Section 36 of the Nordic Contract Acts and its Effects on Nordic Contract Law

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1. The shift of paradigm initiated by Sec. 36 of the Nordic Contracts Act

In the mid-1970's, an important legislative change took place in the Nordic countries: Denmark (1975), Sweden (1976), Finland (1982), Norway (1983), and Iceland (1986) enacted similar provisions in Sec. 36 of their Contracts Acts. Under this new provision agreements or other legal dispositions may be modified or set aside, in whole or in part, if their enforcement would be "unreasonable or contrary to fair dealing".

By focusing on the *unreasonableness* of the contractual term, Sec. 36 introduced a new paradigm in the Nordic approach to contract invalidity. Before that, the invalidity provisions of the Nordic Contracts Acts focused on undue outside influences that the contracting party had been the victim of. Sec. 36 opened the door for invalidity claims based on any alleged "unreasonableness" of particular clauses, e.g. on pricing mechanisms or agreed penalties.

Because of its vague wording, Sec. 36 falls into the category of a *legal standard*. For the same reason it is commonly referred to as *the general clause* (i.e. in definite form). In addition to its reasonableness test in subsection (1), subsection (2) provides that in making a decision under subsection (1), "regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances."

According to its preparatory work, Sec. 36 was intended to serve two main purposes. *First*, to provide a contractual tool against various unspeci-

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fied contractual practices that were assumed to take place in certain (questionable) business environments. *Secondly*, to give courts the powers to set aside contracts made in circumstances where one party (typically a business undertaking) had abused its superior position over the other (typically a consumer).[1]

Today it is obvious that Sec. 36 has changed Nordic contract law more than anyone expected at the time of its passing.

First, Sec. 36 has overshadowed the specific provisions of contractual invalidity that the Nordic Contracts Acts still provide (including cases of fraud, coercion, usury etc.). Even in cases that might fall under such particular provisions, many courts prefer to cite Sec. 36 in order to avoid stigmatizing parties as e.g. "fraudsters" etc.

Secondly, the wide discretion allowed under Sec. 36 has affected the way in which legal scholars and practitioners approach issues of contractual invalidity. Instead of discussing the particular requirements for applying a rule of contractual invalidity, both practitioners and courts seem to prefer exercising the discretion allowed by Sec. 36. This tendency has increased over the last 25 years (and since that number of years marks the timespan of this celebration book, this development seems relevant to discuss here!).

Thirdly, and most importantly, Sec. 36 is no longer "merely" a provision applicable to consumer contracts or other settings where one party exercises its bargaining power to the detriment of a presumably weaker party. It is a broadly applicable tool with the potential to set aside contractual provision between any party, regardless of its contents and purpose.

Given this importance, one might expect that contract law textbooks would go into details on the limits of Sec. 36. To some extend they do. But quite often they approach the issue by systemizing the bulk of case under different categories, defined by various types of *clauses* (e.g. on waivers of liabilities or dispute resolution provisions), by various types of *transactions* (e.g. family law agreements or surety obligations), or by various contractual *structures* (e.g. long term agreements or one-sided cancellation provisions).[2]

[1] At the passing of Sec. 36, a number of *special* general clauses already existing in specialized pieces of contract legislation were repealed – in Denmark, in the Debt Instruments Act, the Housing Rental Act, the Insurance Contracts Act, the Act on Employees' Inventions, and the Copyright Act. Sec. 36 was not meant to reduce the legal protection awarded under these specific provisions, but to let the standard of reasonableness develop under only one (general) clause.

[2] It would go too far to provide examples of this tendency from all the Nordic countries, so I will limit myself to making reference to my own textbook *Grundlæggende aftaleret*, 5th edi-

As I will try to explain in the following, the time might be up for a more analytical approach to Sec. 36 that would open the door for new areas of legal research into its dynamics from other perspectives. In order to explain the need for such a new approach I find it useful to go back to the roots of Nordic contract law:

2. The legal thinking behind Nordic contract law

Nordic contract law can be traced to the societal changes that occurred when the Protestant Reformation arrived in the Nordic region in the 1530's. Protestantism provided for a new approach to human responsibility that came alongside with an increased contractual freedom of the individual. This development was reinforced during the Enlightenment, and it was given convincing power with *Adam Smith*'s market economy theories from 1776. Modern contract law took shape when industrialism and internationalism developed in the second half of the 19th century, when new forms of communication and energy resources made complex transactions possible and profitable.

During those years and up until today, Nordic contract law has been based upon a few theories that originated in German jurisprudence. Some of these theories were the subject of intense debate between legal academics, some of whom also participated in the drafting of the various pieces of legislation within Nordic contract law that were adopted around the turn of the 20th century.

There was general consensus about the approach that contractual rights or obligations arise from "declarations of will" (in Danish *viljeserklæringer*; in German *Willenserklärungen*), i.e. from unilateral statements of intent made by a person by linguistic or symbolic manifestations with the aim of creating contractual rights and obligations towards others.[3] Furthermore, it was agreed both in Nordic and in German contract law, that there might be cases where a declaration of will could be set aside when the underlying "will"

tion (2021), see pages 477–481, and to Lennart Lynge Andersen's important monograph *Aftalelovens § 36* (2018), see e.g. pages 277–349. See also Hans Viggo Godsk Pedersen & Anders Ørgaard: *Almindelig kontraktsret*, 7. udg. (2025), pages 169–173.

[3] With its focus of the "will" of the promisor, this very "assumption" theory is also important for how an agreement should be interpreted. It is thus well-established in Nordic contract law that any declaration of will must be interpreted in light of the subjective and well-known wishes of the parties. This balance ensures that contract law takes into account both the parties' intentions and the reliance created by their actions.

was not (or was no longer) existent anymore. But from here, the agreement ended.

Two approaches to contractual invalidity were discussed: Under the so-called "will theory" – *viljesteorien* – declarations of will should generally be set aside where they were no longer supported by a sufficient *will of the originator, even though they had* been relied on by their recipient. Conversely, under the so-called "reliance theory" – *tillidsteorien* – declarations of will should stand, regardless of any changes of mind on the side of the originator, because of *the reliance* created on its recipient.

The conflict against the two theories would surface in cases where the "will" behind a promise took the form of an *assumption*, i.e. a mental premise that had caused the declaration to be made in the mind of its originator, but without being explicit toward its recipient. These cases were handled in the so-called *doctrine of presumptions* that had already gained acceptance in German jurisprudence, notably in *Windscheid's* "Voraussetzungslehre". This doctrine was considered to be applicable in Nordic contract law at the start of the 20th century, i.e. before the Nordic Contracts Acts were enacted.

The doctrine of presumptions is illustrated by the following example:

If party A has made a promise to party B on the basis of assumption X, and if assumption X fails, then A may be released of its promise, provided that

1. assumption X was *crucial* to A in the sense that A would not have made his promise to B if he had known that X would fail;
2. B *knew or should have known* that assumption X was crucial to A; and
3. given the circumstances of the case, it would appear *reasonable to accept* that the risk of the failure of X should be borne by B.

When the Nordic Contracts Acts were adopted by Sweden (1915), Denmark and Iceland (1917), Norway (1918), and Finland (1929),[4] the preparatory

[4] The passing of the Contracts Acts formed part of a decision *not* to codify the entire private legal order in a *civil law code* like the German *Bürgerliches Gesetzbuch* or the French *Code Civil*. Instead of such a code, similar sector-specific legislation was passed in the Nordic countries, e.g. in the form of Sale of Goods Acts, Debt Instruments Acts, Maritime Acts and Trademark Acts. The decision not to pass civil codes was based upon an understanding that general principles of private law in the law of obligations would suffice, which is still the case when it comes to general principles of interpretation, performance and non-performance, set-off, and pluralities of obligors and obligees. Such principles are also accepted for liability in tort law. These general principles are generally *recognized* in all the Nordic countries, *articulated* by legal scholars, and steadily *confirmed* by judge-made law.

works clearly indicated that the court-made rules of invalidity should remain in force, including the doctrine of presumptions as applicable. This point was clearly made in the preparatory works of the Act, drafted by the most renowned experts in Nordic contract law at those times.

Long after Sec. 36 was introduced, many litigating parties and courts preferred to apply the doctrine of presumptions rather than Sec. 36. Illustrative for this reluctance is the Swedish Supreme Court case reported in *NJA 1985 p. 178*, in which a purchase contract was held to be invalid because the assumption relied on by both parties that the buyer was going to be financially reconstructed, failed so that the buyer went bankrupt. The buyer's behaviour was deemed to have reinforced the seller's belief that a reconstruction was going to take place and had thus reduced the buyer's incentives to assess the risk involved in the transaction. The invalidity of the contract led to a right for the seller to separate the goods delivered, although the seller had not made a valid reservation of title.

3. The period after World War II

World War II not only left the European countries with the immediate task of reconstruction, but also with the challenge to reconsider their legal systems in ways that would hopefully be both stable and in accordance with rule of law principles. In order to fulfil this aim, new legal and institutional structures were introduced, many of which may be seen as a shift away from German legal thinking and methodology. Whereas German jurisprudence had hitherto been dominant in Europe, the defeat of Germany caused a shift of focus in favor of parts of the *common law* thinking of the US and the UK. This shift of paradigms took two forms:

Many legislators in the Western hemisphere introduced new and very detailed and particular types of legislation. "Legislators" were now not only domestic parliaments but gradually also international institutions (indeed so for members of the European Union or the European Economic Area). These many legislative initiatives aimed at protecting various types of contractual parties who by virtue of their status, being e.g. "consumers" or "employees", were presumed to be victims of possible misuse of contractual freedom. Although parties were still free to contract on their own terms, a

There seems to be general consensus among Nordic legal scholars that the rejection of a civil code and the choice of principle-based legal framework has created a flexible contract law system characterized by both pragmatism and predictability.

more regulated approach took over in certain areas, where legislation set limits on unfair contract terms and abuse of market power.

To catch-up with any missing areas, a number general clauses were introduced in all legislative branches, often in the form of "good practice" rules. The first step in this direction was the Universal Declaration of Human Rights adopted by the United Nations in 1948 (which was not in itself binding), and the European Convention on Human Rights in 1950 (which came to be).[5]

The introduction of these general clauses coincided with an increased belief in the role of courts as guardians of the rule of law and fundamental rights. International courts, such as the European Court of Human Rights, began to play an active (one might say, political) role in holding governments accountable for their protection of individuals. Also domestic courts, primarily in the US and Germany, played such a role in shaping the legal and political framework of the post-war societies.

Compared to the more "conservative" role of legislators in pre-World War II Europe, new methodological traditions evolved: *First*, contract law legislation was not only made to provide foreseeability for the parties, but rather to reach political goals, e.g. by protecting certain kinds of parties. *Secondly*, and for the same reason, these new examples of protective contractual legislation were much more detailed than ever seen before. *Thirdly*, they were drafted by administrators, not by academics working in close cooperation with the relevant industry organizations. And *fourthly* (as one may see by looking at the initiatives on competition and marketing practices), they were often made without traditional distinctions between public and private law.

This post-war development took place at a time where the role and importance of legal academics had changed. The role law professors had previously played as initiators and censors of legislation was gradually reduced, when the legislative processes was driven by politicians and civil servants. In these processes, legal academics were less visible, if existent at all. As we shall see, some of them were given tasks in the legislative process. But in general,

[5] Although the U.N. Declaration of Human Rights is not generally perceived as an instrument of contract law, it does indeed contain provisions regarding contractual relationships. According article 23 "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. …"

the academic debate for and against for example Sec. 36 was almost non-existent.

In addition to this, the increased U.S. American inspiration brought forward new forms of *legal-economic thinking*: Legislative initiatives were now increasingly perceived in light of their economic consequences and for market dynamics. Competition and market mechanisms often played a crucial role, especially in competition and consumer protection law. Likewise, law and economic theories of "pulverization" of economic risks predominated, leading to new views on the role of insurance and regulatory models in risky markets.

All these mechanisms fostered a common understanding that particular legislative rules of protection needed to be backed by more general rules (including legal standards of various kinds) that would provide courts and other competent bodies with the discretion to decide cases on an individual basis. Some international rules were even adopted with deliberate ambiguities, when member countries couldn't agree on a precise wording.

4. The reception of Sec. 36 in Nordic Supreme Court case law

The introduction of Sec. 36 came about as a pure Nordic legal initiative and at a time when Denmark was the only Nordic country who was a member of the EU. Although it was not imposed on any of the five Nordic countries to take this legislative step, its soil was fertilized by the legal-political thinking that already predominated in Europe.

The (today) identical provisions were proposed in expert reports put forward in each of the Nordic countries. In Denmark a *Preliminary report on general clauses in property law*, had been written by Professor Stig Jørgensen in 1974. In Sweden, Professor Jan Hellner wrote *Generalklausulutredningen*, as published in SOU 1974:83. In Norway, two expert reports were published, one in NOU 1976:61: *Standardkontrakter*, another in NOU 1979:32: *Formuerettslig lempelsesregel*.[6]

The expert reports raised several concerns, especially regarding the downplaying of party autonomy and predictability, especially in business-to-busi-

[6] German law already had a general clause in § 242 BGB on *Treu und Glauben*, however not directed towards the protection of presumably weak contracting parties. Around the same time the UK enacted a *Consumer Credits Act* of 1974 and a *Unfair Contracts Act* of 1977.

ness transactions. To avoid this, courts were, from the outset, urged not to apply their wide discretion to hold contractual clauses to be "unreasonable". On the other hand, the desire to increase consumer protection was subject to a wide consensus.

In order to balance these opposite interests, it was understood that Sec. 36 was primarily (albeit not exclusively) meant to be applied in transactions with consumers and other presumably weak contracting parties. This reluctance affected court practice in all the Nordic countries during the first decades after the passing of Sec. 36. During the same decades, both domestic legislators and the EU enacted numerous mandatory statutory provisions that protected exactly the same parties explicitly – thereby narrowing the remaining room for applying Sec. 36 considerably.[7]

During the recent decades, Nordic case law have showed an increased willingness also to apply Sec. 36 in business-to-business transactions – first in cases involving small and medium-sized businesses and organizations, and later on also in other cases.

One of the first steps in this direction was made by the Danish Supreme Court in the case reported in *U 1998.281 H*. Here, an article in the bylaws of an employer's association was set aside because it deprived a group of members of its anticipated share of the organization's net assets after their politically motivated withdrawal from the association.

Other cases, however, refused to apply Sec. 36 where a business party had miscalculated the risk associated with a specific contract clause. An example hereof is the Danish Supreme Court decision in *U 2012.3007 H* in which the Danish jewelry producer *Pandora* did not succeed in its claim that a royalty provision in a license agreement with a designer, according to which she should uphold 12 percent of Pandora's turnover, regardless of whether it could be proved *which* of Pandora's (now) many beads, she had actually designed, should not be set aside. The agreement was made at a time when Pandora was still a medium-sized company. Its rationale (namely to avoid the trouble of identifying those beads that the designer had made from other beads), would have benefited Pandora if the company had not become as successful as it did.

[7] See for an overview of this development, Lennart Lynge Andersen: *Aftalelovens § 36* (2018), pages 27 (making the point that Sec. 36 was indeed also intended to prevent questionable business practices as such, i.e. without necessarily involving consumers). See also the discussions on Sec. 36's relevance in business cases on pages 33, 36, 175–177, 227–228, 263–264, 278–279 and others.

5. Should Sec. 36 be studied in new ways?

With the possibility of setting aside contracts due to their contents, Sec. 36 has some resemblances with the doctrine of presumptions. Whereas *Sec. 36* focuses on the contractual term itself as being more or less unreasonable (either in itself or by resulting in an unreasonable outcome in the specific case), taking into account its content, the circumstances when the contract was made, subsequent events, or other relevant factors, *the doctrine of presumptions* focuses on the colliding interest in protecting the "will" of the promisor, and the "reliance" of the promise. Despite their structural difference, both rules may very well lead to the same result in particular cases.

In contract law it is well-known that a given contract may be invalid on various grounds and by applying different contractual rules. Therefore, more than one line of legal argumentation will often justify the same result. Parties invoking Sec. 36 in particular disputes will therefore put forward a wide range of basic arguments to prove their case of "unreasonability". Likewise, courts and other adjudicators will have to consider these arguments.

The question that legal authors within contract law, like myself, might have to consider is whether we could perhaps be more helpful to our readers by analyzing the value of such arguments in transactions where the parties have made their best to negotiate a precise and relevant contract. Have we been too much looking "backwards" with our focus on how courts have used or declined to use Sec. 36 in different types of disputes? Or should we rather focus on the possible intellectual steps that might justify setting aside contractual provisions under Sec. 36, in the same way as our colleagues in earlier times did with the doctrine of presumptions?

My sense is that the answer to this question is yes. Obviously, neither the space available for this contribution, nor its purpose allow me to show how such an approach could be taken. So let me limit myself to suggesting a few ideas for such future research:

In order to give room for such analysis, I would *first* suggest that Nordic contract law exclude specialized areas of contract law from general presentations of Sec. 36. Such a principle decision would go hand in hand with traditions in contemporary contract law which is already divided between such *general parts* that we meet in textbooks for students of contract law, and those other parts that have become integral parts of particular legal disciplines (e.g. on sales contracts, employment contracts, contracts for lease of households and surety promises). These particular legal disciplines will often find their

form and contents by practices applied in the relevant fields. If such particular aspects of Sec. 36 were excluded from general contract law and dealt with in specialized legal disciplines, general contract law could focus on the general aspects and associated legal argumentation.

Secondly, in regard to the remaining general parts of Sec. 36, it seems reasonable for legal authors in contract law to focus on the *abstract mechanisms* in the application of Sec. 36, rather than on the different kinds of *parties and transactions* considered. Such an approach might indeed make sense when specialized areas of Sec. 36 are not discussed in detail in the general contract law disciplines.

One example of such an abstract mechanism could be the analysis of the "mental steps" and decisions that parties make – knowingly or implicitly – when they enter into contracts. Should it, for example, be presumed that "professional" promisors calculate all risks associated with the promise (with the legal effect that they should take the risk of unforeseen circumstances in relation to a Sec. 36 decision)? Or should even a large business party be allowed to bring forward a Sec. 36 claim when an unexpected development turned out unexpectedly? That very issue was at stake in the Pandora case, discussed above (reported in *U 2012.3007 H*) where the Supreme Court based its result on a rather harsh presumed professionalism on Pandora's side.

Another example of abstract perspectives to understand Section 36 might benefit from economic theories of efficiency. Professor Trine-Lise Wilhelmsen made an important contribution to this perspective 30 years ago in her work *Avtalelovens § 36 og økonomisk effektivitet*, published in TfR 1995, pages. 1–246. Based on her studies of 228 Nordic court decisions she presented a number of interesting conclusions (see pages 215–216). One of her observations was that economic efficiency (as shown in economic theory) *might* speak for applying Sec. 36 in cases where both parties misunderstood the critical facts that the agreement was based upon, but the party that relied on the agreement could have made the necessary investigations at a lower cost. Furthermore, she concluded that it is not always efficient to strive for a "perfect" agreement, and that the party who might have reduced such risks most efficiently should therefore also bear them. In general, Wilhelmsen was not able to verify that economic theory was useful for balancing the reasonableness test in Sec. 36.

Wilhelmsen's work is indeed interesting, and it is to my knowledge the only academic work of its kind, even today, in Nordic legal jurisprudence. Perhaps the experience gained during the last three decades could call for a

revisit of her approach? At least, it seems fair to conclude that there is more room for passing the reasonableness test of Sec. 36 if the obliged party *did not* take any known risks, and the counterparty knew or should have known that.

Closely related to such economic arguments is the perception of economic (or other) "value". As fluffy as this concept is in business negotiations, equally difficult it is to handle, e.g. in cases where contracted values increase or decrease during the time of contract fulfillment. It is well-known that Nordic law on unjust enrichments is in many ways uncertain. The same kind of uncertainty may very well appear in an analysis under Sec. 36 where an abstract approach may lead to new insights.

A completely different example might be the application of psychological approaches to the application of Sec. 36 – an aspect that is not far from the "will" and "reliance" theories. If a party has agreed to a provision in a language that as a matter of linguistics leads to a given result, however with consequences that are clearly unintended (for example an earn out-provision based on *gross* numbers and not *earnings*), under what circumstances would that particular mistake be taken into account when determining whether the clause is unreasonable under Sec. 36? Similar examples might be taken from other specific rules on contract invalidity in the Nordic Contracts Acts.

Obviously, there might be many more approaches than these. By offering these above examples, I hope to have given the reader an idea on how the analysis of Sec. 36 might open new insights to the benefit for both practitioners and courts.

6. The role of academics

My observations above are intended to show that Sec. 36 is no longer mainly relevant to contracts between parties acting under unequal bargaining powers. All types of contracts involving all kinds of transactions and parties might be subject to a justified claim of invalidity under Sec. 36. This fact, together with the increased contractual complexity in a specialized world, has given a huge potential for applying Sec. 36 in contemporary contract law.

Legal academics in contract law could therefore be more helpful by presenting theories, lines of argumentation and templates for the assessment of reasonableness, similar to what our colleagues over the ages have done in other areas of private law. The doctrine of presumptions is one such example. Other examples may be found in other areas of contract law, including the general law of obligations and property law.

Coming back to the purpose of this contribution:

Sec. 36 of the Nordic Contracts Acts, in its contemporary understanding, is the result of a legal development that has lasted almost half a century. The time may very well be up for new and forward-looking tools in order to understand how this important rule could and should be applied in transparent and predictable ways in all kinds of transactions.