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Reasoning Outside the Box

Analogies and General Principles Within the Swedish Law of Obligations

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1 Outside the Box

1.1 *The Subject*

In all legal systems, some questions within the law of obligations will fall outside the scope of statutory regulation, even if there is a comprehensive civil law codification,¹ but as we will see,² this situation is arguably especially common within Swedish law. Whilst this situation allows for several different approaches,³ the common wisdom of the Swedish legal literature is that reasoning by analogy is the preferred method.⁴ However, as we will see herein, the Swedish Supreme

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¹ Cf. Vogenauer, Stefan (2015a), “General Provisions III: Arts 1.6–1.12—Application of the PICC”, in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, Oxford 2015, pp. 180–251, p. 201 (regarding the illusory view of a complete civil code).

² See *infra* section 1.2.

³ See *infra* section 2.1.

⁴ See e.g., Bengtsson, Bertil, Ullman, Harald & Unger, Sven, *Allehanda om skadestånd i avtalsförhållanden*, Jure, Stockholm 2013, p. 31; Hellner, Jan, *Rättsteori: en introduktion*, 2nd ed., Norstedts Juridik, Stockholm 1994, p. 110; Lehrberg, Bert, *Praktisk juridisk metod*, 9th ed., Iusté, Uppsala 2016, p. 144. See also Hydén, Håkan & Hydén, Therese, *Rättsregler: En introduktion till juridiken*, 7th ed., Studentlitteratur, Lund 2016, p. 119. Cf. Per Samuelsson, *Entreprenadavtal: Särskilt om ändrade förhållanden*, Karnov Group, Stockholm, 2011, pp. 51–52 (criticizing the reasoning in the Consumer Service Act’s (konsumenttjänstlagen 1985:716) *travaux préparatoires* that the Act, which is said to be based on unwritten, likely customary, law, can be used for analogies, when it would be more natural to directly apply that unwritten law).

Court seems to prefer reasoning from general principles when possible.⁵ Still, if we consider German law, which has influenced Swedish contract law,⁶ the CISG⁷ and the PICC⁸, two common references in the Swedish contract law literature,⁹ all three known by their willingness to rely on general principles,¹⁰ a special Swedish use of general principles emerges. And regardless of method, the reasoning of the Swedish Supreme Court is lacking in several cases, not necessarily because the result is disagreeable, but because well-reasoned *rationes decidendi* are necessary for predictability and foreseeability. This will be examined in this article and improvements sought.

1.2 *Neither a Mountain nor a Molehill*

To understand why reasoning outside the scope of statutory regulation is common within the Swedish law of obligations we must understand its peculiar legal history. Since Sweden, and the rest of the Nordic countries, never achieved

⁵ In the legal literature, such reasoning is described as making *Rechtsanalogien* (ger.), see Lehrberg, 2016, pp. 144–145; Bert Lehrberg, *Avtalsrättens grundelement*, 2nd ed., I.B.A. Institutet för Bank- och Affärsjuridik AB, Uppsala 2006, p. 53; Svensson, Ola, “Den principstyrda rätten 2. Teorins betydelse för svensk kontraktsrätt”, *Ny Juridik*, 2017, pp. 79–109, pp. 98–99. See also *infra* section 2.2 (regarding different methods).

⁶ See Dotevall, Rolf, *Avtal*, Studentlitteratur, Lund 2017, p. 26 (on the influence of the German BGB on the Nordic contract laws); Lando, Ole, “A Short Survey of the Laws of the Nordic Countries”, in Ole Lando et al. (eds), *Restatement of Nordic Contract Law*, DJØF Publishing, Copenhagen 2016, pp. 13–45, p. 25 (regarding the similarities between the German and Swiss civil codes and the Nordic contract laws); Zweigert, Konrad & Kötz, Hein, *An Introduction to Comparative Law*, 3rd ed., Tony Weir trans., Oxford University Press, Oxford 1998, pp. 281–282 (regarding the influence of the German Pandectist School as well as the German and Swiss civil codes on the Nordic contract laws, although the drafters’ “reasonableness and realism” created a distinct result).

⁷ United Nations Convention on International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 65 (CISG).

⁸ UNIDROIT Principles of International Commercial Contracts (PICC).

⁹ See e.g., Adlercreutz, Axel, Gorton, Lars & Lindell-Frantz, Eva, *Avtalsrätt I*, 14th ed., Juristförlaget i Lund, Lund 2016; Dotevall, 2017; Hellner, Jan, Hager, Richard & Persson, Annina H., *Speciell avtalsrätt II: Kontraktsrätt. 1 häftet. Särskilda avtal*, 6th ed., Norstedts Juridik, Stockholm 2015; Hästad, Torgny, *Köprätt och annan kontraktsrätt*, 6th ed., Iustus Förlag, Uppsala 2009; Lando, 2016, p. 21 (containing a survey of Nordic Scholars referring to CISG, PICC, and PECL); Ramberg, Jan & Ramberg, Christina, *Allmän avtalsrätt*, 10th ed., Wolters Kluwer, Stockholm 2016.

¹⁰ See Larenz, 1991, pp. 383–384 (regarding *Rechtsanalogien* in German law); CISG Article 7(2); PICC 2016 Article 1.6(2). See also DCFR I. – 1:102(4).

a comprehensive codification of civil law in the nineteenth or twentieth century,¹¹ the Swedish solution instead became ad-hoc legislation for certain parts of the law of obligations considered central at the time and active, precedent-making courts,¹² with the indirect consequence of less focus on developing the general law of obligations.¹³ The Swedish legislature seems, however, to have become less active in recent times, as we can for example see in consumer law,¹⁴ and many modern types of contracts lack special legislation.¹⁵ And with no history of focusing on general legislation and fundamental principles applicable to all contracts, many important contracts, beyond basic contractual questions, fall outside the scope of statutory regulation, for example contracts for construction and many non-material services.¹⁶ This idiosyncrasy with many uncoded

¹¹ See Sandström, Marie, “The Swedish Model – Three Aspects of Legal Methodology”, in Péter Cserne et al. (eds), *Theatrum legale mundi: Symbola Cs. Varga oblata (Festschrift in Honour of Csaba Varga)*, Szent István Társulat, Budapest 2007, pp. 297–304, pp. 299–301 (though a Swedish French-style codification was prepared and presented 1809–1826 but ultimately rejected by politicians, judges, and legal scholars).

¹² See Sandström, 2007, pp. 299–301.

¹³ In modern times, the erosion of the law of obligations has been noticed, see Bengtsson, Bertil, “Om civilrättens splittring”, in Lars Gorton, Jan Ramberg & Jan Sandström (eds), *Festschrift till Kurt Grönfors*, Norstedts juridik, Stockholm 1991, pp. 29–46, p. 29. Legal scholars have been asked to counteract this development by focusing more on the law of obligations or general principles, see Sandgren, Claes, “Om teoribildning och rättsvetenskap”, *Juridisk Tidskrift*, 2004–2005, pp. 297–333, p. 328. See also Sigeman, Tore, “Behövs begreppet obligationsrätt? Reflektioner vid en boks hundraårsjubileum”, in Eva Lindell-Frantz, Krister Moberg, Birgitta Nyström & Katarina Olsson (eds), *Festschrift till Boel Flodgren*, Juristförlaget i Lund, Lund 2011, pp. 377–391, p. 377 (regarding the advantages on focusing on the law of obligations).

¹⁴ See Bärlund, Johan C., “Konsumentskyddets framtid i Norden”, in Kavita Bäck Mirchandani & Kristina Ståhl (eds), *Förhandlingarna vid Det 39:e nordiska juristmötet i Stockholm 18-19 augusti 2011: Del 1*, Stockholm 2011, pp. 429–447, pp. 433–435 (arguing that the legislative initiative moved to the European Union in the 1990s).

¹⁵ See Ramberg & Ramberg, 2016, p. 18.

¹⁶ Bengtsson, Bertil, *Särskilda avtalstyper 1: gåva, hyra av lös sak, lån, förvaring, entreprenadavtal, avtal om arbete på lös sak, syslomansavtal och andra uppdrag*, 2nd ed., P A Norstedt & Söner, Stockholm 1976, p. 13; Ramberg, Christina, *Kontraktstyper*, Norstedts Juridik, Stockholm 2005, pp. 17–18. See also Flodgren, Boel, “Civilrätten i ett framtidsperspektiv”, in Stefan Strömberg, Charlotte Kugelberg, Petter Asp, Anders Eka, Boel Flodgren & Mikael Mellqvist (eds), *Svensk Juristtidning 100 år*, Iustus förlag, Uppsala 2016, pp. 23–52, pp. 27–31 (regarding the characterises of Swedish private law, including the lack of legislation, the seemingly unsystematic approach to what is legislated and what is not, the role of courts and analogies, and international influences); Munukka, Jori, “Svensk obligationsrätt i det nya Europa”, in Stefan Strömberg, Charlotte Kugelberg, Petter Asp, Anders Eka, Boel Flodgren & Mikael Mellqvist (eds), *Svensk Juristtidning 100 år*, Iustus förlag, Uppsala 2016, pp. 87–99, pp. 92–93 (noting that the lack of civil code has created a certain level

situations in a legal tradition where courts still wish to reason based on statutory regulation contributes to the idiosyncrasies of the Swedish legal system as part of the Nordic legal family.¹⁷

2 Argumentative Approaches

2.1 *Potential Approaches*

When a contract does not provide an answer, when there is no directly applicable statutory provision, and no usages, rules or doctrines in the jurisprudence to supplement the contract, other argumentative methods become important.

One potential method might be implication of terms, where terms that are “implied in law” can be delineated as the common-law functional equivalent of supplementation through *dispositives Recht* or *règles supplétives* in civil-law countries,¹⁸ but this should generally not provide a different result than contractual supplementation.

A more relevant method is to interpret and supplement the statutory regulation. Either where the statutory regulation governs the situation, but where the rights and obligations established therein are not exhaustive, or by analogous application of statutory regulation that does not govern the situation, but is still deemed relevant for the situation. A common terminology is *internal* or *external supplementation*,¹⁹ but since it might cause unnecessary confusion,²⁰ because it is,

of disorientation concerning fundamental and relatively common questions. While older works, such as Rodhe’s *Obligationsrätt* (Law of Obligations) from 1956, are still central for understanding the Swedish law of obligations, law reforms in the 1970s and 1990s have made it more difficult to know what portions of these works still represent the law as it currently stands).

¹⁷ Cf. Sandström, 2007, pp. 297–304 (regarding the Nordic legal family and the special legal methodology in these countries, such as the famous fidelity to *travaux préparatoires*); Zweigert & Kötz, 1998, pp. 276–285 (regarding the Nordic legal family). See also Lando, 2016, pp. 14–24 (regarding sources of law in the Nordic countries and the influence of Scandinavian legal realism).

¹⁸ Vogenauer, Stefan (2015b), “Chapter 4 Interpretation”, in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, Oxford 2015, pp. 568–616, pp. 613–615.

¹⁹ Cf. Schwenzer, Ingeborg & Hachem, Pascal, “Chapter II: General Provisions”, in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed., Oxford University Press, Oxford 2016, pp. 119–222, p. 133; Vogenauer, 2015a, p. 200 (regarding the prevalence of this terminology).

²⁰ Cf. Vogenauer, 2015a, pp. 200–201 (in the context of PICC).

in practice, difficult to delineate between interpretation and supplementation,²¹ and because a silent law is not necessarily a law with “gaps,”²² this terminology is best avoided.

2.2 *The Relationship Between Analogies and General Principles*

In Germanic and Swedish law, there is a distinction between a *Gesetzanalogie* or *Einzelanalogie* (“statutory analogy”), where a single statutory norm is applied to an issue that it does not regulate, as opposed to a *Rechtsanalogie* or *Gesamtanalogie* (“legal analogy”), where we derive a general principle (*allgemeiner Rechtsgrundsatz*) from several provisions with the same legal consequence, which applies both to facts regulated and not regulated by the law.²³ In the Swedish legal literature, a variation of the *Gesetzanalogie* is the *institutnanalogi* (“institute analogy”), where the entire or a large portion of an act is applied to another issue, for example applying many of the Sales Act’s rules to contracts for rent of movables.²⁴

When considering *Rechtsanalogien* as one method of reasoning from general principles, we see the close relationship between analogies and general principles, both delineated as reasoning by analogy. However, we could perceive reasoning from general principles as induction, by finding a specific rule from a general rule. And since going back to the *ratio legis* of a single statutory norm might make it possible to formulate a general principle,²⁵ the connecting factor between these two methods could instead be general principles.

3 Reasoning by Analogy Within the Swedish Law of Obligations

To illustrate problems with the current approach, we will examine two problematic cases and a better-reasoned case.

We can find several examples where the Swedish Supreme Court focuses on structural similarities and differences, such as the parties, the contract characteristics, and the contract type regulated by the source regulation, and not

²¹ See Schwenzer & Hachem, 2016, p. 133; Vogenauer, 2015a, pp. 198–199.

²² Larenz, Karl, *Methodenlehre der Rechtswissenschaft*, Springer-Verlag, Berlin 1991, pp. 370–381.

²³ Larenz, 1991, pp. 383–384; Vogenauer, 2015a, p. 203 (suggesting the term extensive interpretation instead of reasoning by analogy since not all legal systems distinguish between different types of analogies and legal systems differ on what gaps allow reasoning by analogy). See also Lehrberg, 2006, p. 53 (solutions established in the jurisprudence or the legal literature also allow for a *Rechtsanalogie*); Lehrberg, 2016, pp. 144–145.

²⁴ See Lehrberg, 2006, p. 52; Lehrberg, 2016, pp. 144–145.

²⁵ See Larenz, 1991, pp. 384–385.

more fundamental aspects such as the *ratio legis* of an individual rule, the applicability of its underlying rationale to the relevant issue, and the potential outcome of the application.

For example, in NJA 2013 s. 980, the Swedish Supreme Court chose not to make an analogy to the special period of limitation of three years for consumer claims, instead applying the ordinary period of limitation of ten years for a claim against a consumer by the Swedish Mapping, Cadastral and Land Registration Authority (“the Authority”). The Court reasoned that it would be unnatural to view the Authority as a trader, which was considered a prerequisite for applying the consumer period of limitation. Thus, the Court’s reasoning regarding a potential analogy focused on the source norm’s official scope of application. The same type of reasoning can be seen in MÖD 2016:16, heard by the Swedish Land and Environment Court of Appeal. A landowner disputed the Authority’s decided cost for cadastral procedure because the Authority had given an indication of a considerably lower cost before the proceedings. The landowner argued that the circumstances justified an analogy to Section 36 of the Consumer Service Act, restricting price deviations when a commercial service provider has given the consumer an approximate price. However, the court, like the Swedish Supreme Court did in NJA 2013 s. 980, reasoned that a public authority and its relationship to citizens did not show enough similarity with a commercial service provider and its typical relationship with a consumer. Thus, the landowner had to pay the full amount.

These cases show the limits of focusing on structural elements. Since the relationship between government agency and an individual vis-à-vis business actor and consumer were structurally different, the court rejected an analogy, without examining the *rationes legis* of the two situations, with a potentially different outcome.

A better example focusing on the *ratio legis* and similarities of outcome can be seen in RH 2012:72 by the Court of Appeal for Northern Norrland. The court reasoned that Article 28 of the Commercial Agency Act (lag 1991:351 om handelsagentur) regulating severance pay for the agent could not be applied by analogy when the parties had already agreed on the provision’s *ratio legis*. The main purpose of the provision is to compensate the agent for the principal’s retained values resulting from the contract. Since the parties had agreed on a long notice period for termination of the contract alongside high compensation for the agent, the court found no grounds for an analogy. Thus, the court reasoned beyond structural similarities between the current situation and the situations aimed at by the rule’s scope of application. A structural approach to analogies

might improve foreseeability, but might not necessarily require upholding the principle of equal for equals.²⁶

4 Reasoning from General Principles

4.1 Swedish Law

Formulating a method for finding general principles within Swedish law, especially within the law of obligations, has not been given much attention. Hellner argues, in the context of contracts for construction, that when the Consumer Service Act and the Sales Acts contain the same principles, we can expect that they should be applied also for commercial service contracts.²⁷ Whilst this model will not always work,²⁸ and whilst it is uncertain whether both the Sales- and Consumer Service Act would be required to establish a general principle, it is a starting point. Thus, Hellner's conjecture is that general principles should be derived from statutory provisions, a *Rechtsanalogie* in our terminology.²⁹

If we first examine the jurisprudence of the Swedish Supreme Court where it explicitly applies the term “general principle” and its variations when reasoning,³⁰

²⁶ Strömholm, Stig, *Rätt, rättskällor och rättstillämpning – En lärobok i allmän rättslära*, 5th ed., Norstedts, Stockholm 1996, p. 414.

²⁷ Hellner et al., 2015, p. 94. Cf. Hellner, Jan, Hager, Richard & Persson, Annina H., *Speciell avtalsrätt II: Kontraktetsrätt. 2 häftet. Allmänna ämnen*, 6th ed., Norstedts Juridik, Stockholm 2016, p. 21 (regarding difficulties in using the Sales Act (köplagen 1990:931) as support for general principles (swe. *allmänna rättsgrundsatser*, ger. *allgemeine Rechtsgrundsätze*)).

²⁸ See NJA 2017 s. 113, para. 17 (on that liability for failure to perform unless excusable by force majeure is not a general contractual principle (swe. *allmän kontraktetsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip*)). See also Bertil Bengtsson, “Om skadestånd vid konsumenttjänster”, *Svensk Juristtidning*, 2008, pp. 262–273, pp. 267–273; Bengtsson et al., 2013, p. 27; Bengtsson, Bertil, Offentliga tjänster i civilrättsligt perspektiv, Stockholm, Norstedts Juridik, Stockholm 2013, p. 61; Friberg, Nils, “Ansvarsformsteorin – uppkomstidpunkten för en fordran på inomkontraktuellt skadestånd”, in *Juridisk Tidskrift* 2014/2015, pp. 328–346, p. 335; Hellner et al., 2016, s. 21; Johansson, Svante O, *Konsumenttjänstlagen: en kommentar*, Norstedts Juridik, Stockholm 2013, pp. 339–400. But see Ramberg & Ramberg, 2016, p. 111.

²⁹ See also Lehrberg, 2016, pp. 144–145 (on finding *allgemeine Rechtsgrundsätze* through *Rechtsanalogien*); Lehrberg, 2006, p. 53 (on that a *Rechtsanalogie* can also be made from solutions established in the jurisprudence or the legal literature); Svensson, 2017, pp. 98–99 (noting that the application of general contractual principles in Swedish law often means deriving norms from existing law, with NJA 2009 s. 672 as an example of a *Rechtsanalogie*).

³⁰ Rather, it applies several terms: swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*; swe. *allmän obligationsrättslig/förmögenhetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche*

we find that the Court sometimes argue that a relevant general principle exists based on (a) a combination of mostly two to three and up to five sources,³¹ (b) by comparing several statutory norms,³² (c) a single statutory norm,³³ (d) on statements in *travaux préparatoires*,³⁴ (e) on a single case,³⁵ or (f) with support from

Prinzip; swe. *allmän avtalsrättslig/kontratsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip*; swe. *allmänna civilrättsliga principer*, ger. *allgemeine zivilrechtliche Prinzipien*; swe. *allmän princip*, ger. *allgemeine Prinzip*.

³¹ Swe. *allmän princip*, ger. *allgemeine Prinzip*: NJA 1991 s. 138 (Government bill 1972:5 p. 159, 328 ff.; NJA 1982 s. 307; the dissident in NJA 1976 s. 458); NJA 2007 s. 758 (56 § Act on Commission Agency of 1914 (lag 1914:45 om kommission); NJA 1997 s. 44); NJA 2010 s. 629 (Cf. Walin, Gösta, Borgen och tredjemanspart, 3rd ed., Norstedts Juridik, Stockholm 2002, p. 209 f., corresponds to the solution found in DCFR Art. IV.G. – 2:112). Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip*: NJA 2013 s. 135 (NJA 1993 s. 13; NJA 2007 s. 519; Hellner, Jan & Radetzki, Marcus, *Skadeståndsrätt*, 8th ed., Norstedts Juridik, Stockholm 2010, p. 420). Swe. *allmän avtalsrättslig/kontratsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip*: NJA 2007 s. 909 (cf. Rodhe, Knut, *Obligationsrätt*, P A Norstedt & Söners förlag, Stockholm 1956, p. 447; Hellner, Jan et al., *Speciell avtalsrätt II, Kontraktsrätt, 2 häftet*, 4th ed., Norstedts Juridik: Stockholm, p. 150 et seq.; NJA 1992 s. 728; NJA 2002 s. 630); NJA 2017 s. 113, para. 17 (cf. Bengtsson, 2008, p. 267 et seq.; Johansson, 2013, p. 87–89). Swe. *allmänna civilrättsliga principer*, ger. *allgemeine zivilrechtliche Prinzipien*: NJA 1992 s. 782 (examining different payment methods, cf. Walin, Gösta, *Lagen om skuldebrev m.m.*, P A Norstedt & Söners förlag, Stockholm 1977, p. 32 fn. 15 a; Land Code (Jordabalken 1970:994) Ch. 12 § 20 para. 3; NJA II 1980 s 103 f; NJA 1988 s 312; NJA 1982 s 366); NJA 2004 s. 566 (NJA 1950 s. 610; NJA 2001 s. 627); NJA 2014 s. 877, para. 9 (Cf. NJA 1935 s. 81; NJA 1975 s. 45; NJA 1947 s. 647).

³² Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip*: NJA 2013 s. 1174, para. 12 (cf. e.g., 30 § Sales Act (köplagen 1990:931), 16 § Consumer Service Act (konsumenttjänstlagen 1985:716), and CISG Article 80).

³³ Swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*: NJA 1984 s. 627 (dissident: 22 § 2 para. Promissory Notes Act (lag 1936:81 om skuldebrev)); NJA 2014 s. 760 (Justice Lindskog's addendum for his own account: Land Code Ch. 4 § 22. Swe. *allmän princip*, ger. *allgemeine Prinzip*: NJA 2002 s. 577 (Book on Commerce (Handelsbalk 1736:0123 2) Ch. 9 § 5); NJA 2011 s. 399 (2 § Promissory Notes Act); NJA 2012 s. 1095 (Cf. 7 § Contracts Act).

³⁴ Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip*: NJA 2013 s. 1174, para. 9 (reference to the *travaux préparatoires* of the Consumer Service Act). Swe. *allmän avtalsrättslig/kontratsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip*: NJA 1978 s. 14 (reference to the *travaux préparatoires* of the Tort Liability Act (skadeståndslagen 1972:207)). Swe. *allmänna civilrättsliga principer*, ger. *allgemeine zivilrechtliche Prinzipien*: NJA 1992 s. 820 (Cf. NJA II 1930 s. 362).

³⁵ Swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*: NJA 2012 s. 685 (NJA 2006 s. 738). Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip*: NJA 2007 s. 519 (NJA 1993 s. 13). Swe. *allmän avtalsrättslig/kontratsrättslig princip*, ger.

the legal literature,³⁶ but (g) alas, quite often without any support.³⁷ Several cases have also concerned contractual interpretation against the background of such principles, without support for such principles.³⁸ Beyond these explicit cases, we can also infer that the Court reasons from general principles.³⁹ Thus, the Court is quite willing to reason from general principles.

allgemeine Vertragsrechtliche Prinzip: NJA 2010 N 37, para. 4 (NJA 2010 s. 206). Swe. *allmän princip*, ger. *allgemeine Prinzip:* NJA 2005 s. 142 (referring to the dissidents in NJA 1989 s. 224).

³⁶ Swe. *allmän avtalsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip:* NJA 2000 s. 747 (cf. Adlercreutz, Axel, *Avtalsrätt I*, 10th ed., Juristförlaget i Lundund 1995, p. 118 et seq.). Swe. *allmän princip*, ger. *allgemeine Prinzip:* NJA 2005 s. 462 (see e.g., Hellner, Jan, *Skadeståndsrätt*, 5th ed., Juristförlaget, Stockholm 1995, p. 368 et seq. – thus suggesting additional sources). See also the dissidents in NJA 1989 s. 224 (cf. Bengtsson, 1976, p. 122).

³⁷ Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip:* NJA 2015 s. 359, para. 15. See also the court of appeals in NJA 1993 s. 81. Swe. *allmän avtalsrättslig/kontratsrättslig princip*, ger. *allgemeine Vertragsrechtliche Prinzip:* NJA 1984 s. 334; NJA 2010 s. 206, para. 9. Swe. *allmänna civilrättsliga principer*, ger. *allgemeine zivilrechtliche Prinzipien:* NJA 1988 s. 94; NJA 2011 N 44, para. 3. Swe. *allmän princip*, ger. *allgemeine Prinzip:* NJA 2002 s. 358.

³⁸ Swe. *allmän obligationsrättslig/förmögenbetsrättslig princip*, ger. *allgemeine schuldrechtliche/vermögensrechtliche Prinzip:* See NJA 2013 s. 271, para. 7 (cf. NJA 2012 s. 597 para. 13). However, NJA 2012 s. 597, para. 13 only states that interpretation should be based on *dispositives Recht*, without stating the content of *dispositives Recht*, see NJA 2012 s. 597, para. 13; NJA 2014 s. 960, paras. 24–29; NJA 2015 s. 3, para. 13 (the interpretation of the rule concerning professional care should be based on the same principles that other rules in the standard-term agreement is based on). See also dissidents in NJA 2015 s. 862, para. 13 (referring to NJA 2013 s. 271; NJA 2015 s. 3).

³⁹ See NJA 1994 s. 532. Cases concerning good faith, or a “duty of loyalty” (*lojalitetsplikt*), sometimes arguably also belong to this category. Regarding “proper care” (*tillbörlig omsorg*), see e.g., NJA 1986 s. 586 (no source, but concerned a contract for construction); NJA 1992 s. 58 (no source). Regarding “loyalty,” see e.g., NJA 1990 s. 264 (no source – actually referring to a “duty of loyalty,” although it could have referred to a “duty of obedience”); NJA 1990 s. 745 (no source); NJA 2005 s. 142 (no source); NJA 2006 s. 638 (cf. NJA 1930 s. 131 and 21 § Commercial Agency Act, see also the reporting clerk in NJA 2008 s. 24); NJA 2007 s. 86 (referring to the Land Code, the Sales Act, the Contracts Act, the jurisprudence of the Court, as well as the legal literature); NJA 2009 s. 672 (with references to legislation, standard term agreements, and comparative references to foreign law and transnational instruments, while the trial court and court of appeal reasoned from a general principle (swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*) with references to the legal literature and the Commercial Agency Act). Cf. also NJA 1962 s. 359 (no source – breach of duty of loyalty, as expressed in the agreement and by the nature of the agreement); NJA 1978 s. 147 (acknowledging a duty of loyal participation in solving the issue, but not placing much emphasis on that duty). See also Munukka, Jori, “Lojalitetsprincipen – ett institut med framtid i avtalsrätten?”, in Kavita Bäck Mirchandani & Kristina Ståhl (eds), *Förhandlingarna vid Det 39:e nordiska juristmötet i Stockholm 18-19*

The Court sometimes also make references to the CISG, and transnational instruments such as the PICC, PECL⁴⁰, and DCFR⁴¹, not merely to supplement the current national law but also for policy discussions.⁴² However, the Court seldom directly and solely relies on such instruments; in many situations, such references are part of general comparative overviews,⁴³ or comparative references (cf.).⁴⁴ For example, in NJA 2013 s. 1174, concerning a contract for construction, recourse to general principles became necessary. The Svea Court of Appeal noted that PICC and PECL express general principles, and reasoned that the possibility of taking foreign law into account is greater in contract law than in other areas of the law. The Supreme Court also noted that general principles might be expressed in international principles, but did not rely on transnational instruments when finding that it is a general principle that a buyer cannot claim remedies if the failure is caused by the buyer's own act or omission

augusti 2011: Del 1, Stockholm 2011, pp. 87–106, p. 88, fn. 3, p. 90 (with references to earlier cases); Svensson, 2017, pp. 98–99 (regarding reasoning from a *Rechtsanalogie* in NJA 2009 s. 672).

⁴⁰ Principles of European Contract Law.

⁴¹ Draft Common Frame of Reference.

⁴² See Munukka, Jori, “Transnational Contract Law Principles in Swedish Case Law – PICC, PECL and DCFR”, *Scandinavian Studies in Law*, 2012, pp. 229–252, pp. 232–250 (regarding use of transnational principles for supplementation, as “points of reference when evaluating the existing policy,” as “over-arching corrective instruments,” and as “support of a change of policy”). See also Munukka, Jori, “Svensk obligationsrätt i det nya Europa”, in Stefan Strömberg, Charlotte Kugelberg, Petter Asp, Anders Eka, Boel Flodgren & Mikael Mellqvist (eds), *Svensk Juristtidning 100 år*, Iustus förlag, Uppsala 2016, pp. 87–99, pp. 92–93.

⁴³ NJA 2009 s. 672 (DCFR, as support for changing the current policy); NJA 2010 s. 629 (DCFR, CISG, when supplementing the current law). Justice Hästad has made addendums for his own account in several cases, see NJA 2006 s. 638 (UCC, CISG, PECL, PICC to support the current Swedish policy); NJA 2008 s. 733 (making a comparative overview, when supplementing the current law, based on HGB (compared to BGB), UCC, UNIDROIT Convention on International Factoring, UNCITRAL Model Law on Assignment of Receivables, compared to PECL. Also, noting DCFR.); NJA 2010 s. 467 (BGB, PECL, PICC, DCFR, regarding the corrective function of good faith and the general clause (§ 36) in the Swedish Contracts Act (lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område)); Högsta Domstolens dom, T 4904-08, 16.09.2010 (PECL, PICC).

⁴⁴ NJA 2011 s. 600 (DCFR, support for changing the current law); NJA 2012 s. 597 (DCFR, CISG); NJA 2012 s. 1021 (CISG, making a comparison with notice to the seller after third-party claims in sales law before discussing the matter in sale of land); NJA 2014 s. 272 (DCFR); Addendum for their own account by Herre (reporting judge) and Lindskog, see NJA 2012 s. 452 (DCFR). See also the minority in NJA 2000 s. 747 (BGB, PECL, when supplementing the current law). Comparative references by the reporting clerk: NJA 2011 s. 548 (DCFR); NJA 2014 s. 1006 (DCFR).

(cf. 30 § Sales Act; 16 § Consumer Sales Act; Article 80 CISG).⁴⁵ This case thus illustrates that the Court currently seems to prefer a *Rechtsanalogie* using a Convention, rather than directly relying on general principles in non-binding transnational instruments. References to transnational instruments are also tied to specific justices; references up until 2011 relied on the now retired Justice Håstad,⁴⁶ whereas newer references rely on Justice Herre.⁴⁷ Other justices have been willing to refer to the CISG.⁴⁸ Thus, the entire Court is yet to accept general principles in transnational instruments.

4.2 Reasoning from General Principles Under CISG, PICC, and German Law

4.2.1 CISG & PICC

The CISG and the PICC can be examined together since they are closely related.⁴⁹ However, unlike CISG, which is a Convention, the PICC, as transnational private rulemaking, can mainly be applied when chosen as the law applicable to the merits of a dispute in arbitration or incorporated by reference (ger. *materiellrechtliche Verweisung*) within the limits of the applicable law.⁵⁰

⁴⁵ NJA 2013 s. 1174, pp. 1179–1180, para. 12.

⁴⁶ Munukka, 2012, p. 250. See also *supra* note 43 (regarding justice Håstad's addendums for his own accounts).

⁴⁷ Sitting on the bench and being the reporting judge in NJA 2011 s. 600 (DCFR); NJA 2012 s. 452 (DCFR); NJA 2012 s. 597 (DCFR, CISG); NJA 2013 s. 1174 (CISG); NJA 2014 s. 272 (DCFR). Cf. Munukka, 2012, p. 250 (suggesting that Justice Herre would continue referring to the DCFR after Justice Håstad's retirement).

⁴⁸ NJA 2012 s. 1021 (Ella Nyström, Lena Moore, Agneta Bäcklund, Svante O. Johansson (reporting judge) and Lars Edlund sitting on the bench).

⁴⁹ See Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, p. 45 (noting that the PICC are “to a large extent [...] based on the CISG”).

⁵⁰ See Michaels, Ralf, “Preamble I: Purposes, Legal Nature, and Scope of the PICC; Applicability by Courts; Use of the PICC for the Purpose of Interpretation and Supplementation and as a Model”, in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, Oxford 2015, pp. 31–176, pp. 49–51 (the PICC can sometimes also be chosen as agreed rules within the limits of procedural autonomy).

CISG Article 7 and PICC 2016⁵¹ Article 1.6 concerns interpretation and supplementation of the Convention and the Principles, and both refer to express and implied general principles, that are either general or specific.⁵² While both instruments contain general principles for interpretation,⁵³ these only allow new rights and obligations to be established within the scope of interpretation.⁵⁴ For supplementation within the instruments' scopes,⁵⁵ both refer to settlement in accordance with underlying general principles.⁵⁶ Both have restricted scopes,⁵⁷ but the CISG's scope might be more problematic to settle,⁵⁸ since it is older and its drafters sometimes abstained from regulating certain questions, such as interest rate, without excluding them,⁵⁹ whereas the PICC has a much wider scope and its drafters deliberately tried to regulate issues not explicitly dealt within the CISG.⁶⁰

Whilst supplementation under PICC 2016 Article 1.6(2) explicitly adverts to underlying general principles, supplementation is also possible using the interpretive criteria; that is, text, context, drafting history, and policy arguments,⁶¹

⁵¹ References are made to the fourth edition of the Principles from 2016, although the literature refers to the third edition from 2010. However, the latest edition only contains minor revisions pertaining to long-term contracts.

⁵² Cf. DiMatteo, Larry A., et al., *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, Cambridge 2005, p. 23 (regarding CISG).

⁵³ CISG Article 7(1); PICC 2016 Article 1.6(1) (both referring to their "international character" and "the need to promote uniformity"). See also Vogenauer, 2015, pp. 183–198 (regarding criteria and guidelines for interpretation of the PICC, as well as the relative weight of these criteria.).

⁵⁴ See Schwenger & Hachem, 2016, pp. 126–128 (regarding CISG and the requirement to observe "good faith in international trade").

⁵⁵ See *id.*, pp. 121–142 (regarding CISG); Vogenauer, 2015, pp. 198–204 (regarding the PICC). Cf. DCFR I. – 1:102(4).

⁵⁶ See CISG Article 7(2); PICC 2016 Article 1.6(2). See also Vogenauer, 2015a, p. 203 (making the term *Rechtsanalogie* irrelevant for the PICC, since we can hardly distinguish between the approach explicit in Article 1.6(2) and the required "recourse to general principles" in a *Rechtsanalogie*).

⁵⁷ See CISG Article 4 (governing "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract", while explicitly excluding for example, contractual validity and the contract's effect "on the property in the goods sold"); PICC 2016 Preamble (setting forth "general rules for international commercial contracts"). See also Michaels, 2015, pp. 40–47 (regarding PICC).

⁵⁸ See Schwenger & Hachem, 2016, pp. 133–134.

⁵⁹ See *id.*, p. 133 (regarding developments in technology and economy since 1980).

⁶⁰ Vogenauer, 2015a, pp. 199–200.

⁶¹ See *id.*, pp. 189–198.

through reasoning by analogy, or by relying on applicable national law under private international law rules.⁶² However, the Official Comment of Article 1.6 states that the first step is an analogy, and if this cannot provide an answer we resort to reasoning from underlying general principles.⁶³ Since this cannot solve all specific questions either,⁶⁴ we must often fall back on other interpretive criteria for supplementation, for example, reliance on the wider context, *travaux préparatoires*, or policy arguments.⁶⁵ Finally, if a solution cannot be found, we must fall back to national law using private international law rules.⁶⁶ Thus, reasoning from general principles is not the only method.

Another difference between the instruments is how to find the general principles. For the CISG, the general principles might be both internal and external. The internal principles are the many principles derived from the Convention's articles, for example, the principle of full compensation (*Totalreparation*), limited by the principle of risk allocation, good faith, *favor contractus*, and "protecting a party's reasonable reliance caused by the other party."⁶⁷ External principles such as the PICC,⁶⁸ PECL, and DCFR might also be used as additional arguments.⁶⁹ For the PICC, some of their underlying general principles are, in contrast to the CISG, stated in black-letter rules, including freedom of contract, good faith and fair dealings, and sanctioning

⁶² *Id.*, p. 200.

⁶³ PICC 2016 Article 1.6 Off. Cmt. 4 (for example, applying the rule regarding default place of performance (Article 6.1.6) to restitution). See also Vogenauer, 2015a, p. 191.

⁶⁴ For example, in an arbitral award, the tribunal had to examine whether the principle of good faith and fair dealings barred the claimant's claims for being allegedly unreasonably delayed. The tribunal did not find an answer under such general principles and found that the claimant's actions were compatible with Article 7.1.3 (withholding performance) and Article 7.4.8 (mitigation of harm), see Arbitral Award 1998, Second Partial Award, ICC case no 7110.

⁶⁵ See Vogenauer, 2015a, pp. 191–192 (also discussing how to solve the question of burden of proof).

⁶⁶ Vogenauer, 2015a, p. 204.

⁶⁷ Schwenzer & Hachem, 2016, pp. 135–137; DiMatteo et al., 2005, pp. 24–26.

⁶⁸ See Hof van Cassatie, Scafom International BV & Orion Metal BVBA v. Exma CPI SA, 19 June 2009 [C.07.0289.N] (Be.) (applying the PICC as general principles governing the law of international trade).

⁶⁹ Schwenzer & Hachem, 2016, pp. 137–138. This can be criticized, since the PICC, with its first version from 1994, does not express "the general principles on which [the CISG, enacted in 1980,] is based," and since "the PICC to a large extent are based on the CISG," see Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, p. 45.

inconsistent behavior.⁷⁰ We can also derive additional general principles from other articles, which may include *favor contractus* and openness to usages.⁷¹

Among the many available examples, one interesting example under the Convention is the question of interest rate, as examined by an Austrian arbitration tribunal. The sole arbitrator found that the question of interest rate was within the scope of the Convention,⁷² although the Convention did not expressly settle the matter. The arbitrator found that this should be settled according to the Convention's underlying principle of full compensation.⁷³ Based on the Unilex database, a central CISG and PICC jurisprudence database, we can find several cases and awards relying or referring to the codified general principles of the PICC, especially regarding good faith and fair dealings.⁷⁴ For example, a Russian arbitration tribunal, in a dispute concerning a sporting-event license and necessary telecommunication services for broadcasting, found that the respondent failed to substantiate its claim of improper performance of contractual obligations by relying on Article 1.7 (good faith and fair dealings) and Article 5.1.3 (duty of cooperation).⁷⁵

However, since supplementation using general principles is limited to the instruments' limited scopes, the consequences are less substantial than under national law. For example, when the principle of good faith has been codified in national contract law, such as in German and French law,⁷⁶ that principle might

⁷⁰ PICC 2016 Article 1.1, 1.7, 1.8; Vogenauer, 2015a, p. 191 (also, lack of form requirements (Article 1.2 and 3.1.2), *pacta sunt servanda* (Article 1.3), the parties' ability to, generally, modify or exclude PICC's provisions, that is, party autonomy (Article 1.5)).

⁷¹ PICC 2016 Article 3.1.2, 4.5, 6.2.2 (*favor contractus*), 1.9(2) (openness to usages). See Vogenauer, 2015a, pp. 191–192 (also discussing whether protection against “procedural and substantive unfairness” should be considered a general principle).

⁷² See CISG Article 78 (interest for late payments), Article 84 (interest when price is repaid or when goods are restituted), and Article 74 (the general rule on damages for loss suffered as “a consequence of the breach”).

⁷³ Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft, SCH-4366, June 15, 1994 (Au.) (Since a business person with delayed payment would be expected to resort to bank credit, the interest rate was found to be the commonly practiced interest rate in the seller's country with regard to the currency – seller's country or foreign currency agreed by the parties. Cf. PICC 2016 Article 7.4.9.). See also DiMatteo et al., 2005, pp. 26–27.

⁷⁴ As of June 2017: Article 1.1 (18 cases and awards), Article 1.2 (4) and 3.1.2 (1), Article 1.3 (5), Article 1.5 (0), Article 1.7 (47), Article 1.8 (14), and Article 1.9(2) (4).

⁷⁵ International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Arbitral Award No 100/2011, March 16, 2012 (Rus.).

⁷⁶ See BGB §§ 242, 157, 138 (Ger.); Article 1104 CC 2016 (Fr.), replacing para. 3 of Article 1134 CC 1804 (Fr.). The principle is not codified in Swedish or Nordic contract law, but both Article

allow supplementation or even modification of default rules,⁷⁷ and might even impose collateral duties after the contract has been completed.⁷⁸

4.2.2 German Law

In German law, we can find examples where courts reason using *Rechtsanalogien*,⁷⁹ although the term “analogy” can be questioned,⁸⁰ and though the answer cannot always be found in such general principles.⁸¹ The case *BGHZ 9, 157* can illustrate differences between German and Swedish law. This is an example of a *Rechtsanalogie*, regarding the inalienable right to termination for cause for an ongoing obligation.⁸² The *Bundesgerichtshof* relied on twenty statutory provisions, seven cases by the *Bundesgerichtshof* and its predecessor the *Reichsgericht*, and two scholarly works to establish this general principle.⁸³

Based on this case, Larenz in a leading work on legal methodology, describes the thought-process for finding general principles as: (1) The statute prescribes

33 and 36 of the Swedish Contract Act presuppose this principle, known as a duty of loyalty, although it does not permeate Nordic law such as good faith does on the Continent, see Lando, Ole et al., “Restatement of Nordic Contract Law: Comments”, in Ole Lando et al. (eds), *Restatement of Nordic Contract Law*, DJØF Publishing, Copenhagen 2016, pp. 47–327, pp. 81–86 (regarding § 1-6(1): Reasonable consideration of the other party’s interests); Munukka, 2011, pp. 88–91, 104 (regarding differences between the Nordic countries and that the Swedish Supreme Court has been more hesitant in invoking a “duty of loyalty” than its Nordic cousins).

⁷⁷ Markesinis, Basil S, Unberath, Hannes & Johnston, Angus, *The German Law of Contract*, 2nd ed., Hart Publishing, Oxford 2006, p. 142 (regarding that BGB § 242 allows a court to “impose a number of collateral obligations on the parties” and “enables the courts to imply terms in law where the default rules of the Code are not regarded as sufficient or adequate”). Cf. NJA 2010 s. 467 (Justice Håstad’s addendum for his own account concerns the majority’s modification of a legal rule using the general clause (§ 36) in the Swedish Contracts Act); Svensson, Ola, “Att jämka en lagregel”, *Svensk Juristtidning*, 2016, pp. 68–84, pp. 72–84 (discussing the modification in that case).

⁷⁸ See Reichsgericht [RG], 05.10.1939 – V 87/39, RGZ 161, 330 (“Venusbergfall”) (Ger.). See also Markesinis et al., 2006, pp. 142, 651–655 (containing an English translation of the case).

⁷⁹ See Bundesgerichtshof [BGH], 01.04.1953 - II ZR 235/52, BGHZ 9, 157, para. 12 (Ger.). See also Larenz, 1991, p. 384, 386.

⁸⁰ See Larenz, 1991, pp. 384–385. See also *supra* section 2.2.

⁸¹ Cf. BGH, 06.07.2012 - V ZR 122/11, NJW 2012, 3162, paras. 11–14 (Ger.) (finding, in contrast to the lower court, that there are no general principles that invalidate omission obligations after 30 years).

⁸² BGH, 01.04.1953 - II ZR 235/52, BGHZ 9, 157, para. 12 (Ger.). See also Larenz, 1991, p. 384.

⁸³ See BGH, 01.04.1953 - II ZR 235/52, BGHZ 9, 157, para. 12 (Ger.).

the right to termination for cause as mandatory for a series of obligations; (2) all obligations are of the same type (ongoing obligations); (3) such ongoing obligations strongly affect the operation of the parties or entail mutual integration of interests that requires cooperation and trust; (4) the *ratio legis* for the statutory provisions are the same in this regard for all ongoing obligations; (5) the *ratio legis* applies not only to the regulated forms of ongoing obligations, but to all ongoing obligations; and (6) the result is a general principle that for ongoing obligations, termination is possible for compelling reasons.⁸⁴ Note that we must go back to the *ratio legis* when deciding if the provisions are generalizable.⁸⁵ A court might sometimes also establish a general principle based on a single norm, but this cannot be justified for all norms.⁸⁶

4.3 Comparison

Whilst reasoning from general principles are common in all studied systems, the Swedish Supreme Court's reasoning in the studied cases is still idiosyncratic. In comparison with German law and the CISG, deriving general principles from several statutory norms, supported by Hellner's conjecture, is quite uncommon among the studied cases,⁸⁷ and also from a single statutory norm.⁸⁸ With the exception of NJA 2009 s. 672,⁸⁹ and NJA 2007 s. 86,⁹⁰ at best four to five,⁹¹ or

⁸⁴ Larenz, 1991, p. 384.

⁸⁵ *Id.*, p. 386.

⁸⁶ See *id.*, pp. 386–389 (regarding the justified generalization of BGB § 254(1), stating that that liability and compensation to be paid for contributory negligence depends on the circumstances, especially the extent the damage was caused by that party).

⁸⁷ See NJA 2013 s. 1174, para. 12 (cf. e.g., 30 § Sales Act, 16 § Consumer Service Act, and CISG Article 80, Justice Herre reporting judge). See also NJA 2009 s. 672. However, a *Rechtsanalogie* can also be made based on a combination of sources, with solutions also found in the jurisprudence and legal literature, see Lehrberg, 2006, p. 53. This seems more common.

⁸⁸ Regarding swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*: NJA 1984 s. 627 (dissidents: 22 § 2 para. Promissory Notes Act; NJA 2014 s. 760 (Justice Lindskog's addendum for his own account: Land Code Ch. 4 § 22. Regarding swe. *allmän princip*, ger. *allgemeine Prinzip*: NJA 2002 s. 577 (Book on Commerce Ch. 9 § 5); NJA 2011 s. 399 (2 § Promissory Notes Act); NJA 2012 s. 1095 (Cf. 7 § Contracts Act).

⁸⁹ The Court, with Justice Håstad as the reporting judge, made references to four statutes, two standard-term agreements, three *travaux préparatoires*, two cases, three references to the DCFR, one reference to the legal literature and two references to foreign law.

⁹⁰ The Court, with Justice Håstad as the reporting judge, made references to six cases, two *travaux préparatoires*, and thirteen references to the legal literature.

⁹¹ See NJA 1992 s. 782; NJA 2007 s. 909.

two to three sources are used.⁹² However, many more cases contain only one,⁹³ or no sources,⁹⁴ even when additional sources exist.⁹⁵ While this can be explained by majority compromises,⁹⁶ a perception that certain general principles are self-evident,⁹⁷ and a judicial style and legal culture where reasoning is not always supported by sources, it is still problematic. Several of these “general” principles are also strikingly specific,⁹⁸ especially in comparison with German law, the CISG, and the PICC, which might be explained partly by the lack of comprehensive civil law codification. Finally, the limited interest of the Swedish

⁹² See NJA 1991 s. 138; NJA 2004 s. 566; NJA 2010 s. 629; NJA 2013 s. 135; NJA 2013 s. 1174, para. 12; NJA 2014 s. 877, para. 9.

⁹³ See NJA 1978 s. 14; NJA 1984 s. 627 (dissident); NJA 1992 s. 820; NJA 2000 s. 747; NJA 2002 s. 577; NJA 2005 s. 462; NJA 2007 s. 519; NJA 2010 N 37; NJA 2011 s. 399; NJA 2012 s. 1095; NJA 2014 s. 760 (Justice Lindskog’s addendum for his own account).

⁹⁴ See NJA 1984 s. 334; NJA 1988 s. 94; NJA 2002 s. 358; NJA 2010 s. 206, para. 9; NJA 2011 N 44, para. 3; NJA 2015 s. 359, para. 15.

⁹⁵ A good example is NJA 2006 s. 638, where the majority is not very explicit about general principles – this is clarified by the reporting clerk in NJA 2008 s. 24 – and relies on two sources, whereas Justice Hästad’s addendum for his own account contains references to eleven scholarly works regarding whether 82 § Act on Commission Agency of 1914 and 21 § Commercial Agency Act expresses or can be extended to a general principle (swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*), before concluding that it is suitable that 21 § Commercial Agency Act expresses a such principle.

⁹⁶ Cf. the majority’s *ratio decidendi* with the writing of reporting clerks (see NJA 2008 s. 24 and the majority in NJA 2006 s. 638), or a justice writing addendums for his or her own account (NJ A 2006 s. 638; NJA 2014 s. 760). The writing of reporting clerks and justices writing addendums for their own account may reflect a wish to show that their arguments are well supported when reasoning on their own.

⁹⁷ See NJA 1988 s. 94 (the right to set off is lost and the payment cannot usually be revoked with the effect of being able to exercise the right to set off if the debtor pays the debt). However, other general principles would arguably require a source. See NJA 2002 s. 358 (whether a claim is revived should be assessed based on the debtor’s will in the individual case).

⁹⁸ Cf. NJA 1984 s. 627 (dissidents: 22 § 2 para. Promissory Notes Act expresses a general principle (swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*) that when a bank, credit market company, or securities institutions sells bearer bonds, the sale is binding towards the institutions creditors even if the securities are left with the institution for storage); NJA 2006 s. 638 (that 21 § Commercial Agency Act, which is a burden of proof rule applied *ex officio* by the court concerning the effects of passivity when entering into agreements and when it cannot be proven what has happened, expresses a general principle (swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*); NJA 2014 s. 760 (Justice Lindskog’s addendum for his own account: reasoning that for contractual chains, Land Code Ch. 4 § 22 expresses a general principle (swe. *allmän rättsgrundsats*, ger. *allgemeine Rechtsgrundsatz*) that A has a subsidiary right to pursue claims against C – without having to go through B – regarding the obligation to sell goods free from third-party claims).

vis-à-vis German and International legal literature on how to find general principles is more difficult to explain, but it might be considered an indirect acceptance of the Court's weak reasoning by the legal community.

5 Choosing Between Analogies and General Principles

5.1 *The Approach of the Swedish Supreme Court*

In contrast with the PICC,⁹⁹ the Swedish Supreme Court seems to prefer reasoning from general principles when it can and to resort to analogies when a rule cannot be generalized. Whilst it is difficult to delineate the Court's method conclusively, several cases seem to indicate that its strategy is to reason by general principles if possible and to resort to analogies only if there is no established principle or if there are reasons not to develop such a principle.¹⁰⁰

To illustrate the Court's choice between analogies and general principles, we can examine the accountant's right to lien and equitable lien. In NJA 1981 s. 1050, the Swedish Supreme Court reasoned by analogy to several statutes, but did not extend the right to lien (*retentionsrätt*) to accountants, because of, *inter alia*, the accountant's strong interest in having quick access to the bookkeeping material, as well as public concerns.¹⁰¹ In NJA 1982 s. 404, the Court reasoned that it follows from general principles for bilateral agreements that a consultant is not required to give out such bookkeeping material drawn up by the consultant without compensation, that is, the consultant has a right to equitable lien (*detentionsrätt*).¹⁰²

⁹⁹ PICC Article 1.6 Off. Cmt. 4 (the first step should be a statutory analogy, and if that cannot provide an answer, resort to reasoning by underlying general principles). See also Vogenauer, 2015a, p. 191.

¹⁰⁰ But see NJA 2007 s. 909 (the Court initially chose to focus its reasoning on analogies from the Commercial Agency Act and the case NJA 1992 s. 728 for an exclusive distribution contract, but the Court found these sources unsuitable for analogies, instead of solving the issue with a *Rechtsanalogie*).

¹⁰¹ NJA 1981 s. 1050. See also Reidhav, David, Reasoning by Analogy - A Study on Analogy-Based Arguments in Law, Faculty of Law, Lund University, Lund 2007, p. 100 (testing his model of reasoning by analogy on the case).

¹⁰² NJA 1982 s. 404.

5.1.1 *Cases Where the Court Has Chosen to Argue by Analogy*

There is no general principle constituting a right to lien in Swedish law, and there are considerable reasons not to develop such a principle. Thus, the choice of reasoning by analogy in NJA 1981 s. 1050 is no surprise.¹⁰³

In NJA 2002 s. 644, the Court examined whether a course participant was obligated to pay the entire course fee after withdrawing from the course, thus terminating the contract. The Court argued by analogy to Article 41 of the Consumer Service Act, applying it strictly by its wording. Although the right to terminate contracts could arguably be found in general principles,¹⁰⁴ there is no unified set of principles for determining how much of the price a terminating party is obligated to pay.¹⁰⁵

In NJA 1997 s. 418, the Court preferred reasoning by analogy, but that was to avoid inconsistent application. Company A had acquired the shares of company B and C. Based on an unauthorized withdrawal as a loan from company B to C, C had used the money to amortize a loan with a third party (a bank). When the question arose whether the bank should repay the bankruptcy estate of company B, the Court reasoned that a restricted analogy concerning the rule for repayment for such unauthorized withdrawals was preferable to applying a general principle; the statutory regulation was perceived as almost an exhaustive regulation of a company's capital assets and the Court wanted to avoid different consequences between a directly applicable situation and when a third party received something from an unauthorized withdrawal.¹⁰⁶ This restrictive aspect of analogies may explain its use for mandatory regulation, to avoid overextending a regulation to new situations.

5.1.2 *Cases Where the Court Has Chosen to Reason from General Principles*

The accountants' right of equitable lien was determined by reasoning from general principles in NJA 1982 s. 404. However, unlike in the above cases where the Court reasoned by analogy, it had a rational possibility to derive the right of equitable lien based on analogy, for example through Article 14 of the Swedish

¹⁰³ Millqvist, Göran, *Sakrättens grunder: en lärobok i sakrättens grundläggande frågeställningar avseende lös egendom*, 7th ed., Norstedts Juridik, Stockholm 2015, p. 220. But cf. Håstad, Torgny, *Sakrätt: avseende lös egendom*, 5th ed., Norstedts Juridik, Stockholm 1994, p. 27 (with further references).

¹⁰⁴ Hellner et al., 2016, pp. 78–79.

¹⁰⁵ *Id.*, p. 80.

¹⁰⁶ NJA 1997 s. 418.

Sales Act of 1905.¹⁰⁷ Choosing to reason from general principles suggests that the Court will reason from general principles when possible, only resorting to analogies when there are no such principles, or when general principles would lead to a problematic outcome.

This hypothesis is supported by the Supreme Court's reasoning in NJA 1994 s. 532 where the Court found that general principles require the consultant to present analysis results in an intelligible way. The claimant argued, *inter alia*, that the consultant was liable by analogy to section 4 in the Consumer Service Act, but the Court chose to reason from general principles, though it is widely accepted that this statutory provision is an expression of general principles.¹⁰⁸ The Court's choice could arguably be an indicator that when given a choice, it will reason from general principles.

6 What Can We Ascertain from These Modes of Argumentation?

6.1 *The Focus on Analogies Might be Exaggerated*

Whilst it is common wisdom that reasoning by analogy is the preferred method under Swedish law,¹⁰⁹ this might be exaggerated. We have seen many cases where the Supreme Court explicitly adverts to general principles and cases when such reasoning must be inferred. Furthermore, the Court seems to apply general principles when it is possible and primarily make analogies when a rule cannot be generalized further, or if a general principle would lead to an unwelcome result, in contrast to the method recommended for the PICC.

However, many of the general principles applied and referred to as general principles by the Swedish Supreme Court are very specific in comparison with German law, CISG, and PICC. Whilst the Court sometimes reason based on the principle of good faith, it is hesitant to acknowledge good faith as a general

¹⁰⁷ (lag 1905:38 s.1 om köp och byte av lös egendom), later replaced by the Sales Act, which entered into force on January 1, 1991.

¹⁰⁸ Johansson, 2013, pp. 127–128 with further references.

¹⁰⁹ See e.g., Bengtsson et al., 2013, p. 31; Hellner, 1994, p. 110; Lehrberg, 2016, p. 144. See also Hydén & Hydén, 2016, p. 119.

principle,¹¹⁰ but is willing to generalize specific norms and acknowledging them as general principles.

General principles are sometimes criticized in legal problem solving, arguing that they are “more often than not” unable to settle the issue, partly because principles are considered too abstract for particular legal problems, making it necessary to rely on other interpretive criteria in such situations.¹¹¹ The specific nature of the general principles found in the jurisprudence of the Swedish Supreme Court might thus be a compromise, generalized while still being sufficiently concrete for particular legal problems.

6.2 *From Authority to Reasons*

The studied cases from the Swedish Supreme Court show *rationes decidendi* that are, notwithstanding argumentation method, far from always very helpful for future courts, parties, or scholars. First, it is difficult to predict when a court will establish a general principle. Second, when the Swedish Supreme Court relies on analogies, it often focuses on structural similarities, and avoid deeper similarities. This does not necessarily help improve the unity within the Swedish law of obligations. And third, cases lacking sufficient reasoning are difficult to review.

When establishing a general principle, a court or arbitration tribunal applying the CISG must reason why a general principle can be derived from the Convention’s articles, or, if applying the PICC, interpreting the general principles and reason for application, and under German law, establishing a general principle requires a thorough reasoning. In contrast, the studied cases from the Swedish Supreme Court show *rationes decidendi* where general principles are established with strikingly limited reasoning and often without sources, even

¹¹⁰ The “duty of loyalty” (*lojalitetsplikt*) is sometimes expressed as “proper care” (“*tillbörlig omsorg*”), see e.g., NJA 1986 s. 586 (not showing proper care when damaging a water pipe after having been told about the depth of the pipe); NJA 1992 s. 58 (an accountant did not show proper care by giving advice that caused an unnecessary tax expenditure). Sometimes as “loyalty,” see e.g., NJA 1990 s. 264; NJA 1990 s. 745; NJA 2005 s. 142 (requiring a loyal and consistent application of a contractual clause); NJA 2006 s. 638; NJA 2007 s. 86 (a seller of realty – and a seller of movables “as is” – has a certain obligation to inform the buyer that the sellers is aware of and that the buyer should have discovered but overlooked); NJA 2009 s. 672. See also Lando et al., 2016, p. 84. It can be discussed whether the parties can invoke “duty of loyalty” as an independent ground, see Munukka, 2011, pp. 93–102.

¹¹¹ Vogenauer, 2015a, p. 201 (also because the idea of general principles underlying black-letter rules to form a coherent code without gaps is widely considered illusory, especially for PICC that is not “coherent and self-sufficient”).

when additional sources exist. The Court seldom uses more than three sources to reason for a principle,¹¹² which can be contrasted to *BGHZ 9, 157*, where the *Bundesgerichtshof* used twenty-nine sources to establish a general principle.¹¹³ Fundamentally, majority reasonings, which may be compromises, seems based on the Court's authority, in contrast with addendums.¹¹⁴

Such reasoning from authority can be seen in NJA 2007 s. 519, where the Court adverted to one of its older cases, NJA 1993 s. 13, and claimed that the Court in the earlier case had found that a sublesser that had used premises without agreement became obliged to compensate the owner for reasonable rent based on a general principle (swe. *allmän förmögenhetsrättslig princip*, ger. *allgemeine vermögensrechtliche Prinzip*) of unjust enrichment.¹¹⁵ However, in NJA 1993 s. 13, the Court only states that the leaser without a contract is required to compensate the owner for reasonable rent, with a reference to Hellner, which, with his well-known antipathy to unjust enrichment,¹¹⁶ did not claim it to be a general principle under Swedish law.¹¹⁷ The Court later claims to have expressed this general principle in NJA 1993 s. 13, and has later adverted to this case and this general principle.¹¹⁸ Whilst the Court established a right for compensation in NJA 1993 s. 13, later claiming that had it established a general principle of unjust enrichment, when neither this case nor its source used the term unjust enrichment, without later reasoning that this amounted to unjust enrichment, illustrates that the Court does not feel obliged to fill gaps in its reasoning.

The Court should therefore improve its reasoning with NJA 2009 s. 672, NJA 2007 s. 86, and addendums as ideals. The Swedish legal community must also

¹¹² See NJA 1992 s. 782; NJA 2007 s. 86; NJA 2007 s. 909; NJA 2009 s. 672.

¹¹³ See BGH, 01.04.1953 - II ZR 235/52, BGHZ 9, 157, para. 12 (Ger.).

¹¹⁴ Justice Hästad's addendum for his own account, such as in NJA 2006 s. 638, is a good example where authority is not taken for granted but where the Justice presents his reasoning.

¹¹⁵ NJA 2007 s. 519.

¹¹⁶ See Hellner, Jan, *Obehörig vinst: Särskilt utanför kontraktsförhållanden*, Almqvist & Wiksells boktryckeri, Uppsala 1950, p. 393 (arguing that the concept unjust enrichment was often used in other legal systems to overcome problems caused by established legal concepts). See also Kleineman, Jan, "Obehörig vinst och frågan om vårt behov av rättsliga tvångströjor", *Tidsskrift för Rättsvetenskap*, 2013, pp. 531–549, pp. 545–546 (imagining an unpleasant future if a European civil code based on the DCFR, with seven chapters on unjust enrichment, would emerge).

¹¹⁷ See NJA 1993 s. 13 (with a reference to Hellner, Jan, *Skadeståndsrätt*, 4th ed., Juristförlaget, Stockholm 1985, p. 316, that relies on NJA 1946 s. 143; Agell, Anders, "Skadeståndsansvaret vid obehöriga förfoganden", in Ulf Bernitz et al (eds), *Festskrift till Jan Hellner*, P A Norstedt & Söner Förlag, Stockholm 1984, pp. 23–63, p. 23 et seq).

¹¹⁸ See NJA 2013 s. 135.

improve itself, currently capitulating to *rationes decidendi* with lacking reasoning and accepting the Court's authority, forgetting its duty to demand well-reasoned *rationes decidendi*, and not giving the question how to reason from general principles sufficient attention in the legal literature. Furthermore, additional improvements can be made.

6.3 *Improving Reasoning from General Principles*

Reasoning from general principles might at least in certain situations be both easier and lead to more uniform application than analogies. For example, the case from an Austrian arbitration tribunal concerning interest rate under the CISG, which the arbitrator solved using the principle of full compensation,¹¹⁹ is a good example of this, since it would be difficult to solve the issue using an analogy. Also, the failure to substantiate claims of improper performance of contractual obligations under the PICC was quite easily solved using the general principle of good faith and fair dealings (and the rule specifying that principle through the duty of cooperation),¹²⁰ while it would have been more difficult to solve through reasoning by analogy. On a national level, relying on general principles might be easier than analogies for contracts for construction, because of the lack of relevant source regulation.¹²¹

One conjecture why general principles seem to work well within the Swedish law of obligations is because they are often more specific than these examples. However, whilst these specific principles allow for some generalization, they will not help improve the unity within the Swedish law of obligations. To do this, the Court could become better at relating principles to each other, horizontally to other "specific" general principles and vertically to fundamental general principles such as good faith,¹²² without relying on such fundamental principles directly.

¹¹⁹ Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft, SCH-4366, June 15, 1994 (Au.).

¹²⁰ International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Arbitral Award No 100/2011, March 16, 2012 (Rus.).

¹²¹ Cf. NJA 2014 s. 960, paras. 24–29 (where the Court is describing *dispositives Recht* regarding the right and obligation to cure lack of conformity in contracts for construction in terms of general principles).

¹²² The Court could refer to "proper care" ("*tillbörlig omsorg*"), "duty of loyalty," or an obligation "to take the other party's interests into reasonable consideration," see Lando et al., 2016, pp. 81–86 (regarding Restatement of Nordic Contract Law § 1-6(1)).

6.4 *Improving Analogies*

Critics of general principles, such as Vogenauer, argue that reasoning by analogy can be advantageous since it has a closer relationship with the instrument's text than recourse to general principles, and since the content of such black-letter rules do not need to be established, unlike general principles, which promote uniform application.¹²³ Thus, analogies have their advantages.

However, the Swedish Supreme Court sometimes arguably focus too much on structural elements, such as the parties, the type of contract and its characteristics, and not enough on the *ratio legis*,¹²⁴ and the outcome.¹²⁵ If the Court would do the latter, this might sometimes lead to a different outcome. For example, in NJA 2013 s. 980, the *ratio legis* and the outcome supported analogous application of the Statute of limitations, in contrast to the structural differences that decided the Court's reasoning. However, a different outcome is not the only argument for focusing on the *ratio legis* and the outcome. This would improve the argumentation and make the cases more useful to predict future cases. Furthermore, by going back to the *ratio legis*, it might be possible to find additional general principles through induction.

7 Summary and Conclusions

Herein, we have examined and discussed reasoning outside the scope of statutory regulation within the Swedish law of obligations. Based on our results, the common wisdom of analogies as the preferred method should be reviewed. The Swedish Supreme Court relies on general principles as often as it can, and seems to rely on analogies primarily when a norm cannot be generalized. Still, if we compare with German law, CISG and PICC, Swedish general principles are very specific. When reasoning by analogy, the Swedish Supreme Court arguably often focus too much on structural similarities and differences, with sometimes idiosyncratic results, which could be addressed with more focus on the *ratio legis* and the outcome. When reasoning from general principles, the *rationes decidendi*

¹²³ Vogenauer, 2015a, p. 203.

¹²⁴ Cf. Håstad, Torgny, "Rättsdogmatik in absurdum?", *Svensk Juristtidning*, 2017, pp. 357–369, p. 367 (discussing the case NJA 2009 N 40 and arguing that the practically anchored reasons behind the Act on Commission Agency (Kommissionslagen 2009:865) should have been decisive for an analogy). Granted, the Court in NJA 2007 s. 909 rejected an analogy from the Commercial Agency Act based on its *ratio legis*, but the Court should arguably have attempted to solve the issue with a *Rechtsanalogie* based on several statutory norms instead. See also *supra* note 100.

¹²⁵ Cf. Lehrberg, 2016, p. 264 (regarding that it is decisive that the legal question is the same and thus that the legal consequence should be the same in the source case and the target case).

are often lacking in reasoning, with very few references. The legal community needs to demand more thorough reasoning, ideally like justices writing addendums for their own accounts. Furthermore, by relating its reasoning to other general principles, the Court could improve the unity within the Swedish law of obligations.