Exclusions of liability for indirect or consequential loss – the road to hell is paved with good intentions

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How should an exclusion of liability for indirect or consequential loss be interpreted in a Swedish-law contract? Swedish lawyers generally refer to section 67 of the Sale of Goods Act, but there are several problems with that section, not least that it is worded to apply in the specific context of the sale of goods. The Government Bill, Prop. 1988/89:76, makes clear that the legislator had some basic principles in mind when considering the general distinction between direct and indirect loss. It is suggested that these basic principles are largely similar to those found in the common law, with reference to the classic English cases of Hadley v. Baxendale *and* Victoria Laundry. *Applying these basic principles, it is further suggested that loss of profit could, in certain cases, be classified as a direct loss. It is also suggested that the term "consequential loss" is best avoided. Some advice is given to contract drafters at the end of the article.*

1. Introduction

"*The parties exclude liability for indirect or consequential loss*"

What do these words mean in a Swedish-law contract? Is there a clear general meaning, or does the answer depend on the circumstances? Is indirect loss and consequential loss the same thing? And how does this wording compare with M&A market practice?

This article considers these various questions by reference to Swedish law sources, and also by reference to English caselaw which is referred to for interest and inspiration.

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2. Contract interpretation

The principles of contract interpretation under Swedish law are well known. In short, the court or arbitral tribunal follows the joint intention of the parties if such a joint intention can be ascertained. Since that is generally not possible, the court or arbitral tribunal then applies an objective meaning,[1] by making an overall assessment (Sw. *en samlad helhetsbedömning*), analysing, *inter alia*, the wording of the contract, the background law, the facts and circumstances before the contract was entered into including the parties' negotiations, the parties' behaviour after the contract was entered into, the purpose of the contract, the structure of the contract, and reasonableness.[2]

In contracts where there is an exclusion of liability for indirect or consequential loss, parties often use somewhat standard wording, such as the wording set out above. There may sometimes have been a discussion about the wording, but often there is no discussion and no negotiation. In such circumstances, it is of course often impossible to ascertain the parties' joint intention.

When seeking to ascertain the objective meaning of these words, two points are likely to be particularly important: the background law and any specific circumstances that might affect the meaning of the wording in a particular case.

3. Background law

Background law comprises written legislation, caselaw and legal principles, and also trade practices.[3] In the present case, background law can be useful for the purposes of determining how the somewhat unclear words "*indirect or consequential loss*" should be construed.

[1] See *Mätarställningen* NJA 2021 p. 597:
- Swedish text: *I en tvist om tolkningen av ett avtal ska domstolen som utgångspunkt försöka klarlägga vad parterna gemensamt avsett med avtalet. Det går emellertid inte alltid att fastställa en gemensam partsavsikt. När individuella förhållanden inte kan fastställas eller ge ledning får tolkningen bygga på objektiva grunder*.
- In-house translation: *In a dispute about the interpretation of an agreement, the court must as a starting point try to clarify what the parties jointly intended with the agreement. However, it is not always possible to establish a joint intention of the parties. When individual circumstances cannot be established or give guidance, the interpretation should be based on objective grounds*.

[2] See Ramberg, Jan, and Ramberg, Christina, Allmän avtalsrätt, 13th edition (2025), section 7.7.1. Issues of bad faith or fraud can also be relevant (Sw. *ondtrosregeln*), but in the absence of special circumstances it is unlikely that such issues would arise in this context.

[3] See Ramberg, Jan, and Ramberg, Christina, Allmän avtalsrätt, 13th edition (2025), section 7.7.3.

In these circumstances, the obvious starting point regarding background law is section 67 of the Swedish Sale of Goods Act, which provides a definition of ”*indirekt skada*” (Eng. “*indirect damage*”) as follows:

Swedish text:
67 § Skadestånd på grund av avtalsbrott omfattar ersättning för utgifter, prisskillnad, utebliven vinst och annan direkt eller indirekt förlust med anledning av avtalsbrottet. Skadestånd enligt denna lag omfattar dock inte ersättning för förlust som köparen tillfogas genom skada på annat än den sålda varan.

Som indirekt förlust anses

1. förlust till följd av minskning eller bortfall av produktion eller omsättning,

2. annan förlust till följd av att varan inte kan utnyttjas på avsett sätt,

3. utebliven vinst till följd av att ett avtal med tredje man har fallit bort eller inte har blivit riktigt uppfyllt, och

4. annan liknande förlust, om den varit svår att förutse.

Som indirekt förlust enligt andra stycket anses dock inte en sådan förlust som den skadelidande har haft för att begränsa en förlust av annat slag än som anges i andra stycket.

In-house English translation:
67 § Damages by reason of breach of contract includes compensation for expenses, price difference, loss of profit and other direct or indirect loss by reason of the breach of contract. However, damages under this law does not include compensation for loss suffered by the purchaser as a result of damage other than damage to the good that was sold.

Indirect loss means

1. loss as a result of reduction or loss of production or income,

2. other loss as a result of the fact that the good cannot be used in the manner that was intended,

3. loss of profit as a result of the fact that a contract with a third party has been lost or has not fully been realized, and

4. other similar loss, if it was difficult to foresee.

Indirect loss pursuant to the second paragraph is not, however, considered to include such loss that the party suffering the loss incurs for the purpose of limiting a loss of another sort than stated in the second paragraph.

Although this definition is almost always referred to in this context, at least as a starting-point, its application can give rise to considerable difficulties in practice. The following points in particular should be noted.

First, it is obvious – but often overlooked – that section 67 of the Swedish Sale of Goods Act applies specifically to the sale of goods. The wording refers expressly to goods,[4] and it is in that specific context that the wording is intended to apply. Further, it is notable that the wording assumes that it is the buyer of

[4] The text includes an express reference to “*varan*” (Eng. “*the good*”).

the good that has suffered loss by reason of the seller's breach of contract, not the other way round.[5]

Second, it is important to note that the specific regulation set out in section 67 of the Swedish Sale of Goods Act is not suitable for application in all situations. Different considerations will apply in other contexts.[6] It has been suggested that it is particularly unsuitable to apply the regulation in section 67 of the Sale of Goods Act to transactions concerning the sale of companies.[7]

Third, within the sale of goods context, section 67 of the Swedish Sale of Goods Act has been the subject of considerable criticism.[8] In summary, there is a general consensus that the wording of section 67 is difficult to interpret and to apply. There is particular criticism regarding the general wording "*annan liknande förlust, om den varit svår att förutse*" (Eng. "*other similar loss, if it was difficult to foresee*") in paragraph 2, item 4, which is considered to be vague and

[5] See, *inter alia*, Istner-Byman, Miriam, Direkt eller indirekt förlust?, SvJT 2013 p. 862, section 2:
- Swedish text: *Det primära syftet med regleringen i 67 § KöpL är att begränsa säljarens skadeståndsansvar för förluster som till sin typ eller omfattning är svårförutsebara för säljaren*.
- In-house translation: *The primary purpose behind the regulation in section 67 of the Sale of Goods Act is to limit the seller's liability for damages that, by reason of their type or their extent, are difficult for the seller to foresee*.

[6] See, *e.g.*, Hellner, Jan, Hager, Richard, and Persson, Annina H., Speciell avtalsrätt II. Kontraktsrätt, 2nd booklet, 8th edition (2024), section 29.7.3:
- Swedish text: *Eftersom distinktionen mellan direkt och indirekt förlust i lagstiftningen endast förekommer i köplagen och inte införts i andra lagar som införts eller reviderats senare, kan den inte rimligen läggas till grund för en allmän framställning av beräkning av skadestånd i kontraktsrätten. Distinktionen torde vara än svårare att genomföra vid andra avtal än vid köp, tillexempel vid felaktigt utförande av tjänst som dels medför att tjänsten måste göras om, dels leder till skada på den egendom som är föremål för tjänsten. Är kostnaden för att reparera egendomen en direkt förlust eller en indirekt förlust? Jfr 1 häftet. Särskilda avtal 3.9.2.5.*
- In-house translation: *Since the distinction between direct and indirect loss in the legislation only appears in the Sale of Goods Act and has not been introduced in other laws that have been introduced or revised later, it cannot reasonably be used as a basis for a general presentation of the calculation of damages in contract law. The distinction is likely to be even more difficult to implement in contracts other than purchase contracts, for example in the case of incorrect performance of a service that partly means that the service must be redone and partly leads to damage to the property that is the subject of the service. Is the cost of repairing the property a direct loss or an indirect loss? Cf. 1 st. booklet. Specific agreements 3.9.2.5.*

[7] Herre, Johnny, Direkt och indirekt förlust – var står vi idag?, SvJT 2019, p. 210, footnote 1, with reference to Saalman, Henrik, and Dalemo, Per, Indirekt skada i samband med företagsöverlåtelser, JT 2014–15, p. 726–733.

[8] See in particular, Herre, Johnny, Ersättningar i köprätten, Chapter II, esp. section 10 and section 15. See also the various references to other literature in Herre, Johnny, Direkt och indirekt förlust – var står vi idag?, SvJT 2019, p. 210, footnote 17.

badly-worded.[9] It has also been noted that the parties by their actions can often determine whether the loss is direct or indirect.[10]

Fourth, it was stated in the preparatory works to the Sale of Goods Act, *Prop. 1988/89:76,* that it would be for the courts to provide guidance for how the distinction should be made between direct and indirect losses in each individual case, by reference to the principles set out by the legislator.[11] However, as yet the Supreme Court in Sweden has not had the opportunity to provide any such guidance.[12]

Fifth, as Former Justice Johnny Herre has noted, some limited guidance can be found from cases in Norway and Finland. Nevertheless, although the legislation in those countries is similar, the wording is somewhat different and any such references would therefore need to be treated with caution.[13]

In summary, section 67 of the Sale of Goods Act is a starting point, but outwith the sale of goods context section 67 should be treated with caution and it will often be necessary to go further to consider the specific circumstances of the particular case.

[9] The word "*den*" (Eng. "*it*") in this phrase has been particularly criticised, since it is unclear whether this word refers to the type of loss in general or the actual loss suffered in the particular case at hand. See Istner-Byman, Miriam, Direkt eller indirekt förlust?, SvJT 2013 p. 862, section 2.3:
- Swedish text: *Innebörden av begreppet "svårt att förutse" är inte helt klart. En tolkning av lydelsen ger uppfattningen att förluster som avses i denna punkt ska vara svårförutsebara liksom förlusterna som avses i första till tredje punkten. Den slutsatsen är felaktig, eftersom de andra förlusterna inte alls behöver vara svårförutsebara utan istället är det förlustens omfattning som ska vara svårförutsebar. Uttrycket "den" får därför rimligen antas syfta på förlustens omfattning*.
- In-house translation: *The meaning of the term "difficult to foresee" is not entirely clear. One interpretation of the wording suggests that the losses referred to in that paragraph must be unforeseeable just like the losses referred to in the first to third paragraphs. That conclusion is incorrect, because those other losses do not have to be difficult to foresee at all, but instead it is the extent of the loss that should be difficult to foresee. The word "it" can therefore reasonably be assumed to refer to the extent of the loss*.

[10] For example, compensation for a difference in price is generally considered to be a direct loss, whereas compensation for loss of profit is generally considered to be an indirect loss. See also Istner-Byman, Miriam, Direkt eller indirekt förlust?, SvJT 2013, sections 4–6.

[11] Prop. 1988/89:76, p. 50:
- Swedish text: *Det får sedan ankomma på rättstillämpningen att i varje enskilt fall ta ställning till vilka förluster som till sin art är sådana att de, enligt de principer som jag har angett för avgränsningen till indirekta skador, bör hänföras till denna särskilda ersättningspost*.
- In-house translation: *It must then be for the courts to decide in each individual case which losses are such that, in accordance with the principles which I have set out for defining indirect damages, should be attributed to this special item of compensation*.

[12] Herre, Johnny, Direkt och indirekt förlust – var står vi idag?, SvJT 2019, p. 210 at p. 218.

[13] Herre, Johnny, Direkt och indirekt förlust – var står vi idag?, SvJT 2019, p. 210 at p. 218–221.

4. Specific circumstances that might affect the meaning of the wording in a particular case

When considering these issues in practice, it is often the specific circumstances of the particular case at hand that turn out to be determinative. Thus, although it was clearly thought to be useful to provide specific provisions in the Sale of Goods Act for the categorization of indirect loss, in practice this was always unlikely to provide satisfactory guidance.

Despite the legislator's best intentions, section 67 of the Sale of Goods Act has not proved to be a success. To quote an English proverb, the road to hell is paved with good intentions.

In considering what the objective meaning of direct and indirect loss may be in a particular case, it may in fact be best to go back to first principles. In this context, it is useful to note what was written in general terms in the preparatory works to the Sale of Goods Act – in particular, at section 2.5.2 of the Government Bill, *Prop. 1988/89:76*.

The legislator's proposal was stated in general terms:

– Swedish text: *Mitt förslag: Den skadeståndsskyldighet som följer av kontrollansvaret skall omfatta näraliggande och typiska förluster på grund av avtalsbrottet, medan ansvar för övriga förluster skall förutsätta vållande på den skadeståndsskyldiges sida*.
– In-house translation: *My proposal: The liability for damages which follows from the "control liability" should cover closely-related and typical losses due to the breach of contract, while liability for other losses should presuppose fault on the part of the person liable for damages*.

It was pointed out that the basis of the seller's liability to pay damages by reason of delay or defect is based on the seller's so-called "control liability" (Sw. "*kontrollansvar*") – *i.e.* the seller's liability to pay damages for such matters that lie within the seller's sphere of control.[14] In this way, the legislator expressly intended to follow the regulation as set out in CISG.[15]

However, if the seller were liable to compensate for all loss falling within his sphere of control, whether or not he was negligent, then such liability would go

[14] See section 27 of the Sale of Goods Act. See also the definition of "*kontrollansvar*" in the proposal set out at the beginning of section 2.5.1 of the Government Bill, Prop. 1988/89:76, p. 42: *Vid säljarens dröjsmål och fel i varan är säljaren skadeståndsansvarig för sådant som ligger inom hans kontrollsfär (kontrollansvar)…*

[15] Prop. 1988/89:76, p. 43:
– Swedish text: *Arbetsgruppen har valt att knyta skadeståndsansvaret till FN-konventionens regler om skadestånd vilka bygger på ett s.k. kontrollansvar*.
– In-house translation: *The working group has chosen to tie the liability for damages to rules on damages in the UN Convention* [CISG], *which are based on a so-called control liability*.

too far. It is noted that commercial contracts often distinguish between direct and indirect damages, with indirect damages only being payable in cases of gross negligence.[16]

It was against this background that the legislator proposed that a distinction between direct and indirect loss should be included in the legislation. The legislator noted that he considered direct loss to be losses of such a type and extent that are usual and foreseeable with respect to the particular breach of contract in question. It was suggested that such losses should generally be recoverable, whereas more unusual and less foreseeable losses should only be recoverable in cases of negligence.[17]

[16] Prop. 1988/89:76, p. 46–47:
- Swedish text: *Vid utformning av kontraktsvillkor är det vanligt att frågan om skadeståndsskyldighet behandlas med avseende på ansvaret för särskilt angivna skador och inte generellt som i den gällande dispositiva lagstiftningen. Det är visserligen då oftast inte fråga om en differentiering av ansvaret på det sättet att strängare ansvar föreskrivs för vissa skador och ett lindrigare ansvar för andra. Differentieringen sker i stället mellan skador för vilka ersättning skall utgå och skador som inte skall ersättas. De skador för vilka ersättning skall utgå är ofta föremål för en ganska ingående reglering, medan de skador som inte skall ersättas anges i mera allmänt formulerade termer som ”indirekta skador” eller ”följdskador”. Beträffande de båda sistnämnda typerna förekommer dock att kontrakten föreskriver ett ansvar vid grov vårdslöshet.*
- In-house translation: *When drafting contract terms, it is common for the question of liability for damages to be dealt with by reference to liability for specified damages and not generally as in the current dispositive legislation. Admittedly, it is not usually a question of differentiating liability in the sense that stricter liability is prescribed for certain damages and a lighter liability for others. Instead, the differentiation is made between damage for which compensation is to be paid and damage that is not to be compensated. The damage for which compensation is to be paid is often the subject of a fairly-detailed regulation, while the damage which is not to be compensated is defined in more general terms as ”indirect damages” or ”consequential damages”. However, in the case of the latter two types, the contracts sometimes provide for liability in the event of gross negligence.*

[17] Prop. 1988/89:76, p. 48:
- Swedish text: *Mot bakgrund av det anförda anser jag att direkta förluster – med vilket begrepp jag avser förluster som till sin typ och omfattning är vanliga och förutsebara vid det aktuella avtalsbrottet – bör ersättas enligt den strängare ansvarsgrund som kontrollansvaret innebär, medan mera avlägsna och svårförutsebara förluster bör ersättas enligt en lindrigare ansvarsgrund. Denna lindrigare ansvarsgrund bör utformas så, att skadeståndsskyldigheten skall förutsätta att avtalsbrottet eller förlusten är en följd av vållande på den skadeståndsskyldiges sida.*
- In-house translation: *In the light of the above, I am of the opinion that direct losses – by which I mean losses that by their type and extent are usual and foreseeable upon the specific breach of contract in question – are to be compensated according to the stricter basis of liability that the control liability entails, whereas losses that are more distant and difficult to foresee should be compensated according to a more lenient basis of liability. This more lenient basis for liability should be designed so that the liability for damages presupposes that the breach of contract or the loss is the result of fault on the part of the person liable for damages.*

The legislator also noted that indirect losses are such losses that largely depend on the individual purchaser's way of organizing its business and thus are typically difficult for the seller to foresee.[18]

The legislator added that the general wording was added at paragraph 2, item 4, of section 67, since it is obviously impossible to set out a complete and clear definition of all types of indirect loss. It would then be for the courts to provide guidance for how the distinction should be made between direct and indirect losses in each individual case, by reference to the principles set out by the legislator.[19]

It follows that the legislator had some basic principles in mind when considering the general distinction between direct and indirect loss. To summarise:

- Direct losses are considered to be losses of such a type and extent that are usual and foreseeable with respect to the particular breach of contract in question.[20]

[18] Prop. 1988/89:76, p. 49–50:
- Swedish text: *Till kategorin indirekta förluster bör som jag tidigare nämnt hänföras sådana som är i hög grad beroende av den individuelle köparens sätt att organisera sin verksamhet och som därför typiskt sett är svåra för säljaren att förutse*.
- In-house translation: *As I have already mentioned, the category of indirect losses should be attributed to those which are highly dependent on the individual buyer's way of organising its business and which are therefore typically difficult for the seller to foresee*.

[19] Prop. 1988/89:76, p. 50:
- Swedish text: *Givetvis är det inte möjligt att uttömmande och på ett konkret sätt ange alla de typer av förluster som är sådana att de skall hänföras till indirekta förluster. Uppräkningen i lagen av de olika poster som skall ersättas som indirekt skada bör därför avslutas med posten annan liknande svårförutsebar förlust. Det får sedan ankomma på rättstillämpningen att i varje enskilt fall ta ställning till vilka förluster som till sin art är sådana att de, enligt de principer som jag har angett för avgränsningen till indirekta skador, bör hänföras till denna särskilda ersättningspost.*
- In-house translation: *Of course, it is not possible to list exhaustively and in a concrete way all the types of losses which are such that they are to be attributed to indirect losses. The list in the law of the various items to be compensated as indirect damage should therefore conclude with the item "other similar unforeseeable loss". It must then be for the courts to decide in each individual case which losses are such that, in accordance with the principles which I have set out for defining indirect damages, should be attributed to this special item of compensation*.

[20] Several formulations are used in the Swedish text, including: "*näraliggande och typiska förluster*", "*skador vilka till art och omfattning är typiska följder av avtalsbrottet*", "*förluster som till sin typ och omfattning är vanliga och förutsebara vid det aktuella avtalsbrottet*", "*skador som är en typisk och förutsebar följd av avtalsbrottet*", "*näraliggande skador*", "*förluster som till förekomst och omfattning är en normal och beräknelig följd av det skadeståndsgrundande avtalsbrottet*".

- Indirect losses are considered to be more unusual and less foreseeable losses that largely depend on the individual purchaser's way of organizing its business and thus are typically difficult for the seller to foresee.[21]

It is notable that this general distinction is largely similar to the distinction between direct and indirect loss that is found in the common law.

5. The common law distinction – *Hadley v. Baxendale*

In the common law, the distinction between direct and indirect loss is generally understood by reference to the classic English law case of *Hadley v. Baxendale* [1854] EWHC J70.

In summary, the plaintiff owned a flour mill which had stopped working due to a broken crank shaft. The defendant was a carrier. The plaintiff hired the defendant to deliver the broken crank shaft to a third-party so that the third-party could design a new one for them. Until the crank shaft was replaced, the mill could not run, and the plaintiff would lose money. The plaintiff's representative stressed to the defendant that the crank shaft needed to be delivered urgently, but he did not make it clear to the defendant that the plaintiff would lose money in the meantime. The defendant took 7 days to deliver the crank shaft instead of the 2 days that had been agreed upon.

The plaintiff sued the defendant for breach of contract, claiming damages for lost profits while the mill was not in operation.

The court held that the plaintiff was not entitled to the lost profits, since the plaintiff had failed to inform the defendant of the special circumstances which led to the loss (*i.e.* that the mill could not operate until the replacement crank shaft was made). The key passage in the judgment is as follows:

Now we think the proper rule is such as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be [1] *such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or* [2] *such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*[22]

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances

[21] Here too, different formulations are used in the Swedish text, including: "*mera avlägsna och svårförutsebara förluster*", "*skador vilka är betingade av den skadelidande partens individuella förhållanden*", "*skador som inte är typiska eller förutsebara följder av avtalsbrottet*".

[22] To help the reader, a new paragraph has been inserted into the text at this point.

so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants.

In summary, there are generally said to be two "limbs" to the rule in *Hadley v. Baxendale*, as marked by the numbers [1] and [2] which were added to the above quotation:

- [1] Loss "*such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself*", and
- [2] Loss "*such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*," including – where special circumstances were known to both parties – "*the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated*".

6. Loss of profits

Does loss of profits constitute direct or indirect loss?

The proper answer is that it depends. It depends on the circumstances of the individual case.

In many cases loss of profits will be an indirect loss. However, in some cases, loss of profits can be a direct loss. A clear example is the English case *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 K.B 528.

The plaintiff purchased a large boiler from the defendant for use in its dying and laundry business. The defendant was aware that the plaintiff wished to put the boiler to immediate use and knew the nature of the plaintiff's business. The delivery of the boiler was delayed in breach of contract and the plaintiff brought an action for the loss of profit which the boiler would have made during the period in which the delivery was delayed. The claim included a sum for certain particularly lucrative government contracts which the plaintiff lost due to the absence of the boiler.

At first instance, the trial judge denied the claim for loss of profits, on the ground that it was based on special circumstances which had not been drawn to the attention of the defendant and therefore came within the second limb of the

rule in *Hadley v. Baxendale*. However, the Court of Appeal held that the plaintiff could recover losses which were in the reasonable contemplation of the parties, including the loss of profit that could be expected from the lack of use of the boiler. On the other hand, it was held that the plaintiff could not recover for the loss of the particularly lucrative government contracts since the defendant was unaware of those contracts.

Giving judgment in the Court of Appeal, Lord Justice Asquith noted that there was a divergence in the existing caselaw regarding the treatment of loss of profits, with some cases allowing such claims and other cases refusing to do so – in particular, where the defendant was a carrier (as in *Hadley v. Baxendale*), not a seller. Lord Justice Asquith explained this divergence as follows:

> *In such cases* [where the defendant is a carrier] *the courts have been slow to allow loss of profit as an item of damage. This was not, it would seem, because a different principle applies in such cases, but because the application of the same principle leads to different results. A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other "special circumstances" which may cause exceptional loss if due delivery is withheld.*

In the *Victoria Laundry* case, however, the defendant was a seller. The defendant sought to argue that it did not know the particular use that the plaintiff intended for the boiler, but this argument was dismissed by Lord Justice Asquith in somewhat humorous terms, as follows:

> *...* [the defendants] *knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose; for instance, to work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which term we, for the purposes of the rest of this judgment, include maintenance or increase of profit, or reduction of loss? (We shall speak henceforward not of loss of profit, but of "loss of business.") No commercial concern commonly purchases for the purposes of its business a very large and expensive structure like this – a boiler 19 feet high and costing over 2,000l. – with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date, with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business (in the sense indicated above) would be liable to result to the purchaser from a long delay in the delivery thereof. The suggestion that, for all the supplier knew, the boiler might have been needed simply as a "standby," to be used in a possibly distant future, is gratuitous and was plainly negatived by the terms of the letter of April 26, 1946.*

Could similar arguments be made under Swedish law? Applying the facts of the *Victoria Laundry* case under Swedish law, could it be suggested that the laundry's loss of profits (not including the loss of profits flowing from the particular government contracts) constitutes "a loss of such a type and extent that is usual and foreseeable with respect to the particular breach of contract in question" (to

refer to the legislator's general definition of direct loss as set out in the government bill, *Prop. 1988/89:76*)?

Of course, there are clear differences between Swedish law and English law in this respect, and in particular there is no direct Swedish law equivalent to the second limb of *Hadley v. Baxendale*. Nevertheless, it might be argued that a similar result could be achieved under Swedish law, but I suggest that very clear factual circumstances would be required. It would not be sufficient that the supplier of the boiler knew that the boiler would be used by the laundry for business purposes, and that the laundry would suffer a loss of business as a result of a delayed supply. I suggest that it would also be necessary to show that the extent of the loss of business was foreseeable to the supplier, *i.e.* that the loss constitutes "a loss of such a type *and extent* that is usual and foreseeable with respect to the particular breach of contract in question" (to refer again to the legislator's general definition of direct loss as set out in the government bill, Prop. 1988/89:76, emphasis added). In other words, it would be necessary to show that the supplier had reason to calculate that it might be liable for such loss of business, and thus that the loss was a "normal and calculable result of the breach of contract giving rise to the liability" (Sw. "*en normal och beräknelig följd av det skadeståndsgrundande avtalsbrottet*"[23]).

Regarding foreseeability, reference can also be made to Article 74 of CISG,[24] and to the general Swedish law rules of "adequate causation" (Sw. "*adekvat kausalitet*") in the Swedish law on damages in tort. In this context, useful guidance was provided by the Supreme Court in *Multitotal* NJA 2017 p. 9, at paragraph 26:[25]

Swedish text: *Av läran om adekvat kausalitet följer att det för skadeståndsansvar inte är tillräckligt att det föreligger ett faktiskt eller logiskt orsakssamband mellan handling och effekt. Det krävs också att sambandet är av viss särskild beskaffenhet eller har viss kvalitet (jfr Håkan Andersson, Skyddsändamål och adekvans, 1993, s. 87 ff., särskilt s. 95 med omfattande hänvisningar). Kausalsambandet måste värderas för att utröna om, som det anförs i förarbetena till skadeståndslagen (se prop. 1972:5 s. 21 f.), skadan har framstått som en beräknelig och i viss mån typisk följd av det skadegörande beteendet. Skadan ska alltså ha varit i någon mening förutsebar (jfr exempelvis NJA 1991 s. 217). Det som ska skäras bort från ett konstaterat skadeståndsansvar är sålunda effekter av den skadegörande handlingen som är så osedvanliga eller osannolika att den skadevållande parten inte borde ha tagit dem i beräkning.*

In-house translation: *It follows from the doctrine of adequate causation that it is not sufficient for liability that there is an actual or logical causal link between the act and the effect. It is also*

[23] Prop. 1988/89:76, p. 48.

[24] Article 74, CISG: *Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*.

[25] See also Ramberg, Jan, and Herre, Johnny, Allmän köprätt, 11th edition (2025), section 9.14.3.2.

required that the connection is of a certain special nature or has a certain quality (cf. Håkan Andersson, Skyddsändamål och adekvans, *1993, p. 87 et seq., especially p. 95 with extensive references). The causal link must be evaluated in order to ascertain whether, as stated in the preparatory works to the Tort Liability Act (see Government Bill 1972:5 p. 21 et seq.), the damage has appeared to be a calculable and to some extent typical consequence of the harmful behaviour. The damage must therefore have been in some sense foreseeable (cf. e.g. NJA 1991 p. 217). What must be excluded from a proven liability for damages are thus the effects of the harmful act that are so unusual or unlikely that the party causing the damage should not have taken them into account in its calculation*.

In an M&A context, it has been suggested that loss of profits in the target company should reasonably be considered to be a direct loss, whereas the purchaser's loss of profits could be considered to be indirect. See Saalman, Henrik, and Dalemo, Per, *Indirekt skada i samband med företagsöverlåtelser*, JT 2014–15, p. 726 at p. 732:

Swedish text: *Såsom framgår av köplagens förarbeten avses med indirekta förluster i första hand mera avlägsna och svårförutsebara förluster. Bortfall av omsättning/vinst i målbolaget bör knappast vara att anse som avlägsna och svårförutsebara förluster. Tvärtom är det rimligtvis precis de förluster som en köpare förväntar sig ska ersättas vid brist i garantierna*.

[…]

Här bör även framhållas att enligt köplagens påföljdsstruktur är distinktionen mellan direkta och indirekta förluster endast avsedd att aktualiseras i samband med beräkning av skadestånd. Om det överlåtna bolaget drabbas av skada som påverkar dess värde torde sådan enligt köplagen kompenseras fullt ut, i första hand genom prisavdrag eller avhjälpande.

I de fall bortfall av omsättning/vinst drabbar köparen uppstår inte samma begreppsproblematik. Att avtala om att säljaren inte ansvarar för indirekta skador/ förluster som drabbar köparen är en ordning som är i linje med köplagens systematik.

In-house translation: *As can be seen from the preparatory works to the Sale of Goods Act, indirect losses primarily refer to more distant and difficult to foresee losses. Loss of turnover/profit in the target company should hardly be regarded as distant and difficult to foresee losses. On the contrary, it is reasonable to assume that it is exactly those losses that a buyer expects to be compensated in the event of a breach of the warranties.*

[…]

It should also be emphasised here that, according to the remedy structure of the Sale of Goods Act, the distinction between direct and indirect losses is only intended to be relevant in connection with the calculation of damages. If the transferred company suffers damage that affects its value, such loss of value ought to be fully compensated according to the Sale of Goods Act, primarily through price reduction or repair.

In those cases where the loss of turnover/profit affects the buyer, the same conceptual problem does not arise. Agreeing that the seller is not liable for indirect damages/losses that affect the buyer is an arrangement that is in line with the systematics of the Sale of Goods Act.

7. Consequential loss?

What then is "consequential loss"?

On one view, the term "consequential loss" is somewhat meaningless, since all loss caused by a breach of contract may be said to be consequential in the sense of having arisen as a consequence of the breach.[26] It has also been noted in England that the term "consequential loss" may mean different things in different documents.[27]

"Consequential loss" may be translated into Swedish as "*följdskador*", but there is no clear definition of "*följdskador*" in Swedish law.

Since it is quite common to refer to "indirect" and "consequential" loss together, it might reasonably be concluded that these terms generally refer to the same thing. However, I suggest it is best to avoid the term "consequential loss", since the meaning is unclear and could be misconstrued.

8. An alternative wording in Swedish M&A practice

As the legislator noted, the distinction between direct and indirect loss is often regulated in commercial contracts. However, as will be clear from this article, further explanation is needed.

It is notable that, in modern Swedish M&A practice, reference is often made to "*reasonably foreseeable indirect damage*". One current wording in use in the Swedish market is as follows:

'Loss' means any direct or reasonably foreseeable indirect damage, loss, cost or expense actually incurred by the Buyer.

Pursuant to this wording, indirect damage that was reasonably foreseeable to the contracting parties in the case at hand is recoverable, but other indirect damage is not. This concept of "reasonable foreseeability" is easier to understand

[26] See the remark of Mr Justice Atkinson in the English case *Saint Line Ltd v. Richardsons, Westgarth and Co Ltd* [1940] 2 KB 99: "*The word 'consequential' is not very illuminating, as all damage is in a sense consequential*…"

[27] See remarks of Lord Justice Moore-Bick in the Court of Appeal in *Transocean Drilling U.K. Ltd. v. Providence Resources PLC* [2016] EWCA Civ 372 at para. 15:

> *The expression "consequential loss" has caused a certain amount of difficulty for English lawyers, mainly as a result of attempts to define its meaning in the interests of commercial certainty: see* […]. *It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in differentdocuments.* [...]

and to apply that the somewhat vaguer concept of "indirect loss". This wording also has the advantage of corresponding more obviously to the general model as understood internationally in accordance with *Hadley v. Baxendale* and Article 74 of CISG.

This wording also limits losses to such losses that are "*actually incurred*". The general intention behind such wording is to prevent multiples of losses from being recoverable – *e.g.* where a buyer has valued the target company at several times its EBITDA, and where the EBITDA is reduced by reason of a breach of warranty. However, I suggest that it would be unwise to assume that this wording is necessarily sufficient to prevent multiples from being recoverable. Not only could it potentially be argued that there is an actual loss in the value of the shares in such a scenario, but the words "*actually*" and "*incurred*" do not necessarily mean what they say.

In the English case *Charter Reinsurance Co. v. Fagan* [1997] AC 313, there was a dispute about a reinsurer's liability which turned on the definition of amounts "actually paid" in settlement of claims. The House of Lords found that the words "actually paid" did not mean that the reinsured needed to have actually paid the amounts; it was sufficient that the reinsured was liable to pay them.[28]

In his speech in the *Charter Reinsurance* case, Lord Hoffmann used characteristically colourful reasoning, as follows:

I think that in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

Take, for example, the word "pay". In many contexts, it will mean that money has changed hands, usually in discharge of some liability. In other contexts, it will mean only that a liability was incurred, without necessarily having been discharged. A wife comes home with a new dress and her husband says "What did you pay for it?". She would not be understanding his question in its natural meaning if she answered "Nothing, because the shop gave me 30 days' credit". It is perfectly clear from the context that the husband wanted to know the amount of the liability which she incurred, whether or not that liability has been discharged.

[…]

To revert to my domestic example, if the wife had answered "Well, the dress was marked £300, but they were having a sale", and the husband then asked "So what did you actually pay?" she would again be giving the question an unnatural meaning if she answered "I have not paid anything yet". It is obvious that the contrast which the husband wishes to draw is between the price as marked and the lower price which was charged. He is still not concerned with whether the liability has been discharged. This is not a loose use of language. In the context of the rest of the conversation, it is the natural meaning.[29]

[28] See also *The Commissioner of Inland Revenue v. Mitsubishi Motors New Zealand Ltd Co (New Zealand)* [1995] UKPC 38 as to the difficulties of interpreting the meaning of the word "incurred".

[29] As an aside, the barrister who argued – unsuccessfully – in this case that the words "actually paid" actually meant "actually paid" was a Mr. Sumption, who later himself become a judge

9. Conclusion

This will always be a difficult area of the law.

Legislators, judges and contract drafters seek to regulate these issues, but by their very nature they cannot easily be regulated for the simple reason that much depends on the particular facts and circumstances of each individual case.

In summary, I suggest that contract drafters would be well-advised to make their intentions as clear as possible, although of course I recognise that this may sometimes be difficult in practice. If specific losses are intended to be included, then the nature and extent of those losses should be stated, at least in general terms. Alternatively, if specific losses are intended to be excluded, then those specific exclusions should be set out and explained.

If it is not possible to make such intentions clear in the contract itself, then at the very least clear file notes should be taken, thus providing contemporaneous evidence of any relevant discussions and negotiations.

of the U.K. Supreme Court with the title Lord Sumption. Lord Sumption commented upon this case, and upon issues of contractual interpretation more generally, in the Harris Society Annual Lecture at Keble College, Oxford, on 8 May 2017, under the title "A Question of Taste: The Supreme Court and the Interpretation of Contracts", the text of which can be found on the website of the U.K. Supreme Court.