien suojelu

Oikeushyvien suojelun periaate edellyttää rikosoikeuden käyttämistä vain silloin, kun sääntelyn voidaan hyvin perustein olettaa suojaavan jotakin nimettyä oikeudellista intressiä eli oikeushyvää.[26] Kuten mainittu, kilpailuoikeudessa tämä suojattava arvo on nimetty tehokkaaksi kilpailuksi. Vertaamalla tätä arvoa tyypillisiin kriminalisoinneilla suojattaviin arvoihin, joista vahvimpina pidetään perustuslain ja ihmisoikeussopimusten turvaamia yksityisten oikeussubjektien suojeluintressejä, ei kyseessä näyttäisi olevan suojeltava intressi ainakaan sen perinteisessä merkityksessä. Muotoiluna ”terve”

24 Tapani – Tolvanen 2008, s.1.
25 Kriminalisointiperiaatteena voidaan mainita myös legaliteettiperiaate, jota ei tässä kuitenkaan käsitellä. Kriminalisointiperiaatteet on nykyään liitetty myös perusoikeuksien rajoitusedellytyksiin. Legaliteettiperiaatteesta ja perusoikeuksien rajoitusedellytyksistä, ks. esim. Melander 2002 ja 2008.
26 Tapani 2007, s. 404.

tai ”tehokas” kilpailu on oikeushyvänä melko epämääräinen ja abstrakti[27] ja sellaisenaan mahdollisesti soveltumaton suojeltavaksi oikeushyväksi.

Toisaalta vertailukohteena voidaan mainita arvopaperimarkkinaoikeudellinen sääntely, joka markkinoiden toimintaa turvaavana sääntelynä sisältää yhdenmukaisuuksia kilpailuoikeuden sääntelyjärjestelmään. Korkein oikeus on tapauksessa KKO 2000:82 ottanut kantaa arvopaperimarkkinasääntelyllä suojattavien arvojen määrittelyyn. Kyseisen oikeuskäytännön perusteella on todettavissa, että arvopaperimarkkinarikoksissa ei ole rikosoikeudellisessa mielessä asianomistajaa. KKO totesi tapauksessa, että lainvalmistelutöissä on todettu arvopaperimarkkinoiden tehokkaan valvonnan edellyttävän mahdollisuutta sanktioiden käyttöön silloin, kun markkinoiden moitteettoman toiminnan ja puolueettomuuden vastaiset toimenpiteet tai laiminlyönnit ovat omiaan horjuttamaan luottamusta arvopaperimarkkinoihin (HE 157/1988 vp, s. 6). Arvopaperimarkkinarikos kohdistuukin luonteenomaisesti laajaan, tarkasti määrittelemättömään joukkoon. Sillä pyritään ensi sijassa suojaamaan ”*arvopaperimarkkinoiden toimivuutta ja luotettavuutta*.” Näin ollen KKO on tapauskäytännössään vahvistanut, että myös markkinoiden toimivuus ja luottamus markkinoihin voidaan sellaisenaan vahvistaa kriminalisoinnin suojan kohteeksi ja voidaan siten esittää perusteluna myös kilpailuoikeuden kriminalisointia harkittaessa. Luottamuksen suojaamisen merkityksen arvopaperimarkkinoilla KKO on sittemmin vahvistanut tuoreessa tapauksessa KKO 2009:1 (TJ Group, 15.1.2009).[28]

Lisäksi perustuslain omaisuudensuoja- tai elinkeinovapaussäännöksistä on johdettavissa oikeuksia, joiden nimissä ja suojaamistarkoituksessa kilpailunrajoitusten kriminalisointia voitaisiin lähteä perustelemaan. Voidaankin katsoa, että ainakin jotkin kielletyt kilpailuteot merkitsevät oikeushyviä loukkaavia tai vaarantavia moitittavia tekoja[29] niiden kohdistuessa esimerkiksi yksityisen oikeussubjektin talouspiiriin. Tyypillisimmin tällaiset oikeudenloukkaukset tulevat esille kartellitapauksissa, joissa kuluttajat joutuvat hintasopimusten johdosta maksamaan korkeampia hintoja markkinoilla tarjottavista hyödykkeistä. Tällaisen perustelun esittämistarve lienee kui-

27 Matikkala 2008, s. 265.
28 KKO 2009:1, kohta 15.
29 Ibid.

tenkin hypoteettinen jos lähtökohdaksi otetaan se, että kyse olisi rikoslain 30 luvun elinkeinorikosten piiriin kuuluvasta teosta, jossa suojelukohteena ovat pikemminkin yhteiskunnalliset taloudelliset intressit, jolloin yksittäisen oikeussubjektin suojattavat oikeushyvät voidaan jättää vähemmälle huomiolle.

3.2 Hyöty-haitta -punninta

Harkittaessa kilpailunrikkomusten kriminalisointia, tulee kriminalisoinnin myös olla tarkoituksenmukaisempi rangaistus suhteessa hallinnolliseen sanktiointiin, mitä arvioidaan suorittamalla niin sanottu *hyöty-haitta* -punninta.[30] Tässä tarkoituksenmukaisuusharkinnassa[31] apuna voidaan käyttää myös rangaistusteorioita[32] sekä kriminaalipolitiikkaa[33]. Kriminaalipolitiikassakin on nähtävissä eurooppaoikeuden vaikutusta mm. siinä, että uudistukset ovat laajentaneet ja ankaroittaneet rikosoikeudellista vastuuta.[34] Hallinnollisen prosessin etuina on kilpailutapauksissa tyypillisesti pidetty joustavuutta, kun taas rikosoikeudellisten sanktioiden käyttöönottoa on perusteltu niiden preventiivisten vaikutusten vuoksi. Hallinnolliseen sanktiointiin ei myöskään liity yhtä arvovärittyneitä mielipiteitä kuin rikosoikeudellisiin seuraamuksiin.[35] Tällaiset mielikuvat saattavat toisinaan toimia tehokkaana pelotevaikutuksena niiden yritysten kohdalla, joille moitteettoman yritysmaineen ylläpitäminen on tärkeää. Kilpailuoikeudessa preventiivisyys ja tehokas pelotevaikutus tarkoittavat sitä, että yritykset, jotka

30 Ks. esim. Melander 2008, s. 471–477.

31 Tarkoituksenmukaisuusharkinnalla tarkoitetaan tässä sitä harkintakokonaisuutta, joka joko johtaa kriminalisointiin tai jolla voidaan perustella teon rankaisemattomuus rikoslain merkityksessä.

32 Rangaistusteoriat voidaan tyypillisesti jakaa kahteen pääryhmään: sovitusteorioihin, jotka perustelevat rangaistuksen käytön vetoamalla menneen ajan tapahtumiin. Tällöin rangaistuksen oikeutus on tapahtuneessa rikoksessa. Preventioteoriat taas katsovat eteenpäin ja kiinnittävät huomionsa rangaistuksen hyötyvaikutuksiin (Lappi-Seppälä 2000, s. 15–16). Preventio voidaan edelleen jakaa yleispreventioon (rangaistuksen yleistävyys) ja erityispreventioon (rangaistuksen vaikutus tuomittuun rikoksentekijään). Näistä lisää, ks. esim. Lappi-Seppälä 2000.

33 Perinteisimmän määrittelyn mukaan kriminaalipolitiikan tavoitteina mainitaan 1) rikollisuudesta johtuvien kärsimysten ja kustannusten vähentäminen ja 2) näiden kärsimysten ja kustannusten jakaminen perusoikeudet huomioon ottavalla ja muutoinkin oikeudenmukaisella tavalla. Ks. Anttila–Törnudd 1983, s. 182.

34 Nuotio 2007, s. 1108. Nuotio nostaa esimerkiksi ihmiskaupan sääntelyn RL 25 luvussa (L 650/2004). Unionisopimuksen 29 artiklan mukaan yhteisen kriminaalipolitiikan kohteita unionissa ovat järjestäytynyt rikollisuus, terrorismi, ihmiskauppa, lapsiin kohdistuvat rikokset, laiton huumausainekauppa, laiton asekauppa, lahjonta ja petokset sekä lisäksi rasismi ja muukalaisviha.

35 Koponen 2004, s. 13.

muuten osallistuisivat kiellettyyn kilpailunrajoitukseen, jättävät kyseisen toimenpiteen toteuttamatta siihen liittyvän varteenotettavan tutkintariskin ja riittävän ankaran rangaistusuhan vuoksi.[36]

Rikosoikeudellisen sääntelyn tarve kuitenkin vähenee, kun hallinnollisilla seuraamuksilla pystytään puuttumaan väärinkäytöksiin riittävän tehokkaasti ja oikeudenmukaisesti.[37] Hallinnollisessa järjestelmässä pienten rikkomusten käsittelyyn ei myöskään tarvita samanlaista menettelyllistä oikeusturvaa kuin rikosprosessissa.[38] Tosin hallituksen esityksessä Eduskunnalle laiksi hallintolainkäytöstä ja siihen liittyväksi lainsäädännöksi on todettu, että Euroopan ihmisoikeussopimuksen 6 artiklaa on sovellettava useisiin Suomessa hallintolainkäyttöviranomaisissa käsiteltäviin asiaryhmiin ja näin ollen hallintoprosessin oikeusturvavaatimukset lähenevät rikosprosessin vaatimusten kanssa.[39] Vaarana saattaa kuitenkin olla, että hallinnollisia sanktioita ryhdytään menettelyn joustavuuden nimissä käyttämään teoista, jotka on aiemmin kriminalisoitu (kuten kilpailurikkomukset) tai jotka olisi syytä kriminalisoida. Tällaista joustavuuteen perustuvaa näkökulmaa on työryhmän mietinnöstä luettavissa. Oikeusturvan takeita ei kuitenkaan tulisi pyrkiä kiertämään siirtämällä tosiasiallisesti rikosoikeudelliseen järjestelmään kuuluvia tekoja hallinnolliseen prosessiin.

Hallinnollisten sanktioiden ankaroittamisella on myös rajansa ja huolena onkin ollut, että käytettävissä olevat enimmäisrangaistukset ja vahingonkorvaukset olisivat liian alhaisia estämään kilpailulainsäädännön rikkomisia, koska yrityksen kilpailunrajoituksesta saama nettohyöty saattaa jäädä sakoista huolimatta suuremmaksi.[40] Euroopan komission sakkojen laskentaa koskevissa suuntaviivoissa ja Euroopan unionin neuvoston täytäntöönpano-

36 Baker 2001, s. 697.
37 Tapani 2007, s. 405.
38 Tolvanen 2002, s. 198.
39 HE 217/1995 vp, s. 13, ks. myös oikeuskäytännössä tapaukset Euroopan ihmisoikeussopimuksen sovellettavuudesta kilpailuprosesseihin: yhteisöjen ensimmäisen oikeusasteen tuomiot Mannemannröhren-Werke AG v. Komissio, T-112/98 ja Mayr-Melnhof v. Komissio, T-374/94, Yhteisöjen tuomioistuimen tuomiot Kremzow v. Itävallan valtio, C-299/95, Baustahlgewebe v. Komissio, C-185/95 ja Orkem v. Komissio, C-374/87, Euroopan ihmisoikeustuomioistuimen tuomiot Neumeister, 27.6.1998, A-sarja, N:o 8, Funke, 25.2.1993, A-sarja, N:o 256-A ja Özturk, 21.2.1984, A-sarja N:o 73 sekä yhteisöjen tuomioistuimen lausunto Euroopan ihmisoikeussopimuksen sovellettavuudesta unionissa, 2/94 28.maaliskuuta 1996 ECR I-1759.
40 Cseres – Schinkel – Vogelaar 2006, s. 2.

asetuksessa n:o 1/2003 rajoitetaan seuraamusmaksu kymmeneen prosenttiin yrityksen maailmanlaajuisesta vuotuisesta liikevaihdosta. Taloudellisissa tutkimuksissa on kuitenkin väitetty, että näin laskettavat seuraamusmaksut ovat pienempiä kuin arvioidut edut kilpailunrajoituksesta.[41] Työryhmä on toisaalta mietinnössään todennut, että seuraamusmaksun tulee joka tapauksessa ylittää kilpailunrajoituksella mahdollisesti saavutettu hyöty. Mikäli tämä seuraamusmaksun konfiskatorinen tavoite pystytään uudella lailla riittävästi saavuttamaan, seuraamusmaksun tehokkuus kasvanee. Myös yksityisille henkilöille suunniteltu vahingonkorvausoikeus lisännee jonkin verran seuraamusjärjestelmän preventiivistä vaikutusta.

Rikosoikeudellisen järjestelmän yhteensovittaminen kilpailuoikeudelliseen valvonta-, selvitys- ja tuomitsemisjärjestelmään on toisaalta nähty erityisen haastavaksi. Rikosoikeuden haittoina mainitaan tällöin muun muassa rikosprosessin tiukat menettelyvaatimukset[42], ongelmat vastuun kohdentamisessa kilpailunrajoitukseen osallistuneiden henkilöiden kesken ja erityisesti pelko *leniency*-järjestelmän toiminnan vaarantumisesta, koska *leniency*-ilmoituksen tekeminen ei vapauttaisi yritysjohtoa rikosoikeudellisesta vastuusta.[43] Rikosoikeudellisia seuraamuksia olisi siten vaikea sovittaa yhteen anteeksiantojärjestelmän kanssa. Joissakin Euroopan unionin jäsenvaltiossa onkin päädytty ratkaisuun, jossa *leniency*-ilmoituksen tehnyt kilpailunrajoitukseen osallinen saa alennuksen tai anteeksiannon seuraamusmaksuun, mutta ei rikosoikeudellisiin seuraamuksiin. Kuitenkin esimerkiksi Irlannissa ja Isossa-Britanniassa myös rikosoikeudellisen vastuun välttäminen on mahdollista.[44] Puuttumatta vastuusta vapauttamisen ongelmiin, joita työryhmän mietinnössäkin on käyty läpi, *leniencyn* hyötynä suhteessa kriminalisointiin voidaan mainita ainakin tämän yhdistelmän vaikutus kartellin stabiilisuuteen; rikosoikeudellisten sanktioiden uhkasta vapautumisen mahdollisuus houkuttaa kartelliin osallisia tehokkaammin pyrkimään ulos järjestelystä ja ilmiantamaan kartellin, minkä seurauksena luottamus ja tasapaino kartellin sisällä järkkyy.[45]

41 Ks. esim. Wils 2003.
42 Esimerkiksi rikosprosessin korkea näyttökynnys on vaikea saavuttaa kilpailutapauksissa, joissa kilpailuviranomainen joutuu toisinaan varsinkin kartellitapauksissa operoimaan hyvin vähäisellä näytöllä.
43 Työryhmän mietintö, s. 50–51.
44 Schroeder – Heinz 2006, s. 162.
45 Massey 2006, s. 188.

3.3 Ultima ratio

Ultima ratio –periaatteen mukaisesti rangaistusten käyttöön tulisi turvautua vasta sitten, kun muut keinot ovat osoittautuneet riittämättömiksi.[46] Valmistelutyöryhmän mietintö antaa ymmärtää, että kilpailulainsäädännöllä päästään sillä tavoiteltuun päämäärään ilman rikosoikeuden käyttöäkin ja näin ollen rikosoikeuden käytön viimesijaisuuden vaatimus jäisi lainvalmistelijan näkökulmasta täyttymättä. Rangaistavaksi säätämisen viimesijaisuuden periaatteen alueelle voidaan sijoittaa kysymys siitä, mahdollistaako jo nykylainsäädäntö asianmukaiset reagointimahdollisuudet.[47] Työryhmä on ehdotuksessaan päätynyt ainoastaan seuraamusmaksun määräytymisen täsmentämiseen, jolloin seuraamusten ennakoitavuus ja yhteismitallisuus kasvaisivat. Työryhmä on näin ollen katsonut, että riittävänä reagointina voidaan pitää rahamääräiseen sanktiointiin perustuvaa hallinnollista järjestelmää. Seuraamusmaksun laskentasäännöillä todetaan voivan olla seuraamusmaksua korottava vaikutus pitkäkestoisten kilpailunrajoitusten kohdalla, minkä seurauksena myös maksun preventiivinen vaikutus kasvaisi.[48] Työryhmä ehdottaa, että seuraamusmaksun määräytymisperusteet noudattavat Euroopan unionin komission sakkojen laskennassa noudattamaa menettelyä.[49] Laskeminen tapahtuisi jatkossa pääsääntöisesti seuraavalla kaavalla:[50]

I) *Vuotuinen liikevaihto (esim. 500 000 €) * rikkomuksen vakavuuden perusteella määräytyvä %-osuus, esim. 20 % = 100 000 €.*

II) *Rikkomuksen kesto otetaan huomioon kertomalla perusmäärä (tässä tapauksessa 100 000 €) kestoajalla, esim.: 100 000 € * 5,5 (rikkomus kestänyt viisi ja puoli vuotta) = 550 000 €.*

III) *Otetaan huomioon mahdolliset lieventävät ja raskauttavat tekijät.*

46 Ultima ratio -periatteesta ks. Frände 2005, s. 58.
47 Matikkala 2008, s. 266.
48 Kilpailulakiehdotuksen mukaan (34 §) seuraamusmaksu määrätään vanhan lain mukaisesti lakia rikkoneelle elinkeinonharjoittajalle tai näiden yhteenliittymälle. Elinkeinonharjoittajan käsite muutetaan uudessa laissa vastaamaan yhteisöoikeutta eli samaan konserniin kuuluvien yritysten katsotaan muodostavan yhden yksikön. Myös emoyhtiölle voidaan määrätä seuraamusmaksu. Laskuohjeiden osalta uudessa säännöksessä on annettu tarkempia ja teknisempiä ohjeita maksun määräytymisestä. Ks. tarkemmin työryhmän mietintö s. 104–110 ja tämän artikkelin jakso 4.
49 Suuntaviivat asetuksen n:o 1/2003 23 artiklan 2 kohdan a alakohdan mukaisesti määrättävien sakkojen laskennasta (2006/C 210/02), EYVL C210/2, 1.9.2006.
50 Työryhmän mietintö, s. 105–109.

Liikevaihdon perusteena on rikkomukseen suoraan tai välillisesti liittyvien hyödykkeiden eli tavaroiden tai palveluiden myynnistä elinkeinonharjoittajalle kertynyt liikevaihto siltä viimeiseltä kalenterivuodelta, jonka ajan elinkeinonharjoittaja oli osallisena rikkomuksessa. Nykyinen 10 prosentin enimmäismäärä säilyisi uudessa laissa ennallaan.[51]

Rahamääräiseen sanktiointiin perustuva järjestelmä näyttäisi osoittavan heikkoutensa lähinnä oikeasuhtaisen seuraamuksen määrittämisessä. Kansainvälisissä kirjoituksissa sakkojärjestelmää onkin arvosteltu sen rajallisista vaikutusmahdollisuuksista. Tämä johtuu pääasiassa siitä, että riittävän suurten sakkojen asettaminen kartelliin osalliselle johtaisi yrityksen konkurssiin.[52] Kysymys on siten siitä, kuinka suuri sanktion tulisi olla, jotta sen preventiivinen vaikutus olisi yhtä vahva tai vahvempi kuin esimerkiksi vankeusrangaistuksen. Joidenkin näkemysten mukaan tehokas rahamääräinen pelotevaikutus syntyisi vasta kertomalla kartellista arvioitavaksi saadun hyödyn määrä kiinnijäämisriskin todennäköisyydellä (esimerkiksi 10 prosentin mahdollisuus paljastua).[53] Wils on esittänyt, että tällaisen pelotevaikutuksen synnyttävän summan tulisi olla jopa 150 prosenttia yrityksen kartellista saamasta vuosittaisesta liikevaihdosta.[54] Näihin summiin eivät sakkotasot tällä hetkellä Euroopassa yllä, eikä vastaavan laskentakaavan toteuttaminen nykyään liene edes mahdollista.

Nykyisen järjestelmän riittävä preventiivisyys taas puoltaisi hallinnollisessa sanktioinnissa pidättäytymistä kriminalisoinnin jäädessä tarpeettomaksi. Kilpailunrajoitustapausten kohdalla tästä voidaan kuitenkin esittää päinvastaisiakin näkemyksiä. Eurooppalaisesta tutkimuksesta on löydettävissä useita argumentteja sen puolesta, että rikosoikeus on ainoa tehokas puuttumisväline, vaikka se onkin viimesijainen keino; tehokkaasti toimivassa kilpailuoikeusjärjestelmässä vaaditaan sosiaalista ja poliittista yhteisymmärrystä sen puolesta, että kilpailulakeja rikkovia henkilöitä tulisi kohdella rikollisina.[55]

51 Työryhmän mietintö, s. 106.
52 Ks. muun muassa Massey 2006, s. 181.
53 Massey 2006, s. 181.
54 Wils 2003, s. 59.
55 Cseres – Schinkel – Vogelaar 2006, s. 5. Kirjoittajat myös toteavat, että tällainen yhteisymmärrys puuttuu yleisesti Euroopasta tällä hetkellä.

Lisäksi yksilöllisen vastuun välttäminen olisi muutoin helppoa; seuraamusmaksun kantaa uudenkin lain järjestelmässä kilpailunrajoitukseen osallinen yritys, eikä henkilökohtaista vastuuta kilpailunrajoituksen ylläpitämisestä olla Suomessa säätämässä. Vaikka henkilökohtainen vastuu yhdistetään rahamääräiseen seuraamukseen, on useassa tapauksessa mahdollista, että henkilökohtaisen seuraamuksenkin kantaa kuitenkin viime kädessä työnantajana toimiva yritys hyvittämällä sakkoon tuomitulle työntekijälleen tai johtoon kuuluvalle henkilölle kyseisen summan tai suuren osan siitä.[56] Tästä näkökulmasta ainoastaan henkilökohtaisen rikosoikeudellisen sanktioinnin voidaan katsoa kohdistuvan tosiasiassa kartelliin syylliseen henkilöön.

Kriminalisointiperiaatteet ovat hyvin laaja asiakokonaisuus, eikä tässä yhteydessä ole mahdollista keskittyä rikosoikeuden yleisiin oppeihin laajemmin. Todettakoon kuitenkin, että edellä mainittujen periaatteiden ja näkökohtien lisäksi myös suhteellisuusvaatimus on erittäin merkityksellinen kriminalisointien käyttöä harkittaessa.[57] Kilpailunrajoitusten kriminalisoinnin mahdollisuus voidaan siten tiivistää siihen kysymykseen, ovatko rikosoikeudelliset seuraamukset oikeassa suhteessa teolla saavutettavaan hyötyyn ja teon moitittavuuteen. Edellä on esitetty muutamia kriminalisoinnin puolesta ja sitä vastaan puhuvia argumentteja, joista käsin asiaa voidaan lähteä perustelemaan, mutta lainsäätäjän tulisi niiden lisäksi ottaa kantaa suhteellisuusedellytyksen täyttymiseen käsillä olevaa kysymyskokonaisuutta harkitessaan.

4 Lopuksi

Edellä on kilpailulaki 2010 –valmistelutyöryhmän mietintöön peilaten pyritty tuomaan esille seikkoja, joita on perusteltua ottaa huomioon harkittaessa kilpailurikkomusten kriminalisointia. Valmistelutyöryhmä on mietinnössään päätynyt suosittelemaan seuraamusmaksun laskentaperusteiden sekä seuraamusmaksusta vapauttamista ja sen alentamista koskevien säännösten täsmentämistä. Rikosoikeudellisia seuraamuksia ei ehdoteta otettavaksi käyttöön.

56 Massey 2006, s. 182.
57 Frände 2005, s. 25.

Kriminalisoinnin puolesta puhuvat argumentit näyttävät hukkuvan siihen tosiasiaan, että suomalaisessa järjestelmässä ja oikeusajattelussa rikosoikeudellisten seuraamusten sovittamista kilpailuprosesseihin on pidetty jokseenkin kaukaisena ajatuksena. Voidaan kuitenkin esittää painavia näkemyksiä sen puolesta, että asiaa tulisi punnita tulevassa lainuudistuksessa perusteellisemmin kuin tähän saakka. Lisäksi liiketoimintakiellon toteuttamismahdollisuuksista kilpailuoikeudessa on esitettävissä eri suuntaan vaikuttavia argumentteja. Johtoa voitaisiin tältä osin hakea esimerkiksi Ruotsin kilpailuoikeudesta.

Valmistelutyöryhmän mietinnön painottuessa lähinnä petostunnusmerkistön täyttymiseen tarjouskartelleissa mietintö sivuuttaa muut edellä mainitut kriminalisoinnissa huomioon otettavat seikat. Keskustelua ei käydä lainkaan siitä, mikä merkitys esimerkiksi kartelleille on niiden vahingollisuuden vuoksi annettava. Toisin sanoen, miksei kartelli voisi täyttää ainakin tietyissä oloissa vastaavat tunnusmerkit kuin mikä tahansa muukin talousrikollisuuden alaan kuuluva teko. Tässä kysymyksessä vertailua voitaisiin suorittaa esimerkiksi arvopaperimarkkinalainsäädännön kanssa, jossa seuraamusjärjestelmä on rakennettu sekä hallinnollisen seuraamusmaksun, että rikosoikeudellisen sanktioinnin puitteisiin. Lisäksi lainsäädännöllisesti on hyvin vaikea lähteä kriminalisoimaan vain osaa kilpailunrajoituksista, kuten tarjouskartelleja. Vastaan nousevatkin rajanvetokysymykset eri tekomuotojen välillä. Myös tästä syystä koko järjestelmän siirtäminen rikoslain alaisuuteen vaatisi nykyistä huomattavasti laajempaa argumentointia.

Työryhmän näkemyksen mukaan kilpailuoikeuden järjestelmässä tarvittava preventiivisyys on saavutettavissa hallinnollisen seuraamusmaksujärjestelmän uudelleen määrittämisen avulla. Seuraamusmaksun enimmäistaso säilyy kuitenkin ennallaan, joten nykyistä suurempien maksimisakkojen määrääminen ei jatkossakaan olisi mahdollista. Sakkotasot voivat nousta ainoastaan keskimääräisesti, kun laskentatavassa otetaan enemmän huomioon kilpailunrajoituksen luonne ja kesto. Niin kauan kuin sanktiointi perustuu rahamääräisiin seuraamuksiin, maksun enimmäismäärää on toisaalta rajoitettava yritysten kannettavissa oleviin summiin. Seuraamusmaksun preventiivisyyttä olisi kuitenkin syytä punnita enemmänkin ottaen huomi-

oon tässä suhteessa sekä hallinnollisen että rikosoikeudellisen järjestelmän tarjoamat tehokkuusedut.

Lainvalmistelussa otetaan myös mielestäni melko niukasti huomioon kansainvälinen tendenssi tiukentaa kilpailunrajoituksiin liittyviä seuraamuksia. Käsillä olevassa työryhmän mietinnössä on käyty kylläkin läpi esimerkiksi Saksan ja Ruotsin ratkaisuja, mutta kriminalisoinnin puolesta puhuvia argumentteja, joita esitetään yleisessä eurooppalaisessa kilpailuoikeuskeskustelussa, ei mietinnöstä löydy. Ehkä tämä ei olekaan suomalaiselle lain valmistelulle tyypillinen tapa, mutta mielestäni näitä näkemyksiä olisi syytä ottaa huomioon punnittaessa kansallisen järjestelmän uudistamista niiden ajankohtaisuuden ja kilpailuoikeuden vahvan EU-liitännäisyyden johdosta.

Kriminalisointia voitaisiin punnita enemmän rikosoikeudellisesta järjestelmästä käsin ja suorittaa rikosoikeudellisiin seuraamuksiin liittyvää tarkoituksenmukaisuuspunnintaa ottaen huomioon rikosoikeudellisen järjestelmän jo valmiiksi tarjoamat periaatteet. Toistaiseksi perusteluista ei ainakaan käy ilmi, että esimerkiksi todellista hyöty-haitta -punnintaa olisi tehty eri vaihtoehtojen välillä. Näiltä osin jäämme odottamaan varsinaista lakiuudistusta koskevaa hallituksen esitystä, jossa asian punnintaa mahdollisesti suoritetaan perusteellisemmin. Näkemykseni mukaan tämä olisi valmistelutyöryhmän mietintö huomioon ottaen ainakin suotavaa.

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Law and Social Norms in Contractual Relationships

Keywords: Contract Law, Social Norms, Informal Business Practices, Efficiency of Legislation

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Abstract

Law is important – but not as important as many lawyers believe. Evidence from different countries demonstrates that businessmen rely more on social norms than on legal rights and duties. Sometimes law is even deliberately avoided. Social norms and informal practices can also be enforced through a variety of non-legal sanctions. Law is still relevant, especially in non-continuous relationships and so-called end-game situations. But legal norms are most relevant and efficient when they are well-aligned with social norms.

Full Article

1 Introduction

It seems to be a universal phenomenon among human beings that we overvalue our own field of interest and expertise, and undervalue that with which we are less knowledgeable and comfortable. The present article challenges that *legal centralism* of lawyers and legal scholars by showing that, in ordinary life, law plays a role that is entirely secondary to a range of social norms that govern human relationships.

There is a burgeoning academic literature on law and social norms.[2] This article focuses on the role of legal and social norms in the governance of contractual relationships. The first part reviews two empirical studies which look at business practices in two sample countries, the United States and

1 LL.B. (English Law), M.Sc. (Economics). Financial support from the Emil Aaltonen Foundation and the Acton Institute are gratefully acknowledged.

2 The theme is certainly not a new one, but recent years have evidenced an increasing theoretical interest in the relationship between these phenomena, especially in Law and Economics. Mercuro and Medema 2006, chapter 7, is a good introduction. Ellickson 1991 is almost a modern classic which helped to inspire interest in the topic. More recently, several journals have hosted special issues on this topic.

Taiwan. The second part examines different theories about the relationship between social norms and law. The third part discusses some of the implications and challenges of the theory.

2 Empirical Evidence on Legal and Social Norms in Business Relationships

2.1 Non-contractual Business Relationships in the United States

Stewart Macaulay's classic article "Non-Contractual Relations in Business" is a fascinating empirical investigation of the contrasting roles of legal and non-legal norms in business.[3] The study was based on interviews with businessmen and lawyers of firms based in Wisconsin, USA. In the following, I summarize some of the key findings of that study. Although they may be obvious to many businessmen, they are equally surprising – perhaps even shocking – to many lawyers and law students.

Firstly, there is the issue of general attitudes. A lawyer might presume that law has a central place in business relationships. Not necessarily so, says Macaulay. He found that most businessmen claim they prefer a handshake or "a man's word" to legal contracts, despite the fact that their lawyers expressly disapprove of their attitude. For businessmen, "let's do the deal" means defining only broadly what is to be done and what the price will be – specific legal contracts are a secondary matter.

Secondly, the study discovered that many contracts might be legally unenforceable – and businessmen do not necessarily see this as a major issue. It often happens that both parties include their standard forms into their communications, thereby trying to insert those conditions into the contract. This so-called "battle of the forms" means that sometimes there is no clear agreement on which party's standard form governs the relationship, and consequently there may be no contract at all (for lack of acceptance) or its terms may be open to question. Macaulay adds that the companies in the investigation not infrequently made "requirements contracts" (i.e., contracts to supply a firm's requirements of an item rather than a definite

3 Macaulay 1963.

quantity), which were probably unenforceable under Wisconsin law at the time; however, "none [of the businessmen] thought that the lack of legal sanctions made any difference."[4]

Thirdly, businessmen were found to shun legal disputes. As a matter of fact, many contracts were well negotiated and planned, but even then disputes were rarely based on the strict legal obligations; flexible adjustments to legal rights were common. An example is the cancellation of orders: in law, the seller would be entitled to demand full payment, but actually cancellations were commonly accepted without complaints. As one lawyer explained:

> "Often businessmen do not feel they have "a contract" – rather they have "an order." They speak of "canceling the order" rather than "breaching our contract." When I began practice I referred to order cancellations as breaches of contract, but my clients objected since they do not think of cancellation as wrong. Most clients, in heavy industry at least, believe that there is a right to cancel as part of the buyer-seller relationship. There is a widespread attitude that one can back out of any deal within some very vague limits. Lawyers are often surprised by this attitude."[5]

Consequently, lawsuits seemed to be extremely rare in comparison to the number of disputes that arise. One purchasing agent said: "If something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently."[6]

One may ask how universally applicable the findings of this study would be across different industries, countries and types of business. Nevertheless, the evidence in Macaulay's study reveals a fundamental gap between the *legal centralism* of most lawyers and the pragmatic *anti-legalism* of most businessmen.

4 Ibid., p. 60.
5 Ibid., p. 61.
6 Ibid.

2.2 Informal Business Practices in Taiwan

Social norms may be more important than law in other contexts too, as *Jane Winn* demonstrates in her interesting theoretical and empirical study of small business practices in Taiwan.[7] The author notes that the ”economic miracle” of Taiwan after the 1960s is usually attributed to the legal and institutional reforms made by the Taiwanese government – reforms which boosted foreign investments and export industries. Winn argues that this account of Taiwan's economic history does not reflect the reality of domestic business. It has been estimated that more than 50% of all economic activity in Taiwan is conducted not just domestically, but also in the ”informal sector”, that is, outside ordinary legal relationships.

Winn studied Taiwanese business practices through a range of interviews with lawyers, judges, business people, government officials and even some members of criminal gangs. She found strong support for the commonly held belief that in Chinese society, the authority of the law is relatively weak, whereas relations and connections have a normative role above that of formal legal rules. The roots of this setting can be found in traditional Chinese culture: according to the Confucian ideal, human relationships and rituals are the basis for cooperative relationships, while the function of the law is limited to that of inflicting punishments in cases of social misconduct. Thus law plays a secondary role, reinforcing the primary social reality, which pre-exists above legal rules and operates mostly in ignorance of formal law. Winn argues that although values may be changing, this attitude towards law is still reflected in present-day Taiwan – even among lawyers.

Winn depicts the Chinese relational system as follows: in Chinese culture, the “self” is primarily constituted by relationships, especially family relationships. Beyond family ties, connections (*guanxi*) are of central importance. The term refers to something more than ”networking” in Western societies: *guanxi* relations are forged through repeated dealings where there are strong unwritten rules of reciprocity such as doing favors, maintaining ”face” etc. An important point is that, according to the author, dealing with strangers is considered problematic and even dangerous.

7 Winn 1994.

Winn however argues that the traditional culture is not the only reason for the marginal role of the law. Law is considered oppressive partly because of the authoritarian political reality of Kuomintang rule – an authoritarianism that extended to the legal system. Taiwanese legislation is considered "labyrinthine", rigidly formalistic and often incompatible with social realities.[8] The law is often tied to politics through the so-called "exercise of official discretion". For example, gross violations of law might be tolerated for long periods of time, but selective enforcement of laws may be employed to harass political dissidents.[9]

On the empirical level, Winn's study focuses on small businesses. One example is tax evasion, which seems to be common among Taiwanese small enterprises. Tax evasion is often done through misreporting, for example by using multiple account books (a practice that seems to be widespread in other countries too, such as Russia). The author says that many legal measures have been implemented to fight against these practices, but the effect has been questionable. The role of social norms is crucial: successful tax evasion requires the cooperation of many individuals, including accountants and some tax officials. Cooperation is possible due to the fact that relational obligations are considered normatively superior to legal obligations, and because public authorities are widely seen as lacking full legitimacy.

Winn also found that business dealings among small businesses are usually done without formal contracts. One consequence of this is that organized crime has gained an important role in the society, because it plays "a significant role in policing transactions in the informal sector."[10] Whether this is an efficient solution is a separate issue; in any case, it does seem that criminal gangs can provide necessary assistance for debt collection. Some gangsters even have business cards in which they are represented as officers of companies offering dispute resolution and debt collection.

Why then are formal contracts avoided? Winn's interviewees said that courts are often seen as unhelpful, because they follow rigid rules and require formal documentation, which may be lacking. Moreover, even if one succeeds

8 Winn 1994, p. 203.
9 Ibid., p. 202.
10 Ibid., p. 209.

in obtaining a favorable judgment, it can be difficult to locate the assets of the debtor due to complex family ownership structures and dubious accounting practices. In such an institutional setting, a real but controlled threat by gang members can induce the debtor to use his *guanxi* to find the means to honor the debt.

The face of informal business in Taiwan reveals a different picture of the relationship between law and social norms – a picture that seems to be tied to the cultural and political history of the country and its people. Note, however, that Winn's findings may be widely applicable in a range of less developed countries such as India, or countries in Africa and Latin America.[11]

3 Different Relationships Between Law and Social Norms

3.1 Non-legal Sanctions

The empirical findings reviewed above demonstrate that the relevance of social norms is more than a mere sociological moot point. The more challenging question concerns how the relationship between law and social norms should be framed theoretically. In the following sections I review some of the key discussions and arguments on the role of non-legal sanctions, the different uses of law, and debates concerning the efficiency of law and social norms.

One way to look at the issue is to distinguish between legal and non-legal sanctioning mechanisms.[12] An interesting investigation on this has been made by *David Charny*, who investigates different types of commitments and sanctions that may govern commercial relationships.[13] He notes that there are at least three different types of non-legal sanctions.

11 See for example the discussion on "informal trade" in de Soto's 1989 work on extra-legal or "underground" economic activity in Peru.

12 The role of sanctions plays a central role in Anglo-American legal thought, because traditional English legal positivism tended to view laws as mere "commands backed by sanctions". Continental European legal theory is different in its emphasis on law as a normative system. This is also reflected in terminology: in the United States, legal scholars often use "norms" as a short-hand for social norms; in contrast, Finnish lawyers use the word "norms" to refer to legal norms.

13 Charny 1990. See also Panther 2000 for a review of related literature.

Firstly, there are "*bonds*" between the parties themselves. These may take the form of "relationship-specific prospective advantages", such as relation-specific investments, which pay considerably less outside the present relation. In repeated-deal situations, the loss of trust also creates high indirect economic costs.

Secondly, Charny refers to *reputation* among market participants (potential transactors) as a basis for non-legal sanctions. He notes that reputation is important not only in business-to-business markets but also in consumer goods markets. For example, the existence of brand value increases the cost of losing a good reputation, thereby giving strong non-legal incentives to behave fairly. An important issue with regard to the effectiveness of this type of sanction is the dissemination of information to other market participants. One reason why some markets (e.g., lawyers, doctors, financial advisors) may require heavier legal regulation is that many clients in these markets are inexperienced or infrequent buyers of the services and will find it difficult to assess the objective reputation of service providers.

Thirdly, there are *internal sanctions*, which Charny calls loss of "psychic and social goods." He notes that companies often try to encourage valuable internal sanctions by creating strong "corporate cultures" so that employees become emotionally attached to their firm, wanting to behave loyally and regretting if they must change jobs. In support of this theory, one should mention the work of *Bruno Frey*.[14] Building on extensive empirical work in motivational psychology, Frey shows that increasing monitoring and external incentives does not always have the desired effect on work effort, because external incentives can in some circumstances negatively shape the internal attitudes of trust, loyalty and working for the honor of doing a good job. This can easily be applied to business relationships: trust and loyalty are key ingredients of successful business, and that must be taken into account in contract negotiating.

Charny also argues that firm-employee relations are strongly influenced by non-legal incentives and sanctions – and this is true both ways. There are various sanctions, which may include relationship-specific prospective ad-

14 Frey 1993, 1997.

vantages, reputational concerns and internal sanctions. That may explain why parties often pay so little attention to the formal details of employment contracts in the employment process, and not infrequently there is no written contract of employment. Prudent employees (and employers) should of course check that there are no onerous contract terms, but many important discussions, agreements and expectations are routinely left outside the written contract of employment.

Macaulay's empirical evidence is consistent with the preceding framework. He shows that most of business is quite possible without enforceable contracts, given the existence and strength of various social norms that support business relationships. For example: it is unpleasant for company personnel if things are not done right with business partners, so it is better to act in accordance with agreements; salesmen often know purchasing agents well, give mutual favors, go to dinner together etc. Top executives often belong to similar societies and clubs, the likelihood of future business forces companies to maintain a good reputation and failure to pay would result in blacklisting, negative gossip and the like.

Macaulay's evidence also shows that businessmen think that negotiating detailed contracts can harm good relationships, and talking about remote contingencies can result in losing the deal. Frey's theory of intrinsic motivation seems to apply too: The businessmen Macaulay studied had learnt that if you make a detailed contract, you only receive according to the letter of the contract; but if you build relationships of trust, people are more flexible, even generous. Negotiating too many details indicates lack of trust, and may result in a loss of flexibility. Vague obligations may actually work better than precise ones (even though lawyers hate vague obligations), because it is easier to renegotiate them in light of the actual circumstances which may be impossible to predict. Finally, threatening to take things to a lawyer can be dangerous, because by doing so one can insult the other party, who in consequence will retaliate and may refuse to negotiate peacefully. When this happens, the loss of time and money may escalate.

3.2 The Uses and Abuses of Law

The empirical evidence reviewed earlier showed that law is in some contexts less important than many lawyers think. The theory of non-legal sanctions also reveals that legal sanctions play only a minor role in many contexts. This raises some obvious questions: why does law matter at all? Why do businessmen write contracts if they prefer not to rely on them? Is law more important in some contexts than in others?

Charny lists several reasons why commercial contracting parties prefer to rely on non-legal commitments: the costs of drafting can be high; it is difficult to know all contingencies in advance and to weigh their likelihood; informality can help to nurture trust between the parties, etc. On the other hand, legal proceedings are relevant in some circumstances, even though they are generally seen as the most costly and unpleasant dispute resolution mechanism. Sometimes the success of informal negotiations also requires the backing of at least a theoretical threat of going to court. Thus to neglect law altogether would be to miss the full picture and throw the baby out with the bathwater.

Macaulay's empirical findings support this view. The businessmen interviewed said that contracts are sometimes necessary, for example when there are clear risks that must be provided for. Litigation may also be worth the money and time in some special cases. But there are also some surprising reasons to make written and even detailed contracts. For example, saying "I'll have my lawyer review it" can be used as a delaying tactic, whereby one keeps the negotiations alive while still looking around for alternatives without committing oneself. In large companies, detailed contracts may also be used for internal communication, because they specify the relevant details to production departments, accountants etc.

Yet there is more to it, as *Lisa Bernstein's* insightful paper demonstrates.[15] She observes that there are many reasons why trading partners may actually prefer some aspects of their agreements and relationships to be legally unenforceable. Commercial customs and social norms allow business transactors

15 Bernstein 1996.

to modify written contract terms for a range of potential non-legal reasons. Bernstein poses the question of why businessmen do not incorporate all of these factors into the express agreement. She answers by pointing out three potential difficulties.

Firstly, there are *signaling effects*. Negotiating remote contingencies into the contract may be inappropriate, because it may signal distrust or unusual desire to litigate. Or, as was said earlier, one may fear that it would make things too inflexible if circumstances change. Secondly, there are *legal system costs*. Legal system costs refer to litigation costs, delays, and the risk of judicial error. Because of these costs, commercial transactors want to avoid unnecessary litigation. A good example given by Bernstein is the software industry: it is usual to disclaim all legal warranties, but at the same time to promise (in legally unenforceable ways) to fix defective products. The apparent inconsistency is explained by one expert as follows: software companies fear that some customers will initiate unreasonable litigation, and software suits are always very expensive to defend and could ruin the business. Finally, there is a difference between *observable and verifiable information*. Although many relevant factors can be observed by the transacting parties, they may not be verified by a third party. This is true of complex software cases, as mentioned. Bernstein also says that when businessmen are forging new relationships, it is difficult to know the trustworthiness of the other party. Trustworthiness can be observed later on, but it cannot be measured and verified in a legally enforceable way. Thus it can be better to have a strict written contract in case the other party turns out to be untrustworthy, but otherwise to govern the relationship with a more flexible relational agreement.

Bernstein proposes an interesting distinction that makes more sense of the interplay between law and social norms. She differentiates between what she calls (a) *relationship-preserving norms* and (b) *end-game norms*. Relationship-preserving norms are flexible and easily adjustable, and they facilitate cooperative dispute resolution. End-game norms, in contrast, govern the relationship when the parties do not intend to do business again, and therefore the norms are strict and clear. Bernstein believes that commercial parties will rationally want to separate these two types of norms: end-game norms should not be available when the cooperative business relationship

is alive and well, given the limitations of contractual and law-based rules. In contrast, it is good to have those end-game norms in place in case the relationship goes sour; thus neither party can abuse the cooperative nature of relationship-preserving norms.

Macaulay's evidence is broadly consistent with Bernstein's theory, and we need not recite it again. Bernstein provides addition empirical support for her hypothesis. She provides a detailed description of the National Grain and Feed Association's (NGFA) membership arbitration system, which is composed of industry experts. On the one hand, NGFA practices are very flexible when cooperation is ongoing, but when things go to arbitration, the tribunal sticks to the written contracts – and the members prefer it this way. For example, relationship-preserving norms in NGFA usually "split the difference," whereas arbitration proceedings do not, and Bernstein's interviews confirm that this is what NGFA members prefer. Written contracts also often specify the use of official weights, but because this is expensive, in-house weights are accepted in practice; however if it turns that the other party may have been cheating, one can rely on the written terms of the contract and demand compensation. Thus untrustworthy businessmen cannot abuse the cooperative and flexible norms and customs which normally govern NGFA trade.

3.3 Law, Social Norms and Efficiency

One of the big debates concerning social norms and law is their relative – and mutual – efficiency in governing contractual (and other) relationships. The first thing to note is that law is certainly not irrelevant. *Hernando de Soto* explains how the lack of legal contract enforcement impedes business in the informal economy of Peru.[16] When business is conducted without legal permits, businessmen are forced to rely on a range of non-legal mechanisms to mitigate lack of legal enforcement. For example, they cultivate long-term friendships; avoid large deals with individuals trading partners; invest time in investigating and monitoring the other party; or deal only with relatives or people from the same region. Sometimes the informal communities even

16 De Soto 1989, chapter 5.

organize collective dispute resolution bodies, and violence (or threats) may be used as a last alternative.

The difference between the informal economy in Peru and business in Europe and United States is one of degree only. Nevertheless, it seems implausible to say that social norms are enough without law. Indeed, de Soto's analysis of the underground economy in Peru reveals that when the law is not available, people resort to mechanisms which imitate the judicial and policing powers of the state, thereby creating quasi-states within the state.

The question that remains concerns the optimal role and importance of law vis-à-vis informal social norms. *Robert Cooter* posits that legal and social norms do their job most efficiently when they are well *aligned together*, such that they support each other.[17] The idea is not that law and social norms should mirror each other, but that they should complement each other. Cooter explains:

> "In a developing economy with relatively free trade, business will tend to develop efficient norms to regulate private interactions. In these circumstances, the role of state law can be limited to correcting failures in the market for norms. Failures tend to occur because private, informal punishment insufficiently deters wrongdoing. In these circumstances, state enforcement of social norms can increase private cooperation and production. However, successful state enforcement typically requires a close alignment of law with morality, so state officials enjoy informal support from private persons."[18]

The challenge seems to be that of finding the right balance and mixture between social norms and law. Without any law, the "law of the jungle" may prevail, but over-legalization and over-regulation are also harmful.[19] According to Cooter, legal centralism – and consequent over-regulation – is one of the reasons why law and social norms get out of alignment.

17 Cooter 2000.
18 Ibid., pp. 243–244.
19 See for example Pildes 1996.

However, not all legal scholars are as enthusiastic as Cooter about social norms. In his classic work *The Concept of Law*, *H.L.A. Hart* drew the distinction between law and custom.[20] He defined law as a union of "primary rules" (which control people and behavior) and "secondary rules" (which control the application and amendment of rules). Custom, according to Hart, does not have secondary rules, and as a consequence, it is inflexible and not under anyone's rational control. Thus, it would seem, law can be used to reform unworkable or old-fashioned social norms. In a more recent paper, *Eric Posner* gives a general critique of the idea that social norms are inherently more efficient than legal rules.[21] The basic point is similar to Hart's: social norms may not be so rational, and law can improve the situation by regulating behavior rationally and by providing more systematic sets of rules.

Posner is surely right: it would be senseless to say that law has no role to play in shaping and complementing social norms. However, it is hard to say where to draw the line. It can be difficult to say exactly when social norms are working well enough and when law should play a more important role. The dire consequences of over-legalization of the society are probably only seen after many years. Moreover, in many cases law cannot easily amend unworkable or harmful social norms. Take the case of Taiwan[22], or almost any "developing" country: there is a strong path-dependency and interaction between formal and informal institutions.

There are additional reasons to be cautious. Robert Cooter argues in an earlier paper, quite surprisingly, that sometimes it is easier to change custom than to change law.[23] Law depends on political processes, which entail costly procedures and special interests; custom depends on social consensus, which can be more flexible in some circumstances. Cooter goes so far as to say that "Hart's critique of custom resembles a socialist's critique of markets"[24]. There may be more to that argument than meets the eye: *David Charny* believes that methodological commitments influence one's attitude toward social

20 Hart 1961.
21 Posner 1996.
22 See Winn 1994.
23 Cooter 1996.
24 Ibid., p. 1655.

norms.[25] On the one hand, there is the neoclassical tradition of economics, which highlights market failures and largely believes in government's ability to improve matters efficiently. On the other hand, the Hayekian tradition shows that imperfect information makes central planning difficult if not impossible, whereas the analysis of decentralized coordination demonstrates that markets are not so irrational after all.

However, Charny is skeptical about the entire project of "normative analysis" of social norms and law. As he puts it: "There are simply too many unobservable variables, particularly those that bear on the 'noneconomic' motivations and preferences that must play a role in the start-up and the effectiveness of complex sanctioning systems."[26] Therefore it may be better to focus on trying to understand these phenomena and avoid arguing in terms of arm-chair generalities.

4 Implications and Challenges

The theory of law and social norms presents a host of interesting implications and directions for further research. For example, one fashionable topic in economics today is the theory of *incomplete contracts*.[27] According to this strand of research, contracts never specify all the possible contingencies and the responses to them. Reasons for this include that it is impossible to predict and calculate the probability of certain contingencies, while it is often impracticable and expensive to negotiate on them. The theory of incomplete contracts emphasizes the allocation of property rights as a way of dealing with contractual incompleteness: ownership rights function as the residual for whatever is not included in the contract. However, the theory and evidence of social norms shows that the standard analysis of incomplete contracts is plainly misleading: contracts do not exist in a normative vacuum. There are other norms that facilitate cooperation in the absence of contractually agreed provisions. Moreover, businessmen often prefer informal governance of relationships to legal and contractual planning. The

25 Charny 1996.
26 Ibid., p. 1858.
27 See Oliver Hart 1995, Salanié 1997.

theory of social norms therefore challenges the background assumptions of the economic theory of incomplete contracts.

The relationship between legal and social norms is important for practical reasons too. For example, Cooter notes that unproductive and uncooperative behavior can sometimes be prevented through private enforcement.[28] In practice, public enforcement through law may be necessary, but legal enforcement is expensive, and it is important that it is complemented by social norms which punish antisocial behavior. On the other hand, law plays an important role in influencing social norms, because law has an expressive function: laws relating to environmental regulation, tobacco smoking, drug use etc. can have powerful effects on public perceptions and expectations.[29]

Understanding the role of social norms may be especially important for policy-making in developing countries. Mainstream development economics emphasizes institutional reform, but this is understood in the context of formal institutions: electoral systems, law courts, the regulation of police, enforcement of contracts and private property, etc. These are all important issues, but often the question remains: how to achieve all of that in practice? Legal transplants from Western countries do not necessarily produce the desired effects, because the social norms and informal institutions can be very different. *Edgardo Buscaglia* argues that, without the alignment of legal and social norms, one does not get compliance and efficiency.[30] IPR protection in China provides a topical example: although the central government seems to be making an effort to enforce Western-style patents and copyrights, the practice in regional courts and other public instances can be different, because Chinese attitudes towards Western rights and privileges are influenced by many factors other than formal legal provisions alone.[31]

28 Cooter 2000.
29 Cooter 2000 gives an amusing example. A new law in California requires dog-walkers to clean up the poop. Earlier, people did not complain much about dog poop, but after the new law, they do if someone breaks the law. It is easier to say "obey the law" than "don't be so rude." This is understandable: when a standard of behavior is included in the law, it has the moral backing of the legitimate public authorities of the community.
30 Buscaglia 2000.
31 See for example Fung 1996 and Allison and Lin 1999.

However, much work remains to be done before full enlightenment. Some authors have noted the need for a more consistent and holistic theory of norms. The greatest challenge seems to be that of making sense of the internal (or subjective) dimension while uniting it to the external (or objective) dimension of norms. In his influential work, *Douglass C. North* has argued that the biggest challenge in creating good social and political institutions is how to create the conditions for just government and law enforcement. Formal political constitutions seem to make relatively little difference empirically speaking, and North therefore believes that internal norms are central to our understanding of this issue, but we do not seem to have any consensus on what they are and how they are formed and shaped.[32]

Lawrence Mitchell criticizes the new "norms jurisprudence" for accepting too much of the behavioral and positivistic attitude of modern social science and especially economics. He argues that the approach taken by the leading authors ends up distorting instead of improving the explanation of norms, because they "generally share the same basic goal, which is to establish a non-normative theory of norms. [...] They tend to share an underlying metanorm of efficient wealth or welfare maximization, and all share the basic belief that people are motivated principally—if not solely—by self-interest. Most important, by limiting their inquiry to what they see, they are unable to explain, except at the most superficial level, how norms become normative—that is, how they come to tell us what we ought (or ought not) to do."[33]

5 Conclusions

This article has reviewed some of the empirical and theoretical literature on social norms and law. It would be interesting to see some discussion – and investigation – of their relationships in Finnish society and business practice.[34] Given the enormous importance of non-legal norms and governance mechanisms in contractual relationships, it might also not be entirely

32 See North 1990.
33 Mitchell 1999, pp. 208–209.
34 A step in this direction is taken in Nystén-Haarala 1998.

unwise to put more importance to them in legal education. As *Alexis de Tocqueville* once mused: "Laws are always unsteady when unsupported by mores; mores are the only tough and durable power in a nation."[35]

35 Cited in Gregg 2003, p. 54.

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Privity of Contract in Financial Leasing

Keywords: Contract Law, Law of Obligations, Privity of Contract, Financial Leasing, Contractual Liability

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Abstract

This article examines the classical doctrine of privity of contract in the context of financial leasing transactions. According to the doctrine of privity, rights and duties originating from a certain contract shall only affect the parties to that contract. Despite the fact that the doctrine still is an undisputable main rule in Finnish law, exceptions to it are necessary. This is partly due to the fact that modern forms of exchange, finance and contractual practice require flexibility. The situation may be that a third party, who is formally not a party to a contract, is de facto comparable to a contractual party.

An example of a situation where the traditional and dogmatic division into inter partes and ultra partes relationships should be slightly reconsidered is a financial leasing transaction. Financial leasing is an established tripartite form of finance where, in short, the financier A purchases an object from the supplier B and leases it to the customer C who chose the object. The established practice in financial leasing transactions is that the supplier B and the financier A enter into a sales contract and the financier A and the customer C into a lease contract, which essentially differs from an ordinary lease contract on movable property. No formal contractual relationship between the supplier B and the customer C exists. However, it can be argued that a specific relationship – that is de facto comparable to a contractual relationship – does exist between the supplier B and the customer C.

The main focus of this article is on examining the relationships of the parties to the leasing transaction. It is argued that the examination should not be limited to the formal contractual relationship but deviating from the doctrine of privity should be possible if reasonable grounds weighty enough exist. What is to be considered "reasonable ground weighty enough" is examined mainly on the basis of the practical arguments developed by Olli Norros. In addition, due to

the special features of a financial leasing transaction it is argued that financial leasing should be recognized as an independent form of finance. Thus, the relationships between the parties to the transaction should be examined considering the purpose of the parties, the situation de facto as well as the financial leasing transaction as a whole.

Full Article

1 Introduction

The binding effect of a contract is traditionally understood to be limited only to parties of a certain contract: contractual rights and duties only affect the contracting parties. This legal principle is widely known as the doctrine of privity of contract. Traditionally this doctrine has also been the most distinguishing feature between contract and property law both in common and civil law countries[1]. The mechanical distinction between *inter partes* and *ultra partes* relationships has been predominant. Traditional theory states that proprietary rights, or rights *in rem*, are binding on third parties where contractual rights are not[2]. However, in later judicial discussion it has been discerned that judicial evaluations based purely on the mechanical distinctions between different branches of law do not reflect the judicial and social situation *de facto*.

One of the topical judicial phenomena where the wavering of limits between contract and property law, as well as the wavering of *inter partes* and *ultra partes* relationships actualize nowadays, is financial leasing. Shortly put, financial leasing is a form of finance in which a finance company A purchases an object from a supplier B and leases it to the customer C who has chosen the object.

Normally the object is movable property – vehicles as well as manufacturing and data processing equipment, to mention just a few[3]. Reasons for choos-

1 See e.g. Kartio JJ 1997, p. 152, Atiyah 1981, p. 265 and Zitting 1951, p. 73–75.
2 Hoffrén 2008, p. 219.
3 According to the Official Statistics of Finland, the majority of leasing objects leased during the year 2008 were cars and other vehicles (37.9 %), data processing equipment (25 %) and manufacturing equipment (19.2 %). In addition, the portion of leased vessels, airplanes and trains was 2.8 %. See Statistics Finland, Rahoitusleasing 2008. According to the same statistics leasing is mostly used in the mercantile industry.

ing financial leasing vary. Leasing being less capital-intensive than purchasing, a customer company C may avoid excessive debt liabilities by leasing the object. In addition, it may shift the risk of the fluctuation and lowering of the object's value to the financier, as well as enhance its tax planning.

Financial leasing transactions are not statutory[4]. However, these tripartite transactions are widely used and more or less established practice does exist[5]. Referring to the above definition of financial leasing, in a financial leasing transaction parties A and B enter into a sales contract and parties A and C into a lease contract. According to the traditional – and would I say dogmatic – theory, between C and B no contractual relationship nor contractual rights or duties exist. However, the issue is not that straightforward. One would state that financial leasing should not be considered as a specific type of transaction or a specific type of contract but as a transaction that consists of an ordinary lease contract and of an ordinary sales contract. However, remarkable differences compared to ordinary contracts exist, especially considering the lease contract. Due to these differences, extending the effects of the contract beyond the parties and deviating from contractual privity may actualize.

A central question that remains unanswered in Finnish law and jurisprudence is that on which occasions and on which grounds can deviation from the privity of contract happen. No general doctrines, principles or rules exist on how to define when the contract has effects beyond the contract-

4 However, we have written regulation on how the financial leasing is to be treated in the company's accounting. See IAS 17 of the IFRS on Leases, which provides that at the commencement of the lease term, *lessees* shall recognize financial leases as assets and liabilities in their balance sheets at amounts equal to the fair value of the leased property. In taxation, the main rule is that the *lessee* makes deductions in its taxation on the rental payments and the *lessor* makes depreciations on the owned property i.e. leasing object. The taxation may, however, be different if the leasing is regarded *de facto* as purchase. This exemplifies the fact how evaluation in taxation and in civil law is based on the formal view of "legal ownership", meanwhile the evaluation in accounting is based on the view of "economic ownership". In more detail see Torkkel 2006, p. 490–498. Similarly Tepora–Kaisto–Hakkola 2009, p. 430–431.

5 Comparing the statistics from the years 2006, 2007 and 2008, it can be stated that the volume of financial leasing is increasing. Between the years 2006 and 2007 the financial leasing investments increased by 24 %, in 2007 being in total EUR 1.9 billion. The amount of the financial leasing rents, in turn, increased by 13 %, in 2007 being in total EUR 1 billion. Between the years 2007 and 2008, the financial leasing investments increased by 13 %, in 2008 being in total EUR 2.2 billion. The financial leasing rents, in turn, increased by 8 %, being in total EUR 1.1 billion in 2008. See Statistics Finland, Rahoitusleasing 2007 and Rahoitusleasing 2008.

ing parties. Due to the fact that occasions (one of them being financial leasing) are numerous and ambiguous, it is not reasonable to regulate all of them on the basis of the contract type by written, and often inflexible, law.[6] However, it is also clear that some general rules are needed in order to define when the contractual effects may be extended in a reasonable and foreseeable way. In this paper I will mainly examine and focus on two issues. Firstly, I will shortly discuss the origins of the doctrine of privity, its current status in Finnish law and take a view on the arguments developed in order to deviate from the doctrine. Secondly, I will analyze the status of the privity doctrine in the context of financial leasing transactions realized in business-to-business relations.

2 Privity of Contract

2.1 Short Introduction

The classical doctrine of privity of contract can be divided into two branches. Firstly, according to "the burden rule", the contracting parties may not impose a burden on third parties by a contract. Secondly, according to "the benefit rule", regardless of the intentions of contracting parties third parties may not enforce a contract containing benefits conferred to them.[7] Simply put, according to the privity doctrine rights and duties originating from a certain contract shall only affect the parties to that contract.

It is a fact that the privity of contract has a place in almost all legal systems. However, its position and importance varies. Especially in English law, the privity of contract is an elementary principle[8]. In fact, the history of the doctrine can be traced back to English law, to the mid-19th century. As a curiosity, it is worth mentioning that the leading case establishing the doctrine

6 Hemmo OMSL 2002, p. 25.
7 Bridge 2001 EDINLR, p. 1–2. See also Collins 1993, p. 283–286 who regards the doctrine having three aspects: burdens, rights and immunities for third parties. With the latter, Collins means that a contract cannot purport to give legal immunity to a third party, e.g., immunity from claims.
8 Atiyah 1981, p. 265.

as a mainstay in English law was *Tweddle v. Atkinson* (1861)[9]. Prior to this there was no clear position in English law on the rights and duties of a third party[10]. In *Tweddle v. Atkinson* the facts and circumstances were that the fathers of an engaged couple contracted each to pay certain sum of money to the son, i.e., fiancé of the engaged couple. The fathers died before paying the marriage portion. The Court held that the son, i.e., promisee not party to the contract, could not enforce the contract due to the fact that there was no consideration[11].

2.2 Exceptions to the Doctrine

In modern law the privity doctrine is no longer literally applicable. The new and dynamic forms of economic exchange and contractual practice require flexibility to the main principle. In the following I will shortly discuss the main developments and exceptions to the privity doctrine, both in the context of English law and in the context of Finnish law. The English law will only serve as a starting point and as a point of comparison for the later discussion. Thus, the intention is not to make an exhaustive comparative analysis on the status of the privity doctrine. Indeed, comparing the status of the doctrine here would not be convenient due to the essential differences in common and civil law legal systems.

2.2.1 England

Despite the historically strict interpretation of the privity doctrine in England, a considerable number of exceptions have been developed to the prin-

9 However, before this in *Price v. Easton* (1833) the privity doctrine was also considered, but the reasoning of judges differed essentially. See e.g. Beatson 1998, p. 408, Treitel 1991, p. 529 and Khawar Tul. L. Rev 2002, p. 2. The doctrine of privity was again later reaffirmed in e.g. *Beswick v. Beswick* (1968). It was held in *Beswick v. Beswick* that a person, here widow, could not enforce in her personal capacity a contract entered into between the widow's deceased husband and his son. This was due to the fact that the widow was not party to the contract and had provided no consideration for it. However, the widow was allowed to sue the son in the capacity of the administratrix of her husband's estate. See in more detail e.g Atiyah 1981, p. 267–269.

10 See e.g. Treitel 1991, p. 407–408 and Khawar Tul. L. Rev 2002, p. 2.

11 The requirement of consideration is crucial in common law contracts. Each party to the contract must give up some specified right of liberty. If only one party offers consideration, the undertaking is not reciprocal and thus not binding (unless it is made in the form of *deed*). See e.g. Beatson 1998, p. 88–90, Treitel 1991, p. 63 and Collins 1993, p. 51–52. In addition, it is worth mentioning that the relationship between privity and consideration is close. See also Palmer AMJLH 1989, p. 1, who asks: "Is privity a distinct doctrine or merely an aspect of the requirement of consideration?"

ciple[12]. To mention a few, there are assignment of rights, contracts of agency and insurance contracts[13]. The historical point in English law considering the exceptions to doctrine of privity was, however, the enactment of the Contracts (Rights of Third Parties) Act 1999[14]. By the Act itself, a third party may enforce a contract without being a party to it. It must be emphasized, that the purpose of the Act is to create *rights* for a third party, not duties. Thus, as for duties the traditional privity doctrine still applies. However, in order to enforce rights, certain conditions need to be fulfilled. The Act provides, among other issues, that a third party may enforce a contractual term only if the contract *expressly provides* it or the term *purports* to confer a benefit to the third party (see Chapter, Section 1)[15].

Before entering into force, the Act caused many concerns on how the courts would apply it[16]. Critics have, among other issues, focused on the ambiguous term "purports". To be on the safe side, these concerns have on many occasions led to the entire exclusion of the Act through a contractual clause[17]. This may be even unfortunate due to the fact that application of the Act could be useful e.g. in equipment financing. Providing the end user of the equipment a direct right to enforce the sales contract entered into between the supplier and financier would allow the end user to enforce the supplier's warranty contained in the contract.[18] In addition, as intended, the Act adds substantial commercial advantage as English law is now in line with the law of Scotland, most European countries as well as with the laws of other common law countries such as the United States[19].

12 Bridge EDINLR 2001, p. 2.
13 See more in detail Atiyah 1981, p. 267–281 and Bridge EDINLR 2001, p. 2.
14 The Act is available at http://www.opsi.gov.uk/acts/acts1999a, last visited 7 April 2009.
15 In addition, the third party must be expressly *identified* in the contract by name, as a member of a class or as answering a particular description (see Chapter 1, Section 3). Other interesting conditions, but without great relevance regarding the topic of this paper, are provided by the Act as well. E.g., the Act does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with other terms of the contract (Chapter 1, Section 3). In addition, contracting parties may not rescind or change the contract in a way as to extinguish or alter a third party's entitlement without his consent (Chapter 2, Section 2).
16 This observation is based on numerous articles written during the years 1999–2001.
17 See e.g. Bridge EDINLR 2001, p. 4.
18 McKnight J.I.B.L.R. 2004, p. 34–35.
19 Dean J.B.L. 2000, p. 2.

The first occasion where the Act has been considered was the *Colman J. Nisshin Shipping Co Ltd v. Cleaves & Co Ltd* (2003). The case concerned shipping charter contracts entered into between the owners and the charterers. The contracts provided that the charterers would pay a commission to the brokers who were not parties to the contract. When the brokers sought to enforce their rights, the charterers claimed they did not have an intention nor was there a positive statement in the contract to confer benefits to the brokers. The court held in favour of the brokers. It stated that the contracts "purported" to confer rights to the brokers in accordance with the Act in question.[20]

2.2.2 Finland

In Finland the doctrine of privity has not historically been interpreted as strictly as in England. In the following, I will shortly describe some of the numerous exceptions to the privity of contract that have been considered in Finnish law and jurisprudential discussion[21]. The first exception is the contract made in *favour* of a third party[22]. This doctrine has been clear for long, unlike in English law. The second one is the *succession of rights* to a third party where the transferee has the possibility to present contractual claims to the original contracting party[23]. The third judicial construction is the situation in which a contract is concluded *via a representative*[24]. All the three exceptions mentioned above can be regarded as classical ones.

The newer exceptions can be roughly divided into those currently in force on the basis of written legislation and into those not supported by written legislation. Thus, the validity of the latter must be evaluated case by case on the basis of principles and arguments. The first exception currently in

20 McKnight J.I.B.L.R. 2004, p. 35–36.
21 This description is partly based on the clarifying roundup made by Olli Norros in his doctoral thesis. Norros 2007, p. 32–89. As will be noted, situations are various and no general legislation on the legal status of the third party exists. In addition, it must be emphasized that the description made in the following is not exhaustive.
22 See Norros 2007, p. 32–36.
23 Norros 2007, p. 36–43.
24 The authorization can be divided into statutory and to authorization based on contract. The latter again can be divided into direct and indirect authorization. Norros 2007, p. 43–50. In addition, a delegate's liability in direct authorization is provided in Finland by written law. According to the Contracts Act (228/1929) Section 25, a person purporting to be an agent of another shall compensate a third person for any loss suffered because the transaction does not bind the alleged principal.

force on the basis of written law is *product liability*, in which a party other than the supplier is liable for the damages caused by the product[25]. Worth mentioning are also *consumer contracts* where consumers have been provided with rights to direct claims to a business party who has caused the defect but who is not in contract with the consumer[26].

An example of the newer exceptions developed and not supported by written law are *commission contracts* that include, for example, *a professional's liability* to a third party, e.g. attorney's or banker's liability. If certain requirements are fulfilled, for example, if a professional is aware of a third party interest and should understand that his actions will injure the third party, the professional's liability may be justified.[27] *Real estate sales agent contracts* are also an example of commission contracts. In real estate sales agent contracts the real estate agent and the purchaser are not in a contractual relationship. However, wrong particulars given by the agent regarding the object should allow the purchaser to present claims based on the contract entered into between the seller and the agent[28]. *Chain of contracts*, in turn, is a judicial construction where a party to a contract is also a party to another contract regarding transfer of a certain physical performance, for example a product[29]. Keeping in mind the definition of the topic of this paper, the last but, not the least, exceptions not supported by written law are the different *tripartite financing transactions,* such as factoring and leasing[30].

25 The Product Liability Act (694/1990) has been in force since 1 September 1991. Prior to this the legal state on product liability was somewhat unclear despite the fact that in its decision KKO 1984 II 225 the Supreme Court had held the manufacturer liable against the end user. See Norros 2007, p. 50–51.

26 Acts currently providing these general rights to a consumer are Finnish Consumer Protection Act and the Housing Transactions Act. See Norros 2007, p. 62–66.

27 Norros LM 2008b, p. 642 and Norros 2007, p. 55–59.

28 According to the Act on Real Estate and Rental Flat Agency (1074/2000), Section 14, *consumers* currently have this right. Thus, as for consumers, the exception is currently in force on the basis of written law. However, it remains unclear whether this can be realized in business-to-business sales. See Norros 2007, p. 52–54.

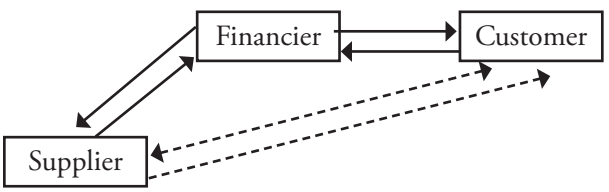
29 Norros himself examines in his research the chain of contracts and more specifically subcontractor's liability to the end user due to a defect in the product that has been transferred through the middleman. See Norros 2008, p. 6–8 and 354. In my opinion, however, the chain of contracts is closely related to financial leasing transactions.

30 Norros 2007, p. 78.

3 Leasing

3.1 General

At this point it is useful to take a closer look at the main judicial features of leasing. It must be noted that in Finnish jurisdiction leasing arrangements are not statutory. Neither does established legal praxis exist. Thus, the transaction is mainly based on the common practice of financial institutions[31] and their customers. In Finland, leasing is commonly realized in the form of *financial leasing* instead of *operational leasing*[32]. In brief, financial leasing means the leasing of movable (or, more rarely, immovable) property, in which the *financier* (the lessor) obtains ownership of certain object needed from the *supplier* and leases it to the *customer* (the lessee) on a fixed, long-term lease contract.[33] The result is a special, tripartite financial transaction that can be presented as follows[34]:



1. Negotiations between S and C on acquiring the object.

2. S makes a sales offer to F regarding the object, the offer including C's approval.

3. By accepting the offer, S and F enter into a sales contract, and F and C, in turn, into a lease contract. In addition, a repurchase contract regarding the object may be made between S and F.

31 During the year 2008 in total 23 corporations offered leasing services as financers. Nine of the total 23 were credit institutions (banks) and 86 % of the rental payments were accrued by them. 14 % of the rental payments were accrued by the remaining 14 other corporations. See Statistics Finland, Rahoitusleasing 2008.

32 Operational leasing is a short-term leasing in which the leasing object is not usually leased for the object's whole economic life to the same lessee. Thus, the same object may be leased successively to various lessees during its life cycle. In addition, in operational leasing the lessee as well as the lessor may have the right to denounce the contract and the lessor usually has the duty to take care of the object's maintenance.

33 See e.g. Tepora 1988, p. 249–250, Takki 1980, p. 239–240.

34 The figure and its specifications are based on the figures drafted by Jarno Tepora. See Tepora 1988, p. 250–252.

4. F orders the sales (or lease) object to be delivered from S directly to C.

5. S transfers object's possession to C and sends the invoice to F. After C has approved the delivery, F pays the selling price to S.

6. C pays the first amount of the rent when the invoice matures and the following rents in accordance with the provisions of the lease contract entered into between F and C.

7. After the end of the term, C may have different options depending on the lease contract: a) to return the object to F, b) to continue the lease period, or more rarely c) to use his call option.

3.2 Notices Regarding Relationships

In the following I will highlight the most essential features regarding the relationships of the parties to the financial leasing *transaction* and exclude all other third party relationships that traditionally have been regarded as questions of property law. The following chapters are discussed based on an assumption that the parties are corporations and that the leasing object is movable property, which is normally the case.

3.2.1 Financier – Customer: Lease Contract

In Finland lease contracts in financial leasing are usually based on standard contractual terms drafted by the financier, e.g. bank or other finance company. However, contractual practice regarding financial leasing contracts (hereinafter "lease contracts") is well established. Differences compared to ordinary lease contracts on movable property are significant.

To begin with, a lease contract is a *fixed-term* contract. Neither the financier nor the customer shall denounce the contract before the basic term period has ended. During the basic term period the purchase price of the leasing object becomes "paid" by the customer in the form of rents[35]. However, the customer may assign the contract providing that the financier accepts the

35 The length of the basic term period is calculated on the grounds of leasing object's estimated life in a way the purchasing price is to be fully compensated. The financier's profits, interests and other expenses are also taken into account. See Takki 1980, p. 262.

new party acquired by the customer. Fixed term does not, however, prevent the parties from *rescinding* the contract on grounds of an essential breach of contract by the other party.[36] In addition, when the basic term period has ended, the customer usually has an option to continue the lease contract with renting prices remarkably lower compared to the basic term or even use his possible call option[37].

Unlike in ordinary lease contracts, in financial leasing contracts it is provided that the customer carries the risk of accidental destruction and damage of the leasing object. In addition, the customer is responsible for the maintenance of the object. According to Takki, these terms are established commercial customs in financial leasing and could be considered valid even without explicit contractual term as *naturale negotiae*.[38] Further, unlike in ordinary lease contracts, in the established leasing practice, the customer also has the duty to insure the object or at least defray the insurance premiums. The last difference to mention, though not the least, is that the financier is usually discharged from liability regarding the (quality) defect[39] or delay in delivery of the object as well as the object's suitability for the intended use. Takki considers the latter being valid without explicit contractual term as *naturale negotiae.* As for the quality defect and delay, a specific contractual term is, according to Takki, required.[40]

36 An essential breach is usually required, e.g., a customer's delay in rental payments. See Takki 1980, p. 262–264 and 274.

37 See figure 1, specification number 7. However, call options are rare nowadays because of the risk that the lease contract may be evaluated judicially as a hire purchase contract as defined in the Act on Hire Purchase 91/1966. This may create problems regarding third parties and taxation. See e.g. Tepora 1988, p. 251 footnote and Takki 1980, p. 266. In addition, in its decision KKO 1973 II 87 the Court held that considering the factual circumstances and the transaction as a whole, a leasing contract was to be evaluated as a hire purchase contract.

38 Takki 1980, p. 266–268.

39 In Finnish law the defects can be divided into *quality defect, legal defect* and *delay.* Legal defect in the object means that the object assigned is encumbered with third party rights, e.g. title or lien to the object. Legal defect may lead on to a situation where the assignee, e.g. lessee loses possession of the object assigned. See e.g. Hemmo 2008, p. 402–411. It is clear that the *quality defect* is usually excluded in the financial leasing contracts from the financier's liability. However, the legal effects are more ambiguous. See Tepora 1988, p. 268–270, who argues that the financier is liable for the legal effects encumbering the leasing object. This issue cannot, unfortunately, be discussed in detail in this paper.

40 See Takki 1980, p. 268–271.

As a conclusion it must be emphasized that the purpose of the financial leasing contract – as the purpose of the whole transaction – is that the financier works purely as a financier in order to finance the investment needed in the commercial practice of the customer. The customer chooses the object as well as the supplier, the object is delivered directly to the customer and the customer approves the object after having examined it.[41] However, it also must be noted that the financier is not an ordinary creditor. On the grounds of special features and differences compared to ordinary lease contracts, the distribution of liabilities discussed above may be considered, in my opinion, to at least some extent as reasonable. The Supreme Court's stand, which was delineated by the recent decision KKO 2008:58, however, differs from that outlined above. In its legal practice the Supreme Court has evaluated lease contracts formally on the basis of ordinary lease contracts. The decision in question will be discussed in more detail in Chapter 4.4.

3.2.2 Supplier – Financier: Sales Contract and Repurchase Contract

As the leasing transaction is based on two separate contracts, the sales contract entered into between the supplier and financier is detached of the lease contract discussed above. The sale of the leasing object is a normal exchange of goods and belongs to the scope of application of the Sale of Goods Act (hereinafter "Act"). The provisions of the Act are subject to the terms of the contract between the parties (Section 3). Thus, if not otherwise agreed, the provisions of the Act apply. For example, the risk regarding the object passes to the purchaser when delivery of the object takes place (Section 13). After delivery, the purchaser must duly examine the object (Section 31). The purchaser loses the right to rely on a defect if he does not give notice to the supplier within a reasonable time after discovering the defect (Section 32). Neither can the purchaser rely on a defect he has been aware of at the time of the conclusion of the contract (Section 20).[42]

41 See Tepora 1988, p. 264–265 and Millqvist 1986, p. 138–139.

42 As for legal defect, there is a specific provision in the Act, Section 41(2), according to which the purchaser is *always* entitled to damages for losses incurred from a third-party claim that existed at the time of the conclusion of the contract if he neither knew nor ought to have known of the claim.

In addition, the supplier and the financier may contract on the supplier repurchasing the leasing object on the financier's demand when the basic rental period has ended (*repurchase contract)*. It is worth noting that this contract may limit the customer's options; the customer cannot, for example, continue the lease.[43]

3.2.3 Supplier – Customer: No Contract

Though there is no contractual relationship between the supplier and the customer, some special features of their relationship must be considered. To begin with, due to the discharge in the financier's liability regarding defect, delay and suitability, the customer should be granted legal remedies to direct claims at the supplier. This can be effectively realized by a) the supplier's *warranty* b) confering this right to the customer in a sales contract entered into by the supplier and the financier (*contract made in favour of a third*) c) *transferring* the financier's rights to direct claims against the supplier or d) *authorizing* the customer to enforce claims on behalf of the financier[44]. However, interpretational problems arise in situations where these judicial remedies granted to the customer are not clearly defined and especially in situations where none of them have been used.

It needs to be considered whether the supplier is in any case liable towards the customer. According to both Takki and Tepora, providing that the financier is discharged from liability by a contractual term, the customer shall have the right to direct claims to the supplier without e.g. financier's specific authorization or other contractual term. Takki and Tepora argue that otherwise the customer's legal protection would be incomplete and unfair.[45] Furthermore, according to Muukkonen and Swedish legal scholar Millqvist, whether or not the financier is specifically discharged from liability, the customer shall principally always – and despite the lack of contractual relationship – have the right to direct claims at the supplier. Muukkonen grounds his view on practical arguments, especially aspects of justness. He also points out that the transaction must be considered as a whole. Millqvist also argues his stand with practical arguments. In addition, Millqvist's approach differs

43 See Tepora 1988, p. 251 footnote.
44 See Millqvist 1986, p. 144.
45 See Takki 1980, p. 271–272 and Tepora 1988, p. 266–267.

from the others' in a sense that despite the formal positions of the parties the supplier shall be directly and fully liable for the breaches and not only "through" the financier. However, depending on the circumstances, the financier's and the supplier's liability should be joint and several.[46] Similar to the stand presented by Millqvist, according to the specific provision of the UNIDROIT Convention on International Financial Leasing, the supplier's liability towards the customer is equivalent to contractual liability[47]. However, Finland has not ratified the Convention[48].

An additional question to the issue of whether the customer has a right to make claims against the supplier is how *wide* is the customer's legal protection and thus how wide is the supplier's right to make defence and invoke contractual terms limiting its liability. The literature is more or less silent on the issue. Tepora, however, points out that in the lease contracts it is usually provided that the customer has a right to use all legal remedies the financier could[49].

It must be emphasized that the approving stands discussed above are stands represented in the *academic literature*. The viewpoint of the *legal practice* might again differ[50]. In its precedent KKO 2008:31 the Supreme Court held that the purchasers of the shares of the housing corporation were not allowed to make claims due to certain moisture defects in the housing unit against the contractor, i.e. the constructor. The Court argued that no contractual relationship existed between the purchasers and the contractor, but only between the contractor and the founder shareholder, i.e. the original

46 See Muukkonen LM 1988, p. 634–635 and Millqvist 1986, p. 147.
47 See UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), Article 10.1 according to which "the duties of the supplier under the supply agreement shall also be owed to the lessee as if it were a party to that agreement and as if the equipment were to be supplied directly to the lessee. However, the supplier shall not be liable to both the lessor and the lessee in respect of the same damage." See also Article 10.2 in which the customer's rights are limited by providing that "nothing in this article shall entitle the lessee to terminate or rescind the supply agreement without the consent of the lessor".
48 Finland has signed the Convention in 30 November 1990. The Convention and information on implementation available at http://www.unidroit.org/english/conventions/c-main.htm, last visited 7 April 2009.
49 In addition, according to Tepora in legal praxis the preliminary approach has been similar. See Tepora 1988, p. 268.
50 Similarly as regards the lease contracts and the Supreme Court decision KKO 2008:58, discussed in Chapter 3.2.1.

seller of the shares of the housing corporation.[51] The Court emphasized that the valid main rule is that a third party is not allowed invoke a contract to which he is not a party if not otherwise enacted. It can be argued that the Court's reasoning was extremely formal. However, Norros points out the judicial importance of the precedent in question may be minor due to the Court's reasoning being extremely tightly bound to the written law, as well as due to the fact that the facts and circumstances of the case took place in the 1980s. Thus, later legal developments that are more open on extending the contractual liability could not be considered by the Court.[52]

4 Extending Contractual Liability

To begin with, it must be emphasized that *extending contractual liability* and *becoming party to a contract* should be distinguished. The latter judicial construction is excluded from this paper. The possibility that a contract confers – with purpose or without purpose of the parties – rights or duties to a third party, does not directly mean that a contractual relationship has been established[53].

4.1 Contractual Liability and Tort Liability

Traditionally, three forms of liability are distinguished in Finnish law. *Contractual liability* is applied in contractual relationships with the aim to ensure contractual commitment. *Tort liability* applies when no contractual relationship exists between the injured and the party causing damage. *Un-*

51 The question was, thus, of *a chain of contracts*, consisting of a contractor, a founder shareholder i.e. original seller and a purchaser. See the commentary on the case Norros LM 2008a, p. 644. The judicial array, as already mentioned before, is comparable to the one in the financial leasing transactions.

52 According to Norros it is clear that later legislative developments cannot be considered by the Court, not even through the general doctrines that may have been changed by legislative amendments. He argues, however, that there should be no obstacle on considering later developments in other legal sources such as case law, judicial literature and practical arguments. See Norros LM 2008a, p. 646 and 654–655. If understood correctly, Norros calls for wider argumentation from the Court, argumentation that takes into consideration especially the practical arguments. This is despite the fact that the facts of the case have taken place before the new ways to argument have been developed. In my opinion evaluation in these situations should be, however, critical and careful in order to maintain legal certainty.

53 See e.g. Norros 2007, p. 116–117. See also Hemmo 1998, p. 26–27, who points out that a party's obligation to perform is independent of the definition contractual liability. In my opinion, a party's obligation to perform is parallel to the common law countries' requirement of consideration (see footnote 8).

just enrichment, in turn, is usually applied in situations where none of the two is applicable. The latter being more or less exceptional, the choice of application is usually made between the tort and contractual liability. These divisions have traditionally had an important normative function.[54]

Norros states, however, that despite the strict division between the tort and contractual liability, a "grey area" between the two has developed. This argument is mainly based on legal praxis and recent legislative amendments[55]. In various precedents the Supreme Court has indicated that on the grounds of practical arguments, at least to some extent contractual liability may be applicable despite the inexistence of a specific contract[56]. According to Norros, the liability applied by the Court cannot be categorized as tort or contractual. Norros finds it problematic that the Court has on many occasions dismissed the analytical consideration of the different forms of liability.[57]

The question follows: what is the normative base for the liability of the supplier towards the customer in financial leasing transactions? According to Hemmo, when the effects of a contract extend beyond the parties, the transaction's purpose and real nature must be considered. If a party is aware on the grounds of general and established practice, that his actions affect some other contractual relationship in a certain way, contractual liability is arguable.[58] Norros shares this stand and further emphasizes the role of practical arguments; contractual liability is arguable in a formally extra-con-

54 See e.g. Hemmo 1998, p. 1–4.

55 An example of such an amendment is the Section 14 of the Act on Real Estate and Rental Flat Agency (1074/2000).

56 See e.g. KKO 2001:70 where the Court held a bankruptcy trustee liable for damages caused to creditors. The Court argued that because the trustee's task was based on law *ipso jure* and not on e.g. a contract, the liability was not contractual nor tort, but something in between, "of a different type".

57 See Norros 2007, p. 125–133. Examples of the few cases where the Supreme Court has considered the normative classification of different forms of liability are KKO 1999:19 and 1992:165. In the former case the Court held that no commission relationship, i.e. contractual relationship, existed between the accounting division and the injured party. The accounting division had, however, failed in its responsibilities and was thus liable for the injured party in accordance with the general contractual principles. In the latter case the Court held that the bank having drafted a faulty deed of gift was liable for the grantee on a contractual basis despite the fact that no contractual relationship existed. The Supreme Court decision KKO 1992:3, in turn, is an example of a decision where the Court did not specifically consider the form of liability but held the bank liable for the payment that was made to a wrong bank account. However, e.g. Hemmo has come into the conclusion that the Court did apply in this decision contractual liability without specifically considering the issue. See in more detail Hemmo 1998, p. 321–326.

58 See Hemmo 1998, p. 302–303.

tractual relationship if there are *substantial* grounds weighty enough[59]. Now considering the purpose and established practice of the leasing transactions described in Chapter 3 and providing these features appear in an individual case, in my opinion, the contractual liability is arguable in the relationship between the supplier and the customer instead of tort. To give an example, in financial leasing the supplier who has given the particulars regarding the object is normally fully aware of being a party to a financial transaction as well as of the consequences of failure of performance. Thus, the situation is somewhat similar to a contractual relationship.

4.2 The Concept of Contract

As mentioned, the strict division into *inter partes* and *ultra partes* does not meet the case in evaluating when a contract extends its legal effects beyond the parties. In Chapter 4.1, I came into the conclusion that extended contractual liability is arguable in financial leasing contracts instead of tort. Thus, contractual legal effects shall be derived from a certain contract. The following approach that slightly re-considers the concept of contract is in my opinion a useful starting point to the discussion on extended contractual liability.

Utilizing the analytical method[60] of civil law, Pöyhönen (currently Karhu) breaks the concept of contract into different elements and dimensions. In his approach instead of a *stable* all-or-nothing concept, the contract should be regarded as a continuous *process* of relations. This procedural concept of contract includes three dimensions or sub-concepts. The s*ubstantial* dimension includes the changing combination of contractual obligations, liabilities and remedies supporting the latter ones. The *personal* dimension means that besides the contractual parties, third parties may as well have some rights or duties. Worth emphasizing is that the rights and duties of the par-

59 See Norros 2007, e.g. p. 133.

60 Shortly put the analytical method aims to break general concepts into sub-concepts, which better describe the actual judicial circumstances. The analytical method was developed as a criticism to the German conceptual jurisprudence that aimed to develop general and all-embracing concepts from which legal consequences were to be derived. In Finland the groundbreaking legal scholar in the branch of analytical method was Simo Zitting who broke the concept of ownership into normative sub-concepts. Peculiar to the analytical method was that no legal consequences should be derived from the concepts. See in more detail e.g. Zitting 1951, p. 1–102 and Tepora 1984, p. 26–32.

ties need not be symmetrical. The *temporal* dimension means that the binding effect and cessation of a contract cannot be exactly defined. In addition, they often happen silently and unnoticed.[61]

4.3 Evaluating Ways to Argument

As Norros states, extended contractual liability is arguable only if there are substantial grounds weighty enough. Practical arguments are central.[62] Practical arguments may be defined as arguments that consider the social and economical realities and consequences of a certain decision. Though practical arguments are often used, especially in the branch of property and contract law, their contents are rarely defined in detail.[63] Thus, it is not straightforward to say on which grounds practical arguments may be regarded as weighty enough in order to extend the contractual liability[64].

Let's take a few examples of the arguments discussed in Finnish jurisprudential literature that aim to argue for extended contractual liability. The *interest of exchange* may be regarded as one of the most used practical arguments or principles[65]. According to Niemi, a third party benefiting unilaterally, as well as the unjust burdening of a third party, must both be considered as disturbances in economic exchange. Thus, the application of e.g. principle of *justice* should not be limited to purely contractual relationships[66]. Kartio brings out a general rule according to which in exchange every undertaking should fulfil the prerequisite of *honour and honesty*[67]. Mononen, instead, discusses a *special relationship* comparable to contractual relationship. To be

61 See more in detail Pöyhönen 1988, p. 211–231.
62 Norros 2007, p.133 and 278.
63 See Klami LM 1996, p. 468.
64 In my opinion, taking into account the doctrine of sources of law, an important issue to consider is to what extent the practical arguments are valid sources of law. As a source of law is generally defined as a basis that has been generally accepted by the legal community, similarly the practical arguments that are to be applied must be generally accepted. Unfortunately, this issue cannot be discussed in this paper in more detail.
65 Klami criticizes the interest of exchange being often used in favour of the addressee of the undertaking without considering more deeply how the approach affects the reliability of exchange in long-term. He also emphasizes that more *empirical* research is needed on the possible consequences. See Klami LM 1996, p. 468 and 471–472.
66 See Niemi 1996 who discusses this on the basis of thinking and theories of Gauthier, p. 175–179 and 202.
67 Kartio JJ 1997, p. 158–159.

regarded as special, some features characteristic to contractual relationships must be recognisable.[68]

It is presumable that none of the views is useful as such when leasing contracts are considered. This is mainly because of the views' generality and abstractness. In the following, I will highlight the main points of the arguments developed by Norros who seems to be the first one aiming to systemize the possible argumentation on extended liability more in specific terms, especially in contractual chains.[69]

4.3.1 Closeness of the Relationship

According to Norros, in a contractual chain some special *proximity* between the subcontractor (hereinafter "supplier", i.e. contractual party) and the end user (hereinafter "customer" i.e. third party) must exist in order to differentiate it from an ordinary extra-contractual relationship[70]. In this examination only the factual circumstances that could be observed by the supplier when concluding the contract may be taken into account[71]. In a more detailed examination regarding closeness of the relationship, the first issue to be considered is that the customer shall be a) *identified* by the supplier[72]. This is based on the fact that in a common contractual relationship a party is usually contracted with and committed to a specific party. In addition, extended contractual liability is reasonable only if the supplier was conscious of the reassigning of the object to the customer.[73]

Secondly, the supplier may be held liable only if the supplier has been able to b) *foresee the damages* caused by the defectiveness of the object. Here it

68 There must be e.g. a) some consideration and conversancy b) some approval, consent or mutual understanding c) duties and d) the right to supervise other party's actions and expect a certain level of quality. See Mononen BLF 2005, p. 106.

69 It is worth reminding that Norros concentrates in his research on *contractual chains* and evaluates these arguments on this basis. Essential is the chain and relationships between *subcontractor, middleman* and *end user*. I, instead, evaluate these arguments in the light of financial leasing transactions.

70 See also Hemmo 1998, p. 281 who sets as a prerequisite the "special relationship" between the contractual and third party. A special relationship enhances the possibility for the liable party to identify persons entitled to contractual compensation.

71 Norros 2007, p. 178.

72 It is not required, however, that the party should be able to *exactly* define the future assignees.

73 See in detail Norros 2007, p. 180–188.

must be considered to what extent the supplier is aware of the object's future environment of use, how significant is the risk for damages of the defective object[74], does the middleman (hereinafter "financier") have the possibility to detect and repair the defect in the object and how established is the practice between the parties.[75]

Thirdly, it must be examined whether the customer had a specific c) *confidence* with the supplier and his performance[76]. Fourthly, the supplier's d) *negligence* regarding the defect in his performance is to be examined. Intention or gross negligence may strengthen and extend the liability.[77] The examination regarding foreseeability (b) may be regarded as the most significant in the overall examination, the status of the latter two (c–d) being only supplementary. Norros points out that if the damage caused to the customer has been clearly foreseeable by the supplier, no other arguments for the closeness of relationship are needed[78].

4.3.2 Hindering the Immediate Channel of Compensation

After well-founded consideration Norros comes to the conclusion that the *prima facie* principle should be claiming damages from the immediate channel[79]. In leasing contracts the immediate channel is the financier. Other conclusion would be unjust from the supplier's point of view and would occasionally release the financier fully and groundlessly from liability. However, the aforementioned principle is flexible: the customer may submit claims directly to the supplier if it is *clearly impractical* to direct claims to the financier.[80] Situations where hindering the immediate channel result as clearly impractical, can be divided into *factual* and *judicial.* Factual hindering covers situations where the primary liable is insolvent, unreachable or

74 This is crucial mainly in chain of contracts to define how broad the risk formed by the subcontractor's object is among the overall risks of the defected object reproduced and reassigned by the middleman. See Norros 2007, p. 195–196.
75 See in detail Norros 2007, p. 189–203.
76 See in detail Norros 2007, p. 203–218.
77 See in detail Norros 2007, p. 219–228.
78 Norros 2007, p. 228.
79 Norros emphasizes that this is despite the fact that in our legal system the general stand especially in jurisprudential literature has more or less been that the hindering of the immediate channel of compensation is not required. See Norros 2008, p. 245.
80 See in detail Norros 2007, p. 230–250.

has quit his business. Judicial[81] hindering covers *inter alia* contractual terms that discharge the liability of the immediate channel.[82] It must be emphasized that the prerequisite on the closeness of relationship must be fulfilled. In addition, the third party may invoke the hindering of the immediate channel only if he was not aware of the hindering when concluding the contract.[83]

4.3.3 The Influence of the Contractual Content

Contractual contents of the two contracts in financial leasing may further define the liabilities between the parties to the transaction. The following may also partly answer the question regarding the wideness of the supplier's liability, and on the other hand the customer's legal protection[84]. Norros divides the influence of the contractual content into sub-questions, as follows: does a) the customer have the right to invoke the terms of the contract in force between the supplier and the financier; b) the supplier the right to invoke the terms of the contract in force between the financier and the customer; c) the supplier the right to invoke the terms of the contract in force between him and the financier; and d) the customer the right to invoke the terms of the contract in force between him and the financier?[85] As a main rule Norros suggests that the answer to all aforementioned questions is affirmative. This conclusion is mainly and in general based on the fact that if the privity is to be broken, it must be two-way.[86] However, exceptions exist. Regarding the topic of the paper, worth mentioning are the reclamation terms regarding notice due to a defect in the object, e.g., time limits and requirements on the form and contents of the notice. Norros concludes that the supplier has a right to invoke towards the customer reclamation the terms of the contract in force between the supplier and the financier but not of the contract in force between the financier and the customer. The starting point is that making notice only to the supplier is sufficient

81 Judicial reasons are more closely related to the issues discussed under the following topic on the contractual content.
82 See in detail Norros 2007, p. 251–275.
83 Norros 2007, p. 276.
84 See Chapter 3.2.3.
85 See Norros 2007, p. 278–280.
86 See arguments in detail Norros 2007, p. 281–307.

and reasonable[87]. Thus, the customer shall make the notice in time and in form[88] defined in the sales contract. It would be unjust if the supplier could invoke terms unknown to him and on these grounds dismiss the customer's notice.[89]

4.4 Supreme Court Precedent KKO 2008:53

As mentioned before, financial leasing transactions are not statutory and no established legal praxis exists. However, in the recent decision KKO 2008:53, given 23 May 2008, the Supreme Court delineated its stand in a remarkable way regarding the status of the parties to leasing transactions. In this case the facts and circumstances were that the plaintiff, financing company GE Capital Equipment Finance Ab (hereinafter "GE Capital") had concluded a leasing contract with the defendant Salon West-Hair Oy (hereinafter "West-Hair") on equipment needed in the customer's commercial practice. However, West-Hair had rescinded the contract and defaulted on its rental payments due to the fact that the leasing object had been constantly broken despite the supplier's efforts to repair the object. The leasing contract (general contractual terms drafted by the plaintiff) included an ambiguous term 10 § that *inter alia* discharged GE Capital from the liability regarding defects in the object. In addition, the term provided – somewhat ambiguously – that the lessee has both the right as well as the duty to represent the lessor in the disputes concerning the supplier's duties provided in the *sales contract.* In order for the lessee to denounce the lease contract the lessee shall have acquired a final judgement that justifies rescinding the sales contract with the supplier. In the defendant's opinion this term was unclear and thus unfair.

The Supreme Court stated that due to the fact that no statutory law nor established legal praxis exist, nor had GE Capital proved that established

87 Norros argues this mainly on the grounds of provisions in special legislation, e.g. Code of Real Estate (540/1995), Chapter 2, Section 26(3), according to which the buyer shall give notice of a defect that he has found out about and his claim based on it to the merchant instead of the seller.

88 Norros also points out that notice made in a form that clearly defines the defect and so fulfills the general requirements of law would be acceptable and reasonable.

89 See Norros 2007, p. 313–329. Other exceptions discussed by Norros see, p. 308–313 on adjustment of contracts, p. 329–340 on arbitration clauses and p. 340–346 on the effect of gross negligence.

practice exists in financial leasing especially regarding the financier's discharge from liability, the rights and duties of the parties shall be defined on the grounds that the parties to the transaction have been contracted. Furthermore, the Court held that because West-Hair was not party to the *sales contract* and because the contractual term 10 § of the *lease contract* was ambiguous and therefore interpreted to the drafter's detriment, GE Capital was considered liable for the defect and West-Hair had right to rescind the lease contract[90]. However, this decision was the result of voting. Two of the five members of the Court stated in their dissenting opinion that financial leasing is an established form of financing whose main features and principles a party to the transaction must be aware of. Simply put, the real purpose of leasing should be considered.

At this point it must be noted that in addition to the precedent KKO 2008:53, the Supreme Court has also given some other, earlier decisions related to leasing[91]. However, the one with the greatest relevance regarding the topic of the paper and the similarity with the already discussed decision is the Supreme Court decision KKO 1997:130, given 29 January 1997[92]. In this case the Court similarly held that between the financier and the customer, rules and principles of the ordinary lease contracts on movable property apply. Thus, the legal status of the parties shall be defined according to their contract[93].

The decision KKO 2008:53 indicates that the Court is not willing to acknowledge the financial leasing transactions as an independent form of financing. This is despite the fact that leasing is a feasible, widely used and

90 Before the decision of the Supreme Court, the District Court of Helsinki held that the leasing contract had to be interpreted as an ordinary lease contract on movable property. The Court held that the term 10 § was to be regarded as unilateral and onerous and thus was *not part* of the contract. In addition, however, the Court held that the contractual term was unfair in accordance with the Contracts Act, Section 36, and could not be taken into account. The Court of Appeal held the District Court's stand. On criticism of the District Court's argumentation see Wuolijoki LM 2008, p. 828.

91 See e.g. KKO 1997:6, KKO 1988:89 and 1985 II 177. Various precedents partly assert the fact that financial leasing is widely and often used.

92 In decision KKO 2008:53, the District Court made reference to this precedent in its argumentation.

93 The ambiguous contractual terms drafted by the financier were therefore interpreted to the financier's detriment and the customer had the right to rescind the contract due to a defect in the leasing object.

more or less old form of financing[94]. In addition, to some extent it can be sensed that the Court it is not too willing to deviate from contractual privity on these grounds. In order to avoid confusion, however, it must be emphasized that the decisions discussed above do not exactly touch core of the paper's topic. The decisions, especially KKO 1997:130, mainly concern the customer's right to make claims against the *financier*. Thus, they do not concern the issue of the customer's right to make claims against the non-contractual party, i.e., the *supplier*. The Court did not even have to directly commit on the issue and thus was not forced to consider the extended contractual liability. However, if the Court would have argued the opposite in its decision KKO 2008:53, the Court would have, in my opinion, indicated that financial leasing is a special and established form of financing that has to be evaluated consistently with its purpose. If the decision was negative to the defendant, would he then be allowed to make direct claims and start new successful proceedings against the supplier? If we look at the contractual term 10 § that ambiguously authorizes the defendant to it, this may be the case. If we, however, think of a situation where no contractual term that authorizes the customer to make claims against the supplier exists, or a situation where such a term is fully unclear, would the customer still have this right? This situation refers to Millqvist's thinking on the supplier's liability not only "through" the financier but directly and fully as such[95].

In the following, I will shortly make some comments on the question raised here and on the decision KKO 2008:53 regarding the relation between the customer and the supplier in light of practical arguments discussed in Chapter 4.3. Considering firstly the *closeness of the relationship* between the supplier and customer, according to the facts of the case the customer has chosen the object together with the supplier in a close contact. It is clear the supplier is able to identify the customer. In addition, it is presumable that the damages caused by the object to the customer were foreseeable by the supplier: the financier did not choose, examine or know of its further usage and worked purely as a financier having no expertise on the equipment. Thus, in my opinion it is obvious that some kind of a "special relation-

94 Financial leasing practice started in Finland in 1965 when two leasing companies Vuokrausluotto Oy and Leasing-rahoitus Oy were established. See Takki 1980, p. 255.

95 See Chapter 3.2.3.

ship" exists between the supplier and the customer. As discussed earlier, Norros takes as a *prima facie* principle that damages should be primarily claimed from the immediate channel of compensation. Only if this is *hindered*, claims may be directed to the secondary channel. A contractual term or even an *established practice* that discharges a party from liability may be, in my opinion, regarded as hindering the immediate channel. In addition, if we take as a starting point that the customer's rights are limited to the contract entered into between the supplier and financier, it cannot be regarded as surprising and unjust for the supplier: if not the customer, then the financier would invoke that contract. This further supports the supplier's liability, not the financier's. In addition, claiming damages from the financier will cause additional expenses when two processes result[96]. A more economical option in tripartite transactions would be that the third party directly claims the damages from the party liable.

My opinion would be different if the financier was more active and if the real circumstances of the case in general differed from the established practice of leasing transactions. As Millqvist points out, the liability between the financier and the supplier should be joint and several: the liability *de facto* depends on the circumstances *de facto*[97]. In other words, the evaluation should be overall, taking as a starting point the procedural concept of contract and considering the real purpose of the judicial construction. As Tepora has emphasized in the context of hire purchase contracts, the judicial consequences should be evaluated keeping in mind the *purpose* of the hire purchases[98]. Further, according to Muukkonen, when analyzing tripartite transactions, there is no reason for asking who is the seller and who the purchaser due to the fact that mechanical classification does not give a truthful picture of the legal status of the parties[99]. As a conclusion, when considering the extension of contractual liability in financial leasing, the real *purpose* of the transaction and the purpose of the parties involved should be taken into account without limiting the evaluation to contractual relationships. In addition, the *awareness* of the parties regarding the aforementioned purposes should not be dismissed.

96 See Norros 2007, p. 161–162.
97 Millqvist 1986, p. 147.
98 Tepora 1984, p. 9.
99 Muukkonen LM 1988, p. 637.

As I have come into the conclusion that the supplier's contractual liability is justifiable on certain occasions, it must be also discussed whether the supplier has a right to invoke the contractual terms limiting its liability. The question is thus how *wide* the supplier's liability is and in turn, how wide are the customer's rights. As discussed in Chapter 4.3, exceptions to the main rule, according to which each party to the transaction has a right to invoke the contract entered into between the other parties, are necessary. Assuming, for example, that the financier has been discharged from liability by a contract in force between the financier and the customer, it is somewhat reasonable – and logical – that the supplier shall have no right to invoke these contractual terms to its own credit and thus extinguish the customer's rights. The supplier shall, however, have a right to invoke the contractual terms limiting its liability in force between the financier and the supplier. This interpretation prevents the supplier from benefiting from advantageous contractual terms concluded between the supplier and the customer and, more importantly, from facing unexpected liabilities[100].

5 Conclusions

It can be concluded that the privity doctrine has not lost its stand either in English or in Finnish law. However, it is remarkable how in both systems the deviation from the privity doctrine is useful and even indispensable in certain situations in order to give some flexibility to the legal system and in order to meet the practical needs of real exchange[101]. However, this deviation should be foreseeable, well defined and arguable. Weakening the main rule in which most actors trust must obviously be restrained. Otherwise the extended liability would lead into a phenomenon called *floodgate* where the claims for damages become unpredictable[102]. This, however, should not lead to a situation where the actor causing damage, for example the sup-

100 See Norros 2007, p. 347, where it is pointed out that the interpretation in question also prevents the extended contractual liability from producing unjust and unexpected results and thus endangering legal certainty.

101 See McKnight's example on equipment financing contracts in Chapter 2.2.1

102 See Hemmo 1998, p. 276–277. It is not probable, however, that in e.g. leasing transactions the extended liability between the supplier and the customer would result in unpredictable claims for damages. As seen in Chapter 4.3, the contractual contents limit a third party's rights to make claims.

plier, unduly avoids his liability[103]. In order to prevent these possible ill effects, we need well-founded and reasonable, case by case consideration and argumentation. As discussed earlier, Norros seems to be the first one in Finnish jurisprudence to consider and systematize in detail the arguments on the grounds of when it is and when it *may* be reasonable to deviate from contractual privity. The arguments developed are not exhaustive nor decisive but useful and indispensable *tools* in legal consideration, discretion and argumentation.

Considering the status of the privity of contract in the context of leasing transactions, it has been concluded that the deviation from the privity of contract is justifiable, providing there are reasonable grounds weighty enough. When deciding whether the grounds are reasonable and weighty enough, one must take into account the *de facto* circumstances and evaluate the closeness of the relationships of the parties to the transaction, the possible hindering of the channels of compensation as well as the contractual terms involved. The most important thing is, however, to consider the *purpose* of the parties. In my opinion, this interpretational principle should be extended to *ultra partes* relations and not limit its applicability to the interpretation of purely contractual relations.

Though I have already expressed my stand, there is still one counter-argument to consider. With its decision, the Supreme Court clearly indicates that the status of the parties involved in financial leasing should be defined by contracts. The argument according to which there is a need to be able to manage contractual risks contractually[104], is valuable. Thus, what prevents the parties to a leasing transaction entering into a common, three-party contract between the supplier, customer and financier where the rights and duties of each party would be clearly defined?[105] This may work or, on the contrary, turn out to be problematic when trying to harmonize different interests. Traditionally in Finland, a well-functioning and foreseeable contractual practice, confidence and purpose-orientated interpretation of contracts have made it possible to draft simple and short contracts with low transac-

103 See Norros 2007, p. 159–161.
104 See Norros 2007, p. 148–152.
105 See also Tepora–Kaisto–Hakkola 2009, p. 433, where it is pointed out that also other alternative ways to realize the financial leasing transaction exist.

tion costs. This has been regarded as an important competitive advantage. It is not desirable to threaten this by dismissing the parties' *purpose* even though no formal contractual relationship exists, especially when there are reasonable and weighty grounds to regard the relationship as *special*. The Supreme Court precedent indicates, however, that even greater care will need to be taken when drafting financial leasing contracts[106].

106 There might be some hope left still. As Wuolijoki LM, p. 831, points out, the Court argued in its decision KKO 2008:53 that the plaintiff had not *proved that established contractual practice* in financial leasing exists. According to Wuolijoki this indicates that the possibility of acknowledging financial leasing as a special and independent form of financing was left open. Luckily, the Supreme Court of Finland is allowed to change its mind in the future.

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Abbreviations

AMJLH	American Journal of Legal History
BLF	Business Law Forum
DL	Defensor Legis
EDINLR	Edinburgh Law Review
J.I.B.L.R.	Journal of International Banking Law and Regulation
J.B.L.	Journal of Business Law
JJ	Juhlajulkaisu (Anniversary volume)
KKO	Korkein oikeus (Finnish Supreme Court)
LM	Lakimies
OMLS	Oikeusministeriön lausuntoja ja selvityksiä (Ministry of Justice publications: statements and legislative reforms)
Tul. L. Rev	Tulane Law Review

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Public/Private Conflict in Investment Treaty Arbitration – a Study on Umbrella Clauses

Keywords: International Investment Law, Abitration, Umbrella Clauses

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Abstract

In investment treaty arbitration a neutral international tribunal adjudicates an investment related dispute between a private foreign investor and the host state of the investment. Access to tribunal is usually granted in investment treaties. Treaties are generally in a bilateral form (Bilateral Investment Treaty, BIT). Investment treaty arbitration is in many ways an abnormal way of settling international disputes. It is not totally public, in that it does not concern a dispute between signatory states. It is also inevitably linked to the municipal law of the host states of the investments. However, investment treaty arbitration is not private either because by assessing alleged violations of treaty provisions by signatory states it, transcends the boundaries of international commercial arbitration.

Many investment treaties include umbrella clauses which create an obligation for the host-states of the investment to observe their obligations towards private investors. The nature of these obligations, however, can be subject to dispute. Whether a treaty protects e.g. the obligations stemming from investor-state contracts can become a puzzling question when a contract itself includes another forum for the settlement of disputes. These situations have resulted in jurisdictional conflicts which the tribunals have solved in an inconsistent manner.

This paper argues that this well-known inconsistency is rooted in the praxis of judging state conduct along sovereign/merchant lines. It is argued that this categorization of state conduct according to the arbitrary rubrics of "sovereign" or "commercial" is but a mirror image of public/private distinction of law constituted in classical legal thought. Accordingly, the jurisdictional conflict generated is here called a public/private conflict in investment treaty arbitration.

Full Article

1 Introduction

The purpose of investment treaties is to increase foreign investments by limiting a state's arbitrary use of its powers against foreign investors. Perhaps the most important innovation of modern investment treaties has been the dispute settlement procedure they offer: investment treaty arbitration. In case of violations of their rights by the host states of investments, private investors are no longer required to plead on their home governments for diplomatic protection. Conversely, investment treaties usually confer on private investors a direct right to initiate objective international arbitration against the host states of their investments.

The balancing function of investment treaties is needed because the powers of investors and host-states are structurally asymmetrical. The heart of the asymmetry is that investors are subject to "exposure to the host state as contract party, regulator, sovereign and judge …"[1] The exponential growth in the number of investment treaties has also made the law on international investments subject for increasing interest, both academic and practical. The density of the network created mainly by Bilateral Investment Treaties (BIT) has even inspired some to speak of an emerging global regime.[2]

Because investment treaties set limits to state conduct, a foreign investment regime can be considered as public international law. However, investment treaties are "public" only to a limit. Investment treaties such as BITs also create private obligations between states and investors and as such, it is said, they "straddle the line between public and private law".[3] This paper discusses the controversial role that *privately agreed obligations* play in investment treaty arbitration and focuses on the different interpretations given to the so called *umbrella clauses*. Many investment treaties include umbrella clauses which create an *obligation for the host-states of the investment to observe their*

1 Wälde 2004a, p. 77.
2 Salacuse 2007, p. 163.
3 Leeks 2007, p. 1.

obligations towards private investors from another contracting party.[4] It is subject to debate what the nature of these obligations can be. Both academic writings and the reasoning of treaty tribunals vary greatly. A common impression has been that umbrella clauses address specific agreements between host states and foreign investors. These explicit agreements/contracts are also under the focus of this paper. However, umbrella clauses have had effects outside contractual obligations as well. This was the conclusion of the Tribunal e.g. in *LG&E v. Argentina*[5].

The umbrella clauses have materialised in jurisdictional conflicts[6] which the tribunals have solved inconsistently. The conflicts can materialize when parties to the investment-related contract have agreed on another forum for solving potential disputes. Then, of the conflicting jurisdictions, the other is *the public*, concerning treaty-based investment protection vis-à-vis the host-state, and the other, *the private*, is primarily occupied by choice of law and forum selection rules which are questions answered on the level of municipal law and private international law. Accordingly, this conflict is here called a public/private conflict in investment treaty arbitration.

This paper studies different interpretations of umbrella clauses in light of a conceptual framework: It is argued that the highly subjective understandings of the public/private distinction of law give a conceptual framework for the interpretation of contract claims in investment treaty arbitration. The inconsistent rulings on the tribunals' jurisdiction on contract claims are rooted in the praxis of judging state conduct along sovereign/merchant lines. States possess a unique ability to inhabit both the spheres of public and private law. Categorizing state conduct according to the arbitral rubrics of "sovereign" or "commercial" represents a mirror image of the public/private distinction of law constituted in classical legal thought. This dichotomy

4 Wordings of the umbrella clauses are diverse, but this "obligation to observe commitments" can be seen as some kind of a standard form.

5 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*. ICSID Case No. ARB/02/1. In the case, the Tribunal considered that the gas law of Argentina could be interpreted as a specific obligation that had to be observed by the state, because gas law was specifically used to attract foreign investors.

6 Zachary Douglas calls these "symmetrical conflicts between jurisdictions", in Douglas 2004, p. 239.

has been upheld already in the development of the doctrine of state responsibility for injuries caused for aliens.

A thorough analysis on the issue is of course out of the reach of this paper. Rather than even try to present a comprehensive review of the many cases regarding the extension of the jurisdiction of the investment treaty tribunals to contractual claims[7], this paper tries to present different approaches taken to this problem, particularly considering the different interpretations of the umbrella clauses.

2 The Enigmatic Umbrella Clause

2.1 Private Obligations Protected

It is said that there are two ways for foreign investors acting under the protection of an investment treaty to initiate international arbitration proceedings based on contract claims: Either the dispute resolution clause itself in the investment treaty is wide enough to encompass contract disputes as well[8] or the investor whose rights have been violated by an alleged breach of a contract by a state can try to *transform its claims from the contract level to the treaty level*.[9] The latter option is usually tried to be justified by umbrella clauses.

There are many formulations of umbrella clauses, not a single umbrella clause. Nevertheless, umbrella clauses are quite similar in their wordings. This is mainly because through model-BITs and other investment treaty models the formulations of the investment treaties are becoming more harmonized[10]. However, such amount of divergence still exists that we cannot argue for universal understanding of an umbrella clause. When interpreting an umbrella clause included in an investment treaty, careful attention must be given to the specific language of the clause and to the context of the dis-

7 A good and concise presentation of such cases can be found, e.g. in Schreuer 2005a.
8 The dispute settlement clause in the BIT between Argentina and France is a good example as it states that its provisions concern "any dispute relating to investment".
9 Schramke 2007, p. 1. Emphasis added.
10 For Douglas "The striking feature of [...] the collection of model BITs is that their formal layout and substantive content are very similar, often practically identical, in spite of the different economic and cultural reality prevailing in the states in question". In Douglas 2004, p. 159.

pute to discern the intentions of the contracting states of the treaty.[11] The different formulations of the umbrella clause are not of great interest here.[12] As a point of reference, a widely used formula is included in the Energy Charter Treaty's (ECT) article 10(1, last sentence):

> "*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*."[13]

ECTs umbrella clause represents an example of a very open umbrella clause. No explicit requirement is set for the "entered obligation" even to be related to the investment.[14] This might give leeway for the interpretation of the extension of ECTs protection to *any agreements*, no matter how insignificant commercially or otherwise, or how unrelated to the investment, the only requirement being the legal statuses of the parties as a "state" and a "foreign investor". However, contextual reading of the ECTs chapter 10 reveals that such extension would not respect the intentions of the treaty drafters.

Thus umbrella clauses address private agreements and obligations. It is rightly said that investment treaty arbitration has a *hybrid* or a *sui generis* character. Unlike any other dispute settlement procedure under international law, investment treaty arbitration is inextricably linked to the national legislation of the host state, since "it is […] the municipal law of the host state that determines whether a particular right *in rem* [subject to the protection by the investment treaty] exists¸ the scope of that right and in whom it vests".[15] Municipal law is an important part of the investment dispute also when the treaty tribunal is asked to adjudicate claims based partly or even completely on private agreements. The *law applicable* of the agreement cannot be put

11 Sinclair 2004, p. 414.
12 Many examples of umbrella clauses are included e.g. in the OECD 2008, see Annex 2.A1.
13 Energy Charter Treaty, available at http://www.encharter.org/, visited 14.5.2009.
14 Generally umbrella clauses require the existence of a link between the entered obligation and investment for it to become effective, as e.g. in article 3(4) of the Netherlands model BIT: "Each contracting party shall observe any obligation it may have entered into with regard to investments […]".
15 Douglas 2004, p. 198.

a side. This has been recognized by treaty tribunals as well, e.g. in the case *SGS v. Philippines*.[16]

Umbrella clauses are said to be able to extend the commitments of the host state beyond traditional international standards by putting contractual arrangements and other promises under the protective 'umbrella' of the investment treaty[17]. Thereby it is generally agreed that umbrella clauses have an effect on privately agreed arrangements[18]. It is the question of *how effective* they are that scholars, tribunals and governments are disagreeing about. The pending question could be put briefly as follows: Do treaty-based international arbitration tribunals have jurisdiction over private agreements between the investor and a host state, and if so, over what kind of agreements, to what extent, and in what kind of situations? It appears that there are as many answers to this question as there are parties but we can point out some divisions along which the opinions settle.

It must be noted that the history of modern umbrella clauses dates back to the 1950s and as such we are not dealing with a recent innovation in international law.[19] And even though the discussion around umbrella clauses has intensified only relatively recently, this is not the first paper either to discuss the different points of view from which umbrella clauses are looked at[20]. Usually, the disagreeing parties can roughly be split into two. Others, sometimes accused of echoing the notorious "Calvo Clause"[21], emphasize

16 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*. ICSID Case No. ARB/02/6. The tribunal stated the inevitable effect of the national law in the case as follows: "*Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State.*"

17 Schreuer 2004, p. 250.

18 This *effet utile* or *the principle of effectiveness* requirement is stated in the article 31(1) of the Vienna Convention on the law of treaties. Treaty provisions should not be mere declarations without a genuine legal effect.

19 It is worth remembering that the historical roots of the modern umbrella clauses date back to the settlement of the Iranian oil nationalization dispute in 1954. See Sinclair 2004, p. 413-415. According to Sinclair this dispute was the first case in which a modern 'umbrella treaty' was employed, and it was primarily embodied in the advice given to the Anglo-Iranian Oil Company by Elihu Lauterpacht. However, the idea of the umbrella clause can be traced even further to the 'early umbrella treaties' of the 1920s.

20 See e.g. Shany 2005, Wälde 2004b and Zolia 2005.

21 The so called Calvo Clause in investment treaties aimed to restrict the means of foreign investors to recourse to international arbitration. Under the doctrine foreigners were to be treated in the same way as local nationals. This meant e.g. that foreigners had to pursue their rights in local courts. See Schreuer 2005b, note 11.

state sovereignty and hold that the law governing private contracts should be a purely domestic matter. Others oppose this view on the grounds of the needs of international commerce and the need to extend good governance to the global economy.[22] Put like this the nature of the dispute seems to be essentially political. A less political way of separating the interpretations of umbrella clauses is the simple depiction of the interpretations as *wide* or *narrow*[23] or *integrative* or *disintegrative*[24]. Somewhere between lies "the middle approach" which states that *it is possible* that a state's violation of a contract with a foreign investor constitutes a breach of an investment treaty, that is, international law.

2.2 Some Inconsistent Tribunal Decisions

The advocates of the narrowest interpretation of the umbrella clause wish for a clean separation of treaty claims from contract claims. This has also been called the *dualist* approach, since it is said to rely on the positivist tradition of international law which holds that a systematic distinction should be maintained between municipal law governing contracts and international law governing treaties.[25] This distinction was held firmly in the very first case where an umbrella clause was taken under the closer scrutiny of a Tribunal. In *SGS v. Pakistan* the Tribunal pointed out the well-known principle of customary international law according which " *. . . under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law*"[26]. The Tribunal was not convinced that a "single sentenced" umbrella clause was reason enough to deviate from the principle and held that:

> "*. . . the scope of Article 11 of the BIT [Switzerland-Pakistan BIT], while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion. The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter*

22 Wälde 2004b, p. 2–3.
23 OECD 2008.
24 Shany 2005.
25 Schill 2009, p. 9.
26 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*. ICSID Case No. ARB/01/13. Para. 167.

> *of municipal rather than international law) are automatically "elevated" to the level of breaches of international treaty law."*[27]

The Tribunal did its best to follow the general rule of interpretation of the treaties set in the Vienna Convention.[28] However, after the decision, a letter turned up with Swiss authorities explaining their intentions when signing the BIT with Pakistan. According to them, article 11 (the umbrella clause) was intended to cover commitments "*[…] which played a significant role in the investor's decision to invest […] i.e. commitments which were of such a nature that the investor could rely on them […]*"[29] Thus it was the crucial expectations of the investors that were sought to be protected by the treaty. Whether these expectations were based on an assumption of non-interference by a state as a sovereign, or on an assumption of maintenance of stability of the necessary legal framework, or on positive promises of the state as a party to the contract, should not make a difference. The further reasoning of the courts and scholars has made it quite clear that an umbrella clause should not be deprived of all of its effect.

The interpretation of the umbrella clause was kept narrow also in *Joy Mining v. Egypt*[30]. The Tribunal did, however, leave some interpretative room for the umbrella clause. It concluded that the umbrella clause should not be given an effect in the matter at hand, but continued:

> " *[..]unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.*"[31]

27 Ibid., para. 166.
28 Vienna Convention on the Law of Treaties, Article 31. According to the article 31(1), "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." However, the article (31(4)) also states that "a special meaning shall be given to a term if it is established that the parties so intended".
29 Cited from OECD 2008, p. 117.
30 *Joy Mining Machinery Limited v. Arab Republic of Egypt*. ICSID Case No. ARB/03/11.
31 Ibid., para 81.

If we follow the reasoning of the Tribunal in *Joy mining v. Egypt*, we can conclude that if the breach of a contract by a state is serious enough, it might "trigger the treaty protection" and subsequently create a link between a contract and a treaty. Thus it is the nature of the state conduct that should be the essential factor in the decision of whether an investment treaty Tribunal should adjudicate a contract dispute. This claim already addresses the special role of the State in contract disputes with foreign investors and brings us closer to the "middle approach". This will be returned to in chapter 3.

Some tribunal decisions imply a substantially wider interpretation of the clause. In *Noble Ventures v. Romania*[32], the Tribunal concluded that the only meaningful way to give effect to the umbrella clause, and this was necessary because of the principle of effectiveness[33], was to take the clause as an effective tool to *"internationalise"* a breach of a contract and thus transform it into a breach of a treaty.[34] This reasoning suggests that umbrella clause would form a "link" between a contract and a treaty and the link would function as way to effectively *internationalise* the contract in the event of a dispute. Therefore jurisdiction of the treaty tribunal would triumph over the jurisdiction of the forum agreed in the contract.

2.3 Critique of the Inconsistency

Investment treaty arbitration is a peculiar form of dispute settlement. First of all, it is heedless of the explicit and mutual consent of the parties to arbitrate and therefore it has been called arbitration without privity.[35] Host states give their consent to arbitrate in the investment treaty and no specific agreement between the parties to the dispute is required. Now it appears that investment arbitration is again taking a step forward: It is not only heedless of the specific consent of the parties, but sometimes it may also completely disregard it. This can happen when the forum clauses of the private contracts are overridden in the name of treaty-based investment protection.

32 *Noble Ventures, Inc. v. Romania*. ICSID Case No. ARB/01/11.
33 See note 18.
34 *Noble Ventures v. Romania*, cited from OECD 2008, p. 123.
35 Paulsson 1995. Paulsson refers to a discussion in the 1960s which concerned sellers' liability. The fall of privity (or *citadel*, as it was called by Prosser), then, meant that buyers had a right to direct action against upstream sellers that were unknown to them and with whom they had no direct legal relationship.

The treaty tribunals' inconsistent interpretations of the umbrella clause, and the resulting uncertainty thereof, might be explained by the relatively young age of the international investment law. As the number of tribunal decisions increases, the swinging of the pendulum probably settles. But for now, increase in legal certainty for both investors and host states does not seem very promising. Foreign investment regime, if such even can be said to exist, is not a uniform and predictable system. Moreover, the increase in the number of investment arbitrations is still accompanied by tactical structuring of investments in a way that they allow investors to create claims under multiple investment treaties. This manoeuvring further increases the likelihood of inconsistent decisions.[36]

It is also notable that inconsistent interpretation of umbrella clauses can rarely be explained by the different wordings of the clauses. The inconsistency, then, might be of a more cognitive origin. It has been claimed that the differing decisions in the three famous cases regarding the treatment of contract claims under the investment treaty regime (*Vivendi*[37], *SGS v. Pakistan* and *SGS v. Philippines*) derive, rather than from different wordings of the clauses, from *ideological divides* between international judges and arbitrators over addressing a multiplicity of legal sources and procedures.[38] Situations where these ideological choices materialise arise from the possibility given by investment treaties for investors to pursue their rights in direct international arbitration without the general requirement of international law to exhaust local remedies. Therefore treaty tribunals are in a direct horizontal conflict with the forum of the contract.[39]

It is disputable whether an individual entity is empowered with such ability that it can *internationalise* a contract. Such a view, advocated e.g. in the reasoning of *Noble Ventures v. Romania*, is open to criticism at least if the Tribunals view would be understood as representing some kind of a doctrinal reading of the umbrella clauses in general. Private corporations do not have a legal personality under international law. Trying to avoid this shortcom-

36 Franck 2005, p. 1546.
37 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*. ICSID Case No. ARB/97/3.
38 Shany 2005, p. 844. Emphasis added.
39 Douglas 2004, p. 239.

ing, proponents of the so called theory of internationalisation of contracts have looked for ways to enable investors to escape the detriments of national legislation.[40] However, it would be confusing indeed, both theoretically and practically, to think of an investment contract as functioning on a level of municipal laws, and its transformation into public international law in the event of a dispute, the only thing necessary for this to happen being the desire of an investor to do so. Of course nothing prevents parties to the investment treaty from agreeing that investment-related contract disputes are handled in the treaty context. Consent of the parties to the treaty can then have an *internationalising* effect on contract disputes. But the problem is that the effect and scope of umbrella clauses is so disputed exactly because specific consent of the contracting parties to the treaty is often hard to indicate. Umbrella clauses can even be included in a treaty without pronounced negotiations on their content.

This paper considers that the inconsistency of the tribunal decisions is rooted in the praxis of judging state conduct along sovereign/merchant lines and in the resulting jurisdictional conflict in investment dispute settlement. The jurisdictional conflict is here called a public/private conflict in investment treaty arbitration. The public sphere presents the traditional form of dispute settlement in the public international law in which states are parties to the dispute, either pursuing their own interests or, by diplomatic protection, the interest of their nationals. Conversely, the private sphere deals with horizontal disputes of a commercial character and thus it functions mainly on a level of municipal law. In the public sphere, the instrument is a treaty and in the private sphere, a contract. It must be noted that the clash of these spheres in the investment treaty arbitration is not the first such case. However, it is the clashes of the rights of states vis-à-vis the rights of aliens which have also before blurred the distinction between public and private.[41]

40 Sornarajah 2007. For the historical origins of the idea of internationalisation of contracts, see p. 417–429. The attempts to internationalise a contract and to neutralise the power of the state include e.g. assimilation of the contract to treaties as if they were "quasi-international agreements" or promoting general principles of law, particularly *pacta sunt servanda* as universal principles which can fill the lacunae existing in the immature municipal legal systems of the host-states.

41 This issue will be returned to in the next chapter.

The next chapter will deal with approaches to the public/private conflict which can be seen as representing a kind of middle approach. What they all have in common is that they are stipulating a criterion according to which some, but not all, contract disputes may become an issue of international law. Usually the decisive factor is the nature of state conduct abrogating the contract.

3 The Doctrine of State Responsibility and the Middle Approach to Public/Private Conflict

3.1 State Responsibility of Breaching a Contract With an Alien

A brief exploration of the discussion regarding the development of the doctrine of state responsibility against injuries caused to aliens reveals that the issue discussed here is a part of the discussion that has started already in the 19th century.[42] Though the issue is not novel, the setting is somewhat different. During the first part of the 20th century, tribunals and scholars were primarily concerned with the grounds for the launch of *diplomatic protection*, in which states protected the rights of their nationals. We, on the other hand, are today discussing a regime of investment protection in which private investors are the sole possessors of a right to initiate direct investor-state arbitration. This transition from the state-sponsored arbitration to individually initiated one has been crucial for the enforcement of investors' rights.[43] It must also be acknowledged that in the doctrine of state responsibility no absolute requirement has been set for the violated alien to be protected by a specific treaty. The doctrine of state responsibility is rooted in customary international law. Another thing that has changed is that, in the investment treaty context, foreign investors are not anymore by rule obligated to *exhaust local remedies* in case of a violation of their treaty-based rights.

Notwithstanding these remarkable changes, the dispute regarding contractual arrangements between states and investors is in many respects similar to the one that started already in the 19th century: is a breach of a contract with an alien by a state *per se* a breach of international law? Amerasinghe depicts the discussion at

42 On the discussion, see Amerasinghe 2004, p. 123.
43 Wälde 2004b, p. 18–19.

the time in a manner quite familiar: "The opinions of the text writers […] could be divided into two schools: those that maintained that a breach of contract by a state was per se a violation of international law and those that required something more than a mere breach of a contract for a violation of international law to take place. The latter school had more support."[44] Amerasinghes' studies on the standing of the tribunal authorities on the issue revealed that the tribunals agreed with the scholars. There was very clear evidence in support of the opinion that a mere breach of contract did not suffice for international law to take over.[45] Thus something else was needed.

When assessing a breach of a contract by a state with an alien as a possible violation of international law it has been a common analytical starting point to focus on the nature of the state's behaviour that led to the alleged violation. Both the Tribunal practice[46] and the scholarly writings have been prone to systematically distinguish state conduct as a sovereign from pure commercial conduct. This tool has been used particularly by the proponents of the so called "middle approach" or "median position" to the question of whether a violation of a contract with an alien by a state can be judged as wrongful by international law. Schwebel argues rightly that a contract between a state and an alien is not an instrument of international law and therefore its breach can not automatically be a violation of international law. However, he continues, if a contract is breached by non-commercial, that is, sovereign conduct of the state, the doctrine of state responsibility may be invoked.[47] This view respects a widely acknowledged principle of international law, codified by the international law commission, according to which

> "*[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law*".[48]

44 Amerasinghe 2004, p. 123.
45 Ibid., p. 120.
46 See e.g. *SGS v. Pakistan, Joy mining v. Egypt* and *El Paso Energy International Company v. Argentine Republic.* ICSID Case No. ARB/03/15.
47 Schwebel 1994, p. 429–431.
48 UN 2008. The commentary of the article notes that the article has two elements; "First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law." The quotation is from the commentary of article 3.

It is an important remark that the rules of the doctrine of state responsibility for internationally wrongful acts can not be directly transferred, as such, to an investment treaty regime. This is because investment disputes are concerned with private interests of the investors in a manner that goes beyond (customary) international law.[49] It is also said that contractual responsibility and international state responsibility are different things and should be distinguished accordingly.[50] Notwithstanding, the criterion developed by the doctrine of state responsibility is popular in the investment treaty regime as well.

3.2 The Middle Approach in the Investment Treaty Context

Wälde considered the inclusion of umbrella clauses, or *pacta sunt servanda* clause as he preferred, to investment treaties as only clarifying the status of customary international law. He determined that the clauses' effectiveness was decisively dependent upon the nature of state behaviour constituting the breach of a contract. According to Wälde, a tribunal should, when determining whether it has jurisdiction to solve a contract-based dispute, follow a two step test: first it must be determined whether the state conduct has been of commercial or governmental nature, and second, it must be decided whether the use of governmental powers has been legitimate, general and not discriminatory, or whether the government's reliance on its powers has elements of abuse.[51] Thus the umbrella clause extends treaty protection to contract disputes only so far as a government abuses its powers as a sovereign and a regulator. If such powers have been used, the state has the burden of proof to convince the tribunal that the use of powers has been acceptable.[52] The same logic is respected by saying that "umbrella clause enables a BIT tribunal to exercise jurisdiction over claims concerning such breaches of contract, which are also BIT violations under the clause, and further permits the tribunal to do so notwithstanding an exclusive forum selection clause in the contract"[53].

49 Douglas 2004, p. 155. "To treat international law as self-sufficient legal order in the sphere of foreign investment is plainly untenable".
50 Zolia 2005, p. 13.
51 Wälde 2004b, p. 23–25.
52 Ibid., p. 25.
53 Wong 2006, p. 137.

Something very similar to the criterion presented was used e.g. by the Tribunal in *El Paso v. Argentina*[54]. Fearing that wide interpretation of the umbrella clause would give incentive for opportunistic investors to invoke investment treaty arbitration in whatever commercial dispute, the Tribunal chose not to extend treaty protection to commercial contracts but only to "*[…] additional investment protections contractually agreed by the State as a sovereign […]*"[55]. The Tribunal chose to "*[…] in view of the necessity to distinguish the state as a merchant, especially when it acts through instrumentalities, from the state as a sovereign*"[56]. This reasoning is very different from that of *Noble Ventures v. Romania* in which the umbrella clause was conceived as an effective way to "internationalise a contract"[57].

In *SGS v. Philippines*, the arbitration Tribunal was faced with a case quite similar to the Tribunal in *SGS v. Pakistan*. Both the claimant and some of the circumstances of the case were the same. The wordings of the umbrella clauses and their placement in the BITs were slightly different, but arguably not enough to make a decisive difference. The Tribunal did not respect the conclusions made in the *SGS v. Pakistan,* on the contrary, it explicitly distanced itself from the Tribunal's highly restrictive interpretation of the umbrella clause.[58] The Tribunal held that the concern of the *SGS v. Pakistan* Tribunal of internationalising contracts through an umbrella clause was unwarranted and noted that, rather than turning questions of contract law into questions of treaty law, the umbrella clause only addressed the *performance of the ascertained obligations*.[59] Moreover, it concluded that BIT did not *"convert the issue of the extent or content of such obligations into an issue of international law"* and therefore the issue fit into the jurisdiction of the Tribunal.[60] In its reasoning, the Tribunal of the *SGS v. Philippines* went beyond the so called middle approach. The case will be further discussed later.

54 *El Paso Energy International Company v. Argentine Republic*.
55 Ibid., para. 82.
56 Ibid.
57 See note 41 and respective text. It must be noted, however, that such detached notions should be treated very carefully. This is because both the circumstances of the case and the investment treaty interpreted are different.
58 *SGS v. Philippines*, para. 119–120, 125.
59 Ibid., para. 126.
60 Ibid., para. 128.

3.3 Some Implications of the Middle Approach

Various metaphors have been used to describe the effect of the umbrella clauses.[61] One is to describe it as a means to "elevate" contractual disputes into the realm of public international law.[62] This impression could be used both by the critics (positivists, dualists) and advocates (internationalists, monists) of the wide or integrative interpretation of umbrella clauses. From the point of view of the "middle approach" presented in this chapter, this notion of elevation can be seen as somewhat misleading. The claim that an umbrella clause elevates contract disputes into the sphere of public international law seems to imply that without the umbrella clause a contract dispute would not have been an issue of treaty protection in any case. Without the clause it would remain a municipal affair. This implication is unwarranted in view of customary international law on state responsibility alone.[63]

If we think of umbrella clauses as merely extending the treaty protection to contractual disputes in a way that protection only covers the abrogation of contracts by abusive sovereign conduct, the practical meaning of umbrella clauses is restricted to the notion that a host state cannot escape its treaty commitments by private agreements and exclusive jurisdictional clauses. If an umbrella clause extends the *protection given by the treaty* to contractual disputes, it extends the protection to the contractual disputes insofar as the *contract violation also constitutes a treaty violation*. Such a violation, then, does not get elevated to the level of public international law but *it is* public international law. "Semantics", some might sigh, but nevertheless important if we are to accept the arguments of the middle approach.

The extra flavour that umbrella clauses add to the general principles already stated by customary international law is that according to the treaty, investors may usually invoke direct investor-state arbitration and therefore investors do not need to exhaust local remedies. As for breaches of a contract by sovereign acts, umbrella clauses then authorise investors under its protec-

61 See e.g. Zolia 2005, p. 1.
62 This notion was used also in *SGS v. Pakistan.*
63 ILC article 3 on state responsibility, see note 50. As already noted, Wälde understood umbrella clauses as clarifying the status of customary international law, Wälde 2004b, p. 21.

tion to invoke international treaty arbitration despite whatever agreements have been made in investment contracts.[64] This view would surely undermine the dualistic understanding of the international law, of which the rule of exhaustion of local remedies is an important part, but only in the softest sense. The autonomic sphere of the individual transactions and freedom of contract in international commerce is left quite intact, since investment treaties would only address the use of powers unavailable for the individuals of the society and, it might be argued, therefore it would not violate the autonomy of the private sphere at all.

The remedy offered by the middle approach to public/private conflict appears elegant and one might be inclined to accept at least its central propositions. However, it would be challenging to develop a clear-cut criterion for judging state conduct along the sovereign/merchant lines. When this is made a threshold question for the tribunal's jurisdiction, inevitable problems arise.

4 Public/Private Distinction in the Investment Treaty Arbitration

4.1 Sovereigns and Merchants

Two important puzzles have complicated the discussion on the law of foreign investments. First, the status of private investors in public international law, and second, the status of municipal law in the law on foreign investments. The latter is all the more important because host states, or their direct intermediaries, still frequently enter into contractual agreements with foreign investors and take part in simple commercial transactions. As to the first puzzle, it is a credible observation that in many respects it is only a matter of interpretation whether primary investment treaty obligations are owed directly to qualified investors or only to the contracting states. Some court rulings have held that inter-state treaties can create individual rights other than human rights but it might also be arguable that BITs only institutionalize and reinforce the system of diplomatic protection.[65] However, respecting the many abnormalities of the investment treaty regime and the

64 This is stated also by Wong, see note 54 and respective text.
65 Bodansky et al. 2002, p. 887–888.

praxis of investment dispute settlement, it has been convincingly argued that investment treaties address and owe their rights directly to investors.[66]

Douglas has argued for a *hybrid model* of investment treaty arbitration and critiqued the prevalence of ideas of "diplomatic protection" in investment treaty arbitration. The proponents of the diplomatic protection view see the investment dispute as a horizontal conflict between the contracting states of the treaty. As many investment treaties give investors a direct right to act against host states, the setting would imply to Douglas that investors are procedurally "stepping into the shoes of public authorities". Douglas opposes this view and holds that it is not supported by investment treaties. Conversely, he argues for a "direct model" which sees investors as direct owners of the rights of investment treaties.[67]

By reversing Douglas' view we can critique another kind of "mutation" as well. The host states too possess a dual role vis-à-vis foreign investors. It might be argued that by embarking on commercial undertakings through contracts, states are stepping into the shoes of private individuals. This brings us to the second puzzle, i.e., the status of municipal law in the law on foreign investments. Thus, by entering into contractual relationships with investors, states are acting as merchants, as if outside the public sphere and self-disarmed from their public powers. These commercial relationships naturally follow the legislation and a forum which respect the consent of the parties to the contract and the rules of private international law. Parties to the contract are free to choose the applicable law for the contract. Investment treaties are only concerned with the minimum level of protection of the investors and do not meddle, at least in principle, with private contracts. Thus, by concluding an investment related contract with each other, the state and the foreign investor would jump from public international law (i.e. treaty protection) to the sphere of private international law.

This jump from one legal system to another could be justified by the fact that it reflects the consent of the parties to the contract in the same manner as the investment treaty reflects the consent of the contracting states. The

66 See particularly Hoffmann 2007.
67 Douglas 2004, p. 156, 168.

parties to the contact are free to choose the applicable law for the contract, and no investment treaty can override the will of the parties. However, regarding the agreed forum for the settlement of investment related contract disputes, it is questionable whether the contract can effectively deny the access of the violated investor to BIT tribunals.[68] This question is crucial for solving the jurisdictional conflict (here public/private conflict) in investment disputes. Juxtaposing the conflicting forum agreements which are, again, the host-state's offer in an investment treaty to arbitrate in a treaty tribunal and an investor's consent in a contract e.g. to litigate in local courts, is fruitful only if we take into account the inherent structural differences in the two agreements. The essential difference is the *mutuality* of the agreement, or the lack of it.

For now, we have only elaborated the role of the municipal law in investment treaty arbitration. But it might be illuminating to reverse this relationship, and ask what role can be given to public international law in private contracts. Amerasinghe has problematized the *mutuality* of the contractual relationship between an alien and a state by an example in which (public) international law is made an applicable law of the contract by choice of law. According to him, it would be peculiar to conceive this act as giving a private entity an international legal personality. This personality would make it possible for the private entity to pursue its contractual rights before international courts. Contract provisions can not give a private entity an international legal status. Also, since *mutuality* is an important element of the contract, the state party should also have the right to be protected by international law.[69] Contractual agreements on applicable law should not create asymmetrical procedural rights. Moreover, Amerasinghe remarks that no better way to conceive this relationship would be to see it as if the alien would, as a party to the contract, be under the diplomatic protection of its home state. Opposing the *internationalisation of the contracts* in this sense,

68 It is questionable whether investors can waive the protection of the investment treaty and whether this is done automatically by signing a contract with a jurisdictional clause, see Hoffman 2004. Douglas holds that investment treaty arbitration should not be given a hierarchical supremacy, but that a Treaty's dispute settlement clause should be seen as a pact that reflects the consent of the signing parties just as investment agreements reflect the consent of the investors and host states. Therefore principles of *pacta sunt servanda, generalia specialibus non derogat* and *prior tempore, potior jure* should become effective. Douglas 2004, p. 248.

69 Amerasinghe 2004, p. 129.

Amerasinghe states that the choice of international law is possible "*without affecting the legal system in which the contract is placed*".[70]

Why should we think that this "existential leap" from one legal system to another should be possible another way around? It is disputable if we can argue for the existence of a "global investment regime"[71], but investment treaties nevertheless form a legal system for international investment protection, an important part of which is the international dispute settlement procedure. Investment treaties create *asymmetrical rights* for investors and respective obligations for host-states, e.g. not to arbitrarily expropriate the investment and to guarantee fair and equitable treatment. An umbrella clause is not different, but it is asymmetrical as well. The conclusion of a contract between the investor and the host-state should not affect this initial legal system set up for the protection of investors' rights. Or, put somewhat differently but respecting the same logic, a contract should not *domesticate* the treaty-based relationship between the host state and the investor. If the argument is reversed like this, we do not need to feel so troubled by giving the "one-sentenced" umbrella clause such a substantial effect as "elevating" contractual disputes into the sphere of public international law.[72] Maybe the *raison d'être* of the umbrella clause is that contractual disputes related to investment should never have escaped the sphere of treaty protection in the first place.

As presented above, the middle approach to public/private conflict is inclined to accept investors' claims before an investment treaty tribunal if the claims are based on abusive sovereign conduct of a state. It is argued here that the obligation set in the umbrella clause to the host-state to observe any obligation it may have entered into with regard to an investment is an international limitation of states' rights vis-à-vis foreign investors *both as a sovereign and a merchant*. Protection given by the umbrella clause is not mutual but asymmetrical, just as is an investor's unilateral right to initiate treaty-based arbitration in the case of a violation of its rights. It is the state, and only the state, that has to observe its obligations. The conclusion of the

70 Ibid., p. 129–130.
71 Salacuse 2007, p. 163.
72 See note 26 and respective quotation.

investment-related contract (that creates mutual obligations) with a foreign investor does not make this obligation void. The implications of the umbrella clause should then be that contract provisions, conceived in principle as a closed and autonomic system in relation to public international law, cannot act as a safe haven for sovereigns to escape their commitment to direct investor-state arbitration in which a neutral tribunal decides if the state has failed to perform its promises.

4.2 The Autonomy of the Private Sphere and Freedom of Contract

For classical legal theorists, contract law was the core of the private law and through the functioning of the free will of the self-interested contracting parties the market could function outside state regulation.[73] Realists attacked this simplification and tried to show that contract law was not as private as it seemed. Conversely, it was essentially public in nature. Public law meddled in the business of private law, because it was necessary for the balancing of the powers of the contracting parties. Thus, public law had a redistributive character.[74] In his classic article "*The basis of Contract*", Morris J. Cohen unveiled the social roots of the contract by stipulating that the state had a positive role using its organizing force in enforcing contracts.[75] Cohen saw the institution of contract as a means to confer sovereignty on one party over another by putting the forces of the state at the disposal of the latter, that is, of the one whose rights have been violated.[76]

Since the international system is founded, in Max Weber's classical terms, by sovereign states in possession of monopoly on the legitimate use of violence in their territories and consequently there are no international "sheriffs and marshals"[77] to be given at the disposal of the violated contracting party, the only thing left for foreign investors are the judges. After the rulings of international judges, then, the mechanism of international enforcement (very much a matter of treaty), may be invoked indirectly. As Amerasinghe

73 Singer 1988, p. 479.
74 Ibid., p. 483.
75 Cohen 1933, p. 585.
76 Ibid., p. 587.
77 According to Cohen's famous words "The law of the contract, then, through judges, sheriffs and marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party", in ibid., p. 586.

emphasizes, enforcement can only take place after judicial decisions have been made. He sees investment treaty arbitration in contract disputes as a "special dispute settlement mechanism" which does not necessarily address *international wrongs* when it comes to contract-based claims.[78] It is this investors' right, not only to plea to a neutral tribunal, but a right to indirectly invoke treaty-based international enforcement of the awards which makes umbrella clauses a matter of great importance for investors.

When assessing the commercial relationship which has been created by the contract, a critical notion is the *mutuality* of the legal relationship between the state and the investor.[79] Accepting the mutuality of the investor-state contract, we can see this investor-state relationship through the eyes of Sir Henry Sumner Maine as forming a part of the progressive movement of the (international) society "*from status to contract*". Through this movement, the autonomy of the contracting parties becomes the focal point of the contract.[80] The parties to the contract are autonomous entities entering into a horizontal relationship of which substantive content is not regulated by a higher authority. This pure type of autonomy of the private sphere can be accepted in the foreign investment context as well. Investment treaties do not attempt to restrict the powers of the host states to negotiate the substance of the investment-related contracts. Umbrella clauses do not affect choice of law clauses in the investor-state contracts.[81]

However, in order to guarantee the observance of the states' obligations towards investors, and the *performance* of these obligations, a treaty tribunal must have jurisdiction on contractual disputes as well. To judge state conduct in this relationship is not to draw lines between commercial/sovereign conduct, but to determine the legitimate expectations of the investor. Asymmetrical provisions of investment treaties are rooted in the different legal statuses of investors and states. By signing a contract, a State does

78 Amerasinghe 2004, p. 140.
79 Ibid., p. 129. See also previous chapter on the mutuality of the contract and on the asymmetry of the investment treaty provisions.
80 Maine 1954, p. 100.
81 Schill 2009, p. 24, stating that "[...] While the obligations on the BIT are obligations entered into under international law, the relations between investor and host-state remain governed by whatever law the parties to the investor-State contract have chosen as the applicable law".

not become an individual or vice versa. Umbrella clauses are asymmetrical provisions that have permeable effect on private obligations. Therefore, as to host states and foreign investors, a total movement "*from status to contract*" is an unreachable target.

Judging the nature of state conduct remains, of course, a fundamental part of investment disputes. It is necessary, for instance, in the case where we have to determine the acceptable grounds for the state to abrogate a contract or alter legislation in a way injurious to the investor. Such reasons may be e.g. social or environmental and given the existence of acceptable and legitimate causes for such a "positive" sovereign act and a just compensation for the investor whose economic interests have been violated, a right to perform its sovereign functions as a state might also be a basis for the legitimate abrogation of the contract.

Let us assume that there is a state claiming that the abrogation of the contract resulted from such a "positive sovereign act". It is, then, the essential condition for making a just decision by the tribunal, to determine whether there was a legitimate basis for such an act or not. In case of an investor alleging the existence of a "negative sovereign act" it should be the essence of the case before the tribunal to determine whether there is a basis for such claims. The investment treaty tribunals are destined to move on the continuum of public and private. We can not totally escape the need to address state conduct along the public/private lines because it is an important part of determining the *merits of the case*.

4.3 Pacta Sunt Servanda

The taxonomy of states and investors as public or private or possibly even both has been somewhat baffling. One example is the discussion on the principle of *pacta sunt servanda* and its role in investment treaty arbitration. The exploitation of the principle in the argumentation gives a perfect example of how the dual role of states as public/private entities can be used in different patterns of argumentation. First, *pacta sunt servanda* was advocated by the theory of internationalisation of contracts which argued it to be a general principle of law and thus it should be effective in international

agreements as well.[82] This analogy to private law could be challenged on the grounds that investment agreements such as concessions are not private in nature, but more akin to administrative contracts and therefore an issue of public law.[83] Conversely, when challenging the jurisdiction of the investment treaty tribunal, it is usually claimed that because the entered agreement is embedded in the municipal law of the states (i.e. contract law), an investment treaty tribunal lacks jurisdiction in contract disputes. A forum clause should not be dismissed because treaty tribunals must respect the collective will of the parties and the principle of *pacta sunt servanda*.[84]

Respecting the logic presented, the following conclusions can be made: Because the contractual relationship between the investor and a host state is vertical in that the other is a public authority and the other a private person, *pacta sunt servanda* cannot be given an effect as a universal legal principle. Only if the investor as a direct owner of treaty rights was seen as using public powers and the agreement (contract) was assimilated to the treaty, *pacta sunt servanda* might again become effective because of the well known rule in the public international law that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*"[85] But as we have seen, the shoes of the public authorities might just be too big for investors. The other conclusion could be made after leaping to the private/municipal sphere of law: Because a contract is a matter of municipal law, and relations between the host state (acting as a merchant) and the investor are a purely private and horizontal matter, a treaty tribunal lacks jurisdiction. The consent of the parties to the contract must be respected and therefore the jurisdiction of the forum appointed in the contract would triumph.[86]

82 See Sornarajah 2007, p. 421. In the investment treaty context perhaps the best example of such effort is found in Wälde 2004b, p. 27. Though Wälde emphasized the meaning of the pacta sunt servanda principle, he did not give unconditional support for internationalisation, but advocated a criterion which is in this paper called a middle approach.

83 Sornarajah, 2007, p. 422–423. Sornarajah states that "the theory of internationalisation which is contract-centered may be a casualty in these developments".

84 Douglas 2004, p. 248.

85 Vienna Convention on the Law of Treaties, Article 26.

86 See Douglas 2004, p. 283. Douglas holds that this argument is mandated e.g. by the principles of *pacta sunt servunda*, and *generalia specialibus non derogant*, which also presuppose horizontality. Douglas, however, also requires that the causa of the claim originates from the breach of a contract and not a breach of a treaty.

Thus it might be read into the statements presented in this chapter that whether the principle of *pacta sunt servanda* can be applied depends on the *nature of the agreement* entered into by the state and a foreign investor. Is this not only another way to repeat and manipulate the public/private distinctions already drawn in assessing the statuses of states and investors as public/private entities or sovereign/merchant nature of a state's conduct? Duncan Kennedy's remark on such manipulation of the boundaries of public and private is worth repeating here: "[…W]e have no meta principle of appropriateness that will tell us when argument *A* is right or when, on the contrary, it is flat wrong and *B* is right. When a distinction reaches this stage, using it in legal argument seems a mere exercise: we can do it so well we can't believe it anymore."[87]

5 Some Practical Implications

What are the practical implications, then, of the (very theoretical) arguments presented in this paper? Of course we can not deprive a state of its full legal competence to enter into contracts with foreign investors. By stating that contractual disputes related to the investment should not leave the sphere of treaty protection is only to say that the concluded contract can not make treaty provisions on investment protection void. However, an investment treaty does not make a contract void either. Respective obligations agreed by the contracting parties and the law regulating their fulfilment still hold and it is the duty of a tribunal settling the dispute to respect these agreements. It is the *performance of the host state*, which is under the scrutiny of the tribunal, not the equity of the contract's substance. Performance of promises is important because the investor and the operation of the investment might be inescapably dependent on them.[88]

Should it be possible, then, to hand every dispute arising from a breach of a contract by a state to international tribunals? The result might be a notorious "flood" of cases. Some authors optimistically rely on rational self-restraint of

87 Kennedy 1982, p. 1354.
88 E.g. a contractual promise to provide for the investor the necessary energy or materials for running the investment related business. Non-performance of these promises may prove fatal for the investment.

the investors.[89] The cases before investment treaty tribunal might also consider only partially, if at all, the problems falling under the provisions of the investment treaty. Thus the tribunal might find itself adjudicating a dispute of a commercial character, primarily according to the municipal law applicable to the contract. In these situations, a tribunal might feel tempted to hand the jurisdiction for deciding the specific content of the failed obligations (e.g. the amount of money owed) to a more proper forum. This would again lead to jurisdictional uncertainty and duplication of proceedings. As the Tribunal in *SGS v. Philippines* remarked:

> "*[…] the purpose of the BIT is to promote and protect foreign investments. Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim. By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions in some cases, but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.*"[90]

However, while making this remark, the Tribunal assigned parts of the case (simple contractual obligations) to municipal courts of the host state. What is important, however, is that the Tribunal retained its jurisdiction on certain aspects of the case though it stayed the proceedings for the time the municipal courts of the Philippines had decided the case. Manoeuvring via treaty tribunal, then, in the case of *SGS v. Philippines* did not allow the investor to escape domestic proceedings. However, from the point of view of the investor, this manoeuvre might prove necessary at least because of three reasons. First, it still got the protective umbrella of the treaty for its use, i.e. there is an international authority watching over the performance of the host state's promises even though the specific content of the promises is decided by the domestic courts. Secondly, it is not obligatory to exhaust local remedies before returning to the treaty tribunal, but if a satisfying and

89 It is believed that investment arbitration is simply too costly for economically less important cases. See Schill 2009, p. 34, and Schramke 2007, p. 24.
90 *SGS v. Philippines*, para. 132(c).

just ruling is achieved in the first instance, and the respondent (host state) settles on the decision as well, the proceedings in the international tribunal could continue. Third, manoeuvring via treaty tribunal might be necessary also because of the possible *fork in the road* clauses included in many Investment treaties.[91]

The treaty tribunal is free to exercise its authority also by invoking the *forum non conveniens*, for instance, in refusing a simple commercial dispute which has no significant effect on the investor's undertaking. But a tribunal is not obligated to do so. Contract clauses should not deprive the tribunal of its jurisdiction in investment-related disputes. If the tribunal is pleaded to in a commercial dispute crucial for the investment, the forum clause should not result in automatic lack of jurisdiction. We do not need only to trust on the discretion of the investors not to bring every minor dispute to (costly) international tribunals and flooding them with cases not belonging there. We should also trust on the discretion of the tribunal to reject the case, or steer parts of it to another court, if it thinks there is another forum more appropriate. This does not mean that the tribunal should reject every case of a commercial character. As regard to fearing the opening of the floodgates, the double discretion of both the investors and the tribunals should efficiently prevent the flooding of international tribunals with minor commercial disputes.

6 Concluding Remarks

The development of sound rules for interpretation of investment treaty provisions capable of affecting private agreements has been somewhat absent. It might just be that international judges, as scholars and politicians, are meddling in a discourse quite ideological in nature.[92] It would be a difficult task to develop a legitimate and formal criterion for distinguishing state conduct as sovereign or merchant. In the investment treaties this would be plainly impossible and through the decisions of treaty tribunals difficult, particularly because no important effect can be given *de jure* to the precedents.

91 A typical fork in the road clause in the investment treaty provides that the investor is made to choose between the domestic courts and international arbitration to litigate its claims, and that choice, after it has been made, is final. See Schreuer 2004, p. 239.
92 Shany 2005, p. 844.

If investor-state contracts would totally evade the different legal statuses of the investors and states, investment treaty arbitration could be ignored by exclusive jurisdiction clause. If we only accept this notion as far as a state does not abuse its public powers, as suggested by the middle approach[93], a proper legal system for contract related investor-state disputes would be dependent upon which role the state has been playing while signing the contract and/or violating it: a merchant or a sovereign.

Categorizing state conduct according to the arbitrary rubrics of "commercial" or "sovereign" represents a mirror image of public/private distinction of law constituted in classical legal thought. The source of jurisdictional conflicts in investment treaty arbitration is the subjective conception of the state as an institution performing multiple roles in society and thus moving on the public-private continuum. If we are to accept the middle approach to the public-private conflict, we will engage us to the endless development of the criterion for choosing of which end of the continuum the state was closer to when it signed and/or allegedly violated the contract.[94] We should not disregard the different *legal statuses* of the states and investors. If we keep the state as a state and a private investor as private legal person in investment disputes we do not need to make either of the parties to perform existential leaps between international and municipal legal systems. Investment treaty arbitration is located neither in the public international nor municipal system of law. Amerasinghes' insight on this problem is helpful: What is created is an extra-national special dispute settlement mechanism in which a contract dispute turns into a matter of public international law only when we turn into the enforcement of the awards[95].

93 See chapter 3.2.

94 Kennedy has depicted eloquently the lengthy process of the decline of public/private distinction. The decline of the distinction results mainly from the difficulties in developing clear and objective rules or criteria for judging an institution as public or private. See Kennedy 2004.

95 Amerasinghe 2004, p. 80. See also p. 127 "What the states parties to the jurisdictional treaty did as to confer jurisdiction and give the alien a *locus standi* before an international tribunal […] but not at an international level adjudicated upon by an international tribunal." Moreover he states that "[t]he jurisdictional treaty does not have any impact on the substantive relationship between the parties to the contract". It must be further noted that the credibility of the investment regime itself could be questioned because of the weak enforcement of the tribunal awards. On the legitimacy and problems of international investment law particularly in Latin-America, see Ryan 2008.

The practical claims of this paper are the following: Judging the nature of state conduct along sovereign/merchant lines cannot and should not be neglected because it is important in deciding the merits of a case. However, it should not be made a threshold question for appointing a proper legal system for the dispute. By doing so, we are turning a question that is crucial for adjudicating a case in a just way into a procedural dilemma of settling the conflict of jurisdictions. Investment treaties have set up a legal system for investment disputes and investors protected by umbrella clauses should have the right to plea to a neutral treaty tribunal. However, this is not an absolute right. A treaty tribunal should be able to assign the case or parts of it to another court/tribunal if it feels that it is more suited to adjudicate the substantive obligations of the violated contract. By doing this, the treaty tribunal is not obligated to dismiss itself from the case completely, but it can stay its proceedings for the time the municipal court has decided its case. This was the conclusion of the Tribunal in *SGS v. Philippines*.

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