Summary

This thesis treats the legal problems that arise when a buyer is not content with what the seller has delivered. It is based on the recognition that sales law is a part of the law of obligations and that its purpose therefore is to divide risks between the parties to a contract. There is no rational reason to base the division of risk on anything but the parties' contract and the circumstances around it. I deal primarily with Swedish law, but to some extent other legal systems are treated as well.

The Swedish terminology for the treatment of the buyer's discontent with the object purchased addresses the breach of contract rather than the opposite. Thus, the breach of contract is called "fel" – which would translate "wrong" or "faulty" – while there is no such term for a correct delivery. The closest term would be "avtalsenlig" – "in accordance with the contract". In comparison with the terminology of CISG[1] a "fel" indicates a lack of conformity, while an "avtalsenlig" object conforms with the contract.

I deal with contracts for sale of all kinds of property. There is no reason for the law to treat property differently just because it is movable, immovable or intellectual. Thus, according to the Swedish Sale of Goods Act[2] – here referred to as SSA – the Consumer Sales Act[3] and the Land Law Code[4] the seller is in breach of contract when the object does not conform with the buyer's reasonable expectations. This means that the buyer's expectations are the starting point for any discussion whether an object is in conformity with the contract or not. It is a logical starting point, since every legal action concerning the matters discussed most probably is a consequence of the buyer's discontent. The decision whether the objects conform or not divides the buyer's expectations into two parts – one that is protected by the law and one that is not. That division is the sole purpose of the decision and of the law that governs it.

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1 The UN Convention on Contracts for the International Sale of Goods (Vienna 1980).
2 (SFS 1990:931). All Swedish acts of parliament or government are published in Svensk författningssamling (SFS) with year and number. Thus, the Sale of Goods Act ("köplagen") was the 931:st act of the year 1990.
3 "Konsumentköplagen" (SFS 1990:932).
4 "Jordabalken" (SFS 1970:994).

There are of course other aspects of division of risk than the distinction between conformity and non-conformity. In standardized contract terms – such as ORGALIME S 92, ECE 188 or ICC's Model International Sale Contract[5] – it is common that the seller's liability is maximized, e.g., to 15 % of the purchase price. That means that the buyer stands the whole risk of loss above the limit if the effects of the seller's breach of contract exceed it. Another example is the division between direct and indirect loss in § 67 SSA. Direct losses are to be covered by the seller if the reason for the breach of contract or the loss was out of his control,[6] while his liability for indirect losses is limited to situations where he has been negligent or where the object at the time of the conclusion of the contract did not conform with the specific descriptions given to it in the contract. These and other similar situations are discussed in chapter 11.

There is no reason for the law to treat only certain types of expectations. It does not make any sense to dismiss a buyer's claim that his expectations have not been met, on the only ground that his expectation is of the wrong kind. All expectations must be dealt with. That, of course, does not mean that all expectations are protected, but only that no expectations are automatically disqualified. With the sole purpose to make the presentation easier to read, I have distinguished, e.g., between expectations on identity,[7] durability[8] and usefulness.[9] The legal rules and the legal reasoning that should be applied are the same for all the different aspects.

The study shows that there are two possible steps – one supplementing the other – to the decision whether an object conforms with the contract or not. The first step is an objective test that does not bother with any actual knowledge on the seller's part. The objective test is here referred to as *the general rule*. In the spirit of art. 8 CISG, the determining factor is a comparison between the buyer's expectations and the expectations that a reasonable buyer would have had in the same circumstances. If the buyer's expectations would have been shared by a reasonable buyer, and if the objects do not meet them, there is a breach of contract by the seller. If, however, the buyer's expectations would not have been shared by a

5 ICC Publication 556.
6 See §§ 27 and 40 SSA, cf. art. 79 CISG.
7 See chapter 6.
8 See chapter 7.
9 See chapter 8.

reasonable buyer in the same circumstances, there is no lack of conformity, at least not according to the general rule.

Under the general rule the buyer's expectations are protected if they would have been shared by a reasonable buyer in the same circumstances. Thus, the supplementary rule only concerns itself with expectations that would not have been shared by a reasonable buyer. Under *the supplementary rule*, the buyer's expectations are protected if the seller knew of them and if it would be contrary to good faith and fair dealing by the seller not to satisfy them.

The thesis is divided into two parts. The first part discusses the general rule and the second part discusses the supplementary rule.

The general rule

The parties are free to determine the object of the contract. Anything else would be contrary not only to the concept of freedom of contract, but also to the concept of contract as such. All the problems discussed stem from the fact that the buyer has failed to describe his expectations well enough in the contract. Thus, the consequences of the general rule are that the buyer should make sure that the expression of his expectations in the contract would have given a reasonable buyer the same expectations, while the seller should make sure that his delivery matches the description. The general rule is described in chapters 2–10. The greater part of the theoretical discussion takes place in chapter 5.

The contract's description of its object is the starting point for all treatment of the discussed issue. This means that every object is unique, even if it often resembles other objects of the same kind. There is, therefore, no aspect of non-conformity that can be separated from the contract's description of its object. A separation between ordinary[10] and particular[11] purposes could be maintained where the seller's obligation were only to deliver an object that could be used for one of many purposes, such as according to s. 14 (2) of the English SGA, before it was changed in 1994.

[10] See § 17 (2 (1)) SSA and art. 35 (2, a) CISG.
[11] See § 17 (2 (2)) SSA and art. 35 (2, b) CISG.

Since the object according to § 17 (2 (1)) SSA and art. 35 (2, a) CISG shall be usable for *all the purposes* for which goods *of the same description* would ordinarily be used, any adequate description according to § 17 (2 (2)) SSA or art. 35 (2, b) CISG leads to the application of § 17 (2 (1)) SSA or art. 35 (2, a) CISG. This means that the division in the sales laws between ordinary and particular purposes does not have any legal function. § 17 (2 (2)) SSA and art. 35 (2, b) CISG are therefore only reminders that a buyer should describe his expectations in a way that makes them ordinary when one takes his description into account.

One limitation on the protection of the buyer's expectations is the time when they must exist to be taken into account.[12] The concept of pacta sunt servanda would not make much sense if the law protected expectations that arise after the conclusion of the contract. Therefore, they must exist at the time of the conclusion of the contract. That is when the buyer fixes the description of his expectations and when the seller looses the right to influence them. A related problem that is primarily present in international sales contracts is that different standards may apply in different countries and that one may have to choose *from where* the governing standard should be taken.[13] The same general problem can also arise in national trade, where e.g. one country has different climatic zones, which may cause a buyer in one part of the country to have certain expectations that he would not have had if he had lived in another part. If nothing else follows from the contract, the objects shall conform with the standards at the seller's place of business.

Neither the national sales laws nor CISG bother with *why* objects do not conform. All that matters is whether they conform or not.[14] This means that the objects must be compared with the contract's standard – the reasonable buyer's expectations – at a given time. The fact that a comparison is made between *the object* and the buyer's reasonable expectations must mean that the time of the passing of risk, as it is described in § 13 SSA or in art. 67–69 CISG, is the only possible point in time to decide whether the physical features of the object conform or not. There are, however, other aspects of conformity than the mere physical ones.

[12] See chapter 3.1.
[13] See chapter 3.2.
[14] See chapter 4.

The risk that the buyer does not obtain property rights in the object, or that government regulations limit the buyer's free use of it, must also be accounted for. This, of course, means that risk passes in these respects as well. The seller can usually control any change in property rights. There is therefore little reason why the risk in that respect should not pass when the object is delivered. Neither party can control the government's decisions. The reasons for a passing of risk at delivery are therefore not as strong for such limiting regulations as they are for the buyer's expectations concerning physical features and property rights. For immovable property the risk for limiting governmental decisions passes at the time of the conclusion of the contract. This seems to be true for goods as well.

It happens that a seller guarantees that the good will last or function for a given amount of time, e.g. one year.[15] It has been argued that this alters the time when the object should be compared to the contract's standard from the passing of risk to the end of the stated period. A more systematic view is that such a guarantee means that the object at the passing of risk should be of a standard or quality that allows it to last for the given time. The buyer can reasonably expect the object to have the potential to last for the time stated. According to Swedish law, a guarantee shifts the burden of proof. If no guarantee is given, the buyer must prove that the alleged non-conformity was present when the risk passed to him, even if it was not apparent at that time. When a guarantee is given, the buyer must show that there is a lack of conformity at the time when he gives the seller notice. It is then up to the seller to prove that the object was in accordance with the contract when the risk passed.

According to the sales laws, the buyer looses the right to rely on a lack of conformity if he does not give the seller notice within a certain period of time, usually two years. What this really means is that the buyer can never – if the contract does not say otherwise – expect the object to last for a longer time than two years. Although many objects sold do last for a longer time, they do not do so according to the contract.

A buyer cannot expect anything to be contrary to what he knows to be the case.[16] Therefore, the buyer's expectations as a starting point means

[15] See chapter 7.2.
[16] See chapter 5.1.

that his knowledge of any lack of conformity with what other buyers would expect, automatically disqualifies him from claiming it to be a non-conformity. This follows expressly from the Swedish sales laws, while art. 35 (3) CISG seems to give a different rule for situations covered by art. 35 (1). There is some support for the assumption that there is a general principle in CISG that parties should act in accordance with good faith and fair dealing. Even if one concludes e contrario from art. 7 (1) CISG that there is no such general principle in CISG, there is strong support in art. 1:201 Principles of European Contract Law and in art. 1.7 UNIDROIT Principles for the conclusion that the buyer can never demand delivery of what at the time of the conclusion of the contract he knew would not be delivered.

It is not uncommon that the description of an object of a contract does not adequately communicate to the seller what the buyer expects. This of course means that he can have many expectations that the law does not protect. The description "immovable property" does not mean that it is reasonable to expect that there is a house on the property. "Immovable property with a house" makes such expectations reasonable, possibly even along with expectations that one can live in the house. A yet better description – "an immovable property with a house that is not damaged by mould or water" – gives a buyer the right to even higher expectations. Of course, the same reasoning can be applied to other objects. The description "car" gives a buyer reason to expect that the object has wheels, motor, steering-wheel etc., but not that the roof can be brought down – an expectation that the description "convertible" would make reasonable – or that it should be free from rust – a feature that could reasonably be expected if the object is described as "a car free from rust" or even if it is described as "a new car".

A buyer often examines an object before he buys it. For immovable property this is often referred to as the buyer's "undersökningsplikt" – his duty to examine. A buyer has reason to examine the object to find out whether it has the features that he expects it to have, but that are not covered by its description. If he does or does not do so is immaterial in law, but he might as well do it, since such deviations from his expectations are his risk and not the seller's.

UNILEX[17] D.1995-9 can be used as an example. A German buyer of mussels expected them to be saleable in the German market. However, they contained more cadmium than what the German health authorities recommended. Bundesgerichtshof decided that the Swiss seller did not have to deliver goods that were in accordance with recommendations in the buyer's country. Thus, under that contract there was nothing wrong with the mussels. Therefore, the buyer had every reason to examine the mussels before he bought them. Of course he could also have described his expectations better: "Mussels with a cadmium level that is lower than what the German health authorities recommend."

As a mirror image the seller sometimes is said to have a duty of disclosure – "upplysningsplikt". Before the conclusion of the contract, the seller has reason to disclose to the buyer every feature that is contrary to the buyer's reasonable expectations. By doing so, he will make the feature a part of the buyer's expectations and he will no longer risk being in breach of contract. The so-called duty to examine and the so-called duty of disclosure are mere consequences of the division of risk. They are not rules in themselves.

An example inspired by an infamous Swedish court case[18] can be used for clarification. Assume that the object of a contract is described as a "Porsche" and that the price indicates that it is a real car. The seller, however, intends to deliver a toy car. As long as a reasonable buyer would have expected a real car, the seller will be in breach of contract when he delivers the toy car. However, if the seller tells the buyer that he intends to deliver only a toy car, and does so before the contract is concluded, he has given the object a correct description. The buyer can no longer expect him to deliver a real car. The delivery of a toy car will not be a breach of contract.

If an object is sold "as is", the buyer cannot reasonably expect as much from it as otherwise. An "as is-", or any similar, clause's object is therefore to lower the buyer's expectations, so that he can reasonably expect less than he would be able to without the clause. The result is very similar if the seller urges the buyer to examine the goods. In both cases, the

[17] International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (See http://www.cnr.it/CRDCS/unilex.htm (1999-09-13).

[18] NJA 1977 p. 717 *(The Girl and the Porsche)*. Cases from the Swedish Supreme Court are published in "Nytt Juridiskt Arkiv" (NJA) and are referred to with the year and the page in NJA on which they start.

change in division of risk is a function of the clarity with which the seller has communicated to the buyer that he does not want to stand the risk for any disappointment on the buyer's behalf. The more clearly this is communicated, the greater is the buyer's risk.

The buyer can reasonably expect that he will become the owner of the object and that nobody else has any property rights in it.[19] According to art. 42 CISG, however, the buyer cannot reasonably expect that the object is free from industrial or intellectual property rights of a third person. All he can expect is that it is free from any such rights that the seller is, or ought to be, aware of.

The risk for governmental regulations limiting the right to use the object differs depending on whether the object is movable or immovable.[20] In the latter case, the buyer can reasonably expect that the property is free of any special regulations limiting its use, while the buyer of goods has reason to believe only that there are no such limitations that the seller knows of.

The supplementary rule

The second part of the thesis treats what I refer to as the supplementary rule. Even if a buyer's expectations would not be shared by a reasonable buyer, they can be protected if the seller is aware of them and it would be contrary to good faith and fair dealing by the seller to deliver what a reasonable buyer would expect, and demand payment in accordance with the contract. The cost for acquiring knowledge is one determining factor when one decides whether or not the seller has acted contrary to good faith and fair dealing. When the seller has made special investments, in time, money or otherwise – investments that could have been made by the buyer as well – to gather relevant information, there is little reason not to let the seller benefit from his superior knowledge. When, on the other hand, the information has been free for the seller – as seller – there is greater reason not to let him use it against the buyer.

[19] See chapter 9.1.
[20] See chapter 9.2.

The assumption that there is a supplementary rule and that it is applicable only when the buyer's expectations would not have been shared by a reasonable buyer, is primarily based on cases where the seller's knowledge has been referred to in court decisions. There is no reason to even discuss the seller's knowledge, if it does not affect the outcome of the case, i.e. if the risk would not have been borne by the buyer if the seller had not had that knowledge.

The standard of good faith and fair dealing is expressed in § 33 of the third chapter of the Swedish Contracts Act (CA).[21] The chapter deals with the validity (or invalidity) of legal actions. According to Scandinavian law – and contrary to the Anglo-American doctrine of consideration – a promise is binding in itself. Thus, an offer is binding and cannot be revoked.[22] For the issue of validity, this means that the promise, rather than the contract, is the object of concern. The buyer's promise to pay a certain sum of money can be affected by the seller's action against good faith and fair dealing – primarily fraud. The seller's promise has not been affected by anyone's fraudulent behavior and is therefore usually still binding. According to a common view – seemingly inspired by the Anglo-American doctrine of consideration, but contrary to the Scandinavian promise theory – the contract, and only the whole contract, can be invalid if one party has been defrauded into it. This view is contrary not only to the structure of the Contracts Act, but also to the promise theory on which it is founded. The relationship between the supplementary rule and the rules on validity and invalidity of legal actions is discussed in chapter 13.

It would of course not be acceptable that a buyer is not bound by his promise while the seller is bound by his, if that would mean that the buyer had the right to demand performance by the seller without performing himself. The questions to ask are therefore: "What is validity?" and "What is invalidity?" Although the wording of § 30 CA only refers to when the promise has been *caused* by the other party's fraud, there is little reason to draw the conclusion that a promise that is not caused by the

[21] "Lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område", or for short "avtalslagen".

[22] It is of course not binding for all eternity, but only for the time stated in the offer or, if no such time is stated, for a reasonable time.

fraud, but where its content has been influenced by it, should not be treated in a similar manner. In the latter case the promise will only be partially invalid – and thereby of course still partially valid.

The suggested solution is only possible if a party's promise can be divided.[23] At least since 1906, when the former Swedish Sales Law entered into force, every Swedish sales contract has been divisible. The law gave the possibility of a reduction of the price if the object of the contract did not conform with its description in the contract, which meant that the object of a sales contract no longer was a thing, but rather a certain value, represented by and expressed as the thing.

> If the buyer of a car successfully claims a SEK 500 reduction of the SEK 5 000 that he paid for it, the exchange of value in the contract has been altered from "SEK 5 000 car for SEK 5 000 money", to "SEK 4 500 car for SEK 4 500 money". Thus, the balance of the contract has been re-established.

The division between total and partial invalidity seems to coincide with the division between breaches of contract that give a right to avoid the contract or to demand delivery of substitute goods and breaches that give a right only to remedies that are less burdensome for the seller. According to art. 25 CISG a breach of contract is fundamental – and gives the right to avoid the contract or to demand delivery of substitute goods – if it substantially deprives the party not in breach of what he is entitled to expect under the contract. According to the predecessor – art. 10 ULIS – the buyer can avoid the contract if "a reasonable person in the same situation as [he] … would not have entered into the contract if he had foreseen the breach and its effects".

If a fraud has affected the buyer's promise as such, so that it would not have been given at all if the seller had not lied or had disclosed facts that the buyer was entitled to have access to, then the buyer's whole promise is voidable. Since the seller's promise is valid as such, the buyer may claim damages covering the added value that he could reasonably have expected to receive in exchange for his promise. If, on the other hand, the buyer's promise would still have been given, but with another content, the fraud should not be allowed to affect the promise, and thereby the con-

[23] See chapter 14.

tract, more than it did when the contract was concluded. In such a situation the buyer's promise is not fully – but only partially – voidable. Only the part of it that has been affected by the fraud is invalid. The effect on the buyer's promise is that it is reduced to what it would have been if the seller had not defrauded him. Usually this means a reduction of the price. It should, however, not be calculated at the time of delivery,[24] but rather at the time of the conclusion of the contract.

> Assume that a party has bought a boat and a car. In both cases the seller had knowledge of expectations that the buyer had but that a reasonable buyer would not have had. Assume further that in both cases it is contrary to good faith and fair dealing by the seller to deliver what a reasonable buyer would have expected – but less than the actual buyer expected – and demand payment according to the buyer's promise. Assume also that the buyer would not have wanted the car at all if the seller had disclosed the facts, but that he still would have wanted the boat, but only for a lower price. The buyer should be allowed to avoid the contract for the car, but not for the boat. The price for the boat should be reduced to what it would have been if the seller had disclosed the lacking information.

The possibility of partial voidability has been present in the law at least since the Contracts Act entered into force in 1916. At least in Sweden, it seems to have been rapidly forgotten. It was therefore necessary to reinvent it. According to § 36 CA it is possible to alter a contract's content if it is unfair. The rule incorporates all the other rules on invalidity in the Contracts Act.

[24] Cf. art. 50 CISG and § 38 SSA.