

# The duty of loyalty in Nordic law

Master's thesis

Author:  
Samuli Kulmala

Mentor:  
Prof. Heikki Halila

University of Helsinki  
Faculty of law  
Contract Law

Autumn 2014



Tiedekunta/Osasto Fakultet/Sektion – Faculty Oikeustieteellinen tiedekunta – Faculty of law		Laitos/Institution– Department	
Tekijä/Författare – Author Samuli Kulmala			
Työn nimi / Arbetets titel – Title The duty of loyalty in Nordic law			
Oppiaine /Läroämne – Subject Sopimusoikeus – Contract law			
Työn laji/Arbetets art – Level OTM-tutkielma / Master's Thesis		Aika/Datum – Month and year Lokakuu / November 2014	
		Sivumäärä/ Sidoantal – Number of pages XIII + 122	
Tiivistelmä/Referat – Abstract			
<p>The subject of this thesis is the duty of loyalty in the Nordic law of contracts. This study is of comparative law, and it aims to compare the definitions and explanations given for the duty of loyalty in the Nordic countries. The comparisons are made between Finland, Sweden, Norway and Denmark. This study could also be described as partly legal dogmatic, since the purpose of the comparisons is to find out what the legal meaning and effect of the duty of loyalty are. Since the duty of loyalty is a broad and general norm which applies to a number legal spheres, such as consumer and insurance contracts, the subject of this study needs to be delimited in order to keep the discussion coherent and focused. Because of this, the study will only inspect the duty of loyalty in the context of commercial contracts.</p> <p>In all of the Nordic countries, the duty of loyalty is an unwritten legal norm and/or a principle. The duty is generally defined as a duty of the contracting parties to reasonably consider each other's interests and expectations without unreasonably risking their own. Many authors in jurisprudence have criticised this definition as vague and impalpable. Yet, at the same time, many authors see it as a norm that has gained more significance and influence in the law of contract, especially during the last decades. In Finland, there are many authors who have discussed the duty in articles and textbooks, but there is no doctoral thesis that focuses solely on the duty of loyalty. The situation is somewhat different in neighbouring countries, as several doctoral theses about the duty exist in Sweden and one in Norway. Aside from these theses, the academic discussion and debate has been vivid in all the Nordic countries. This study aims to gather and compile this discussion into a comparative analysis. Lastly, it presents a synthesis of these descriptions and discusses whether these descriptions could be merged into a notion of a Nordic duty of loyalty.</p> <p>The structure of this thesis consists of an introduction, followed by four chapters which concern the individual countries of this study. Each country is discussed in its own chapter. These chapters aim to describe the discussion and the debate in jurisprudence concerning the duty in the country in question. Each of these chapters consists of the following topics: 1.) the legal basis of the duty, 2.) the definitions given for the duty, 3.) how the duty has been defined in relation to other norms of contract law, 4.) the functions of the duty, 5.) its applications and lastly, 6.) the more specific elements attributed to the duty, such as its influence in different contracting phases and what specific obligations are thought to stem from it. The purpose of the first topic is to analyse the legal character of the duty. This will be done by inspecting the descriptions of the authors in jurisprudence and how the duty has been applied in court practice. The second topic describes the more specific definitions given for the duty in jurisprudence, and the third part seeks to find out how these definitions separate and define the duty in relation to the other norms of contract law, such as the bona fides, the principle of equity/reasonableness and the Contracts Act 36§. The fourth topic gives an account of the functions which authors have attributed to the duty, and the fifth one discusses the possible applications of the duty and what consequences disloyal conduct can give rise to. Examples of such consequences and legal remedies are the cancellation of contract, liability for damages and the voidableness of contract. The sixth part concerns the opinions of legal authors as to what type of concrete obligations the duty could generate and how it can actually supplement a contract.</p> <p>After the chapters discussing the individual countries, the sixth chapter will give a comparative analysis of the opinions and discussions mentioned in the aforementioned chapters. The sixth chapter consists of the same subtopics as chapters 2.-5. First and foremost, the author will analyse definitions and elements of the duty and discuss whether individual authors agree or disagree about them. Besides this, the author will also deliberate whether it is possible to find differences on national levels.</p> <p>The last chapter discusses the conclusions of the comparisons. The first part of this chapter will seek to give an illustration of what is, or could be, the broadest and the most comprehensive definition given for the duty in the Nordic countries. The author will also comment on the applicability of the duty in commercial contracts. As a counterweight to the first, the second part highlights the more critical and disinclined views towards the duty and seeks to summarize the debate.</p>			
Avainsanat – Nyckelord – Keywords sopimusoikeus, liikesopimus, lojaliteettiperiaate, lojaliteettivelvollisuus, pohjoismainen oikeus, oikeusvertailu, duty of loyalty, good faith, contract law, Nordic law, comparative law, commercial contract			
Säilytyspaikka – Förvaringställe – Where deposited			
Muita tietoja – Övriga uppgifter – Additional information			

## Table of contents

Bibliography .....	V
Court cases .....	XI
Finland .....	XI
Sweden .....	XI
Norway .....	XI
Denmark .....	XI
Other .....	XII
List of abbreviations, statutes and translation notes .....	XII
Other documents .....	XIII
1. Introduction .....	1
1.1. Nordic law and the method of comparison .....	2
1.2. The subject, sphere and structure of this study .....	3
1.3. Terminology .....	5
2. Finland .....	7
2.1. The legal basis of the duty of loyalty .....	7
2.2. Definitions for the duty of loyalty .....	9
2.3. The duty of loyalty in relation to other principles and norms .....	11
2.4. Functions of the duty of loyalty .....	14
2.5. Application in contracts and consequences of disloyal conduct .....	16
2.6. Elements of the duty of loyalty .....	20
2.6.1. The duty of loyalty in different phases of a contractual relationship .....	20
2.6.2. Obligations stemming from the duty of loyalty: two perspectives .....	22
2.6.2.1. Specific obligations requiring contribution to contract .....	26
2.6.2.2. The duty to disclose and inform .....	27
3. Sweden .....	30
3.1. The legal basis of the duty of loyalty .....	30
3.2. Definitions for the duty of loyalty .....	33
3.3. The duty of loyalty in relation to other principles and norms .....	35
3.4. Functions of the duty of loyalty .....	38
3.5. Application in contracts and consequences of disloyal conduct .....	40
3.6. Elements of the duty of loyalty .....	45
3.6.1. The duty of loyalty in different phases of a contractual relationship .....	45

3.6.1.1. Pre-contractual phase .....	45
3.6.1.2. Contract-external liability?.....	47
3.6.2. Obligations stemming from the duty of loyalty .....	49
3.6.2.1. Specific obligations requiring contribution to contract .....	52
3.6.2.2. The duty to disclose and inform.....	55
4. Norway .....	60
4.1. The legal basis of the duty of loyalty.....	60
4.2. Definitions for the duty of loyalty .....	61
4.3. The duty of loyalty in relation to other principles and norms .....	64
4.4. Functions of the duty of loyalty .....	67
4.5. Application in contracts and consequences of disloyal conduct .....	68
4.6. Elements of the duty of loyalty .....	72
4.6.1. The duty of loyalty in different phases of a contractual relationship.....	72
4.6.2. Obligations stemming from the duty of loyalty .....	74
4.6.2.1. Specific obligations requiring contribution to contract .....	75
4.6.2.2. The duty to disclose and inform.....	77
5. Denmark.....	81
5.1. The legal basis of the duty of loyalty.....	81
5.2. Definitions for the duty of loyalty .....	81
5.3. The duty of loyalty in relation to other principles and norms .....	83
5.4. Functions of the duty of loyalty .....	84
5.5. Application in contracts and consequences of disloyal conduct .....	85
5.6. Elements of the duty of loyalty .....	86
5.6.1. The duty of loyalty in different phases of a contractual relationship.....	86
5.6.2. Obligations stemming from the duty of loyalty .....	87
5.6.2.1. Specific obligations requiring contribution to contract .....	88
5.6.2.2. The duty to disclose and inform.....	88
6. The comparative analysis .....	91
6.1. The legal basis of the duty of loyalty.....	91
6.2. Definitions for the duty of loyalty .....	94
6.2.1. Superordinate concepts above the duty of loyalty .....	94
6.2.2. The definitions for the concrete duty of loyalty .....	95
6.2.3. Restrictions to the concept of the duty of loyalty.....	98
6.3. The duty of loyalty in relation to other principles and norms .....	100

6.4. Functions of the duty of loyalty .....	104
6.5 Application in contracts and consequences of disloyal conduct .....	105
6.5.1. The applications of the duty.....	105
6.5.2. The consequences of disloyal conduct.....	106
6.5.3. Possible criteria for the duty of loyalty and contract types with particular emphasis on loyalty .....	108
6.6. Elements of the duty of loyalty .....	109
6.6.1. The duty of loyalty in different phases of a contractual relationship.....	109
6.6.2. Obligations stemming from the duty of loyalty .....	111
6.6.2.1. Specific obligations requiring contribution to contract .....	113
6.6.2.2. The duty to disclose and inform.....	114
7. Conclusions.....	117
7.1. The Nordic duty of loyalty – a broad definition .....	117
7.2. The Nordic duty of loyalty – a critical approach .....	121

## Bibliography

*Adlercreutz, Axel & Gorton, Lars*: Avtalsrätt I. 13 upplagan. Lund 2011. (Adlercreutz & Gorton 2011)

*Andersen, Mads Bryde*: Grundlæggende aftaleret. 2. omarbejdede udgave. København 2005. (Andersen 2005)

*Andersen, Lennart Lyngø & Madsen, Palle Bo*: Aftaler og mellemænd. 5.udgave. København 2006. (Andersen & Madsen 2006)

*Aurejärvi, Erkki*: Virallisen vastaväittäjän professori Erkki Aurejärven Helsingin yliopiston oikeustieteelliselle tiedekunnalle antama 5.10.1989 päivätty lausunto Matti Rudangon väitöskirjasta rakennuttajan myötävaikutushäiriöistä rakennusurakassa. Lakimies 8/1989 pp.1170–1176. (Aurejärvi LM 8/1989)

*Aurejärvi, Erkki*: Virallisen vastaväittäjän professori Erkki Aurejärven Turun yliopiston oikeustieteelliselle tiedekunnalle antama, 14.9.1993 päivätty lausunto Ari Huhtamäen väitöskirjasta luotonantajavastuu. Lakimies 7/1993 pp.1095-1127. (Aurejärvi LM 7/1993)

*Bernitz, Ulf*: What is Scandinavian law? Concept, characteristics, future. Scandinavian Studies in Law volume 50, 2007 pp.13-30. (Bernitz Sc.St.L vol.50 2007)

*Björkdahl, Erika P*: Lojalitet och kontraktlikt förhållanden. En civilrättslig studie av förutsättningarna för ansvar vid förhandlingar eller andra kontakter mellan avtalsmässigt obundna parter. Uppsala 2007. (Björkdahl 2007)

*Björne, Lars*: Lojaliteettiperiaateen kehityksestä. In lojaliteettiperiaate. Oikeusperiaatteet ja oikeuskäytäntö-tutkimusprojektin seminaarin 11.11.1993 alustukset. Edited by Ari Saarnilehto. Turku 1994. (Björne 1994)

*Björne, Lars*: 33§ avtalslagen – drag i den nordiska debatten under förra delen av 1900-talet. In Avtalslagen 90 år edited by Flodgren et al. Stockholm 2005. (Björne 2005)

*Cordero-Moss, Giuditta*: Fremmede retsbegreber i nordisk kontraktret. Debatt. Det 38. nordiske juristmøte i København 2008. Taken from website of the nordiske juristmøte on

23.4.2014 <http://nordiskjurist.org/meetings/fremmede-retsbegreber-i-nordisk-kontraksret/>  
(Cordero-Moss NJM 2008)

*Dalbak, Camilla*: Lojalitetsplikt som grunnlag for å begrense og utvide fleksibilitet i avtaleforhold. Lov og rett 10/2007 pp.598-612. (Dalbak LoR 10/2007)

*Evald, Jens*: Retsmisbrug i formueretten. København 2001. (Evald 2001)

*Falkanger, Thor*: Opplåning og lojalitetsplikt. Kommentarer til Rt.1994 s.775 om pant i adkomst dokumenter til leierett til bolig. Lov og Rett 1/1995 pp.100-112. (Falkanger LoR 1/1995)

*Gomard, Bernhard*: Obligations ret. 1. del. 4. udgave. København 2006. (Gomard 2006)

*Gomard, Bernhard*: Obligations ret. 2.del. 3 udgave. København 2003. (Gomard 2003)

*Grönfors, Kurt*: Avtal och omförhandling. Stockholm 1995. (Grönfors 1995)

*Halila, Heikki*: Rakennuttajan tiedonantovelvollisuudesta rakennusurakassa. Helsinki 1981. (Halila 1981)

*Halila, Heikki & Hemmo, Mika*: Sopimustyytit. Helsinki 1996. (Halila & Hemmo 1996)

*Hellner, Jan*: Kommersiell avtalsrätt. Stockholm 1993. (Hellner 1993)

*Hemmo, Mika*: Sopimusoikeus I. Helsinki 2003. (Hemmo 2003)

*Heidbrink, Jacob*: Recension: Erika P. Björkdahl, Lojalitet och kontraktliknande förhållanden. En civilrättslig studie av förutsättningarna för ansvar vid förhandlingar eller andra kontakter mellan avtalsmässigt obundna parter (ak.avh.), Iustus förlag, Uppsala 2007, 494 s. Juridisk Tidskrift 4/2007-08 pp.962-971. (Heidbrink JT 4/2007-08)

*von Hertzen, Hannu*: Sopimusneuvottelut. Helsinki 1983. (von Hertzen 1983)

*Holm, Anders*: Den avtalsgrundade lojalitetsplikten – en allmän rättsprincip. Linköping 2004. (Holm 2004)

*Hov, Jo & Høgberg, Alf Petter*: Alminnelig avtalerett. Oslo 2009. (Hov & Høgberg 2009)

*Huhtamäki, Ari*: Luotonantajavastuu. Helsinki 1993. (Huhtamäki 1993).

*Hultmark, Christina:* Lojalitetsplikten i avtalsförhållanden - närmare bestämt upplysningsplikten rörande rådighetsinskränknings vid köp av kiosk-rörelse. Juridisk Tidskrift 4/1991-92 pp.701-704. (Hultmark JT 4/1991-92)

*Husa, Jaakko:* Oikeusvertailu. Helsinki 2013. (Husa 2013)

*Häyhä, Juha:* Lojaliteettiperiaate ja sopimusoppi. Defensor legis 3/1996 pp.313–327. (Häyhä DL 3/1996)

*Häyhä, Juha:* Oikeusperiaatteet ja sopimuksen purkaminen. In Juhlakirja – Kaarlo Tuori 50 vuotta. Edited by Paul Van Aerschot et al. Helsinki 1998. (Häyhä 1998)

*Karhu, Juha:* Recension: Jori Munukka, Kontraktuell lojalitetsplikt, Jure förlag, 2007, 575 s. Juridisk Tidskrift 3/2007-08 pp.754-757. (Karhu JT 3/2007-08)

*Karhu, Juha:* Lojaliteettiperiaate sopimusoikeudessa – oikeudellista peruskartoitusta. Teoksessa juhlaulkaisu Leena Kartio 1938-30/8-2008. edited by Pekka Vihervuori, Mika Hemmo, and Eva Tammi-Salminen pp.101 – 116. Helsinki 2008. (Karhu 2008)

*Kleineman, Jan:* Utomkontraktuella lojalitetsplikter – ett sakrättsligt problem? In Festskrift till Gösta Walin. Editor: Olle Höglund et al. Stockholm 2002. (Kleineman 2002)

*Korhonen, Petteri:* Om den immaterialrättsliga lojalitetspliktens teoretiska grundvalar. JFT 1/2006 pp.22–52. (Korhonen JFT 1/2006)

*Korhonen, Petteri:* Lojalitetsplikt som ansvarsgrund inom immaterialrätten. JFT 4/2006 pp.345–394. (Korhonen JFT 4/2006)

*Lehtinen, Tuomas:* Kansainvälisen kaupan liikesopimus ja remburssi. Vammala 2006. (Lehtinen 2006)

*Lindholm, Tuomas:* Fremmede retsbegreber i nordisk kontraktsret. Det 38. nordiske juristmøte i København 2008. Taken from website of the nordiske juristmøte 23.4.2014: <http://nordiskjurist.org/meetings/fremmede-retsbegreber-i-nordisk-kontraktsret/> (Lindholm NJM 2008)

*Madsen, Palle Bo:* Lojalitetskrav i kontrakts- og konkurrenceretten. Ugeskrift for Retsvæsen 1982 B pp.165-171. (Madsen UfR 1982 B)



*Moalem, David*: Fortielser ved kontraktindgåelse – om obligationsrettens loyale oplysningpligt. Ugeskrift for Retsvæsen 17/2004 B pp.133-141. (Moalem UfR 17/2004 B)

*Mononen, Marko*: Sopimusoikeuden materiaalisuudesta. Helsinki 2001. (Mononen 2001)

*Munukka, Jori*: Kontraktuell lojalitetsplikt. Stockholm 2007. (Munukka 2007)

*Munukka, Jori*: Lojalitetsplikten som rättsprincip. Svensk Juristtidning 9/2010 pp.837-848. (Munukka SvJT 9/2010)

*Munukka, Jori*: Lojalitetsprincipen – ett institut med framtid i avtalsrätten. Det 39. nordiske juristmøte i Stockholm 2011. Taken from website of the nordiske juristmøte 30.4.2014: <http://nordiskjurist.org/meetings/lojalitetsprincipen-ett-institut-med-framtid-i-avtalsratten/> (Munukka NJM 2011)

*Muukkonen, P. J.*: Yhteistyösopimukset ja lojaliteettivelvollisuus. In Juhlajulkaisu Urho Kaleva Kekkonen 1900 3/9 1975. Editor: Mikael Hidén. Helsinki 1975. (Muukkonen 1975)

*Muukkonen, P. J.*: Sopimusoikeuden yleinen lojaliteettiperiaate. Lakimies 7/1993 pp.1030-1048. (Muukkonen LM 7/1993)

*Mäenpää, Kalle*: Contract Negotiations and the Importance of Being Earnest. JFT 4/2010 pp.322–350. (Mäenpää JFT 4/2010)

*Mähönen, Jukka*: ”Good faith and fair dealing” ja lojaliteettivelvollisuus. In kansainvälisestä kaupasta. Juhlajulkaisu Tuula Ämmälä. pp.203–231. Edited by Antti Aina et al. (Mähönen 2000)

*Nazarian, Henriette*: Lojalitetsplikt i kontraktsforhold. Oslo 2007. (Nazarian 2007)

*Norlén, Andreas*: Oskälighet och 36 § avtalslagen. Linköping 2004. Acquired as a PDF-file from Norlén’s homepage on 30.5.2014: <http://www.andreasnorlen.se/> (Norlén 2004)

*Nicander, Hans*: Lojalitetsplikt före, under och efter avtalsförhållanden. Juridisk Tidskrift 1/1995-96 pp.31-49. (Nicander JT 1/1995-96)

*Nystén-Haarala, Soili*: The long term contract Contract law and contracting. Helsinki 1998. (Nystén-Haarala 1998)

*Nysten-Haarala, Soili*: Lojalitetsprincipen både från domstolens och från rättsanvändarens perspektiv - kommentar med betoning på proaktiv avtalsverksamhet. In *Avtalslagen 90 år* edited by Flodgren et al. Stockholm 2005. (Nystén-Haarala 2005)

*Pohjonen, Marja*: Miten lojaliteettiperiaate ilmenee tekijänoikeudessa? In *lojaliteettiperiaatteesta. Vastapuolen edun huomioon ottamisesta eri oikeuden aloilla.* Edited by Ari Saarnilehto. Turku 1994. (Pohjonen 1994)

*Pöyhönen, Juha*: Sopimusoikeuden järjestelmä ja sopimusten sovittelu. Vammala 1988. (Pöyhönen 1988)

*Pöyhönen, Juha*: Uusi varallisuus oikeus. Helsinki 2000. (Pöyhönen 2000)

*Ramberg, Christina*: Uppsägningstid vid långvariga samarbetsavtal. *Svensk Juristtidning* 1/2010 pp.94-98. (Ramberg SvJT 1/2010)

*Ramberg, Jan & Ramberg, Christina*: Allmän avtalsrätt. Nionde upplagan. Visby 2014. (Ramberg 2014)

*Regner, Emma*: Varför inte lojalitetsplikt? *Juridisk Tidskrift* 3/2001-02 pp.713-720. (Regner JT 3/2001-02)

*Rudanko, Matti*: Rakennuttajan myötävaikutushäiriöstä rakennusurakassa. Vammala 1989. (Rudanko 1989)

*Saarnilehto, Ari* (editor.): *Varallisuus oikeuden kantavat periaatteet.* Helsinki 2000. (Saarnilehto 2000)

*Saarnilehto, Ari*: Neuvottelulojaliteetti ja kotitalousvähennys. *Tapaus KKO* 2008:91. *Oikeustieto* 5/2008. (Saarnilehto oikeustieto 5/2008) Acquired from the Edilex-database.

*Saarnilehto Ari, Annola Vesa, Hemmo Mika, Karhu Juha, Kartio Leena, Tammi-Saminen Eva, Tolonen Juha, Tuomisto Jarmo, Viljanen Mika.*: *Varallisuus oikeus.* Helsinki 2012. (Saarnilehto et al. 2012)

*Stang, Fredrik*: En utviklingslinje i de formuerettslige ugyldighetsregler. *JFT* 1933 pp.365-395. (Stang JFT 1933)

*Simonsen, Lasse*: Prekontraktuelte ansvar. Oslo 1997. (Simonsen 1997)

*Taxell, Lars Erik: Avtal och rättsskydd. Åbo 1972. (Taxell 1972)*

*Taxell, Lars Erik: Rätt och demokrati. Åbo 1976. (Taxell 1976)*

*Taxell, Lars Erik: Om lojalitet i avtalsförhållanden, DL 1977 pp.148-155. (Taxell DL 1977)*

*Taxell, Lars Erik: Om avtalsetik. JTF 1979 pp.487 – 498. (Taxell JFT 1979)*

*Tieva, Antti: Luottamus, lojaliteettivelvollisuus ja liike-elämän pitkäkestoiset sopimukset. Defensor Legis 2/2006 pp.240–251. (Tieva DL 2/2006)*

*Tieva, Antti: Kiinteistö- ja rakennusalan pitkäkestoiset liikesopimukset. Lakimies 6/2009 pp.934–955. (Tieva LM 6/2009)*

*Thorsen, Arne Falkanger: Lojalitetsplikt i kontraktsforhold. Jussens Venner 1/1993 pp.36-54. (Thorsen JV 1/1993)*

*Votinius, Sacharias: Varandra som vänner och fiender. Stockholm/Stehag 2004. (Votinius 2004)*

*Wilhelmsson, Thomas: Om tro och heder i finsk avtalsrätt. Avtalslagen § 33 rättstillämpningen. Oikeustiede — Jurisprudentia 1978, pp.35-88. (Wilhelmsson 1978)*

*Wilhelmsson, Thomas: Good faith and the duty of disclosure in commercial contracting – the Nordic experience. In Good faith in contract. Concept and context. Edited by Roger Brownsword, Norma J.Hird and Geraint Howells. Suffolk 1999. (Wilhelmsson 1999)*

*Wilhelmsson, Thomas: Litteratur - Sacharias Votinius, Varandra som vänner och fiender – En idékritisk undersökning om kontraktet och dess grund, Stockholm Symposium 2004, 349. Svensk Juristtidning 4/2005 pp.439-448. (Wilhelmsson SvJT 4/2005).*

*Woxholth, Geir: Avtalerett. 6.utgave. Oslo 2006. (Woxholth 2006)*

*Ämmälä, Tuula: Lojaliteettiperiaatteesta eräiden sopimustyyppien yhteydessä. In lojaliteettiperiaatteesta. Vastapuolen edun huomioon ottamisesta eri oikeuden aloilla. Edited by Ari Saarnilehto. Turku 1994. (Ämmälä 1994)*

NJA 1998 p.520

**Court cases**

NJA 1998 p.852

NJA 2005 p.608

**Finland**

KKO 1985 II 29

KKO 1992:165

KKO 1993:130

KKO 1999:19

KKO 2005:127

KKO 2007:72

KKO 2008:91

**Norway**

Rt.1919 p.494

Rt. 1984 p.28

Rt. 1988 p.1078

Rt. 1994 p.775

Rt.1995 p.1460

Rt.2004 p.1256.

**Sweden**

NJA 1978 p.147

NJA 1983 p.332

NJA 1990 p.264

NJA 1990 p.745

NJA 1991 p.808

NJA 1993 p.188

NJA 1997 p.524

**Denmark**

UfR 1981.295 H

UfR 1981.300 H

UfR 1982.4 H

UfR 1989.622 SH

UfR 1995.366 H

UfR 1997.974 H

UfR 2001.1293 H

## Other

Esso Petroleum Co Ltd v Mardon [1976]

## List of abbreviations, statutes and translation notes

- AftL (aftaleloven) = Lov om aftaler og andre retshandler på formuerettens område (lovbekendtgørelse nr. 600 af 8. september 1986) (Contracts Act)
- AvtL (avtalslagen) = Lag (1915:218) om avtal och andra rättshandlingar på förmögensrättens område (Contracts Act)
- AvtLo (aftaleloven) = Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljесerklæringer. (LOV-1918-05-31-4) (Contracts Act)
- KBL (Købeloven) = Lov om køb (lovbekendtgørelse nr. 237 af 28. March 2003) (Sale of Goods Act)
- KL = Kauppalaki (27.3.1987/355) (Sale of Goods Act)
- KjøpsL (kjøpsloven) = Lov om kjøp (LOV-1988-05-13-27) (Sale of Goods Act)
- KöpL (köplagen) = Köplag (1990:931) (Sale of Goods Act)
- Lag [1991:351] om handelsagentur (Act on Commercial Representatives and Salesmen)
- Lag [1990:409] om skydd för företagshemligheter (Act on the Protection of Trade Secrets)
- Lov om handelsagenter og handelsreisende (agenturloven) (LOV-1992-06-19-56) (Act on Commercial Representatives and Salesmen)
- Lov om handelsagenter og handelsrejsende (handelsagenturloven) (LOV nr 272 af 02/05/1990) (Act on Commercial Representatives and Salesmen)
- OikTL (oikeustoimilaki) = Laki varallisuusoikeudellisista oikeustoimista (13.6.1929/228) (Contracts Act)

Työsopimuslaki (26.1.2001/55) (Employment Contracts Act)

Vakuutusopimuslaki (28.6.1994/543) (Insurance Contracts Act)

Vahingonkorvauslaki (31.5.1974/412) (Tort Liability Act)

Velkakirjalaki (31.7.1947/622) (Promissory Notes Act)

Individual laws are referred to with their national names. When discussing all of the Nordic Contract Acts as a whole (OikTL, AvtL, AvtLo, AftL), the term *Contract Act(s)* will be used. The term *Trade Act(s)* will be used for the trade laws (KBL, KL, KjøpsL, KöpL).

## **Other documents**

HE 241/2006 Hallituksen esitys luottotietolaiksi

SOU 1979:36: Konsumenttjänstlag. Betänkande av konsumenttjänstutredningen

Regeringens proposition: 1984:85 110 Om konsumenttjänstlag

## 1. Introduction

De nordiska avtalslagarna bygger på en presumtion som ofta är felaktig, nämligen den att avtalet är en samverkan mellan två jämställda parter – L.E. Taxell.<sup>1</sup>

The traditional outlook of civil law is somewhat straight-forward: the main rule is the private autonomy of contracting parties and the parties are obliged only by what has been explicitly stated in the contract provisions. The contract provisions are the rules of a contractual relationship, and alongside statutory norms they define how contracting parties must act. Still, in the recent decades, authors in jurisprudence have also debated about the possibility of applying principles and unwritten norms in order to alter contractual relationships.<sup>2</sup> Although this discussion is not the main focus of this study, it indirectly affects its progression. The question of how much the *duty of loyalty* can influence a contractual relationship is linked to this broader debate.

The aim of this study is to compare the notion of the duty of loyalty between the following four Nordic countries: Finland, Sweden, Norway and Denmark. The duty of loyalty is usually defined as a duty of the contracting parties to reasonably consider each other's interests and expectations without unreasonably risking their own. What does it mean to consider the contracting partners interests? What kind of acts does this require, and how does this oblige the contracting parties? These questions form the core of this study, and although giving an unambiguous answer to them might be impossible, it is possible to illustrate and compare the answers given to these questions. Still, it would be impossible to describe all mentions of the duty, since the notion existed (in some form) already in Roman law. This study is delimited to only the last decades.

The next concept one might have to define further is that of *Nordic law*. Generally, the Nordic countries are seen as culturally and socially alike countries with roughly similar legal systems. Nordic (or Scandinavian) law is seen either as a subgroup of civil law or as an independent legal family. Its most common characteristics are the lack of a civil code, although statutory law acts as a basis for most fields of law, and (at least earlier) legislative co-operation. Especially the similar Contract and Trade Acts of the Nordic countries are

---

<sup>1</sup> Taxell JFT 1979 p.493.

<sup>2</sup> Häyhä 1998 pp.123, 129, 140-141.

important for this study, since they form a mostly uniform basis of the Nordic law of contracts.<sup>3</sup>

### 1.1. Nordic law and the method of comparison

The Nordic countries form their own legal culture also in contract law. The specific characteristics of the Nordic law of contracts are its specific emphases on principles in the interpretation of contracts, trust, and the intention of contracting parties, and substance over form.<sup>4</sup> Nordic authors in jurisprudence often refer to each other's texts regardless of which of the countries they originate from. Because of these similarities and correspondences, one might ask if it is necessary to speak of a comparative study rather than a legal dogmatic one. While this might be true, this study takes the outlook that even though the countries' legal cultures are similar, it is possible to find individual differences and aberrations between the countries. It is also easier to systematize the material by country.<sup>5</sup> On the whole, one could say that the opinions and texts of the authors presented in this study can usually be regarded as valid material for jurisprudence in all of the Nordic countries, but one must bear in mind that the histories of the countries and their jurisprudences differ, and their authors emphasize various doctrines and norms dissimilarly.<sup>6</sup>

Comparative law is said to mean observing and explaining similarities and differences between legal systems and cultures, and it can be practiced with a wide range of different methods and styles. To start with, this study focuses on a single notion: the duty of loyalty in contract law. Points of interest of this study are to find similarities and especially differences in the concept of the duty. Therefore, using Jaakko Husa's term, this analysis could be defined as a *micro* comparison. A micro comparison focuses on single norms or legal institutions. It is also partially a *functional* comparison, which means it studies how a particular problem has been solved in different legal systems.<sup>7</sup> Besides these aspects, this study is mostly legal dogmatic in its approach to the duty of loyalty. This means that the

---

<sup>3</sup> Bernitz Sc.St.L vol.50 2007 p.15.

<sup>4</sup> Lindholm NJM 2008 pp.271-272, Bernitz Sc.St.L vol.50 2007 p.21.

<sup>5</sup> Bernitz Sc.St.L vol.50 2007 p.21: "[..] Scandinavian law often has its special features when it comes to the solutions chosen and the substantive rules. However, it is practically never uniform. When looking for the details, always necessary in the application of the law, there are quite notable differences between the exact position of the law on a specific point in the five Nordic countries."

<sup>6</sup> For examples of this see: Björne 2005, Wilhelmsson 1978.

<sup>7</sup> Husa 2013 pp.25-27, 126,145



aim is to find out how the duty of loyalty has been defined and how it can be applied in legal disputes. As a starting point, one can state that the general concept of the duty of loyalty is more or less similar in all of the Nordic countries. Since the legal cultures and the societies of the Nordic countries are similar and in some areas nearly uniform, it is necessary to dig rather deeply into the layers of legal doctrine to find individual differences.

## 1.2. The subject, sphere and structure of this study

Because the duty of loyalty is a broad concept that runs through most areas of contract law, ranging from consumer to commercial affairs, it would be a rather taxing effort to compare the concept in all possible situations and fields. Therefore, some delimitations and specifications for the subject matter are essential. First and foremost, this study will focus on *commercial* contracts, with emphasis on the sale of goods. Other contract types, such as construction, franchising, joint venture, and other co-operation contracts will be discussed in conjunction with certain elements of loyalty, but mostly as examples and without delving too deeply into the details.

Due to the above-mentioned, the following areas of law and contract types will be *excluded*: 1.) Consumer contracts 2.) Labor contracts 3.) Contracts concerning fiduciaries, such as agency, commissions and estate agents etc. 4.) Insurance contracts and 5.) Corporate law. Although the duty is relevant in all of the aforementioned areas, which at times overlap and influence each other, the aim is to give a more focused, general, and universal description about notion of the duty without cluttering the text with profuse details and individual peculiarities. This does present a certain challenge, however, as great part of the source material discusses the duty on a very general level without specifically referring to commercial context, or then *vice versa*, discussing a very specific contract type. Due to this, it is important to note that the citations from the presented authors are usually describing the duty in general and references to commercial context will be specified individually.

The *structure* of this study aims to give a general description of the duty of loyalty in each of the countries examined. First, the countries will be discussed individually. It is common for writers to refer to other authors and court cases from other Nordic countries as source material, which sometimes causes similarity in argumentation. After the introduction, this study is divided into four chapters discussing the individual countries in the fol-

lowing order: Finland, Sweden, Norway and lastly Denmark. Each of these chapters is divided into 6 parts. The first part will focus on the legal basis of the duty. A brief description of the duty's history in legislation and jurisprudence will be given, followed by mentions of the statutes, court cases and law-drafting documents that are associated with duty in the country in question. The second part illustrates how the duty has been defined in jurisprudence. The presentation will include different classifications, descriptions and explanations of how the duty is to be understood in contract law. After this, the question of the function(s) of the duty and its relation to other norms and principles of contract law will be discussed in parts three and four. The goal is to find out how authors in legal science perceive the duty and how much dissent there is concerning its composition. The fifth part of the analyses describes the applications of the duty (e.g. interpretation of contract) and consequences that breaching the duty may give rise to (e.g. liability for damages). After this, some of the more specific elements of the duty will be discussed in part six. These include its influence in different phases of contract (pre-, post- and non-contractual), what kind of contract types are especially sensitive to (dis)loyalty and more specific obligations that are (at least by some authors) said to derive from the duty. After describing the aforementioned countries, the sixth chapter of this study moves on to comparing the countries. The main query is: what is similar, what is different? Is it possible to speak of a common Nordic concept of duty of loyalty? Finally, the last chapter draws the conclusions and analyses the material in two perspectives: one that takes a broad and accepting view to the notion of the duty and another that is more critical towards it.

The material used in this study consists mostly of monographs and articles. The publishing time-period of these texts is not sternly delimited, but the author tries to focus on more recent texts and analyze how the duty of loyalty is viewed at present. Most of the material is from the 90's and time after that. Some court cases are mentioned, but the interest of this study is focused on how these cases are analyzed in jurisprudence. These cases are mostly used as examples, although they have an important role in defining the legal basis of the duty.

### 1.3. Terminology

One of the main issues in conducting a study consisting of multiple countries and judicial systems is defining the used terminology. As this study consists of four different countries, and thus four different languages translated into English, one might say there is a lot of room for confusion. Because of this, the author has settled on translating certain recurrent terms and otherwise just giving an approximate translation with the original term mentioned in brackets. This is due to the fact that a lot of the source material consists of doctoral theses in which authors often name and suggested new terms which usually only (completely) work in the source language.

The paramount term of this study is of course *the duty of loyalty*. In comparing the Nordic countries, it is obvious that the term is quite identical by its common phrasing and meaning: *lojaliteettivollisuus* (fin), *lojalitetsplikt* (swe/no), *loyalitetstpligt* (dk). Some authors also use the term principle of loyalty often with hardly any definition in relation to the duty of loyalty. It seems that these terms are mostly used as synonyms, which is also the case in this study unless stated otherwise. The factually equivalent term for the duty in Anglo-American law is *good faith*. Some writers use the term *good faith* as a synonym or a counterpart for above mentioned national terms of the duty of loyalty.<sup>8</sup> Mähönen states that the term *lojaliteettivollisuus* (duty of loyalty) is somewhat problematic because it is easily confused with fiduciary loyalty of an authorized representative or agents. He claims that in these fiduciary institutions the loyalty is one-sided (agent → principal) whereas good faith is reciprocal. He suggests that using the term *hyvä usko* (good faith) should be preferred in Finland. Also, the term *vilpitön mieli* would be a suitable translation if it was not already used to refer to the *bona fides*-term (discussed in more detail in part 2.3.).<sup>9</sup>

In this study the author has nevertheless chosen to use the term duty of loyalty as opposed to good faith. The fact that Mähönen sees the term loyalty as easily confused with fiduciary relationships is in itself interesting, as some authors describe the duty of loyalty as a comprehensive rule that includes fiduciary relationships along with other areas of law, such as

---

<sup>8</sup> Nysten Haarala 1998 pp.32–33, See also Munukka 2007 pp.125–126, Holm 2004 p.179.

<sup>9</sup> Mähönen 2000 pp.218–219, Saarnilehto 2000 p.130: "Selkeintä olisikin puhua lojaliteettivollisuudesta (esim. Muukkonen 1975) tai yksinkertaisesti lojaliteetista (Mähönen 1998, s.232). Paras termi olisi kuitenkin "hyvän uskon vaatimus". *ibid* p.143. See also Ämmälä 1994 p.4: "Oikeuskirjallisuudessa on katsottu, että lojaliteettiperiaatteen mukainen lojaliteettivollisuus koskisi sopimuspuolia sopimustyyppistä riippumatta." She does not define the difference between the principle of loyalty and the duty of loyalty any further.

labor and insurance law. It would seem that the terms have at least in some sense merged together.<sup>10</sup> As the study will later point out, the concept of the duty of loyalty has for the most part very similar definitions in the Nordic countries. This prompts to ask whether switching from the term of loyalty to good faith in the national or Nordic context is the best alternative. In any case, this justifies the use of the term loyalty in the study at hand.

Another question is the dichotomy between the terms loyal/disloyal (lojaali/epälojaali, lojal/illojal). There seems to be some ambiguity concerning these terms. In this study, the author uses them as counterparts. Actions that are not done according to, or are against, the duty of loyalty are disloyal. This is done also to create distance to the term *bona fides* which is also somewhat blurry in relation to good faith. The term bad faith (*mala fides*) is neither to be confused with disloyalty. Lastly, in order to create a distinction to the Anglo-American concept of “good faith” the term *duty of loyalty* will be used here to refer to the Nordic legal doctrine.

Other terms used for in this study are the more specific loyalty obligations (lojalitetsförpliktelse). These obligations and their definition vary between countries and authors. Rather than discussing these duties individually in their own categories, the author has chosen to divide them into two categories: 1.) specific obligations to contribute and 2.) the duty to disclose. Such divisions do not as such exist in all of the examined countries, and more specific categorizations will be discussed individually. The term of specific obligations to contribute is used among others to describe: the duty to co-operate, the duty to mitigate damages, the prohibition to compete etc. The common denominator for these duties is that they aim to support the effectuation of contract and they have a co-operational character. The second category is used to more specifically describe the duty to disclose that is probably the most discussed aspect of the duty of loyalty in jurisprudence.

---

<sup>10</sup> For examples see Munukka 2007 and Nazarian 2007.

## 2. Finland

### 2.1. The legal basis of the duty of loyalty

In Finnish jurisprudence, it has been said that the duty of loyalty and the idea of contracts as a co-operation of the contracting parties first got a central role in the works of Lars Erik Taxell.<sup>11</sup> Taxell discussed the duty in his textbook *Avtal och rättskydd* from 1972 and later in an article “Om lojalitet i avtalsförhållanden” from 1977. Also, in his article concerning contracting ethics from 1979 he makes an observation that there is a tendency to give more room for moral based evaluations in the law of contracts, and because of the ever increasing complexity of the modern society the legislator has to give the courts more room for assessment inside the boundaries set by statutory law. A contract is no longer solely seen as a conflict of interests and a way to promote individual gains but rather *as a collaboration of the contracting parties*. The duty can also promote the (mostly informational) equality between parties. Because of the aforementioned facts, Taxell sees room for an ethical dimension in contracts. In itself the duty of loyalty is said to promote the fundamental values of equality, collaboration, and reciprocity in contracts.<sup>12</sup>

There is no unequivocal legal definition for the duty of loyalty in Finnish law. Some statutes contain specific provisions that are associated with the duty, but they usually refer to certain specific situations such as an employee’s obligations towards an employer in the Employment Contracts Act (*Työsopimuslaki*, TSL) 13§. Contracting parties also sometimes write contract clauses to include the duty into their contract.<sup>13</sup> Still, even when there are no such specific provisions, there exists a somewhat uniform consensus in jurisprudence that it is in some situations possible to apply an unwritten general rule of the duty of loyalty. This duty is non-discretionary, which means that contracting parties must abide to the duty of loyalty regardless of contract type and whether it is mentioned in contract’s

---

<sup>11</sup> Munukka NJM 2011 p.89 and Muukkonen LM 7/1993 p.1032, Saarnilehto 2000 p.62: a text from Portin is also mentioned. Other Nordic authors also mention Taxell’s works *i.a.* Evald 2001 pp.276-277, Munukka 2007 pp.62-63, Holm 2004 p.30, 81, see also Nazarian 2007 p.313. *Cf.* Votinius 2004, Wilhelmsson Wilhelmsson SvJT 4/2005 p.443.

<sup>12</sup> Taxell JFT 1979 pp.488-489, 498 and Taxell DL 1977 pp.148 – 149, also later Muukkonen states in *ibid* LM 7/1993 p.1040: “Nykyaikainen sopimusoikeus rakentuu käsitykselle, jonka mukaan sopimus on osapuolten yhteinen yritys”, Saarnilehto 2000 pp.69, 84, 129, 165-167. Häyhä DL 3/1996 p.319, Wilhelmsson 1999 p.182. Pöyhönen 2000 p.136

<sup>13</sup> Muukkonen LM 7/1993 p.1035, Tieva LM 6/2009 p.952.

terms. It is also general in a sense that it can apply to all types of contracts, and as mentioned it “transcends” different legal spheres ranging from consumer relations to immaterial law.<sup>14</sup> The statutory norms of the Contracts Act (Oikeustoimilaki OikTL) 33§ and 36§ are often mentioned in conjunction with the duty, although there is no consensus on whether they can be used as a normative basis for the duty (more detailed description of this discussion in 2.3.). In his doctoral thesis about commercial contracts, Tuomas Lehtinen seems to dismiss the question of the legal basis of the duty altogether, justifying its existence with practical necessity. He states:

Teoreettinen kysymyksenasettelu siitä, kyetäänkö tai halutaanko lojaalisuus esittää toimintavelvollisuutena tai lainsäädökseen tai periaatteeseen perustuvana itsenäisenä tai epäitsenäisenä velvoitteena, ei ole kovin hedelmällinen. Lojaalisuus on yleinen sopimusoikeudellinen ja varsinkin liikesopimustoimintaan liittyvä toimintatapa.<sup>15</sup>

Since the duty of loyalty is not statutorily defined, its legal validity is mostly based on its uniform recognition in the legal doctrine and due to it being mentioned in some law-drafting documents and court cases.<sup>16</sup> It has been discussed in numerous articles and text books but, unlike in Sweden and Norway, no doctrinal thesis exists that would focus solely on the duty of loyalty. Still, many writers have discussed it in detail in conjunction with other themes such as construction contracts.<sup>17</sup> The Supreme Court has explicitly used the term “duty of loyalty” in cases KKO 1993:130, 2007:72 and 2008:91. Ari Saarnilehto has stated that with the case 2008:91 the “breakthrough” of the duty of loyalty has become apparent and court practice has therefore acknowledged the duty.<sup>18</sup> According to Soili Nystén-Haarala, also the courts of first instance and appellate courts have begun applying the duty.<sup>19</sup>

---

<sup>14</sup> Muukkonen LM 7/1993 p.1032, Saarnilehto 2000 p.59, 139, 141, 182, Ämmälä 1994 p.4. Korhonen JFT 4/2006 p.346, Häyhä DL 3/1996 p.320.

<sup>15</sup> Lehtinen 2006 p.82.

<sup>16</sup> Muukkonen LM 7/1993 p.1032, see also p.1033 where he lists writers who advocate the duty of loyalty as a general principle of contract law. He states that the writers in jurisprudence in general accept the principle. Saarnilehto 2000 p.130, Nystén-Haarala 1998 p.34.

<sup>17</sup> See for instance: Rudanko 1989, Halila 1981, Huhtamäki 1993, Lehtinen 2006

<sup>18</sup> Saarnilehto oikeustieto 5/2008 p.4: “[...] lojaliteettivelvollisuuden tai -periaatteen läpimurto sopimusoikeudellisissa ratkaisuissa on nyt totta. Käytännössä on tunnustettu se, mitä kirjallisuudessa on esitetty jo pitkään.”

<sup>19</sup> Nystén-Haarala 2005 p.445.

## 2.2. Definitions for the duty of loyalty

As stated above, there is no exhaustive and/or concrete definition for the duty of loyalty. It is usually defined as: a duty of the contracting parties to reasonably consider each other's interests and expectations without unreasonably risking their own. The duty acts mostly as a guideline, and it is an element to consider in most contracts. The most important aspects of loyalty come from the ideas of common goal, trust and co-operation. Since the duty restrains contracting parties from one-sidedly promoting their own gains, it therefore limits the parties' freedom of contract.<sup>20</sup> Lehtinen divides Taxell's definition of loyalty into a passive (one may not solely promote his/her own interests) and an active (one must in certain boundaries consider his/her contracting partners interests) forms of loyalty. He also describes it as a neutral duty (see chapter 2.6.1 duty in contracting phases for details).<sup>21</sup> Petteri Korhonen describes the duty by stating that the duty of loyalty means loyalty towards the contracts goal, contractual balance, and risk distribution.<sup>22</sup> However, the duty is not without boundaries. Lehtinen points out that loyalty means loyalty within and inside the boundaries of a contract. The parties don't have an unrestricted obligation to help each other e.g. in case of economic difficulties.<sup>23</sup>

At first glance, the Finnish doctrine does not seem to view the duty of loyalty as an especially strong and/or independent principle. It is described as appearing through other principles that are close to it. Such closely related or parallel principles include: the protection of trust (luottamuksensuoja), reasonableness (kohtuus) and the parity of contracting parties.<sup>24</sup> Juha Karhu suggests that the duty is growing towards to being one of the fundamental values of contract law, although as such it does not hold as much weight in the system

---

<sup>20</sup> Saarilehto 2000 p.88 and 129, 166 Saarnilehto et al. 2012 p.76 and pp.123-125, Taxell 1972 pp.81-82, Taxell DL 1977 p.149, Pöyhönen 1988 p.19: The duty of loyalty means that when planning and realizing his/her actions a contracting party must in a certain way and to an extent also consider the interest of his/her contracting partner, Nystén-Haarala 1998 p.34: "The interests of the contracting party must be respected. Loyalty between contracting parties should exist at least to this extent in all commercial contracts, even without any special feature of co-operational relationship." Lehtinen 2006 p.79, Mäenpää JFT 4/2010 p.327: "Therefore, the principle of good faith can be seen as a counter principle to the principle of freedom of contract."

<sup>21</sup> Lehtinen 2006 p.211.

<sup>22</sup> Korhonen JFT 1/2006 p.41.

<sup>23</sup> Lehtinen 2006 pp.81–83.

<sup>24</sup> Ämmälä 1994 pp.16–17, Lehtinen 2006 p.197: "Lojaliteettiperiaate ja lojaliteettivelvollisuus ovat käytännössä vilpittömän mielen "apuinstrumentteja.", See also Korhonen JFT 1/2006 p.40.

of contract law as the principle of the freedom of contract, the interest of trade (vaihdamman intressi), reasonableness, and the protection of a weaker/disadvantaged party.<sup>25</sup> Marko Mononen defines the duty of loyalty solely as a descriptive principle that is used to systematize norms. Thus it cannot be seen as independent grounds for court decisions.<sup>26</sup>

On the other side, there are authors who perceive the duty of loyalty as a broader and more potent principle. Taxell describes it very broadly as a general principle of law (allmän rättsprincip) that can directly affect a contractual relationship.<sup>27</sup> Similarly, Juha Häyhä seems to place more emphasis on the independence of the duty, stating that it should guide the actions of the parties as well as serve as grounds for resolutions in courts.<sup>28</sup> Also Hannu Tolonen seems to consider it as an independent principle.<sup>29</sup> Other descriptions mention it as a contributory principle or a general principle in contract law.<sup>30</sup> The concept of the duty also has its critics who disapprove of it. The duty has, with good reason, been criticized as being vague and problematic, especially in relation to the aspect of predictability. Erkki Aurejärvi states that this vagueness reduces its utility value. Due to its vagueness, it could be seen as applying to any situation, and therefore it lacks definitive meaning. It could also be merged with the terms “honest” or “lawful.”<sup>31</sup>

Lastly, Lars Björne makes a distinction between the *concrete* and the *general* levels of the duty loyalty. By the concrete level of loyalty, he means an obligation to actively pay attention to the other party's interests, which gives rise to certain specific duties such as an obligation to give notice of defects (reklamaatio) and disclosing. This concrete level appears to be a legal dogmatic perspective on the duty loyalty, with its emphasis on the obligations of the parties. By the general level, he means a requirement of honesty and that the parties' actions may not be dishonorable and unworthy, in other words, they must adhere to the

<sup>25</sup> Karhu 2008 p.103, Pöyhönen 1988 p.79.

<sup>26</sup> Mononen 2001 p.164: ”Lojaliteetin aseman tunnustaminen merkitsee sitä, että todetaan joidenkin yksittäisten lainsäännösten asettavan sopijapuolelle tietynlaisen lojaliteettivelvoitteen. Lojaliteettiperiaate ei näin ollen ole itsenäinen ratkaisunormi, vaan yksittäisten normien luonnetta ja tavoitetta kuvaava periaate.”

<sup>27</sup> Taxell 1976 p.456, Taxell 1972 p.82: ”Det er även möjligt att åsidosättandet av lojalitetskravet har den innebörd och den styrka att det i och för sig innebär ett avtalsbrott.”

<sup>28</sup> Häyhä DL 1996 p.320: ”[...] lojaliteetilla on katsottu olevan itsenäinen oikeusnormitehtävä.”

<sup>29</sup> Saarnilehto 2000 pp.185–186: ”On ajateltavissa, että 80-luvulla lojaliteettivelvollisuus ei ollut siinä määrin itsenäinen periaate, että sille haettiin institutionaalista tukea mainitusta lain säännöksestä [OikTL 36]. Nykyään yli kymmenen vuotta [hovioikeuden] ratkaisujen jälkeen on ehkä oletettava lojaliteettiperiaatteen itsenäistyneen kohtuusperiaatteesta. Nykyään on luontevaa ajatella, että samaa juttua voidaan tutkia sekä lojaliteetin että kohtuuden kannalta.”

<sup>30</sup> Nystén-Haarala 1998 pp.125, 134–135. Taxell 1972 p.82.

<sup>31</sup> Aurejärvi LM 7/1993 p.1102 and Aurejärvi LM 8/1989 p.1173: ”«Lojaliteetti», tarkoittaa sananmukaisesti «lainkuuliaisuutta», lojaali henkilö noudattaa lakia eli tekee ”oikein.” See also Häyhä DL 3/1996 p.321,



requirements ethically acceptable behavior. This general level seems to emphasize contracts as co-operation of contracting parties.<sup>32</sup> Björne's view seems therefore divide the idea of the duty of loyalty into the perspective of concrete legal dogmatics and a more general philosophy of law perspective.

### 2.3. The duty of loyalty in relation to other principles and norms

As mentioned, Oikeustoimilaki contains no explicit paragraph(s) of the duty, although some writers such as Tuula Ämmälä, Ari Huhtamäki and Hannu von Hertzen consider the paragraph 33§ as an indirect statutory basis for the duty. However, this sentiment is not shared by all authors.<sup>33</sup> Jukka Mähönen states that one cannot identify 33§ with the duty of loyalty, since 33§ is a normative basis for voidableness, unlike the duty of loyalty that defines the contracting parties obligations during a contractual relationship. Regardless of this, in some cases of the courts of appeal the disloyal conduct of a contracting party has been considered a reason to apply the OikTL 31§ and 33§.<sup>34</sup> Interestingly, Tolonen sees a change in an earlier perception of the legal doctrine that the duty of loyalty is above all based on the concept of good conduct (33§), since nowadays the outlook on the duty has shifted more towards an assessment that contractual relationships are co-operation of contracting parties.<sup>35</sup> This could be interpreted as a statement that 33§ is no longer so fitting point of reference for the duty as it was before.

In order to apply the duty of loyalty, one is required to assess the reasonableness of the parties conduct. Because of this, the relationship between the duty of loyalty and the principle of *reasonableness* is difficult to precisely define. Exercising contractual rights in a way that one-sidedly alters the equivalence of contract can be considered unreasonable, and in addition also disloyal. Reasonableness has its most recognizable expression in the

---

<sup>32</sup> Björne 1994 p.6.

<sup>33</sup> For example Rudanko 1989 p.35, von Hertzen 1983 p.176, Huhtamäki 1993 p.41,65, Pohjonen 1994 p.148, also HE 241/2006 2.1 "Lainsäädäntö: Oikeustoimilain 33 §:n on katsottu olevan ilmaisu yleisemmästä lojaliteettiperiaatteesta." For dissenting opinions see: Muukkonen LM 7/1993 p.1041 and Saarnilehto 2000 p.132. For other writers who support the view see: Muukkonen *ibid.* Nystén-Haarala 1998 p.127: "In the Nordic countries §33 is too narrow a general clause to function as a basis for general loyalty duty." Nevertheless, 33§ is seen as an expression of a general principle that makes it possible to void contracts on the basis of acts contrary to good conduct and good faith, see Wilhelmsson 1978.

<sup>34</sup> Saarnilehto 2000 p.132.

<sup>35</sup> Saarnilehto 2000 p.165.

OikTL 36§ which is said to be the normative basis for the principle of reasonableness (or fairness, equity). Mähönen seeks to separate the two principles by defining the principle of reasonableness as being about adjusting uneven contractual balance caused by differences in the economic power and information between the parties. In comparison to this, the duty of loyalty constitutes specific *obligations to act* in order to assure an adequate consideration of the other party's interests.<sup>36</sup> Mononen points out that although contract equity is not the foremost emphasized aspect of loyalty, it does set some requirements for the duty. This view seems to be somewhat similar as the one stated by Karhu that the duty affects 36§, but mostly as a "background" norm.<sup>37</sup> Tolonen notes that earlier in the 80's the duty might have been viewed alongside the principle of reasonableness, but it can nowadays be considered as an independent principle of law.<sup>38</sup> Muukkonen also considers 36§ and the duty as having influenced the development of the law of contracts in the last decades. Nevertheless, he explicitly states that the duty cannot be linked to any specific statutory norms.<sup>39</sup>

How to distinguish the duty of loyalty from *the bona fides type of good faith* (vilpitön mieli/god tro) has also been one of the topics discussed by several authors. Bona fides is usually defined as honest conduct and/or good faith. Judging whether a person acts in bona fides is usually done by assessing if he/she *knew or should have known* of a fact or circumstances that are relevant to the case in question. Lehtinen separates the duty of loyalty from the bona fides by defining the duty of loyalty as something that demands a *degree of loyal activity or conduct* towards the other party and the bona fides as something that evaluates a person's knowledge and "mental state." Loyalty also means active conduct, not just abstaining from disloyal activity. He suggests that in order for a person to claim to have acted in bona fides, the person giving an expression of intent must show a certain degree of loyalty in his/her actions, but for a person receiving an expression of intent to make such claim loyalty towards the giver is not so particularly relevant. Here the bona fides evalua-

---

<sup>36</sup> Saarnilehto 2000 p.111 and Mähönen 2000 p.226, Although the contract balance may also be evaluated on the basis of loyalty, see Mähönen 2000 p.228: "Kohtuusperiaate ja sen mukainen sovittelu merkitsee taloudellisesti ja tiedollisesti erivertaisen osapuolten aseman ja suoritteiden tapauskohtaista arviointia. Hyvän uskon vaatimus on olennainen osa tätä punnintaa." See also Ämmälä 1994 p.7: "Sopimus ei myöskään saa olla sisällöltään kohtuuton eikä hyvän tavan vastainen. [...] Edellä esitetyn kaltaisissa yhteyksissä ei yleensä ole puhuttu lojaliteettiperiaatteesta."

<sup>37</sup> Mononen 2001 p.294, Karhu 2008 p.104: "[...] pohjoismaisiin sopimuslakeihin sisältyvän yleisen sovittelusäännöksen, lakien 36§, taustalla vaikuttaa näkemys sopimuspuolten lojaliteettivelvollisuuksista toisiaan kohtaan."

<sup>38</sup> Saarnilehto 2000 pp.185–186, see footnote 21.

<sup>39</sup> Muukkonen LM 7/1993 p.1040: "Toisin on asian laita sopimusoikeuden yleisen lojaalisuusvelvollisuuden osalta. Sen voimassaoloa ei voida perustaa eikä tässä tarkoituksessa edes viitata yksittäisiin lainsäädännöksiin"

tion shows dissimilarity between the giver and the receiver. He also views the duty of loyalty as an auxiliary principle of the bona fides; loyal conduct implies bona fides to some extent.<sup>40</sup> Mähönen states, that the common denominator between the bona fides and the duty of loyalty (good faith) is the protection of justified expectations (luottamuksen suoja), but the bona fides is nevertheless a “technical term” that is to be kept separate from loyalty.<sup>41</sup>

Another principle related to the duty is the *protection of a weaker party*. Ämmälä states that certain norms that aim to protect a weaker party also have a loyalty aspect. Nevertheless, the duty of loyalty could be stretched too far if it is viewed to be implied in all the norms intended for protecting a weaker party.<sup>42</sup> Although Lehtinen is generally skeptical towards applying protection of the weaker party to commercial contracts, he states that the protection might have an indirect influence through the duty of loyalty. Since disloyal conduct may lead a contracting party to a weaker position than he/she was in the beginning of the contractual relationship, the protection of the weaker may be realized through the adjustment of contract done on the basis of disloyal conduct. He further states that the duty of loyalty and the protection of a weaker party must still be kept separate from each other. The parties must strive to achieve a common goal, but this does not mean that they should assess each other's weaknesses in order to remove them, for which there is no room in commercial contracts.<sup>43</sup> Tolonen seems to have a broader interpretation of loyalty, as he considers it possible to apply the duty when there is no applicable statutory norm for the protection of a weaker party.<sup>44</sup>

---

<sup>40</sup> Lehtinen 2006 p.183, 197, Mähönen 2000 pp.219–221

<sup>41</sup> Mähönen 2000 pp.222.

<sup>42</sup> Pohjonen 1994 p.148. Ämmälä 1994 pp.21–22.

<sup>43</sup> Lehtinen 2006 p. 245, 249, *ibid.* p.248: if the protection of a weaker party becomes a legal principle, the concept of the prevailing duty of loyalty must also be expanded. Also p.257: in international trade the duty of loyalty is emphasized instead of the protection of a weaker party. See also Mononen 2001 p.165: ”Lojaliteettiperiaatteeseen ei yleisesti sisällytetä erityistä heikomman suojan näkökulmaa. Heikomman suojan yhteydessä lojaalisuus onkin ymmärrettävä hieman eri tavalla. [...] Lojaalisuuden sijaan painotetaan solidaarisuutta. Kyse on vahvemman sopijapuolen velvollisuudesta olla solidaarinen (lojaali) heikompa vastapuolta kohtaan.” and Karhu 2008 p.104.

<sup>44</sup> Saarnilehto 2000 p.182: ”Jos lainsäädännöstä ei ole, voi yleinen lojaliteettiperiaate tulla sovellettavaksi.”

## 2.4. Functions of the duty of loyalty

Taxell's idea of the duty of loyalty as an ethic principle that incites parties to co-operate, as mentioned in part 2.1, is not the only function attributed to the duty. The way the functions of a legal norm are understood affects its application and interpretation practice. This fact makes it relevant to inspect the functions of the duty of loyalty. Karhu states that the duty of loyalty enables one to analyze the norms of the law of contracts. Therefore, it can be used to *justify a resolution* or *used descriptively* to group together various norms in order to give them a common background. This common background can then be used to define and analyze norms, for instance whether a norm should be interpreted restrictively or not. Karhu also describes the duty of loyalty as being on one side connected to the interests of trade through the protection of trust and justified expectations, and on the other, to looking after the contracting partners' interests, and because of this, it is also linked to the notions of contractual balance and equity. He further defines it as a *complex principle* that contains elements from value oriented principles (*arvoperiaate*) and goal oriented principles (*tavoiteperiaate*). Further, it can be illustrated as a "bilateral" principle that connects the contracting parties. The duty supplements and strengthens other principles, such as protection of justified expectations and protection of a weaker contracting party. He also claims that the duty of loyalty is growing towards to becoming one of the constituting principles of contract law.<sup>45</sup>

Another important function attributed to the duty is the *protection of trust* in trade by preventing opportunistic behavior. In order to make especially long-term co-operation contracts work, it is essential that contracting parties consider each other's interests when making decisions and acting. If contracting parties do not trust each other, this usually leads to needs for more detailed contracts and more supervision of one's own rights, which then increase transaction costs. Mononen describes loyalty as solidarity towards one's contracting partner. The goal is to maximize the benefits of a contract for both parties.<sup>46</sup> In this

---

<sup>45</sup> Pöyhönen 1988 p.19, 184. See also *ibid* p.79: Karhu describes the duty of loyalty to be less independent than the other principles of the law of contracts, such as freedom, equity, commercial interests and the protection of a disadvantaged party. The duty of loyalty can be interpreted and defined through and in accordance with the principles of commercial interests and equity. Karhu 2008 p.103, 105. Mäenpää JFT 4/2010 s. 327

<sup>46</sup> Mähönen 2000 pp.213–214, Mononen 2001 p.161, Ämmälä 1994 p.27.

ways, the duty has effects “outside of the court room,” in that it guides the parties’ decision making. The parties themselves should seek ways to consider and take into account each other’s interests, so that the contract bears fruit for both of them.<sup>47</sup> According to Lehtinen, loyalty as a rule: 1.) improves a contracting party’s position during negotiations 2.) increases trust between the parties 3.) supports the fulfillment of contracts and 4.) acts as a repair mechanism for contractual problems.<sup>48</sup>

Häyhä points out that aside from systematizing norms, the duty broadens and steers the perspective of the contractual relationship away from contract provisions. From the perspective of the predictability of contracts, the evaluation of a contractual relationship should encompass not only contract provisions but also the justified expectations of contracting parties. Without the inclusion of the expectations, the parties trust towards each other would be less protected and they would have to write overly elaborate contracts to compensate this. A contract in itself does not always provide necessary means for predictability. Perceiving the duty of loyalty as being based on the expectations of contracting parties would allow adjusting contracts when their provisions don’t match the contracting parties’ expectations, and when the provisions are no longer feasible.<sup>49</sup>

Sopimusta ympäröivä tila ei olekaan ennakoinnin kannalta aivan tyhjä. Ennakoinnin perusta ei olisikaan yksin sopimuksessa, myös sen ympärillä oleva, lojaliteettiperiaatteen kattama alue, voisi olla perustana sopimusoikeudellisesti suojatuille odotuksille.<sup>50</sup> Lojaliteettiperiaate on tullut otetuksi käyttöön tilanteissa, joissa sopimusoikeuden ideaali ei ole sopimustoiminnan todellisuutta. Sopimusoppi on ottanut käyttöön välineen, jonka avulla oikeustila pyritään saamaan todellisuutta vastaavaksi. Todellisuudessa sopimuksen merkitys ennakoitavuuden perustana on vähentynyt.<sup>51</sup>

---

<sup>47</sup> Häyhä DL 3/1996 pp.315, 319, 326–327

<sup>48</sup> Lehtinen 2006 pp.86–87.

<sup>49</sup> Häyhä DL 3/1996 pp.320–325.

<sup>50</sup> Häyhä DL 3/1996 p.319.

<sup>51</sup> Häyhä DL 3/1996 p.323.

## 2.5. Application in contracts and consequences of disloyal conduct

Moving away from the general-level functions the duty may have, this section discusses the specific questions of in what ways a court can concretely apply the duty and to what type of contracts. The specific applications and consequences of the duty must be assessed *in casu*. It has been suggested that the duty could be divided into various more specific obligations or elements, such as the duty to disclose (more about this in section 2.6.2.2). The influence of these elements also varies *in casu*, which makes it difficult to give a uniform definition of how the duty can be applied. During a contractual relationship the duty can give rise to, or create, obligations which were not at all or at least not explicitly mentioned in the contract. This means that due to the requirements of loyalty the obligations the parties have towards each other go beyond the written terms of contract and contract terms do not solely define the way contracting parties are expected to act. In other words, the duty can be applied to *supplement* a contract. For example, contract interpretation in court may lead to a credit agreement being supplemented with an obligation for the debtor to give relevant information about his/her financial state to the creditor on his/her own initiative.<sup>52</sup>

It can be said that the more the parties' interests are entwined the more weight the duty of loyalty has in assessing the parties' actions.<sup>53</sup> On the other side, as Lehtinen points out, obligations stemming from loyalty should not be contrary to those explicitly mentioned in contracts.<sup>54</sup> Ämmälä notes that the duty does not affect all contract types and contractual phases equally, and its concrete meaning and importance varies.<sup>55</sup> One could say that the duty of loyalty is viewed through a contract, rather than the other way around.

Taxell states that the courts have at least three possible ways of applying the duty of loyalty. Taxell's description is quite comprehensive, since these three aspects are generally mentioned by most of the other authors. The first way of implementing the duty is contract

---

<sup>52</sup> Muukkonen LM 7/1993 p.1048, Saarnilehto 2000 p. 129, 167, Saarnilehto et al. p.1166 (an example of the debtors duty to inform). Häyhä DL 3/1996 p.314, Nystén-Haarala 1998 p.128, Pöyhönen 1988 p.19. Taxell DL 1977 p.155 and Taxell 1972 p.82, Ämmälä 1994 p.5, 15 and 24: Especially in the case of a co-operation/joint venture contract the duty of loyalty is seen as an essential part of the contract, even when it is not mentioned in the contract terms

<sup>53</sup> Korhonen JFT 1/2006 p.50.

<sup>54</sup> Lehtinen 2006 p.85: Lehtinen bases this on the *rigor commercialis*-principle that is characteristic for commercial contracts.

<sup>55</sup> Ämmälä 1994 p.8.

*interpretation*, for instance in a case of obscure contract terms. This way a court may restore the contract balance between the parties and their interests. Second, the other norms applied to the case may present the court *possibilities for consideration* on how to restore the balance, for instance in the case of OikTL 33§. Thus, a contract may be declared void according to 31§ or 33§, or adjusted according to the OikTL 36§. The third implementation is the aforementioned supplementing in a “*gap situation*” or a *hard case*, where there are no written norms to be found. In this case the court may come to a resolution by assessing the elements and circumstances of the case and reflect whether the parties have adhered to the duty of loyalty. This way the duty can be used to supplement gaps in legislation and contracts. It ensures that the parties’ interests are taken into consideration in unexpected situations, for example in a legally unclear dispute.<sup>56</sup> In Mähönen’s view the duty of loyalty attains its foremost influence through interpretation of contracts. A neglect from a party to inform the contracting partner of relevant facts may cause the neglecting party to lose his/her right to invoke a (in itself valid) misinterpreted term.<sup>57</sup>

The duty of loyalty has no precisely defined consequence. This means that there is no defined sanction for the party breaching the duty of loyalty. Instead, one must consider the actions that constituted a breach of contract and the situation as a whole. Violation of the duty can at times mean a breach of contract and even fraud (OikTL 33§ & 31§). When a contract is breached because of disloyal conduct, the consequences are the same that a breach of contract generally can have, such as: the cancellation of contract, the reduction of price, the liability for damages (KKO 1993:130) and some contract terms may be considered non-binding and voidable. In some cases the breach of the duty could be considered as a breach of contract in itself, although Mähönen considers this disputed (see also Mononens view in chapter 2.2). This would mean a possibility to effectively invoke the duty for e.g. voidableness of contract, even without invoking one of the OikTL’s norms of voidableness. Since there is no direct consequence for breaching the duty, its effects appear indirectly for example through the application of the OikTL 33§.<sup>58</sup> Whether the duty could constitute an independent basis for voidableness of contracts is therefore unclear.

---

<sup>56</sup> Taxell DL 1977 p.154, see also Saarnilehto p.141, Häyhä DL 3/1996 p.327.

<sup>57</sup> Saarnilehto 2000 p.141, Nystén-Haarala 1998 p.165, 171.

<sup>58</sup> Pöyhönen 1988 p.19, Saarnilehto 2000 pp.141–143: “Periaatteiden [European contract law] mukaan sekä hyvän uskon vaatimuksen että myötävaikutusvelvollisuuden rikkominen on sopimusrikkomus, johon toinen sopimuspuoli voisi vedota. *Suomen oikeus ei ole kiistattomasti samalla kannalla.*” (italicization here), cf. Taxell 1972 p.82, Taxell DL 1977 p.155.

All of the Finnish writers emphasize the duty of loyalty in long-term contracts, and contracts that emphasize co-operation (such as licensing or franchising), and contracts of personal nature (such as a publishing contract). In such contracts, the parties can be seen as dependent on each other, which heightens the need for loyalty. Since long-term contracts are based on mutual trust, a breach of loyalty may often be valid grounds for cancellation of contract, since the breach usually tends to make future co-operation impossible.<sup>59</sup> It is argued that the *pacta sunt servanda*-principle is somewhat inadequate to fulfill the practical needs of long-term contracts. Reasons for this are the need for flexibility in commercial practice and the need to promote co-operation of the contracting parties. The principle of loyalty could be seen as a solution for these problems.<sup>60</sup> Nystén-Haarala suggests that: “in long-term contracting good faith is perhaps the most important principle of all” and that “good faith in LTCs [long-term contracts] can be described as mutual loyalty or trust.” Also, in LTCs mutual trust is a more significant and more flexible principle than the general contract law’s dogmatic, abstract and standardized principle.<sup>61</sup> Tolonen states that the basic form of the duty may be the one attributed to the fundamental obligations of mostly equal parties or unequal professional actors (such as in franchising).<sup>62</sup> Lehtinen point out that loyalty creates a counterweight for strict liability and the sharing of risks in commercial contracts.<sup>63</sup>

Nystén-Haarala sees a distinction between the general contract law’s outlook on contracts and the outlook required in long-term contracts that emphasize co-operation. Her view shows a division between the situations where co-operation is considered part of the fundamentals of contract, and in other situations where it is considered as a secondary, supplementing duty. She states that: “In general contract law thinking, co-operation is treated as a duty. In LTC practice it is more like a *prerequisite, which is not based on duty* (italicization here). In connection with occasional market contracts, the duty to co-operate means merely the duty to inform the other party of a risk of harm. [...] However, mutual loyalty in

---

<sup>59</sup> Muukkonen LM 7/1993 p.1039, see also footnote 49, Muukkonen 1975 p.358, 364. Hemmo 2003 p.53, Saarnilehto 2000 p.88, 131. Ämmälä 1994 p.18, 23. Häyhä DL 3/1996 p.317. Nystén-Haarala p.28 For construction contracts, see Rudanko 1989 pp.47–48, Pöyhönen 2000 p.156.

<sup>60</sup> Häyhä DL 3/1996 p.317

<sup>61</sup> Nystén-Haarala 1998 p.32. Also *ibid* p.35: “All the other principles in LTC practice are actually variations of mutual loyalty (= trust).” See also Ämmälä 1994 p.24 and 45, Nystén-Haarala 2005 p.445.

<sup>62</sup> Saarnilehto 2000 p.183: “Sinänsä lojaliteettivelvollisuuden perustyyppi liittyy ehkä lähinnä yhdenvertaisten osapuolten tai ammattimaisen sopimustoiminnan erivertaisten osapuolten keskeisiin velvoitteisiin (franchising-sopimukset).”

<sup>63</sup> Lehtinen 2006 p.31.



co-operational long term contracts works at a considerable different level than in occasional trade contracts.”<sup>64</sup>

The authors have also discussed whether there exists a *common criterion* in accordance to which the duty of loyalty should be assessed. This common criterion could reduce unpredictability in applying the duty. Muukkonen considers *reasonableness* (kohtuus) a fitting criterion, meaning that parties should consider each other’s interests within reason and reasonably contribute to the fulfillment of contract.<sup>65</sup> Häyhä regards loyalty as an aspect of assessing what the contracting parties expect from their contract. Because of this, he suggests that loyalty should be estimated according to *what is normal in similar situations* and thus predictable. This way it would be possible to mend the otherwise problematic unpredictability caused by the vagueness of the duty of loyalty. It would actually make predictability the main criterion of assessing loyalty and parties’ interests.<sup>66</sup> Korhonen seems also to support this view, stating that: “the protection of trust and its effects on the contracting positions of the parties has a fundamental role in assessing the duty of loyalty. [...] This way, the duty aims to guarantee the fulfillment of the contract’s goal by protecting the trust of the contracting parties.”<sup>67</sup> Lehtinen evaluates the question of the common criterion in relation to a network of contracts (sopimusverkko). He suggests that the criterion for the degree of loyalty required should be the importance which a party’s conduct or actions have *for attaining the goal* of the contract network. Thus loyal conduct should not, on one hand, cause an unreasonable burden for the contracting parties of the network, and on the other, neither unbalance the network.<sup>68</sup>

---

<sup>64</sup> Nystén-Haarala pp.34–35.

<sup>65</sup> Muukkonen LM 7/1993 p.1046 and ibid 1975 p.359.

<sup>66</sup> Häyhä DL 3/1996 pp.324–327. ibid p.324: “Lojaliteettiperiaatteen soveltamista tarkoittavissa ratkaisuihin olisi näistä lähtökohdista arvioituna mahdollista käyttää mittana esimerkiksi sitä, mikä vastaavissa tilanteissa on tavanomaista ja siksi ennakoitavaa. [...] Kysymys on ennakkoinnin kriteeristä.” See also Wilhelmsson 1999 p.184: “The good faith principle can therefore be understood as at least a duty to take into account the legitimate expectations of the other party.”

<sup>67</sup> Korhonen JFT 1/2006 p.43: “Då spelar tillitsskydd och dess verkningar på avtalspositioner (rättigheter/skyldigheter i olika relationer) en grundläggande roll för överväganden rörande t.ex. lojalitetsplikter. [Detta betyder också ett ställningstagande till den önskvärda och typiska riskfördelningen i den ifrågasatta avtalstypen.] Det blir således uppenbart att lojalitetsplikter syftar till att säkerställa genomförande av avtals syften genom att skydda avtalsparternas förtroende.”

<sup>68</sup> Lehtinen 2006 p.215. See also ibid p.86, where Lehtinen states that there is no exhaustive answer. He mentions the golden rule of the bible as an example of a criterion.

## 2.6. Elements of the duty of loyalty

### 2.6.1. The duty of loyalty in different phases of a contractual relationship

The duty of loyalty encompasses contractual relationship as a whole and has various effects in different contracting phases, from negotiations to the actual execution of contract and possible breach of contract. Because of this, the duty of loyalty is usually divided into a pre-contractual or negotiations-phase loyalty and a later contractual loyalty.<sup>69</sup> *Negotiation loyalty* is closely related to the concept of *culpa in contrahendo* that is defined as liability due to negligence under contract negotiations. *Culpa in contrahendo* usually leads to a liability for negative interest, although the concept is not clearly defined in Finnish law.<sup>70</sup> Huhtamäki states that the duty of loyalty can be seen as continuation of the *culpa in contrahendo*, in considering liabilities of parties. He also points out that one of the duty of loyalty's purposes is to prevent contracts ending up being adjusted or void, and this prevention happens already during negotiations.<sup>71</sup>

Loyalty in negotiations is nevertheless seen apart from later contractual or performance loyalty, since during negotiations contracting parties' interests are more conflicting and there is no clearly agreed mutual goal yet. The main rule is that the parties are only responsible for their own costs and risks during the negotiations. Negotiation liability may arise when one party unduly breaks off long-lasting negotiations, since the demand for loyalty for other party grows as the negotiations advance. This is due to the fact that long lasting negotiations usually create justified expectations of closing a contract. The parties should also share relevant information on their own initiative.<sup>72</sup> Lehtinen suggests that during negotiations the duty of loyalty is focused on the contracting partner, whereas during the actual performance phase the loyalty is more focused on the contract itself (and on the other party through the contract). Because of this focus, he calls the latter *a neutral duty* which is

<sup>69</sup> See Muukkonen LM 7/1993 p.1045, Nystén-Haarala pp.17, 121–129, Taxell 1977 pp.150–153, Saarnilehto 2000 p.130, Ämmälä 1994 pp.4–5.

<sup>70</sup> Saarnilehto 2000 p.136, 141, Nystén-Haarala 1998 pp.121–123.

<sup>71</sup> Huhtamäki 1993 pp.39, 65–66: "Lojaliteettiperiaatetta on käytetty samassa tarkoituksessa kuin culpa in contrahendoa ja edellistä voidaan ainakin sopimusneuvottelujen vastuukysymyksiä ajatellen pitää jälkimmäisen jatkeena."

<sup>72</sup> Saarnilehto et al. 2012 p.389, Halila 1981 p.47, Nystén-Haarala 1998 p.122, 127, Ämmälä 1994 p.5, Hemmo 2003 p.211, Halila 1981 p.47: "Sopimusoikeudessa ei voida sivuuttaa roomalaisoikeudellista caveat emptor-kantaa. Lojalisuusvelvoitteen tarkastelussa on erotettava ne tilanteet, joissa osapuolten edut ovat selvästi ristiriitaiset ja ne, joissa sopimuksen tekemisen jälkeen kummankin tulee myös valvoa toisen etua, jotta molempinpuolista etua vasten sovittu sopimus voitaisiin asianmukaisesti täyttää."

seen as loyalty to the contract. In case of contract networks, the duty of loyalty may oblige a party to act loyally towards others than just one, or the most direct, contracting partner. For instance, a mandatee may have obligations towards the other parties of the net than just the mandator (see KKO 1999:19). This is due to the fact that the parties must act loyally to fulfill the goal of the contract network, which can include more than just performing the obligations explicitly mentioned in the contract.<sup>73</sup>

The duty of loyalty protects the justified expectations of contracting parties already before the closing of contract. In this way it closes the gap between the state of a non-binding contract, in which there are no contract terms to protect the expectations of the parties, and the state of the actual contractual relationship. Häyhä suggests that this way the duty also prevents the kind of thinking that expects all possible things to be regulated in the contract terms.<sup>74</sup> Although the division between pre-contractual and actual contracting-phase loyalty seems to be generally acknowledged, Nystén-Haarala suggests that the division between these phases is not absolutely necessary, since loyalty should have a broader interpretation.<sup>75</sup> Tieva suggests that in long-term contracts the duty can also extend to the moment the contractual relation ends and even *after* that time. This would mean that the parties should consider each other's interests even after the contractual relationship e.g. concerning confidential facts that they were not allowed to express during the contractual relationship.<sup>76</sup>

---

<sup>73</sup> Lehtinen 2006 p. 83 See also *ibid.* pp.211-212 Lehtinen describes loyalty in a net of contracts (sopimusverkko) as loyalty towards the contract. This way, the participants of the net do not need to ponder on the object or the subject to whom the loyalty is directed. The object of loyalty is the contract itself. *ibid.* p.332. KKO 1999:19: "Toimeksisaajalla voi kuitenkin olla toimimis- tai tiedonantovelvollisuus myös toimeksiantajan sopimuskumppania kohtaan esimerkiksi oman menettelynsä tai tehtävän sisällön perusteella taikka muutoin tehtävän suorittamiseen liittyvistä olosuhteista johtuen." See also KKO 1992:165.

<sup>74</sup> Häyhä DL 3/1996 p.322.

<sup>75</sup> Nystén-Haarala 1998 p.128: "The division into preliminary and performance phases can only have a guiding effect. Loyalty does not necessarily have to be different during different phases. It has to be interpreted as a complex constructed on various principles." *cf.* Halila 1981 p.47: "[...] on tärkeää tehdä ero lojaalisuusvelvollisuuden osalta sopimuksen tekovaiheessa ja sen jälkeen."

<sup>76</sup> Tieva LM 6/2009 p.951, see also Tieva DL 2/2006 p.248. Tieva also compares loyalty with the "trust-principle" (luottamusperiaate), stating that in contract law the duty of loyalty is more binding than the trust-principle, *ibid.* pp.249-250. What this actually means is nebulous, as the meaning of the trust-principle is left somewhat unclear, see p.245.

### 2.6.2. Obligations stemming from the duty of loyalty: two perspectives

There are two dissenting views about the more specific categorizations and elements of the duty of loyalty. One can either: 1.) see the duty to disclose and other specific obligations as being part of the duty of loyalty or as its subcategory etc. or 2.) as separate and independent duties and obligations. The first option means therefore that the notion of the duty of loyalty means, and refers to, not only the “general” duty of loyalty (a duty for contracting parties to consider each other’s reasonable interests) but also to a wider group of more specific obligations. This would make the duty a *superordinate term for more specific obligations*, and in addition the duty could be divided into more specific obligations. The second option means a division between the “general” definition of loyalty and the independent specific obligations, so that the concept of the duty loyalty would only denote a duty for contracting parties to consider each other’s reasonable interests. Other obligations, such as mitigating damages and the duty to disclose, would therefore be separated from its concept. A third way to define the concept of the duty presented in jurisprudence is to separate the general aspect of the duty from specific duties on the basis of whether the norm is based on statutory legislation (specific) or the non-statutory principle of loyalty (general).<sup>77</sup> This seems to be one of the most blurred aspects in the Finnish discussion concerning the duty.

At any rate, Taxell, Ämmälä, Korhonen and Nysten-Haarala (possibly also Björne, Huhtamäki and Tolonen among others) form the group of authors who consider loyalty as a *common term for all of the duties* the parties have towards each other. The duty has different effects in various situations, and it can appear in multiple ways, such as the duty to disclose (tiedonantovelvollisuus), the duty to co-operate, or the duty to contribute (myötävaikutusvelvollisuus) etc. Thus, the duty to disclose and the duty co-operate are only different parts or forms of loyalty.<sup>78</sup> Nevertheless, Ämmälä also states that the specif-

<sup>77</sup> Saarnilehto 2000 p.131, 165.

<sup>78</sup> Saarnilehto 2000 pp.88-89, 131. Taxell 1979 pp.81-82, *ibid* 1977 pp.149-153. Ämmälä 1994 p. 9: “Lojaliteettivelvollisuutta voidaan pitää yleisnimityksenä erilaisille velvollisuuksille, joita sopijapuolella on vastapuoltaan kohtaan. Velvollisuus ilmenee eri tilanteissa ja eri sopimustyyppien osalta jonkin verran toisistaan poikkeavalla tavalla kuten tiedonanto- tai ilmoitusvelvollisuutena.” *ibid* pp.10–12, 45. Nysten-Haarala 1998 p.33: “the duty to co-operate strengthens good faith.” *ibid* p.128, and p.134: “The main point in legal dogmatics is that the principle of loyalty is transformed into duties, the breaking of which is sanctioned.” See also Pohjonen 1994 p.148 and Björne 1994 p.6: “Joskus on suljettu tiedonanto-, reklamointi- ja myötävaikutusvelvollisuus lojaliteettiperiaatteen ulkopuolelle, jolloin periaatteesta on jäänyt jäljelle yleinen vaatimus siitä, että sopimuspuolen on kohtuullisessa määrin otettava huomioon toisen sopimuspuolen edut. Tulen tässä kuitenkin käyttämään *yleisesti hyväksyttyä määritelmää*, joka sisällyttää myös tiedonanto-

ic duties close to loyalty cannot be merged with loyalty in all situations, and when it is possible to refer to a more specific duty one should do so, as they describe the situation better than the vague loyalty. Regardless, in her view the duty to co-operate cannot be wholly separated from the concept of loyalty or disclosing, since it can in some cases be synonymous with the latter two concepts.<sup>79</sup> Korhonen seems to uphold a similar view and take it somewhat further. He criticizes the idea of separating the duty of loyalty from other secondary duties, since defining these duties before assessing a concrete case is not possible. He sees trust (*tillit*) as a common basis and background for the different duties of loyalty, such as informing and co-operation. Because of this common basis, he views it impossible or unfeasible to separate the duty of loyalty from the duty to disclose.<sup>80</sup>

Lehtinen does not state a univocal opinion on the matter, although he also seems to consider the duty as giving rise for some specific obligations. Nevertheless, in concerning the duty to disclose, he makes a division between statutory norms requiring disclosure and norms which “purely” arise from the duty of loyalty. On one side, he states that some specific obligations are derived from the duty of loyalty. The general concept of loyalty would consist of the duty to consider the contracting partner’s interests. The duty to disclose that is purely based on the general duty of loyalty should be kept separate from statutory, contractual or other norms requiring disclosure. If a party has a duty to give or sell information based on a contract provision, then it is to be viewed as an obligation based solely on the contract and not as something derived from the general principle of loyalty. Still, the fundament for evaluating the duty to disclose in a commercial contract is based on the general duty of loyalty.<sup>81</sup> He suggests that the practical relevance of the notion of the duty of loyal-

---

ym. velvollisuudet lojaliteettiperiaatteen piiriin.” (italicization here), Huhtamäki 1993 p.39:

”Lojaliteettivelvollisuuden konkreettinen sisältö ilmenee ainakin kahdella tavalla: tiedonantovelvollisuutena ja huolenpitovelvollisuutena.” See also Häyhä DL 3/1996 p.318, Wilhelmsson 1999 p.168, 182, Pöyhönen 2000 p.136, Mäenpää JFT 4/2010 p.327, 347.

<sup>79</sup> Ämmälä 1994 p.10, 45: ”Kaikkia oikeudellisia ilmiöitä ei voida eikä ole tarpeenkaan selittää lojaliteettiperiaatteen avulla. Useimmiten niistä periaatteista, jotka sisältyvät osana lojaliteettiperiaatteeseen, voidaan käyttää omaa nimitystä tarvitsematta turvautua lojaliteettiperiaatteeseen.”

<sup>80</sup> Korhonen JFT 1/2006 p.51: ”Den allmänna lojalitetsprincipen kan därför vid sidan av den allmänna omsorgsplikten åstadkomma olika biförpliktelser som är nödvändiga för att avtaletssyften och avtalsparternas berättigade avtalsgrundade intressen och förväntningar skall kunna realiseras. Därför är det inte nödvändigt och inte ens möjligt att separera lojalitetsplikter från upplysningsplikter, ty upplysnings-, undersöknings- och lojalitetsplikter grundar sig på samma tillitsrelaterade synpunkter.”

<sup>81</sup> Lehtinen 2006 p.117: ”Tässä esityksessä lojaliteettiperiaate ja siitä johdettava lojaliteettivelvollisuus eri ilmenemismuodoissaan (tiedonantovelvollisuus jne.) ovat osa toimivaa sopimusverkkoa” (italicization here) This could be interpreted so that loyalty is a general term for more specific obligations. Ibid p.120: ”Lojaliteettivelvollisuudet, jotka voidaan johtaa lojaliteettiperiaatteesta, ovat määräytyvät pääsääntöisesti tapauskohtaisesti. Yleisellä tasolla lojaliteettivelvollisuus kattaa sopimosapuolten velvollisuuden ottaa

ty is more substantial, if it is not mixed with specific, statutory loyalty-obligations. Viewing loyalty as a principle rather than a statutory norm would give it a greater significance, especially in commercial contracts. If loyalty is only considered a statutory norm, it will not be sufficiently assessed and applied *in casu*, but rather as something within the boundaries of “minimum and maximum.”<sup>82</sup>

The dissenting outlook represented by Muukkonen, Mähönen and possibly Hemmo, among others, perceives the duty as being separate from other obligations which can reasonably be independently defined, such as the duty to disclose. These remaining duties and obligations must be considered as individual contractual duties that are to be kept separate from the duty of loyalty. Muukkonen states that not all occasions where a party is obligated to consider the other party’s interests should be brought under the concept of loyalty. In any case, the duties to disclose (tiedonantovelvollisuus), contribute (myötävaikutusvelvollisuus) and notify of damages (reklamaatio) should be kept separate from the duty of loyalty. He further divides the concept of loyalty into a general duty of loyalty and a specific duty of loyalty. The general duty is a “common principle” in civil law, and its validity is constituted on its above-mentioned uniform acceptance in legal doctrine and law-drafting documents. The term specific duty consists of the written, statutory norms that constitute the duty in certain situations (e.g. TSL 13§).<sup>83</sup> Mähönen agrees with Muukkonen and states that unless the duty is separated from other norms, its independent meaning in itself would become too narrow and its utility value diminished. In addition, speaking of loyalty when there are more specifically defined obligations would blur its concept (e.g. Kauppalaki 17:2.2 is to be separated from loyalty). What remains after these specific obligations are

---

huomioon myös toisen neuvottelu ja sopimuskumppanin etu. Tiedonanto- ja selonottovelvollisuutta on kuitenkin syytä tarkastella itsenäisinä velvollisuuksinaan.” p.121: ”Lojaliteettiperiaatteeseen perustuva tiedonantovelvollisuus tulee siis erottaa säädökseen, sovellettavaan sääntöön tai ohjeeseen taikka sopimusehtoon perustuvasta tiedonantovelvollisuudesta. [...] Kuitenkin liikesopimussuhteessa perustan tiedonantovelvollisuuden arvioinnille luo yleinen lojaliteettiperiaate; tietoa antaessaan liikesopimuksen sopimuskumppani toimii lojaalisti ottamalla huomioon myös toisen sopimuskumppanin tai osapuolen edusta.”

<sup>82</sup> Lehtinen 2006 p.86.

<sup>83</sup> Muukkonen LM 7/1993 pp.1045 – 1046: ”Lojaliteettivaatimuksella tarkoitan siis sopijakumppanin velvollisuutta ottaa huomioon toisen sopijapuolen intressi ja myös valvoa sitä. Lojaalisuusvelvollisuus on itsenäinen sopimusoikeudellinen velvollisuus eikä sitä saa sotkea sopimusoikeudelliseen tiedonantovelvollisuuteen, myötävaikutusvelvollisuuteen tai reklamaatiovelvollisuuteen, joista oikeudellisina ilmiöinä on omat periaatteet ja ”teoriansa”. Lojaalisuusvelvollisuudessa on vielä erotettava kontrahoimislojaliteetti ja yleinen lojaalisuusvelvollisuus sekä viimeksi mainitusta erityinen lojaliteettivelvollisuus.” *Contra* Nystén-Haarala 1998 s.125 footnote 298:”In spite of Muukkonen’s opinion, the development in Finnish private law seems to be heading towards a broader understanding of loyalty.” Karhu 2008 p.104: ”Lojaliteetille onkin luonteenomaista, että se ei eriydy muista sopimusoikeuden periaatteista tarkkarajaisesti tai yksiselitteisesti.”

separated would then constitute the duty of loyalty.<sup>84</sup> Paradoxically, Ämmälä uses a similar argument to express the opposite view, that is, that if the duty is separated from other proximate obligations its contents and concept could become too narrow.<sup>85</sup> Hemmo criticizes the idea of viewing statutory obligations, such as informing and notifying, as based on the duty of loyalty. One should differentiate between norms that have been statutorily defined and refer to the duty of loyalty only when the source of the obligation is not definite.<sup>86</sup>

The duty of loyalty usually manifests concretely in more specific obligations, such as disclosing and mitigating damages. Although as Korhonen mentions, it may also modify the parties' primary contractual obligations.<sup>87</sup> Though there is no univocal view on whether the duty of loyalty and other obligations, such as mitigating damages and contributing to contract, should be discussed under the concept of loyalty, the next part of the study aims to discuss the more specific duties that the authors in jurisprudence link with the duty of loyalty, in detail. Even the distinction between the duty to disclose and the duty to cooperate (*myötävaikutusvelvollisuus*) is not clear, and what the duty to contribute consists of is also somewhat blurry. Halila states that (at least in the context of construction contracts) the duty of loyalty and the duty to co-operate can often be used as synonyms. The duty to disclose may also be considered an aspect of the duty to co-operate.<sup>88</sup> The following discussion will proceed as follows: first, the obligations that generally aim to aid the fulfillment of contracts' goal and promote the parties' co-operation are discussed under the subtitle *specific obligations requiring contribution to contract*. The contents of the chapter consist mostly of obligations described in Finnish as *myötävaikutusvelvollisuus*. The second part discusses the duty to disclose. It consists mostly of obligations that deal with the

---

<sup>84</sup> Saarnilehto 2000 pp.131–132: "Ensiksi mainitun käsityksen omaksuminen [laajempi määritelmä] johtaisi siihen, että lojaliteettivelvollisuuden sisältö jäisi muista sopimusoikeudellisista säännöistä ja periaatteista riippumattomana ohueksi ja käyttöarvo olemattomaksi. Toisaalta puhuminen lojaliteettivelvollisuudesta on omiaan aiheuttamaan sekavuutta siinä, milloin on todellisuudessa kysymys täsmällisemmin määriteltävissä olevasta velvollisuudesta."

<sup>85</sup> Ämmälä 1994 p.9: "Edellä sanotusta ilmenee, että lojaliteettiperiaatteen (tai lojaliteettivelvollisuuden) sisältöä ja laajuutta ei voida ilmaista täsmällisesti yleisellä säännöllä. Lojaliteettiperiaatteen sisältö saattaa toisaalta jäädä kovin ohueksi, jos se yritetään ehdottomasti erottaa mainituista sitä lähellä olevista periaatteista."

<sup>86</sup> Hemmo 2003 p.55.

<sup>87</sup> Korhonen JFT 1/2006 p.52.

<sup>88</sup> Halila 1981 p.49–50: "Myötävaikuttamisen ja lojaalisuuden käsitteitä voidaan useimmissa tapauksissa käyttää rinnakkain synonyymeinä, vaikka myötävaikuttaminen viittaakin enemmän aktiiviseen ja lojaalisuus ensisijaisesti passiiviseen toimintaan. Tiedonantovelvollisuus on osa myötävaikuttamisvelvollisuutta, jos käsitteet ymmärretään Taxellin tavoin laajassa merkityksessä." see also Mähönen 2000 pp.223–225, Ämmälä 1994 p.10: "Myötävaikutusvelvollisuutta ei voida kuitenkaan aina erottaa lojaliteettivelvollisuudesta tai tiedonantovelvollisuudesta, vaan kysymys on ainakin joissakin tapauksissa ainoastaan eri nimitysten käyttämisestä."

flow of information between the parties (*tiedonantovelvollisuus*). The obligation to notify of defects (reklamaatio) is sometimes discussed separately from the duty to disclose, but here notifying is mentioned under the duty to disclose. What Ämmälä discusses as the duty of fidelity (*uskollisuusvelvollisuus*) will not be specifically discussed here, since it has more to do with company law and labor law.<sup>89</sup>

### **2.6.2.1. Specific obligations requiring contribution to contract**

The duty to co-operate is defined as an obligation to contribute towards effectuating the contract's goal. It aids the attaining of the necessary conditions required for the parties' performances.<sup>90</sup> Regardless whether one views the duty to co-operate as being separate from the duty of loyalty or not, most writes discuss it in conjunction with the general duty of loyalty.<sup>91</sup> Because of this, it is clear that co-operation is at least closely related to loyalty, even if one does not accept them as being a unitary duty. Mähönen, who views them as separate, defines the difference between the concepts of the duty to co-operate (or contribute - *myötävaikutusvelvollisuus*) and the duty of loyalty in that co-operation is primarily about protecting the party's own interests, whereas loyalty aims to protecting the contracting partner.<sup>92</sup>

The narrowest form of loyalty is said to be the *prohibition of chicanery*. Contracting parties are never allowed to (ab)use their rights solely to harm the contracting partner.<sup>93</sup> In a way, this creates a link between the duty of loyalty and the prohibition of the abuse of rights, as Hemmo describes the prohibition of abusing rights as being similar or "parallel" with the duty of loyalty.<sup>94</sup> Another broader example of an obligation to co-operate is mentioned in KL 50§ (buyers' obligation to contribute to contract).<sup>95</sup> Parties must also abstain from resorting to exaggerated means when problems arise and abstain from speculating on the cost of their contracting partner. A minor disturbance does not entitle a party to cancel the contract and one must also consider the interests of the party responsible for the breach

<sup>89</sup> Ämmälä 1994 pp.15–16.

<sup>90</sup> Saarnilehto 2000 p.134, Ämmälä 1994 p.10.

<sup>91</sup> For instance Taxell 1972 p.81, Nystén-Haarala 1998 pp.33–34. Mähönen 2000 pp.223–225, Halila 1981 pp.49–50, Ämmälä 1994 p.10.

<sup>92</sup> Saarnilehto p.134. See also Häyhä DL 3/1996 p.316.

<sup>93</sup> Halila & Hemmo 1996 p.12, Saarnilehto 2000 p.135, Karhu 2008 p.106, Taxell JFT 1979 p.493.

<sup>94</sup> Hemmo 2003 p.56, also Halila & Hemmo p.12.

<sup>95</sup> Lehtinen 2006 p.81.



of contract.<sup>96</sup> The flipside of contribution, namely *passivity*, may also be considered a breach of the duty. The doctrine of creditors delay represents such thinking, since creditor has an obligation to ensure that the debtor can adequately fulfill his/her obligation (such as in the Promissory Notes Act, Velkakirjalaki, 3.3). Another example of passivity is a situation where a party has legitimate reasons to assume that the other party has approved of his/her performance or action. Such legitimate expectations gain protection from the duty of loyalty. This may, for example, apply in the context of construction contracts to an alteration work that has not been refused.<sup>97</sup> Furthermore, contracting parties must abstain from causing damages and strive to mitigate possible damages, including situations where such damages solely befall the other party. In consequence, liability for damages due to a violation of loyalty is usually extended up to the damages that could have been avoided, if the responsible party had acted accordingly. A statutory statement of this rule concerning delicts can be found in the Tort Liability Act (Vahingonkorvauslaki) 6:1.<sup>98</sup>

### **2.6.2.2. The duty to disclose and inform**

The duty to disclose can be described as an obligation to *adequately inform the contracting partner* in a situation where one party has information that is of importance for the common goal of the parties. The aim is to restore the informational equality and equivalency of contracting parties. Not only must a party give relevant information when actually asked to, he/she may also be obliged to give such information on his/her own initiative (see e.g. KKO 2007:72). The existence of this obligation is dependent on whether a contracting party could reasonably achieve this information him/herself and whether the party has more/less expertise on the matter. When one side has an advantage in expertise compared

<sup>96</sup> Rudanko 1989 p.44 e.g. responsible party should in some cases be given a possibility to repair damages. Taxell 1972 p.81: "Lojalitetskravet förutsätter även att part, när en avtalsstörning inträffat, underlåter att spekulera på sin motparts bekostnad."

<sup>97</sup> Saarnilehto et al 2012 p. 229. Rudanko 1989 p.145, Häyhä DL 3/1996 footnote 8, with mention of the OikTL 4§ & 6§). von Herten 1983 p.179.

<sup>98</sup> Rudanko 1989 p.244, 296, Saarnilehto 2000 p.127. Nystén-Haarala 1998 p.34:"Minimizing the loss is already an established classical principle in all commercial relations and in commercial trade law." See also KKO 2005:127: "Tällainen velvollisuus [esittää yksilöidyt vaatimukset] voidaan johtaa kaupan osapuolten välisestä velvollisuudesta toimia vahinkojen rajoittamiseksi ja toisen osapuolen edut huomioon ottavalla tavalla myös kaupasta johtuvassa jälkiselvittelyssä." and KKO 1985 II 29:"Pankki on pantinhaltijana ollut velvollinen mahdollisuuksiensa mukaan valvomaan pantin omistajan Bruunin etua myös myydessään panttia saatavastaan. Pankki on kuitenkin panttaussopimuksen nojalla toimituttamassaan panttihuutokaupassa ilman hyväksyttävää syytä sallinut osakkeiden myynnin huomattavasti alle käyvän arvon ja siten laiminlyönyt huolenpitovelvollisuutensa."

to the other, this may in consequence increase the requirement to inform the other side. Therefore, the duty may fall upon a party that has more information due to his/her professional or specialist capabilities or because certain information is more easily available to him/her. Standard terms are also to be assessed in accordance to the duty of loyalty. This becomes most evident in an obligation to point out possibly surprising and harsh contract terms. Hence, the terms of standard contracts are put aside in favor of the justified expectations of contracting parties.<sup>99</sup>

*The extent of the duty to disclose* varies in different situations, but information that is to be kept secret due to law or a contract provision is naturally not part of the duty. The duty not to express confidential information can also be seen as part of loyal conduct. As a counterweight, in some cases neglecting to inform is not considered disloyal if the other party has neglected his/her duty to investigate e.g. the object of purchase (selonottovelvollisuus). On the flipside, one party's duty to disclose means that the other party is exempted from investigating to a certain degree, since his/her reasonable expectations are protected in a situation where the duty to disclose has been neglected. The requirements for the duty to investigate are also considered to be higher for professionals and experts. In some situations and contract types, it is possible that there is very little or no duty to disclose unless there is a statutory obligation requiring it.<sup>100</sup>

Lehtinen considers international commercial contracts to have such high expectations for expertise that one has to presume that the contracting parties are experts on their fields of trade. If this is not the case, a loyal party could have a duty to inform the other about his/her lack of expertise or knowledge of the trade in question. Aside from this, he mentions that a party should still inform another of legal facts which are essential for the contract, in a situation where the contract is governed by his/her national law that is not familiar to the contracting partner. To be relieved of this duty a party should prove that the contracting partner shows intention to find the required information him/herself, e.g. by con-

---

<sup>99</sup> Saarnilehto et al 2012 p.94, Saarnilehto p.166, 183: although the doctrine of surprising and harsh terms can be understood as being separate from the duty of loyalty, it is often difficult to clearly distinguish them from each other. On p.185, Tolonen states: "Sekä oppi yllättävistä ja ankarista ehdoista että lojaliteettivelvollisuus koskevat usein tiedonantovelvollisuutta." Häyhä DL 3/1996 p.316, 324. Other examples include a vendor's duty to inform the buyer about the object of purchase. Taxell 1977 pp.149–151, 155 (mention of 33§ as basis for disclosure) and Taxell 1972 pp.81–82, Ämmälä 1994 p.7, Huhtamäki 1993 p.66, see also 1993:130. See also Saarnilehto p.133: Mähönen states, that the term duty to disclose should be used only to describe obligations arising from law, court practice and contract terms. When such obligation does not exist, one should examine the situation according to the duty of loyalty.

<sup>100</sup> Ämmälä 1994 p.13, 15, Lehtinen 2006 pp.120–123, Korhonen JTF 1/2006 p.42.

sulting a local lawyer. Concerning the limits of disclosing in international trade, he remarks that there is no loyalty for sale price, meaning that contracting parties are not obliged to inform how and on what grounds their price is or was defined.<sup>101</sup>

Taxell includes the obligation to give notice of defects (reklamation) as a part of the duty of loyalty.<sup>102</sup> Aside from the unwritten general duty to disclose, the duty exists also in statutory provisions, such as in the Insurance Contract Act, and it may also be incorporated into the terms of contract.<sup>103</sup> According to Rudanko, the duty of loyalty becomes evident in building contracts in a form of an obligation of parties to notify each other. This is usually done to limit damages that befall the contracting partner. If an injured party does not notify his/her counter-party who is responsible for the damages about them, this limits the latter party's liability for damages. The said obligation may lapse, if the party has caused the breach of contract intentionally or with gross negligence. Negligence may also be evaluated in accordance with the 30§ of the Contracts Act (deceitful use of misinformation) or 33§ as exploitation of the other party's lack of information, and thus rendering the contract voidable.<sup>104</sup>

---

<sup>101</sup> Lehtinen 2006 p.123, 131.

<sup>102</sup> Taxell 1972 p.82. See also KKO 2005:127 and Karhu 2008 pp.102-103.

<sup>103</sup> Häyhä DL 3/1996 p.315. See also KKO 1993:130.

<sup>104</sup> Rudanko 1989 p.38, Halila 1981 p.47, Saarnilehto 2000 p.135, 142, Saarnilehto et al 2012 p.422, Wilhelmsson 1978 pp.64–66.

### 3. Sweden

#### 3.1. The legal basis of the duty of loyalty

The thought that contracts should be based on co-operation of contracting parties has been discussed in Sweden as well. Generally this means that contracting parties should strive to attain a common goal through their contract. This has been described as being somewhat equivalent to the “golden rule.” In a way, this changes the traditional formal view of contracts considering what and how a party must perform to a more contextual view: what is to be done in order to fulfill the shared goal of a contract. Aside from this, the duty of loyalty can be seen as protecting contracting parties against unexpected situations and results.<sup>105</sup> The idea behind the duty is that both parties are required to help each other towards gaining as much as possible from their contractual relationship. The goal should be a win-win situation for both and therefore the parties’ co-operation gains a strong emphasis.<sup>106</sup>

The earlier Scandinavian legal realism movement had mostly negative sentiments towards the duty of loyalty and in effect, all rules based on abstract justice. The Swedish legal doctrine and practice was skeptic towards the duty of loyalty for most of the 20<sup>th</sup> century. The duty had been a topic of discussion earlier in Finland than in Sweden, being acknowledged to a degree already in 1970s. Not until later towards the end of the century did it start becoming increasingly acknowledged in Sweden as well. Although previously viewed somewhat unfavorably, the duty has gained support in recent years, and Jori Munukka considers the amount of supporters to be quite considerable at present. He views it clear that Swedish law acknowledges the existence of the duty of loyalty during contractual relationships and also before and after them.<sup>107</sup> Nevertheless, the duty is not usually mentioned explicitly in court cases.<sup>108</sup> Munukka considers the reasons for the growing importance of the duty of loyalty to lie in an increasing tendency to regulate contract types and enact laws

---

<sup>105</sup> Munukka 2007 pp.463-464, also Holm p.42, 55.

<sup>106</sup> Ramberg 2014 p.32, Holm 2004 p.268.

<sup>107</sup> Munukka 2007 pp.2, 53-62, 198, 454-455, 461. Munukka himself puts a lot of emphasis on the duty of loyalty, see *ibid* p.514: “Lojalitetsplikten är en rådgivande avtalsrättslig grundsats.” See also Holm 2004 pp.68-75, 81-82: “ [...] lojalitetsprincipen har fått ett *doktrinärt* genombrott i slutet av 1900-talet i Sverige.” Grönfors 1995 p.39, Regner JT 3/2001-02 p.719: “Lyft fram lojalitetsplikten!”

<sup>108</sup> Munukka 2007 p.61, 192.

with general clauses. Also, the sphere of contractual liability has grown broader and more norms are seen as being based on the duty of loyalty. Because of the latter tendency, even older statutory norms are being viewed in a new light.<sup>109</sup>

Unlike in Finland, the duty has been the subject of several doctoral theses in recent years. The most comprehensive one is probably the thesis of Munukka that discusses the duty in a wide array of situations. Erika Björkdahl has discussed it in conjunction with pre-contractual and contract-external situations. Anders Holm covers the duty on a more general level with more emphasis on its philosophical aspects. Holm mostly uses the term principle of loyalty. Also Sacharias Votinius assesses the duty mostly from a philosophical perspective, as a (central) part of the concept of friendship-based contract-paradigm.<sup>110</sup> Aside from these doctoral theses, the duty is mentioned in most legal textbooks, although not in all. Of course, in this kind of study it is impossible to describe all the aforementioned doctoral theses in the level of detail they would deserve, and some of their aspects have to be condensed in the following discussion.<sup>111</sup>

As in Finland, there is no general statutory legal definition for the duty of loyalty in Swedish law, although mentions of it exist in some law-drafting documents and court cases. The Supreme Court has been somewhat guarded to expressly use the term duty of loyalty (although it is used in case NJA 1990 p.264).<sup>112</sup> More specific statutory norms about the duty of loyalty exist, especially for fiduciary and consumer relationships. These more specific obligations are said to be an expression of the broader, more general duty of loyalty. Some writers also seem to consider them as statutory norms of loyalty.<sup>113</sup> The Avtalslagen

---

<sup>109</sup> Munukka 2007 p.448.

<sup>110</sup> See also Wilhelmssons SvJT 4/2005 p.440: "[Samtidigt visar den också vad] författaren anser vara det centrala elementet i en nutida syn på avtalet som baseras på vänskapsparadigmet: den kontraktsrättsliga lojalitetsplikten."

<sup>111</sup> Munukka 2007 pp.61, 453–456. Ramberg 2014 p.32.

<sup>112</sup> Munukka 2007 pp.61, 192-193, 460. See also the list of court cases stated on *ibid* pp.193-194. For law-drafting documents see e.g. SOU 1979:36 p.186, Prop 1984/85:110 p.39: "Det kan anses vara en allmän obligationsrättslig princip att en part i ett avtal är skyldig att visa omsorg vid uppfyllande av en förpliktelse som han har åtagit sig och att därvid i tillbörlig grad ta till även motpartens intressen." (Proposition for consumer services law), Holm 2004 p.81, 84, See also Munukka NJM 2011 p.90.

<sup>113</sup> E.g. Lag (1991:351) om handelsagentur: 5.1 and 7.1 Munukka 2007 p.207, Norlén 2004 p.150: "När det gäller praktiken ingående och upprätthållande av en avtalsrelation finns en del exempel på lagstiftning som kan ses som en kodifiering av lojalitetsdygden, till exempel KöpL 70 § 1 st [..]". (One might ask how the word dygd (virtue) is to be interpreted here; in any case, probably in a broader sense than just the legal norm of duty of loyalty, see *ibid* pp.123, 133, 135, 244-245) Nicander JT 1/1995-96 p.33: "Som exempel på en uttrycklig bestämmelse om lojalitetsplikt när medkontraheten har presterat i strid med avtalet kan nämnas att en köpare som tagit emot men avvisat gods såsom icke avtalsenligt, enligt 73 § köplagen har en skyldighet att omhändertaga och vårda godset för säljarens räkning."

33§ (Contracts Act, AvtL, Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område) is also mentioned to have a close connection with the duty of loyalty, although according to Munukka it is usually applied more restrictively than its wording would allow.<sup>114</sup>

The established definition for the duty of loyalty is usually that *the parties must consider each other's interests*. Although this does not mean that the parties would in all cases have to diminish their own interests. Further, the duty is a non-codified legal *principle* and can be considered as a reciprocal duty of the contracting parties.<sup>115</sup> Holm further describes it as an ethic principle of law (rättsetisk princip).<sup>116</sup> Munukka describes it as a semi-dispositive duty. The parties may in some cases further define and restrict obligations (e.g. that there is no obligation to disclose in certain situations), although this may not apply to all obligations (e.g. to completely free oneself of the obligation to mitigate damages).<sup>117</sup>

The applicability of the duty in commercial contracts varies due to their heterogeneity. In *commercial context* the duty is described as an obligation to consider the counterparty's interests but without requiring them to be set before one's own (unlike in fiduciary relationships), and thus allowing the parties to further their own goals. Still, provisions that entitle the other party to too one-sided powers might be in a risk of being considered disloyal (e.g. a right to choose all arbitrators or adjust performance, see NJA 1983 p.332). Munukka states that certain law-drafting documents and the legal doctrine speak for the duty's applicability to the sale of goods, and its existence in building contracts (entreprenadavtal) is definite, although it may not be as flexible as in general contract law. As such, the duty of loyalty has gained more influence in commercial contracts and holds a broader function than before.<sup>118</sup>

---

<sup>114</sup> Munukka 2007 p.53. Also *ibid* p.80: Munukka states, that the problem with the *tro och heder* of 33§ is that in Sweden and Finland, it is mostly a subjectively evaluated norm, which makes it troublesome when discussing an objective duty of loyalty. *Ibid*. p.192. See also Holm 2004 pp.89-91. Holm mentions the obligation to inform in conjunction with 33§ and also discusses the Avtalslagen 30§ and 31§.

<sup>115</sup> Munukka 2007 p.1: more accurately he defines it as: A party has an obligation to consider or take charge of the other party's interests. (En part är skyldig att iaktta, eller tillvarata, motpartens intressen). See also *ibid* pp.12, 83, 93, 460-461, 480. Ramberg 2014 p.32. Holm 2004 p.85, 182, 273.

<sup>116</sup> Holm 2004 p.220, 225.

<sup>117</sup> Munukka 2007 p.489, also Holm 2004 p.18.

<sup>118</sup> Munukka 2007 p.195, 395: "I entreprenadavtal får lojalitetsplikt anses råda. [...] Denna plikt är emellertid i avtalets miljö inte fullt lika flexibel som i kontraktsrätten i allmänhet." *Ibid* pp.405-406, 449, 459-460.

### 3.2. Definitions for the duty of loyalty

In his doctoral thesis, Munukka gives the duty several definitions which aim to give it a more definite meaning. He describes the duty of loyalty as a norm of exception (undantagsnorm) and a fundamental principle.<sup>119</sup> He further divides the duty into five more specific definitions: 1.) a safeguard definition (*tillvaratagandedefinition*), which contains an obligation to actively and attentively safeguard/guarantee/secure (*tillvarata*) the other party's interest in the best way available (an example being the duty to warn). 2.) a control definition (*kontrolldefinition*), which requires lower activity and consideration of the other party's interests than the guarantee definition. It forms an obligation to protect, which then sets a demand for certain exercise of control done in the interests of the other party. 3.) a co-operation definition (*Samverkansdefinitionen*) that defines loyalty as a duty to act in order to effectuate the contract. The parties have an obligation to contribute and advance the fulfillment of contract. 4.) a diligence definition (*aktsamhetsdefinitionen*) that requires the parties to abstain from activities or neglect that could cause harm for the contracting partner (obligations such as mitigating damages, confidentiality and prohibition to compete). 5.) an abuse definition (*missbruksdefinitionen*) which constitutes a prohibition of abusing law, expertise or economic superiority to further one's own gains.<sup>120</sup>

None of the aforementioned definitions exclude the others, which means that they are parallel. Their emphasis, importance and effects vary within different contract types. The definitions 1-3 are defined as positive obligations to act and 4-5 as negative obligations to (abstain from an) act, although this does not mean that the positive definitions could not produce obligations with negative effects (e.g. to abstain from an act) or the other way around. How far-reaching obligations these definitions produce cannot be specifically stated. Nevertheless, Munukka considers it possible to give a general ranking of the definitions, in the order mentioned above, with the guarantee definition being the most far-reaching. An exception is the control definition that is a milder variant of the guarantee definition and can't be defined in relation to the co-operation definition.<sup>121</sup>

Munukka also discusses possible *formal criteria* for further defining the duty of loyalty. These could be 1.) it is a *legal* duty (not a purely moral obligation) 2.) It is a *contractual*

---

<sup>119</sup> Munukka NJM 2011 p.91.

<sup>120</sup> Munukka 2007 p.84, 198.

<sup>121</sup> Munukka 2007 p.84.

obligation. This would define a contract as a necessary prerequisite for applying the duty. He criticizes this definition, since the duty is also perceived to apply already during contract negotiations. Munukka suggest that this problem could be solved by defining non-contractual loyalty as its own category or as an analogical application of the contractual duty of loyalty. 3.) *Indivisibility* which means a party cannot have the duty towards several parties at the same time, meaning that loyalty cannot be divided. This interpretation is based on an idea of loyalty defined as debtors' duty to act for the creditors' benefit. Munukka questions this view, stating that it is too narrow of a definition, since it would contain only employment and other fiduciary relationships, and it would exclude the pre-contractual loyalty. 4.) *Reserve rule* criterion (*reserveregelskriteriet*): the duty of loyalty is not codified, so the notion is to be used for referring to non-statutory and other non-established norms. This criterion is also criticized, since it would isolate the already established norms from their loyalty-based evaluation and value background. Viewing the duty as non-codified could also lead to it becoming peripheral. It would also make it difficult to define loyalty as a principle or a comprehensive norm. 5.) *Vagueness* criterion, the duty of loyalty is a vague norm. Already well defined and concrete obligations would not need referring to the vague notion of loyalty, and they should be viewed as independent duties. As with the reserve rule criterion, this criterion can also be criticized since it would lead to the duty becoming peripheral, because the more norms become concrete, the less meaning would be given for the duty of loyalty (“ju mer konkretion, desto mindre lojalitetsplikt”). It would also lead to problems in defining when a norm is well-defined, and separating these norms from their value-oriented loyalty-background could be unwise. The ideas of vagueness and reserve rule criterion should rather be used to define the duty but not as its criteria.<sup>122</sup> It would seem that only the first criterion is fully accepted to describe the duty.

Munukka has further defined three models for various applications of the duty of loyalty. The first one is the entrustment model (*anförtroendemodell*) which applies to fiduciary and employment situations. The advocating party (i.e. agent) must actively work to further the principals' interests and adapt his/her own interests accordingly. The second one is the receiver model (*mottagendemodell*) which applies to consumer relations. In this model a party must consider the other contracting party's interests when effectuating his/her intentions and goals. Unlike in the *anförtroendemodell*, one party has no command over the other, and they both guard their own interests. Still, the consumer is the receiver of the entre-

---

<sup>122</sup> Munukka 2007 pp.86, 198–201, citation from p.201.



preneurs' loyal conduct. These two models are mostly based on the codified norms of the duty of loyalty. The third model of participation (*deltagandemodell*) consists of other contract types, such as the sale of goods, insurance and construction contracts (*entreprenad*). In comparison to the previous two, it is a party neutral model. In this model, the general duty of loyalty is not as explicit as in the two aforementioned ones, and the duty appears through more specific obligations.<sup>123</sup> Since the two aforementioned models are mostly excluded from the subject of this study, only the *deltagandemodell* will be examined in more detail. It has also been discussed whether the duty of loyalty should be defined as loyalty to the contract or loyalty to the contracting partner. Munukka deliberates these views and seems to emphasize the latter option:

Lojalitetsplikten I svensk rätt skyddar avtalsintresset men detta är inte den yttersta gränsen. Den svenska lojalitetsplikten förefaller ändå bäst beskrivas ha motpartsintresset som skyddsändamål.<sup>124</sup>

### 3.3. The duty of loyalty in relation to other principles and norms

Munukka has sought to define the duty of loyalty in relation to other principles of contract law. In order to explain these relations, he speaks of the *requirement of loyalty* (*lojalitetskravet*) as a systematical, general-term above and consisting of: 1.) the duty of loyalty, 2.) the prohibition of the abuse of rights (*rättsmissbruksförbudet*) and 3.) norms of reasonableness/fairness (*skälighetskrav*, manifested through norms such as the AvtL 36§ or The Sale of Goods Act (*Köplag*) 45§). The aforementioned aspects overlap each other and are difficult to exactly define. Loyalty is not solely bound to the contracting parties' wishes or expectations for certain conduct. Rather, it calls for all-around, comprehensive loyal behavior in interpreting and effectuating the contract.<sup>125</sup>

According to Munukka, the *prohibition of the abuse of rights* is not as a concept so commonly acknowledged in Sweden as in Denmark and Norway. Although known, it has not gained a significant position in contract law. The prohibition of chicanery is a form of the abuse of rights, but Munukka states that the latter is an even broader concept. Chicanery

---

<sup>123</sup> Munukka 2007 pp.207–209, 314, 350, 422: although the consumer also has a duty of loyalty towards the entrepreneur, 499.

<sup>124</sup> Munukka 2007 pp.500–501

<sup>125</sup> Munukka 2007 p.12,15,73, 196.

means the (ab)use of right to harm others or illegitimate use of rights. The prohibition of the abuse of rights also encompasses a use of right even when it would otherwise be legitimate but not in proportion to the needs of the party. Because both chicanery and abuse are fundamentally considered disloyal, the prohibition of the abuse of rights can be viewed as a part of the duty of loyalty or the other way around. But since the duty of loyalty has a broader applicability and definition than the doctrine of the abuse of rights, Munukka sees it systematically better to speak of them both under the general term of lojalitetskravet. The prohibition of the abuse of rights can on one side be seen as an individual legal institution and on the other side as a vehicle of expression for the duty of loyalty.<sup>126</sup>

As with the abuse of rights, the requirement of *reasonableness/proportionality* (skälighetskrav) that is usually implemented through the general clause of Avtalslagen 36§, is difficult to unambiguously separate from loyalty. Munukka suggests that the duty of loyalty does not have the same restrictions in its application as the general clause (i.e. reasonable/unreasonable) and that the reasonableness-assessment serves a correcting function (korrigerande funktion), whereas loyalty has a complementary (kompletterande) function. He also suggests that viewing reasonableness through the requirement of loyalty could clarify it as a concept. His view is that loyalty obligations are a complex of norms, which are parallel to the principle of reasonableness in that they both aim to protect the proportionality in contracts. Because of above-mentioned facts, he sees it justified to view the skälighetskrav as a sub-concept under the general term of lojalitetskrav.<sup>127</sup>

Holm has also discussed the AvtL 36§ and the abuse of rights in relation to the duty of loyalty. He too views them linked to each other, since the AvtL 36§ is linked to loyalty through the perspectives of reasonableness, equivalence and justified expectation. On one side, 36§ could be understood as a part of the principle of loyalty and on the other, it constitutes a codified legitimation basis (legitimitetsbas) for the principle. Holm also agrees that the prohibition of the abuse of rights is connected to the duty, especially through the prohibition of chicanery. In this respect, the duty works to prevent speculation on the counterpart's cost and abuse of formal rights. Incidentally, although Holm frequently uses the

---

<sup>126</sup> Munukka 2007 pp.104–105.

<sup>127</sup> Munukka 2007 pp.112–113, 512. Ibid p.125: "Lojalitetskravet som förklaringsmodell kan bereda en bättre grund för förståelsen av skälighetsbegreppet. [...] Godtas synsättet att skälighetsreglerna grundar sig på ett kontraktuellt lojalitetskrav ges en konkret förklaring till skälighetsreglernas existens och räckvidd." Also ibid p.192: "Lojalitetsnormerna kan uppfattas som ett normkomplex som är sidoordnat med skälighetsprincipen och som gemensamt med denna princip syftar att tillförsäkra kontraktuell proportionalitet."

term lojalitetskrav, he does not at any rate explicitly describe it as systematic term like Munukka, nor as being categorically above the two aforementioned elements.<sup>128</sup>

Norlén views the principle of loyalty (and the virtue of loyalty, lojalitetsdygd) as one of the fundamental values (värdegrund) upon which the the AvtL 36§ is constituted (along with the principles of equivalency, vigilance, trust, will and the prohibition of contracts against law and good conduct). In some cases, it can be difficult to state whether a norm or a resolution is based on the will (intent/volition) principle (viljeprincip) or the principle of loyalty or both (Norlén mentions NJA 1997 p.524 as an example). Since the principle of loyalty is mostly oriented towards *guiding the actions* of the parties in relation to each other (handlingsinriktad), he sees it difficult to view contract terms as unreasonable solely based on loyalty-assessment. Similarly, assessing the proportionality of the parties' performances must be done in accordance to the principle of equivalency, not loyalty, although crass disproportionality might be an indication of disloyalty.<sup>129</sup>

The normal consequences for breaching the duty of loyalty in a contract are the ones attributed to a breach of contract in general, such as cancellation of contract or liability for damages. That is to say, a breach of loyalty does not necessarily invoke the AvtL 36§. A long-term contract might be an example of a case, where a breach of the principle of loyalty would be assessed under 36§. In such case, the parties may not be willing to cancel a long-term contract that they still deem salvageable, but it would be unreasonable to expect the party harmed by disloyal conduct to uphold the contract as such.<sup>130</sup>

Munukka states that even though adjusting a contract according to the AvtL 36§ is considered to have a higher threshold in commercial cases than in consumer cases, this does not in itself mean that the same threshold should apply to the other two elements of the lojalitetskravet, since adjusting a contract is the utmost interference to the freedom of contract.

---

<sup>128</sup> Holm 2004 p.56, 103-105, 181, 207: "36§ avtalslagen kan dels förstås såsom en del av den generella lojalitetsprincipen, dels kan den förra i viss mån utgöra en kodifierad legitimitetsbas för den senare." See also Norlén 2004 p.261.

<sup>129</sup> Norlén 2004 pp.246–265.

<sup>130</sup> Norlén 2004 pp.264-265: "Till följd av att medkontrahenten brutit mot ett ur lojalitetsprincipen härlett åtagande, vore det oskäligt mot den drabbade parten att tvingas fullgöra det ena eller det andra åtagandet i oförändrat skick. Alltså är avtalsvillkoret i fråga oskäligt med hänvisning till senare inträffade förhållanden och kan jämkas."

Oskälighetströskeln för jämkning är betydligt högre för kommersiella parter än konsumenter. Riktigt samma nivåskillnad kan inte avläsas beträffande övriga uttryck för lojalitetskravet, vilket kan motiveras med att avtalsrevision är det mest långtgående ingreppet i avtalsfriheten, och därför ett instrument som bör tillgripas med urskillning.<sup>131</sup>

The distinction problem with the term *bona fides* (god tro: to not know or shouldn't have known of a relevant fact) is also mentioned in Swedish jurisprudence. Munukka suggest that this term should be reserved as a technical (tekniskt) concept in relation to a material fact, that is to say, to assess the type of care a subject must exercise in order to gain information of relevant facts, meaning either awareness or "should have known" awareness of a fact.<sup>132</sup> The definition of good conduct/manners (goda seder) in Swedish law is usually used in conjunction with the concept of a contract that is against law or good manners (*pactum turpe*). Munukka states that the duty of loyalty is not seen as the same as the *pactum turpe*, since the former's goal is to prevent misdemeanor by one of the parties, rather than to assess actions taken by the parties together. Neither is the concept of good customs (god sed), which is usually used to describe trade customs and practice, to be confused with loyalty. Good customs have a more collectivistic nature as professional standards than the duty of loyalty. However, the duty of loyalty and commercial ethics are connected to each other and in commercial branches, where the emphasis on the ethicality of actions is high, loyalty should be assessed accordingly.<sup>133</sup>

### 3.4. Functions of the duty of loyalty

Holm discusses the functions of the duty of loyalty by stating that on one side, some obligations aim to assist parties in achieving their contract's purpose, such as obligations that emphasize co-operation. On the other side, the duty acts as a basis for protective obligations (skyddsförpliktelser) which are not directly related to the purpose of the contract, but rather aim to guide the parties' actions by taking into consideration the whole contractual relationship (such as the duty of care). Its third function is to work against the abuse of

---

<sup>131</sup> Munukka 2007 p.459.

<sup>132</sup> Munukka 2007 p.127.

<sup>133</sup> Munukka 2007 pp.128, 132–133.

rights and correcting (korrigerings) unsatisfactory results. Aside from these functions, the duty can also promote dynamicity of the legal system.<sup>134</sup>

Munukka divides the functions of the duty of loyalty in an even more detailed-fashion into: a category or “title” function (rubrikfunktion), a flexibility and correction function (flexibilitets- och korrigeringsfunktion), a materialization function (materialiseringsfunktion), a concretization and supplementing function (konkretiserings- och utfyllningsfunktion), a linking function (sammanbindande funktion), restricting opportunism (opportunistbegränsande funktion), restricting conflicts (konfliktsbegränsande funktion) and restricting damages (skadebegränsande funktion), an activity promoting function (aktivitetsfrämjande funktion), a trust creating function (tillitskapande funktion) and lastly a (possible) function of promoting trade.<sup>135</sup>

The concretization and supplementing function assures that contracts are seen as containing obligations that require consideration for the other party, since writing all-inclusive contracts is impossible. The flexibility function makes it possible to apply loyalty-based rules in situations which the parties’ have not beforehand taken into account. This way it also makes it possible to overcome the formal requirements and the wording of a contract with a more “materially” justified result. Correcting function makes it possible to deviate from an otherwise established solution when it would lead to an unbalanced result. Through the linking function, the duty helps to systematize and ensure the coherence of the legal system and its interpretation. The title function enables one to assess norms with a similar purpose under the concise concept of loyalty. Further, the materialization function makes it possible for certain obligations, e.g. dispositive statutory norms, to be seen as loyalty obligations (lojalitetsförpliktelser). The trust creating aspect ensures protection for the shared intent or trust of the parties, even when such intent is not specifically expressed during the formation of the contract.<sup>136</sup>

Munukka points out that the problems of the duty of loyalty come from the fact that it usually goes against form. Jurisprudence requires (at least to some degree) division between legal and moral norms. Such division is usually realized through form and formal rules. Nevertheless, he points out that it is not necessary for a norm to be thoroughly de-

<sup>134</sup> Holm 2004 pp.180–181, 220.

<sup>135</sup> Munukka 2007 pp.502–506, Munukka SvJT 9/2010 pp.839–844. Holm 2004 pp.55-56: ”Att stå för sitt ord är centralt för såväl good faith som lojalitet, men i än högre grad att inte uppträda opportunistiskt i generell mening.”

<sup>136</sup> Munukka 2007 pp.502-506, Munukka SvJT 9/2010 pp.840-, of trust also Holm 2004 pp.13-14.

finned in order for it to be part of contract law. The broader the consensus on the definition of the duty of loyalty is, the more it becomes integrated into contract law. He also mentions that legal rules are susceptible to a risk of vulgarization. When a legal rule that was earlier based on loyalty-assessment becomes formalized (e.g. reklamation), this can lead to the norm becoming “petrified” in that it loses its contact with its original loyalty-based perspective.<sup>137</sup> Munukka states that the requirement of loyalty (lojalitetskrav, see section 3.3) and the duty of loyalty both act as limits and restrictions to such formalization and the rule of the supremacy of contract. Since the duty can be invoked against explicit contract terms, it can be viewed as being an antagonist and an exception to the rule of the supremacy of contract.<sup>138</sup>

Lojalitetspliktens rättfärdigande kan på ett abstract plan hävdas ligga i sin korrigerande av avtalsfriheten när friheten leder till oönskade, i något avseende samhällsskadliga effekter.<sup>139</sup>

### 3.5. Application in contracts and consequences of disloyal conduct

A contract can be *supplemented* through the application of the duty of loyalty (utfyllning). Munukka considers the supplementing the duty’s most notable function. Supplementing a contract can be done on the basis of dispositive norms (statutes, customs and principles) or in accordance with an individual case’s typical premises or on *in casu* assessment.<sup>140</sup> Munukka states that many of the aforementioned dispositive norms contain obligations which can be perceived as being based on loyalty (lojalitetsförpliktelser). As a consequence of supplementing contracts on the grounds of the duty of loyalty, contracting parties may find themselves bound by obligations that were not explicitly written in their contract. Supplementing gives rise to a certain amount of secondary obligations that complement the pri-

<sup>137</sup> Munukka SvJT 9/2010 pp.844-845.

<sup>138</sup> Munukka 2007 pp.73, 465, 469, 510–511, Munukka NJM 2011 p.101. Munukka SvJT 9/2010 p.843: “Lojalitetsplikten, och lojalitetskravet i sin helhet, kan uppfattas som avtalsfrihetens antagonist. [...] Lojalitetsplikten fungerar som en regulator, som en allmängiltig avtalsrättslig proportionalitetsprincip, en begränsare av avtalsfriheten, särskilt om avtalsfriheten uppfattas på sitt klassiskt stränga affärsmässiga sätt.”

<sup>139</sup> Munukka 2007 p.501

<sup>140</sup> Munukka 2007 p.74, 92, Holm 2004 p.56, 110, 180: Holm mentions a comparison to the ergänzende Vertragsauslegung of German law.

mary obligations of the parties. One could see the purpose of these obligations in protecting contracting parties, even when contract provisions lack such protection.<sup>141</sup>

At the same time this can lead to problems due to the fact that such supplementing is usually unpredictable. Munukka suggests that this could be avoided by considering the supplementing that is based on the duty of loyalty as a way to bring unspoken (but nevertheless intended) obligations to a contract. This would mean an obligation to act as if the obligations were agreed upon, and to interpret the contract and perform by taking account another party's *legitimate expectations* for certain conduct. Despite certain unpredictability in the loyalty-based supplementing, applying the lojalitetskrav also has the benefit that to avoid unfitting consequences judges do not have to stretch the wording of provisions or attempt to construe the will of the parties to fix gaps or to avoid unfitting consequences in litigation. This might be seen as increase in predictability, since the other two aforementioned methods are more *in casu* and therefore unpredictable than the loyalty-based assessment.<sup>142</sup> Holm adds that the supplementing should be linked to the typical expectations that the parties can be assumed to have with a certain (type of) contract.<sup>143</sup>

Votinius discusses the unpredictability aspect by comparing a traditional promise-based principle of contracts (löftesprincip, the contract only obliges to do that which the parties have explicitly promised, focus on textual interpretation) and an equitability-based principle which the duty of loyalty is part of (rättvisepincip, equitability of contracts, all circumstances are to be assessed in contract interpretation). The promise-based view may be the more predictable one when contracts provisions are clear and simply worded, but then again, it is always more or less uncertain how courts judge the wording of contracts. The equity-based interpretation may lead to a different conclusion than the promise-based, but it is not necessarily a more unpredictable one. It is neither possible for contracting parties to describe all conceivable situations that could arise in their contracts, especially in long-term contracts. There is always bound to be some level of uncertainty.<sup>144</sup>

---

<sup>141</sup> Munukka 2007 p.74, 92, 185: "Ändamålet skulle i så fall kunna preciseras som att ge motparten ett skydd trots avsaknad av formell avtalsgrundad rätt till sådan behandling." Ibid 2007 p.458, Holm 2004 pp.2-3.

<sup>142</sup> Munukka 2007 p.93, 468.

<sup>143</sup> Holm 2004 pp.126-127, 221: "Lojalitetsprincipen är starkt associerad till "den befogade tilliten" vilken för närvarande synes vara en av de mest uppskattade förklaringarna till rättsregler, nåde inom kontraktsrätt och skadeståndsrätt." ibid p.254.

<sup>144</sup> Votinius 2004 pp.213, 219, 230, 270-271. See also pp.232-233: Votinius discusses cases in which the courts have applied a promise-based perspective of argumentation, but the ruling has been done on grounds of loyalty.

The duty also affects contractual relationships through *interpretation* and an obligation to interpret the contract loyally can be seen as an individual obligation based on the duty of loyalty.<sup>145</sup> The duty to interpret a contract loyally has many forms and variations. Foremost this means that the parties must carry out and interpret their contractual obligations loyally. One aspect of this is the presumption that a contract is interpreted consistently and neutrally for both parties. It also affects interpretation of opportunistic or inconsistent actions of a party and Munukka suggest that the interpretation of ambiguous terms against the draftsman (*contra stipulatorem*) could likewise be considered as an application of the duty of loyalty. Further, when considering a contracting party's breach of contract, the other party must measure the reasonableness of his/her actions in relation to the breach. This means that the assessment should not be too one-sided. This can be understood as being based on the idea of co-operation within contract and that parties must stay loyal to the goal of the contract. Parties may explicitly include the duty of loyalty into their contract terms, but sometimes contract terms may also indirectly give an expression of a particular demand for loyalty in the contractual relationship. The demand for loyal interpretation of contract can be applied e.g. when a party's interpretation is misleading the other party about facts. Further, if the contractual relationship is explicitly based on the trust between contracting parties, this could then give a party a right to cancel the contract due to a breach of trust. Aside from contract terms, the duty may also affect the interpretation of legal rules.<sup>146</sup> Holm points out that the duty could adjust the interpretation of the *pacta sunt servanda*-principle into a more goal-oriented direction.<sup>147</sup>

There are no generally defined consequences for a breach of the duty of loyalty. They may be defined in contract terms e.g. in case of prohibition to compete. Examples for effects a breach may give rise to, are: liability for damages, cancellation of contract, and voidableness. The liability type of the duty of loyalty can be defined as culpa-liability. The parties must have *reasonable* consideration for the contracting partners' interests.<sup>148</sup> Similar assessment applies to actions taken due to a breach of contract (cancellation or price

---

<sup>145</sup> Munukka 2007 p.74, Holm 2004 p.55, 180.

<sup>146</sup> Munukka 2007 pp.74, 93–98, 457–458. 468, Holm 2004 p.173.

<sup>147</sup> Holm 2004 p.172: "Lojalitetsprincipen skulle kunna påverka tolkningen av pacta sunt servanda i en mer ändamålsorienterad riktning."

<sup>148</sup> Munukka 2007 p.96, 167, 190, 192: "Vad som skiljer lojalitetsbrott och lojalitetsförpliktelser från övriga avtalsavvikelser eller kontraktsförpliktelser kan alltså inte sammanfattas i en enkel formel. Istället får man konstatera att en lojalitetsförpliktelse är en slags kontraktsförpliktelse som kan urskiljas från den snävt formulerade kontraktsuppfyllelsen." Ramberg 2014 p.33. Holm 2004 p.274.



reduction).<sup>149</sup> The consequences for breaching the obligation to disclose vary, except in case of fraud (AvtL 30§). The usual consequence is a liability for damages, but a reduction of selling price may also be possible.<sup>150</sup> Concerning the burden of proof, Munukka mentions a *presumption of loyalty* which means that the party who is claimed to have acted disloyally does not have the burden of proof that his/her actions were in accordance with the duty. The loyalty of a party is presumed, but this does not mean that one could avoid his/her obligations by claiming to have acted loyally. Loyalty does not expunge other obligations.<sup>151</sup>

So as mentioned before, the consequences must be evaluated *in casu*. The type of contract mainly defines the exact obligations arising from the duty of loyalty. By knowing what type of elements a contract type contains, one can also determine how the duty of loyalty affects the contract in question.<sup>152</sup> The duty acts as a guideline or a standard for the parties and in defining more specific obligations.<sup>153</sup> Ramberg suggests that it usually does not have much weight as an independent claim in legal disputes; instead it usually gains most of its influence in legal and contractual interpretation.<sup>154</sup> Munukka discusses this further and states that in cases where a party's obligations are clearly defined by law or contract terms the duty of loyalty appears mostly as lacking of independence. Nevertheless, when this is not the case, the duty may as an independent principle give rise to specific obligations, and thus have an independent influence. It may also indirectly affect regular contract terms by defining them via interpretation and by influencing the type of consequences attributed to them.<sup>155</sup>

---

<sup>149</sup> Nicander 1/1995-96 p.36.

<sup>150</sup> Munukka 2007 p.167.

<sup>151</sup> Munukka 2007 p.475.

<sup>152</sup> Munukka 2007 p.74, 191: "En slutsats som kan dras av detta är att lojalitetsplikten är flexibel men att denna flexibilitet inte är liktydig med rättsosäkerhet eftersom det är relativt klarlagt vilka slags krav som ställs inom avtalstypen och hur dessa krav tillämpas." Munukka SvJT 9/2010 p.837. See also Holm 2004 p.110, 224.

<sup>153</sup> Nicander JT 1/1995-96 pp.32-33, ibid p.32: "Plikten utgör i sig ingen konkret handlingsnorm, utan bildar endast utgångspunkt för hur parten bör förhålla sig till medkontraheten."

<sup>154</sup> Ramberg 2014 p.33, See also Ramberg SvJT 1/2010, in the article, the case NJA 2009 p.672 is interpreted as being unfavorable for the duty of loyalty as an independent norm, p.97: "Mot bakgrund av att lojalitetsresonemang fått så stort utrymme i hovrättens dom, förefaller det närmast som om Högsta domstolen indirekt uttrycker att lojalitet inte utgör en självständig rättsgrund." Cf. Munukka SvJT 9/2010 pp.845-848, Munukka thinks that the case actually speaks in favor of the duty, p.846: "Det är [alltså] en överdrift att uttyda så mycket avståndstagande från lojalitetsplikt ur NJA 2009 p.672, inte minst med beaktande av utgången."

<sup>155</sup> Munukka 2007 pp.488, 490, see also Munukka NJM 2011 pp.93-102, 104.

Certain types of facts attributed to a contract may increase the influence the duty of loyalty has upon it. As usual, it is seen to have an especially important role in *long-term contracts*.<sup>156</sup> These contracts usually demand more co-operation than just a simple momentary transaction. Yet, Munukka seems to be more or less sceptic on how much meaning the element of longevity in itself should have. Longevity by itself may lead to stagnation and inefficiency. He seems to put more emphasis on inspecting the complexity of contracts, along with its intensity and closeness of the parties (e.g. in co-operation contracts, joint venture, franchising) when assessing loyalty. The costs of the acts required by loyalty may also play some role in this assessment, in comparing the proportionality of benefits to costs.<sup>157</sup> Longevity should rather be viewed alongside other loyalty factors:

Långvarighet bör däremot inte tillmätas något värde i sig, utan det är det regelmässiga sammanträffandet av andra erkända faktorer i lånvariga förhållanden som medför skyddsvärde.<sup>158</sup>

Holm emphasizes loyalty in long-term contracts and states that when something relevant happens during the contracting period, it would be disloyal for a party not to work towards adjusting the contract accordingly. He sees the AvtL 36§ as strongly linked to loyalty when it comes to adjusting long-term contracts due to the trust that characterizes the co-operation in long-term contracts. Since a long-term contract is also meant to promote future co-operation, it is not realistic to expect that the parties could extensively define all performances required during the contracting period.<sup>159</sup>

---

<sup>156</sup> Ramberg 2014 p.32, Nicander 1/1995-96 p.33, 35: Nicander mentions the following examples of long-term contracts: licensing, leasing of machines, building contract, retailing of wares, research, technic or other long-term commercial type of co-operation.

<sup>157</sup> Munukka 2007 pp.491–498, see also Nicander 1/1995/96 p.35.

<sup>158</sup> Munukka 2007 p.493.

<sup>159</sup> Holm 2004 p.103-104, 118.

### 3.6. Elements of the duty of loyalty

#### 3.6.1. The duty of loyalty in different phases of a contractual relationship

##### 3.6.1.1. Pre-contractual phase

As in the other Nordic legal systems, the duty of loyalty has effects during the pre-contractual and the actual contracting phases in Swedish law. Generally, the pre-contractual relationship is not as definite as the actual and realized contractual-phase. Although it may be invoked as independent grounds for liability, the duty of loyalty is considered to be somewhat weaker during the pre-contractual phase.<sup>160</sup> Holm states that the pre-contractual requirement of loyalty contains mostly activity or diligence obligations that work towards attaining a certain goal.<sup>161</sup>

It is thought that a party may be liable for damages, if he/she disloyally starts, continues or breaks off negotiations (*culpa in contrahendo*). It is also considered disloyal to start or continue negotiations without an intention of forming a contract. A similar evaluation would probably apply if one starts negotiations only to delay the counterparty's business or to discover trade secrets. The responsible party is liable for the negotiation costs of the other party (negative interest).<sup>162</sup> According to Hellner such liability has been interpreted restrictively in Sweden and to arise, it generally requires that a party has acted disloyally.<sup>163</sup> Björkdahl considers bad faith (*ond tro*) of a party as a requisite for liability.<sup>164</sup>

It is also possible that a party becomes bound to a contract because of his/her *passivity in contract negotiations*. The general rule is that passivity in negotiations does not lead to a party becoming bound by the contract. Still, the fact that a party has a reason to trust that the contract has been established and this false impression is not corrected due to the passivity of the other party who should have understood that his/her contracting partner is mistaken, may exceptionally lead to the contract being considered binding. This type of obligation to notify the counterparty can be found in Avtalslagen 4.2, 6.2 and 9§. Holm states

<sup>160</sup> Munukka 2007 p.431, Munukka NJM 2011 p.96. Regner SvJT 3/2001-02 p.718: "Det finns anledning att anta att även parter som har för avsikt att ingå avtal med varandra anses ha en viss lojalitetsplikt mot varandra." See also the case mentioned in *ibid*, NJA 1978 p.147.

<sup>161</sup> Holm 2004 p.87.

<sup>162</sup> Ramberg 2014 p.68, note that the term disloyal (*illojal*) is somewhat undefined in relation to duty of loyalty, see Munukka 2007 pp.80-83 and p.185. Adlercreutz & Gorton 2011 p.119, Holm 2004 p.100.

<sup>163</sup> Hellner 1993 p.38, NJA 1990 p.745 is mentioned as an example.

<sup>164</sup> Björkdahl 2007 p.144.

that these paragraphs can be seen as expressions of loyalty obligations that apply during contract negotiations. The sanction for going against these norms is that one becomes unwillingly bound to a contract. Also the liability for negative interests is possible.<sup>165</sup> There are also mentions of cases concerning a post-contractual duty of loyalty. Such duty is statutorily defined for commercial agents according to the lag (1991:351) om handelsagentur 32§ (Act on Commercial Representatives and Salesmen).<sup>166</sup> Other examples of a requirement to act loyally could be situations where an item has been left to a party's possession and needs to be returned, or a party has obtained trade secrets during the contractual relationship.<sup>167</sup>

The negotiating parties are generally allowed to break off negotiations when they wish to do so. Nevertheless, the duty of loyalty may set a demand for the parties to *work towards the realization of the contract*. This may mean e.g. that a party may be liable for damages in a case where the realization of the contract is dependent on the party needing an acceptance from a third party (e.g. committee or a board of trustees). Although this generally means that contracting parties should not hold for sure that the contract will be realized, in some cases a party's *justified trust* may be considered as grounds for liability for the other party. The prerequisites for the liability are that a party to acts in a way that constitutes a factual trust for the other party and that in the light of these actions the other party's trust is justified. Lengthy and well proceeded negotiations are one of the factors in considering loyalty, as the obligation to consider the counterparty's interests increases the further the negotiations advance.<sup>168</sup> An obligation to inform the other part of one's weakened economic state has also been discussed in Sweden. Generally such obligation does not exist. Still, according to Munukka there is a tendency in the doctrine to approve of it in some situations, e.g. near bankruptcy situation.<sup>169</sup>

---

<sup>165</sup> Ramberg 2014 p.108, Holm 2004 p.88, Votinius 2004 p.257: Votinius describes AvtL 4.2 and 6.2 as obligations to view oneself in the counterpart's position (sätta sig in den andres situation). See also Björkdahl 2007 pp.295-296.

<sup>166</sup> 32 §: Har agenturavtalet upphört skall agenten, intill dess huvudmannen själv kan bevaka sina intressen, vidta sådana åtgärder som är nödvändiga för att skydda huvudmannen mot förlust, om det inte därav uppkommer betydande kostnad, olägenhet eller ekonomisk risk för agenten. Denne har rätt till skäligen ersättning för åtgärderna. See also Munukka 2007 pp.280-281, Björkdahl 2007 pp.332-336.

<sup>167</sup> Nicander JT 1/1995-96 pp.48-49.

<sup>168</sup> Munukka 2007 pp.425-426, 429: "Majoriteteten förefaller emellertid att anse att en förhandlare kan vara skyldig att verka för avtalets ingående." Björkdahl 2007 pp.330-336, 362-369.

<sup>169</sup> Munukka 2007 p.428, see also Holm 2004 pp.86- Norlén 2004 p.328: "Om parten vid avtalets ingående inser eller bör inse att det finns en påtaglig risk att medkontrahenten inte kommer att få betalt, bör han informera medkontrahenten om det, så att den sistnämnde själv kan värdera risken och ta ställning till om

Björkdahl describes the pre-contractual liability in negotiations (two-party situations) as being dependent on whether the negotiations have proceeded so far, that *one could expect* that the contract will be established, if nothing unexpected happens during the negotiations. The parties are no longer in contact just to explore potential contracting partners and instead aim to establish a contract, and therefore they can rely on that the counterpart does not create unfounded expectations for the contracting. In this situation, the relationship of the parties could be described as contract-like (*kontraktsliknande*), which means that the negotiations are no longer completely non-binding, in that the parties now have an obligation to consider each other's interests, i.e. the duty of loyalty. The duty of loyalty acts as a prerequisite for the liability.<sup>170</sup> Thus one could also view the duty of loyalty as a threshold for liability.

### 3.6.1.2. *Contract-external liability?*

The duty of loyalty has also been discussed in *non-contractual or contract-external situations*. Of course, the general rule is that a third person is not bound by a contract (*privity of contract*), but exceptionally it may be possible to extend the liability for damages to third persons, particularly if the situation is considered contract-like (*kontraktsliknande*). These exceptions are limited and must be evaluated *in casu*.<sup>171</sup> The opinions stated on this matter are often guarded, but some possible situations for loyalty-based assessment have been discussed. One possible situation is when a party tries to circumvent a contract provision. Such situation did arise in the case NJA 1993 p.188, where the court saw that a party tried to circumvent a prohibition to compete by establishing a new company. Munukka analyzes this case and draws the conclusions that the liability of a third party would generally require an intention to circumvent the contract, and that the liable party and the third party are closely connected to each other (e.g. parent and subsidiary company). Another comparable situation could be a case where the third party coerced or caused a contracting party to breach the contract (NJA 2005 p.608). Other possible non-contractual situations mentioned are a bank's obligation to look after third-party interests, e.g. in cases of pledge (NJA

---

han i alla fall vill ingå avtalet." Cf. Björkdahl 2007 p.329: "[...] det inte kan anses föreligga någon skyldighet för en part att upplysa om andra ekonomiska förhållanden än insolvens"

<sup>170</sup> Björkdahl 2007 pp.284-297. *ibid* p.309: "Ansavaret aktualiseras bara av sådana omständigheter som har inträffat efter det att parternas skyldighet att iakttä varandras intressen har inträtt, alltså när lojalitetsplikt föreligger."

<sup>171</sup> Munukka 2007 pp.441, 447. Björkdahl 2007 pp.42, 380, 384.

1998 p.520) or a money transfer to a third party. These obligations could be seen as being based on the duty of loyalty, although it is disputed.<sup>172</sup>

Holm seems to disagree about the idea of the duty of loyalty extending to non-contractual obligations. He argues that the concept should be reserved to describe obligations exclusive to the parties of a contract. Otherwise, using the term loyalty in non-contractual situations would broaden and thus degenerate the meaning of its concept. Still, an act that harms a third party could in some cases be viewed as a breach of the duty of loyalty against the *contracting partner*. In broad terms, if A and B are contracting partners, and C is in contract with B, then harm caused by A to C could be considered disloyal towards B, if the acts also harm B.<sup>173</sup>

Although Björkdahl mentions the duty of loyalty as grounds for liability in negotiation situations, that is to say, in situations where two parties are intending to establish a contract, she states that in *three-party* constellations this view does not apply similarly. Her description of two-party situations is comparable to the pre-contractual situation (see 3.6.1 above), and her description of three-party situations could be compared to the contract-external situation described in this study, although she uses the term *utomkontraktuell* for them both. She describes a three-party situation as an arrangement where A and B are contracting parties, whereas C is in contract with B and not with A. A makes a claim against C due to damages caused by actions of C. She states that since A and C are not in contract and do not aim to establish a contract, one must use other factors (than loyalty) to assess the situation. The prerequisite for liability in this case is that A and C have some sort of

---

<sup>172</sup> Munukka 2007 pp.440-447, 501, 512, p.501: "Lojalitetsplikt själv kan emellertid åberopas som ett argument för att bryta kontraktsvallarna när en part formellt handlat genom annan." NJA 1998 p.520: I det aktuella fallet har banken utan Eurocredits godkännande lämnat ut de pantsatta aktierna till ägaren Morgongåva. Det har lett till att Eurocredit inte fått betalt för sin säkrade fordran på Morgongåva. Banken har därmed blivit skyldig att ersätta Eurocredit för dess förlust oavsett att banken inte kan anses ha stått i något avtalsförhållande gentemot Eurocredit. See also Kleineman 2002 pp.207-225, who discusses the case NJA 1998 p.520 and non-contractual obligations in more detail. Although guarded, Kleineman mentions that some circumstances may affect the assessment of loyalty towards third parties, p.225: "Slutligen kan det nämnas att det påpekats för mig att det kan finnas goda sakskaäl – vid en nyanserad bedömning av utomobligatoriska lojalitetsplikter – att även skilja mellan olika slags plikter, så att upplysningsplikt, vårdplikt och utlämnandeplikt kan aktualiseras i olika grad, beroende på det speciella förhållandet mellan "besittaren" och den rättighetsförvärvande tredje mannen." Cf. Björkdahl 2007 pp.400-402.

<sup>173</sup> Holm 2004 pp.177-179. p.178: "Risken, som jag ser den, är att begreppet *lojalitetsförpliktelse*, i den mån utvecklingen fortsätter som här antytts, riskerar att bli liktydigt med "förpliktelse" i allmänhet, vilket knappast gagnar förståelsen av den rättsliga systematiken med tillhörande begreppsanvändning."

closeness/proximity (närhet) or a collusive co-operation with each other.<sup>174</sup> Thus it could be said that also Björkdahl reserves the term duty of loyalty for contracting partners and pre-contractual situations, not for situations concerning contract-external three-party constellations.

### 3.6.2. Obligations stemming from the duty of loyalty

The duty of loyalty is said to consist of, or link together, a number of different obligations.<sup>175</sup> Holm defines these obligations as a subcategory below the principle of loyalty. The common feature of these obligations is that they oblige a party to consider his/her counterparty's interests and to act with care.<sup>176</sup> Munukka states that aside from supplementing and interpreting contracts through the duty of loyalty (lojalitetsplikt) the duty also acts as a basis for other obligations and duties (lojalitetsförpliktelser), such as obligations to disclose and contribute. In other words, he views such duties and obligations as being based on the more general duty of loyalty. These specific duties are more refined in their definitions and have more specific applications. The specific duties can also be viewed as concrete expressions of the general legal principle of the duty of loyalty which is defined *in casu* through these more specific duties. These obligations are thus an indicative category of obligations that are interconnected by the facts that they express an idea that a contract contains more than just the explicit contract terms and that a party must effectuate these obligations according to the other party's interests. He uses the term specific (särkilda) duties of loyalty for these individual expressions of loyalty and the general duty as a vaguer and broader term. Because of this, some statutorily defined duties (e.g. the duty to disclose) can be well defined and clear in some contract types, and in other cases they might be derived from the general duty of loyalty with almost no clear definition. Also, the

---

<sup>174</sup> Björkdahl 2007 pp.377-384, 402-403, *ibid* p.384: "Att det föreligger närhet ses alltså som en grundförutsättning för att ansvar skall kunna uppstå i förhållande till någon som det inte föreligger en kontraktsrelation till. Om situationen sedan skall kallas för kontraktsliknande eller inte är en smaksak."

<sup>175</sup> Holm 2004 p.1, 56, Munukka 2007 p.135, Votinius 2004 p.253. Regner JT 3/2001-02 p.718.

<sup>176</sup> Holm 2004 p.110, 271: "Denna princip fångar upp ett antal rättsliga normer, vilka har ett gemensamt ratio determinationis."

divisions between the specific duties are somewhat vague and they themselves constitute mostly a loosely cohesive category of duties.<sup>177</sup>

Holm discusses the obligations of loyalty under the title of secondary obligations (*biförpliktelse*), although mentioning that the duty may influence the interpretation of the primary obligations (*huvudförpliktelse*). He states that the division between primary and secondary obligations is not always meaningful and the application of the duty is not dependent on such division.<sup>178</sup> Munukka divides the aforementioned specific duties into: 1.) the duty to co-operate, (*medverkansplikt*) 2.) the duty of confidentiality (*tystnadsplikt*), 3.) the prohibition to compete (*konkurrensförbud*) 4.) the duty to disclose (*upplysningplikt*) 5.) the duty to mitigate damages and 6.) the duty of care.<sup>179</sup>

These duties may appear as *positive* obligations, such as the duty to disclose, or *negative* obligations, such as the duty of confidentiality, and sometimes even as *both*, such as the duty of care. Most of these duties require a contractual relationship between the parties, except for the duty to prevent damages that is also a general principle of law in itself. Munukka states that these individual duties cannot be exclusively defined as secondary obligations (*biförpliktelse*), although they usually appear as such. In other words, e.g. the duty of care can be considered as the primary obligation (*huvudförpliktelse*) in some contracts. According to Munukka, even though one cannot define the specific duties solely as secondary or dependent obligations (*osjälvständig förpliktelse*), they can nevertheless be systematically placed into the category of non-constitutive (for the contract type) and secondary obligations.<sup>180</sup> Although this definition is not exclusive, it can be considered characteristic:

Vad som förefaller utmärka lojalitetsförpliktelser är att de översiktligt betraktat kan uppfattas som förpliktelser i tillägg till de mera konkreta avtalsutfästelserna. De är alltså *vanligen icke-konstitutiva element* eller *biförpliktelser*. Att denna karakterisering inte håller för alla avtal hindrar ju inte att de, i *avsaknad av närmare avtal härom*, i systematiskt hänseende disposi-

<sup>177</sup> Munukka 2007 p.135: "Lojalitetsförpliktelser kan uppfattas som exponenter för lojalitetsplikt, som mera konkreta uttryck än den allmänt formulerade lojalitetsplikten." *ibid* pp.136–137, 201–204, 460, *ibid* p.204: "Lojalitetsförpliktelser utgör en löst sammanhållen kategori med vaga gränser."

<sup>178</sup> Holm 2004 pp.113–114, 173, 180.

<sup>179</sup> Munukka 2007 pp.143–184.

<sup>180</sup> Munukka 2007 pp.185–186, 190–191.



tivt placeras i facket icke-konstitutiva element/biförpliktelser. Förpliktelsernas lojalitetsprägel framträder alltså mot bakgrund av det dispositiva huvudmönstret.<sup>181</sup>

Munukka further categorizes these specific obligations under the above-mentioned five definitions of the duty of loyalty (see section 3.3.) as follows: 1.) The guarantee definition (*tillvaratagandedefinition*) contains the duty to warn (*avrådningsplikt*). It is also related to the fiduciary duties, such as commissions' agents, commercial agents and employees' (in labor law) duty of loyalty. 2.) The diligence definition (*aksamthesdefinition*) contains the duty of confidentiality, the prohibition to compete and the duty to mitigate damages. The duty of care could be placed under either of the two aforementioned definitions. 3.) The abuse definition (*missbruksdefinition*) contains the duty to inform of a hindrance. 4.) The co-operation (*samverkansdefinitionen*) definition contains the duty to co-operate (or contribute, *medverkansplikt*). Pre-contractual loyalty, the obligation to notify of defects and the parties' obligations in the sale of goods and building contracts (e.g. KöpL) could be categorized either under the co-operation definition or the diligence definition or both. 5.) the control definition contains certain post-contractual obligations.<sup>182</sup> An obligation to renegotiate can also be seen as having its basis on, or being an expression of, the duty of loyalty. Holm seems to view it disloyal to abstain from taking measures to adjust a long-term contract in accordance with drastically altered circumstances.<sup>183</sup>

Votinius discusses the different obligations stemming from the duty of loyalty under the titles of obligations: 1.) to position oneself in the other party's situation (*sätta sig in i den andres situation*), 2.) to give important information to the other party and 3.) to act diligently in considering the other's interests. The first aspect sets a requirement for a party to observe what the other party has understood or misunderstood (for example AvtL 4.2 and 6.2). Further, no-one is to profit from another's mistakes or let the other party bear all the risks. This constitutes an obligation to clarify (*klagörandeplikt*). The second aspect constitutes an obligation to disclose (see below in 3.6.2.2.). The third aspect is especially meaningful in fiduciary relationships, but it can also be commonly described as a duty of best

<sup>181</sup> Munukka 2007 p.191.

<sup>182</sup> Munukka 2007 p.198, 232, 270, 285, 314, 379, 395, 405, 432.

<sup>183</sup> Munukka 2007 p.120, Grönfors 1995 p.39, 85, Holm 2004 p.103: "I den mån det inträffat någon betydande avtalsrelevant händelse under avtalstiden, kan det betraktas såsom att inte vara tillräckligt lojal, om part blankt vägrar att medverka till att situationsanpassa avtalsinnehållet." See also Norlén 2004 pp.385-387. Norlén discusses a situation where demanding renegotiations or a change in performance (e.g. more money) would be seen as disloyal or as extortion, *ibid* p.392: "En lojal part utsätter inte medkontrahenten för irrelevanta påtryckningar."

efforts in performance. These obligations may gain more emphasis if one of the parties is considered to be more skilled or a professional.<sup>184</sup>

### ***3.6.2.1. Specific obligations requiring contribution to contract***

*Duty to co-operate or contribute* (medverkansplikt) is usually defined as an obligation *to work towards the fulfillment of the contract's purpose*. This duty contains further-going obligations than just the contractual performance. Some of them also aim to protect contracting parties' business and data, e.g. obligation of confidentiality and prohibition to compete. On the other side, passivity that leads to loss of rights may be seen as an infringement of a duty as well.<sup>185</sup> The co-operation aspect can also be defined more specifically as an obligation not only to perform according to the contract terms but also to act accordingly so that the opposing party can adequately perform his/her obligations and effectuate the contract. The duty to co-operate is usually present in all contracts, although its specific meaning varies between contract types. The KöpL 50§ is mentioned as an example of a statutory norm requiring co-operation. As mentioned earlier, the basic form of the duty obligates the parties to abstain from harming the counterparty and denies the possibility to invoke a self-caused deviation from the contract terms as a breach of contract. It can also manifest as a duty to help (bidragsplikt), to do supplementary work (tilläggsarbete, especially in case of building contracts) or to adjust ones performance in a reasonable ratio so that the other party gains the maximal use from the contract. More specifically, it can also mean a duty to express oneself in an understandable manner to the other party, if the subject matter of the contract is complex. A buyer's obligation to give the seller a chance to repair a flawed object of purchase is also mentioned as an expression of co-operation.<sup>186</sup>

The *duty to prevent and mitigate possible damages* is a general principle in the compensation of damages, but it can also be seen as a form of the duty to co-operate. In accordance with the duty of loyalty, contracting parties must take active measures to prevent damages and abstain from causing them. The duty to prevent damages does not include all damages that are theoretically possible to avoid, but rather the damages that could reasonably be avoided and if a party reasonably attempts to prevent such damages, he/she will not be held

<sup>184</sup> Votinius 2004 pp.256-266.

<sup>185</sup> Munukka 2007 p.143, Munukka NJM 2011 p.102, see also Holm 2004 p.113, 142, Norlén 2004 p.365.

<sup>186</sup> Munukka 2007 pp.143–147, 376. Holm 2004 p.114, Votinius 2004 pp.262–266.

liable for them, even if the attempt is not successful. The preventive measures have to be reasonable in comparison to the possible proportions of damages, since the preventive acts may also sometimes conflict with the interests of the preventing party. This can happen, for instance, when such acts could reduce the party's own goodwill-value. If one party neglects the duty, the right to demand performance from the contracting partner may in turn be limited.<sup>187</sup>

The obligation to mitigate damages may also appear in a situation where one party has endured damages due to other party's breach of contract. In this situation, the former must take reasonable efforts to limit the damages that befall him/her or else the liability of the breaching party may in turn be limited. The duty may also present itself as a duty of care, e.g. in a case of lease where a borrower has an obligation to make sure the object stays in condition during the lease. Disloyal actions in a contractual relationship may also affect the interpretation and evaluation of the contract in court, e.g. if one party misuses the other party's misunderstanding or disloyally invokes a contract provision.<sup>188</sup>

The *duty of confidentiality* (tystnadsplikt) is an obligation to abstain from giving information about the parties' relationship or information that could harm the other party. It is usually considered as a continuous obligation which may eventually expire after a certain time period. It is of course often intentionally written into contracts, and in such cases the provision usually carries post-contractual effects. Pre-contracts and other similar instruments (e.g. letter of intent) can act as a basis for certain amount of loyalty duties. The duty of confidentiality has a connection with loyalty, and it usually obligates the parties to consider each other interests when giving confidential information about the contract to third parties e.g. banks and abstain from abusing such information. There is no general statutorily defined obligation for confidentiality in contracts, but the law concerning trade secrets (Lag [1990:409] om skydd för företagshemligheter) 6§ constitutes a liability for damages for someone using or disclosing trade secrets. Munukka states that it is difficult to draw the line for what is to be considered confidential, but the utmost border for liability must be drawn before facts which a party must give due to his/her (public) legal obligations. On the other side, the more a disclosure could harm the other party, the more weight is put on confidentiality. One must assess the content, truthfulness and the intention of the disclosure.

---

<sup>187</sup> Munukka 2007 pp.167–170. Holm 2004 p.38, 106: Holm discusses similar views under the title *disloyal passivity*. Ramberg 2014 pp.33-34. Votinius 2004 p.266. See also KöpL 70§, Norlén 2004 p.150.

<sup>188</sup> Ramberg 2014 pp.33–34, 157–159.

Criticizing a contracting partner publicly may be seen as a breach of the duty of loyalty and lead to cancellation of contract, especially if the intention is to slander the partner.<sup>189</sup>

The *prohibition to compete* (konkurrensförbud) is similar to the duty of confidentiality, in that it is mostly a continuous negative obligation for a limited time period. It usually constitutes an obligation to abstain from competing with one's contracting partner. It may be agreed upon in a contract, but both Munukka and Holm point out that the obligation may also arise during contractual relationship due to the nature of the contract type in question, even though it is not expressly mentioned in contract terms, or it may in some cases be included on the basis of supplementing or/and interpreting the contract through the duty of loyalty.<sup>190</sup> Holm states that in situations where a contract is supplemented with a prohibition to compete, when assessing its duration one must consider what competition laws and the Avtalslagen 38§ would normally allow as the limit.<sup>191</sup> In fiduciary and employment contracts, it usually has a significant meaning in post-contractual situations. The premise is that the parties are allowed to compete after the contractual relationship has ended. Therefore, a post-contractual prohibition requires that it has been agreed upon in contracting terms.<sup>192</sup>

A commercial sales contract does not normally give rise to a prohibition to compete, although in corporate acquisitions it might be considered disloyal for the seller to immediately establish a similar company after the sale if it considerably undermines the buyer's assumed benefits of the acquisition. Copyright contracts and license contracts may also be assessed similarly. Still, Holm states that considering the freedom of trade, supplementing the contract with a prohibition to compete should be based on at least an *implicit* agreement of such provision, in order to justify the parties' expectations of its existence.<sup>193</sup>

*Duty of care* (vårdplikt) is defined as a duty to take care of property. Such duty generally requires a contractual relationship between the parties to arise, although a prior contract may lead to the duty of care extending for some time after the contractual relationship. It can apply to property, such as real estates and chattel, but also to rights, like a possible

---

<sup>189</sup> Munukka 2007 pp.148–150, Ramberg 2014 p.34, see also Holm pp.101-102, 132, Nicander 1/1995-96 p.34. Björkdahl 2007 pp.341-343, Regner JT 3/2001-02 p.718.

<sup>190</sup> Munukka 2007 pp.151–152, Holm 2004 p.141.

<sup>191</sup> Holm 2004 p.143.

<sup>192</sup> Munukka 2007 pp.283-284,

<sup>193</sup> Holm 2004 pp.158-167: "Undantagsvis torde det kunna dock tolkas in ett mer eller mindre underförstått förbud för säljaren att konkurrera med köparen."

future right of recourse (regressrätt NJA 1998 p.852) or a pledge. The duty applies to entrusted property and non-entrusted property. Further requirements for the duty are that the obligated party has some degree of *control* over the property (e.g. KöpL 72§ and 73§, the norms of Köplagen may also be apply to other contract types via analogy.) and that the other party is *entitled* to the property. This is also the reason why the duty can be seen as part of the loyalty duties, since an owner of property is usually not able to take care of the property as long as it is in someone else's control. Control usually means that the property is in possession of an obliged person, and the duty usually expires when the property is assigned to the owner. An obligation to insure property and an obligation to sell wares that would otherwise lose their value may also be seen as forms of the duty of care. The obligation to sell otherwise deteriorating wares is also linked to the obligation to prevent and mitigate damages.<sup>194</sup>

### **3.6.2.2. The duty to disclose and inform**

The duty to disclose (upplysningsplikt) contains a wide range of different kinds of obligations which usually appear as duties to inform another party of facts or one's own conceptions or impressions concerning certain facts. It has various forms in different statutory norms, contract types, and situations.<sup>195</sup> The circumstances that cause the obligation to arise vary, but one general description is: a party has certain information which he/she knows (or should know) that the counterparty lacks, and knows (or should know) that the information is relevant for the other party in establishing the contract. The questions of in whose control sphere the information lays and how attainable such information generally is also affect the assessment.<sup>196</sup>

---

<sup>194</sup> Munukka 2007 pp.170-179, 184. See also *ibid* p.274, 279: a commercial agent has an obligation to actively look after the principals interests which is based on the duty of loyalty. A statutory norm about the obligation to take care of the principals' property is found in lag (1991:351) om handelsagentur 6.1,1. Ramberg 2014 p.34. Votinius 2004 p.265. See also Holm 2004 p.180. Nicander JT 1/1995-96 p.33: Nicander mentions KöpL 73§ as a particular norm of the duty of loyalty (uttrycklig bestämmelse).

<sup>195</sup> Munukka 2007 p.153, Holm 2004 pp.92-94, 132, Ramberg 2014 p.33, Votinius 2004 p.260, Nicander JT 1/1995-96 pp.33-35. Björkdahl 2007 pp.86-87: Björkdahl notes that some obligations to disclose are indirectly written in statutory norms.

<sup>196</sup> Norlén 2004 p.321: "Det finns ett grundläggande krav på att man skall tillvarata medkontrahentens intressen (vara lojal), bland annat genom att lämna medkontrahenten betydelsefull information." *ibid* pp.323, 325, 338-339, 343-345.

According to Munukka, the duty to disclose could potentially exist in almost all contract types. Its purpose is to guarantee that the contracting partner gets the intended performance and gains benefit from it. A statutory example of the duty can be found in KöpL 19.1,2, which states that a seller may not invoke a “sold as it is” provision, if he/she has neglected to inform the buyer of a relevant fact concerning the goods.<sup>197</sup> Nicander points out that just the fact that one of the parties is considered to be weaker than the other does not constitute a right to be informed solely due to such position. Nevertheless if a party notices that the counterpart does not have the required knowledge or access to relevant information needed to guarantee his/her interests, an obligation to inform may arise for the stronger or more skilled party.<sup>198</sup>

Since the aforementioned definition is vague, Munukka divides the duty more specifically into: 1.) an obligation to give notice (neutral reklamationsplikt), 2.) an obligation to warn (avrådningsplikt) and 3.) an obligation to inform of performance hindrance (meddelandeplikt vid prestationshinder). There is no general duty to inform of *legal facts*, unless a party has been misled or seriously mistaken in which cases a neglect to inform could be seen as disloyal conduct.<sup>199</sup>

A party may be obligated to give notice of defects (reklamation) e.g. damages.<sup>200</sup> Munukka speaks of a *neutral notification (neutral reklamation)* in cases which a party notifies another of his/her breach of contract and a *consequence notification* about the intended actions due to a breach of contract. He states that the duty to give a neutral notification is seen as a general principle in contract law (although its extent varies). It can also be seen as related to the duty of loyalty, since it (at least partially) aims to reduce the damages that could befall the other party. Still, he deliberates whether notifying of defects, especially when it is a strict statutory obligation, can be viewed as being based on the duty of loyalty as certain matters, such as causality between a late notification and its effects on the contracting partner, leave it questionable. A further form of the duty to disclose is the duty to answer (svarsplikt) which means that a party must react to a notice or information given by the other party. Such duty may arise in pre-contractual situations, when the offeror has a

<sup>197</sup> Munukka 2007 p.153: “[...] på lämna motparten meddelande om sin uppfattning eller om något faktiskt förhållande”, *ibid.* 154, 136. A statutory norm for the duty to inform exists in lag (1991:351) om handelsagentur 5.2,2, see also Munukka 2007 p.277, 367.

<sup>198</sup> Nicander JT 1/1995-96 pp.35-36.

<sup>199</sup> Munukka 2007 pp.153-154, see also Ramberg 2014 pp.33-34.

<sup>200</sup> Ramberg 2014 p.34, Munukka NJM 2011 p.102: “En närmast oomstridd uppfattning är att reklamationsplikt kan stödjas på lojalitetshänsyn.”

reason to trust that the offerees inactivity means an acceptance (see for instance AvtL 4.2 and 9§). The notification acts as a preserver of rights, if it is neglected the party may no longer invoke an action or certain conduct as a basis for breach of contract.<sup>201</sup>

A buyer usually has an obligation to *investigate or inspect the object of purchase*, (undersökningsplikt) e.g. KöpL 20§. One of its functions is preventing misuse of rights in a situation where a buyer tries to invoke a known defect as lack of conformity with the contract. Although Munukka sees the obligation to inspect as being related to the obligation to notify of defects, he states that it is not considered as an obligation that is based on loyalty, since its function is more related to the *caveat emptor*-principle.<sup>202</sup> The obligation to inspect balances the sellers' duty to disclose.<sup>203</sup> So even if the obligation is not considered to be based on loyalty, it nevertheless affects the interpretation of whether a particular disclosure can be considered disloyal.

The *duty to warn* (avrådningsplikt) calls for a party to inform his/her partner when the required performance or the object of purchase does not have the benefits or uses the party expects it to possess (e.g. NJA 1991 p.808) or that the expected benefits could be gained in a less timely or costly way. An example of this is a repairman informing his customer that it would be cheaper to replace an object rather than to repair it. The KöpL 17.2 contains an indirectly described demand that an object of purchase must be applicable for the intended use. If this is not the case, then the seller must inform the customer or risk that the object of purchase will otherwise be considered flawed. As a more specific example, Munukka mentions a contractors' obligation to warn or remark against unfitting plans or decisions in a construction contract. The standard form contract of building contracts 04 (allmänna bestämmelser för byggnads-, anläggnings- och intstallationsenraprenader) 2:2 could through systematic interpretation (systeminriktad tolkningsmetod) be seen as constituting

---

<sup>201</sup> Munukka 2007 pp.153-161, 356, 156: "Neutral reklamationsplikt anses utgöra en allmän kontraktsrättslig princip." See also p.484.

<sup>202</sup> Munukka 2007 p.158: "Man kan fråga sig varför inte undersökningsplikten också uppfattas som en lojalitetsförpliktelse. Utöver det att undersökningsplikten är osjälvständig i förhållande till reklamationsplikten, ligger skälet till detta nog främst i undersökningspliktens samband med *caveat emptor*-principen, vilken främst förefaller bygga på idéer om bevisning och processekonomi." *ibid.* pp.371, 390-393: where also a comparison to the Finnish case KKO 1993:130 is mentioned, see footnote 267.

<sup>203</sup> Holm 2004 p.224, Norlén 2004 pp.214-215.

an obligation for a contractor to remark a future proprietor about flaws in building plans. These obligations can also extend to the pre-contractual phase.<sup>204</sup>

The *duty to inform of performance hindrances* (meddelandeplikt vid prestationshinder) can be considered as being based on the duty of loyalty, and it can be defined as a duty to notify the contracting partner if one is not able to perform according to the contract (naturaprestation) or receive the performance of the contracting partner. The KöpL contains at least three paragraphs for this: 28§, 40.1,2 and 58§.<sup>205</sup> Lastly, there is a mention of an obligation to explain or clarify (klargörandeplikt) that requires a party of .e.g. a leasing-contract to explain how the object of purchase is to be used and maintained.<sup>206</sup>

Aside from the different types of obligation to disclose, Norlén has sought to define the requirements for information that the parties should, or are not required to, disclose. Norlén differentiates between *destructive, redistributive and productive facts* regarding the meaning a particular piece of information has for one's counterparty. Information about destructive facts that contain a risk of personal injury or property damage should always be given. Withholding such information is disloyal, since the parties must work towards mitigating damages. According to Norlén, redistributive facts can be assessed similarly as destructive ones, if withholding them might lead to such redistribution of value (and an unbalanced contract) that the withholding would have to be considered disloyal, especially if the particular information is not available to the counterparty. An example of such case could be the above mentioned near bankruptcy of a contracting party (3.6.1.1 & footnote 163). Productive facts which mainly increase or create value for an item or performance e.g. trade secrets, are usually not encompassed by the disclosure, as it would stretch the duty of loyalty quite far. Nevertheless, this rule is not necessarily without exceptions, as Norlén dis-

---

<sup>204</sup> Munukka 2007 pp.162-163, KöpL 17.2: Om inte annat följer av avtalet, skall varan [...] 2. vara ägnad för det särskilda ändamål för vilket varan var avsedd att användas, om säljaren vid köpet måste ha insett detta särskilda ändamål och köparen har haft rimlig anledning att förlita sig på säljarens sakkunskap och bedömning. Holm 2004 pp.92-94 also discusses the KöpL 17.3 as an example of the duty to disclose. See also Votinius 2004 pp.260-262 and Hultmark JT 4/1991-92 pp.703-704 for an analysis of the case NJA 1991 p.808, where also a possibility of the buyer's obligation to warn is discussed. p.704: "I princip är det ju fråga om ett illojalt beteende oberoende av vem av parterna som förtiger viktiga omständigheter för att avgöra köpobjektets värde."

<sup>205</sup> Munukka 2007 pp.163-164.

<sup>206</sup> Nicander JT 1/1995-96 p.33.



cusses situations where withholding such information (e.g. a seller is mistaken about the value of an object etc.) could be considered disloyal.<sup>207</sup>

---

<sup>207</sup> Norlén pp.328-332, 345 see also: when considering the case of Esso Petroleum Co Ltd v Mardon, p.334: "Man skulle i vart fall kunna säga följande: om den ena parten i en avtalsrelation har överlägsna (kanske exklusiva) möjligheter att göra en så säker prognos som det är möjligt att åstadkomma, förefaller lojalitetsaspekten tala för att han inte bör få utnyttja detta informationsövertag till att göra avtalet obalanserat – lika lite som han bör få utnyttja exklusiv information om konkreta fakta i samma syfte. Detta innebär, enligt min mening, att man *inte kan hävda att information av inexakt natur generellt sett inte omfattas av upplysningsplikten*. Någon sådan motgrund bör inte erkännas." (italicization here) This seems to be a broader interpretation of the duty to disclose than in the doctrine in general, see p.346.

## 4. Norway

### 4.1. The legal basis of the duty of loyalty

The duty of loyalty had its breakthrough in the Norwegian legal practice already at the beginning of the 20<sup>th</sup> century, and it was also discussed in the legal doctrine at that time. It was said to have been (at least to some extent) inspired by the German rule of *True und Glauben* (242§ BGB). The duty was discussed as early as in the 1920's by Fredrik Stang and sometime later also by other writers, such as Ragnar Knoph. Among others, the norm of *Avtaleloven* 33§ (Contracts Act) was considered to have an important influence on the development of the duty. A broader and more emphatic interpretation of 33§ itself gained originally a somewhat stronger support in Norway than in the other Nordic countries. Stang viewed 33§ as a comprehensive general rule of contract law and as a basis for the requirement of loyalty between contracting parties.<sup>208</sup>

Det er handelssamfundets trang til tryggere omsetningsformer, som har ført inn i retten ikke bare forbudet mot illojal konkurrence og reglene om lojalitet og hensynfullhet under avviklingen av et kontraksforhold, men også kravet på lojalitet og hensynfullhet under de forhandlingen som går forut for kontraktsslutningen.<sup>209</sup>

As in the other Nordic countries, there is no general statutory norm for the duty of loyalty in Norway, although some specific norms of it exist along with mentions in law-drafting documents. There are also several court cases that mention it directly (e.g. Rt.1984 p.28, 1988 p.1078, 1994 p.1460 Rt.2004 p.1256), and Nazarian states that it has a firm support in legal practice and doctrine, although the descriptions of it are usually vague. Hov & Høgberg mention it as being one of the institutes that has been mostly developed through court practice. It is considered to be a legal principle and standard that is based on the legal culture (*juridiske kulturarv*). Even when there is statutory legislation of the duty, it is not viewed as being wholly comprehensive, meaning that the unwritten general duty supplements the more specific norms. Several writers describe the norms of *kjøpsloven* (Sale of

---

<sup>208</sup> Nazarian 2007 pp.151-153. Stang JFT 1933 pp.380-381, 379: "Man skal optre lojal overfor hinannen. «Tro och heder» krever det.", Wilhelmsson 1999 pp.170-171. See also Björne 1994 p.10.

<sup>209</sup> Stang JFT 1933 p.381.

Goods Act) as being based on and as manifestations of the duty of loyalty.<sup>210</sup> In comparison to other Nordic countries, the duty seems to have a strikingly strong support in court practice.

## 4.2. Definitions for the duty of loyalty

Nazarian defines the duty of loyalty as a secondary obligation (biforpliktelse) that obliges the parties to consider each other interests, especially when a party is not him/herself able to take care of his/her interests and such consideration can happen without significant costs or losses. She states that although the principle of loyalty and the duty of loyalty are usually synonymous, strictly speaking the former is the legal basis for the duty. She suggests that this principle of loyalty can be described as a principle of natural law (naturrettslig prinsipp), in a sense that it is a cultural, ethical and society guiding principle. The duty of loyalty is considered to be non-discretionary, meaning that the parties may not completely rule out the duty. Regardless, it is possible for the contracting parties to define what they consider disloyal, thus outlining the extent of the duty.<sup>211</sup>

Etter min mening vil partene også aldri kunne få domstolenes hjelp etter å ha "lurt skjorten av hverandre", men den nærmere avgrensningen av lojalitetsplikten innhold vil avhenge av hva de har avtalt.<sup>212</sup>

Nazarian has sought to define the *minimum requirements (minstekrav) for the duty of loyalty*. Note that the discussed requirements would apply to loyalty in general, that is to say, in a broader perspective than just that of commercial contracts. These requirements require a total assessment of the contracting situation as a whole (totalvurdering). The requirements are used for setting a threshold for the parties' actions in relation to the duty of loyalty. First of the requirements is that the actions of a party are considered to be *reprehensi-*

<sup>210</sup> Nazarian pp.86-87, 93-95, 126-127, Dalbak LoR 10/2007 p.604 and 605: "Eksempelvis er store deler av kjøpsloven er basert på lojalitetsprinsippet." Thorsen JV 1/1993 p.43: "Kjøpsretten og kjøpsloven er på en måte gjennomsyret av den tanke at partene ikke skal betraktes som motstandere, men som medarbeidere. Dette innebærer at de begge er forpliktet til å arbeide for at kjøpsavtalen oppfylles til beggees fordel." Hov & Høgberg 2009 p.66, see also footnote 74 for a more extensive list of cases than stated above. For a list of statutory rules associated with loyalty, see Hov & Høgber 2009 p.38, see also Simonsen 1997 pp.115-116, 157: "Lojalitetskravet anses i dag som en integrert del av kontraktsretten."

<sup>211</sup> Nazarian 2007 pp.29-30, 134-137, 175, 178: "Selv om en ikke legger til grunn et naturrettslig synpunkt eller kristen etikk, er det klart at lojalitetsprinsippet er moralsk begrunnet." See also Dalbak LoR 10/2007 pp.598-599.

<sup>212</sup> Nazarian 2007 p.138.

*ble* (klanderverdig), although some exceptions apply (notification of damages etc.). For an act to be reprehensible there must have been an alternate way to act. A party could have reasonably acted differently. The assessment of reprehensibility is affected by the parties justified expectations and circumstances in general, such as: the type of contract, the relationship of the parties, the potential for damages caused by the acts and the capabilities of the parties. Furthermore, it is a strict culpa-based liability, which requires that a person knew or should have known that an action would lead to negative effects for the counterparty. A mistake (villfarelse) may thus exempt one from the liability. Secondly, disloyal actions or neglect must be *linked to the contractual relationship* of the parties and thirdly, it must cause *negative effects* or a risk of such effects for the contracting partner (adferden er egnet til påføre negative effect). Further, the parties must also act to prevent and mitigate such negative effects. The negative effects must be of relevance for the counterparty's interests in the contractual relationship in question. Disloyal conduct must come from a contracting party (subject of loyalty), but it is also possible for actions or neglect of an associate of a party (partstilknyttede) to affect the liability of the primary subject of loyalty. These situations require a link between the associate and the contracting party, e.g. a principal-agent relationship. The said negative effects would not necessarily have to be imminently financial (with the exception of disloyal competition), so they could also include a risk of losses and a loss of possibilities or advantages. This means that in co-operation contracts that place a lot of weight on trust, actions that compromise such trust can be considered disloyal. As Nazarian states:<sup>213</sup>

“Ettersom det er adferden I seg selv som vurderes etter lojalitetsprinsippet, bør der ikke være avgjørende at det har oppstått et umiddelbart økonomisk tap for å kunne gjøre gjeldende sanksjoner, med unntak av erstatning. Lojalitetsplikt bør beskytte et videre spekter av interesser enn bare de rent økonomiske.” and later: “I enkelte kontraktsforhold vil fravær av positiv effekt kunne være tilstrekkelig”.<sup>214</sup>

Nazarian defines the requirements for an alternate way of conduct further with the party's *protected expectations* (*beskyttelsesverdig forventning*). An alternate possibility for conduct is evaluated according to the justified expectations of one's counterparty, in that the more a party can justifiably rely on his/her contracting partner's loyal behavior, the stricter

<sup>213</sup> Nazarian 2007 pp.198, 201, 209, 214-215, 217-218, 239, 245, 245-246, 248, 252-262, 296, also considering mistake of law, see pp.263-266. See also Simonsen 1997 pp.280-281

<sup>214</sup> Nazarian 2007 p.240 and latter part p.244. Cf. Thorsen JV 1/1993 p.37: Ført og fremst må handling eller unnlåtelsen være egnet til å påføre de øvrige kontraktparter *skade eller et økonomisk tap*. (italicization here)

the duty. These expectations are of course judged on the premise of what is typical in certain contracting situations, not on a party's purely subjective expectations. The assessment is relative, in that the degree set on the expectations of loyal conduct depends on how well a contracting party can be expected to guard his/her interests. This again depends on the contract type, the risk and negative effect potential of the actions and the party's capabilities. First, if a negative effect is caused solely by the behavior of a single party, it is easy to say that the counterparty probably has little chance to prevent the effects of e.g. public slander. In these cases a party should always act loyally to prevent the effects of his/her conduct. Second, in any case a party must safeguard and see to his/her own interests when it would be grossly negligent not to do so. The assessment is made between these two boundaries, and the parties' responsibility to guard their own interests is stricter in commercial contracts.<sup>215</sup> The typical expectations of contracting parties are also mentioned by Simonsen as the basis for loyalty obligations.<sup>216</sup>

Despite the aforementioned aspect of commercial relationships, Nazarian considers a notable difference in the balance of power as grounds for a stricter demand on loyalty. She suggests that the weaker party should be given some amount of protection. Experience in a certain field of commerce can also justify a higher demand on loyalty, especially if the counterparty is inexperienced. Examples of this are franchising-relationships or when a small company does business with a major business-concern. Naturally, it is required that the weaker/inexperienced party's lack of capabilities is known to the stronger party. Furthermore, various commercial branches have different expectations and customs concerning what is expected from a contracting partner, and these business customs and ethics adjust the threshold set for a party's expectations.<sup>217</sup>

The aforementioned minimum-requirements are intended to clarify and ease the applicability of the duty. Nazarian gives a summarized description of these requirements as follows: 1.) the subject of loyalty must abstain from actions that can cause the contracting

---

<sup>215</sup> Nazarian 2007 pp.269, 271-272: Nazarian discusses whether the term justified expectations (berettigede forventninger) or protected expectations (beskyttelsesverdige forventninger) should be used to describe the assessment. She prefers to use the latter, since she finds the former to be, amongst other things, based on circular reasoning. Ibid pp.275-276, 279, 282-285, 295. See also Hov & Høgber 2009 p.40: «[Omvendt] vil en antakelig legge kravene til lojalitet noe lavere i rent forretningsmessige forhold.»

<sup>216</sup> Simonsen 1997 p.7: Lojalitetsstandarden er først og fremst båret oppe av typiske partsforventninger. [...] Forankringen av lojalitetsstandarden i partsforventningene gjør den elastisk og konkret.

<sup>217</sup> Nazarian 2007 pp.290–291: "Det er positivt at den svakere part kan gis en viss beskyttelse også i kommersielle kontrakter." Ibid. pp.294-295, 317. Power-balance is mentioned also in Hov & Høgberg 2009 p.40 and Simonsen 1997 p.250: "Selv om beskyttelsesbehovet generelt ikke er like påtrengende som i forbrukerforhold, må det kunne tillegges vekt når behovet faktisk er til stede."

partner negative effects, if such actions would be considered reprehensible in consideration of the protected expectations of the contracting partner. 2.) The subject of loyalty must act to prevent and mitigate the negative effects caused to the contracting partner, if it would be reprehensible not to do so in consideration of the protected expectations of the contracting partner. 3.) The subject of loyalty is to promote the interests of the contracting partner in a reasonable manner, if the partner has protected expectations of such actions. 4.) These protected expectations are assessed by especially considering the parties capabilities, the relationship of the parties, the degree of co-operation and trust along with the damage potential of the act(s).<sup>218</sup>

Nazarian's definition is by far the most detailed description for requirements of the duty. Other writers also assess the issue in a similar manner, such as Thorsen who sets two conditions for an action or neglect to be disloyal: 1.) the actions or neglect must cause harm or economic loss for the other party and 2.) there must be something subjectively reprehensible (subjektivt klanderverdig) with the acts that cause the losses. The party is also required to have known or should have known about the possibility of an act causing damages.<sup>219</sup> Simonsen states that the duty of loyalty is a *culpa*-based norm. The *culpa*-liability requires that the liable party foresaw the possibility of damages and could have acted in an alternative manner, in order to prevent the said damages. He considers the evaluation of liability to be set on a regular diligence requirement (i.e. not gross negligence etc.).<sup>220</sup>

### 4.3. The duty of loyalty in relation to other principles and norms

As in Finland and Sweden, the relationship between the duty of loyalty and the avtaleloven (Contracts Act, AvtLo) 33§ and 36 § has puzzled authors in Norway. Hov & Høgberg note that 33§ has been applied relatively often in Norway in comparison to Sweden and Denmark. Courts have also applied 33§ in conjunction with the duty of loyalty, and sometimes contracts have been judged void solely by mentioning only the duty even

---

<sup>218</sup> Nazarian 2007 pp.326-327.

<sup>219</sup> Thorsen JV 1/1993 p.37.

<sup>220</sup> Simonsen 1997 p.164.

though applying 33 § might have been possible. The impact the demand of loyalty has on contractual relationships has recently been highlighted in legal theory and practice.<sup>221</sup>

At en har lagt stadig større vekt på dette [lojalitet], kan medføre at eldre rettsavgjørelser om avtl. § 33 og særlig de som forkaster en ugyldighetspåstand, ikke nødvendigvis kan anses representative for rettsoppfatning i dag.<sup>222</sup>

Nazarian states that both 33§ and 36§ can be seen as expressions of the principle of loyalty and that assessing contracts on the basis of these norms can lead to similar results. She states that loyalty is the principal attribute (hovedbegrunnelse) in the assessment of 33§. The duty is also closely related to the prohibition of the abuse of rights. The AvtLo 33§ is assessed in a similar way as the duty of loyalty (stride mot redelighet eller god tro), but Nazarian states that one can interpret the case Rt 1984 p.28, in which both the AvtLo 33§ and loyalty were discussed, so that the duty of loyalty sets a stricter demand on meticulousness than 33§, as the latter only requires that a party knew about certain circumstances, not that he/she should have known about them (negligence). The duty of loyalty also has a broader applicability and "reach" than 33§ and it may constitute other effects than just the voidableness of contract.<sup>223</sup> The relationship between the duty and the prohibition of the abuse of rights is also a close one and Dalbak seems to support the idea of considering the prohibition as part of the duty of loyalty.<sup>224</sup>

Woxholth makes an interesting point about the relationship between 33§ and the duty by stating that the duty is easier and simpler to apply than 33§, especially in a commercial context. This is based on the fact that being non-statutory, the duty offers more freedom in its utilization than the detailed contemplation of honesty (redelighetskrav) required by 33§, which has a high threshold in commercial contracts.<sup>225</sup> This might imply that the duty fills a gap that the doctrine of applying 33§ restrictively in commercial context has left.

<sup>221</sup> Hov & Høgberg 2009 pp.365-367, see also Simonsen 1997 p.157, 159: "Klarest har prinsippet kommet til uttrykk i avtl. § 33."

<sup>222</sup> Hov & Høgberg 2009 p.367.

<sup>223</sup> Nazarian 2007 pp.67–71, 205-206. *cf.* Woxholth 2006 pp.319-320, Woxholth states, that it is a matter of opinion whether one considers negligence to be part of 33§ on the basis of expansive interpretation or on the basis of the duty of loyalty. A feasible option would also be to view it as an unwritten rule that has arisen to supplement 33§ in such cases.

<sup>224</sup> Dalbak LoR 10/2007 p.611: "Det er i disse rettsmisbrukstilfellene lojalitetsplikten etter min mening primært vil kunne komme til anvendelse." Thorsen JV 1/1993 pp.36-37. See also Simonsen 1997 p.180: "Den vanlige oppfatningen er at kravet til lojalitet skal ramme misbruk av kontraheringsfriheten,[..]"

<sup>225</sup> Woxholth 2006 p.328: "Fastsettelsen av nivået for lojal opptreden etter den ulovfestede ugyldighetsregelen kan skje på et fiere grunnlag, utan at rettsanvenderen føler seg bundet av

The AvtLo 36§ is assessed similarly as the duty of loyalty, but Nazarian points out that both norms have an individual applicability, since what is encompassed by the applicability of 36§ is not identical with the duty of loyalty. This is due to the fact that 36§ is *result-oriented* in assessment and the duty of loyalty rather considers the loyalty of the parties *actions*. Infringing the duty does not necessarily lead to the adjustment of contract. The central point of loyalty-assessment is to evaluate whether a party's actions were disloyal, whereas 36§ focuses on results and substance (unreasonableness). She also discusses whether the duty could be used as independent grounds for revision of contracts. She mentions that some cases support such thought and it could be possible, but since it probably would not lead to a different resolution than just applying 36§, one may as well consider it as a part of the assessment that is done while applying 36§.<sup>226</sup> Thorsen points out that 36§ is usually not viewed as a direct standard for loyalty. Interestingly, he states that one could assess unreasonableness in contracts through loyalty by considering it disloyal for a party to refrain from adjusting an unfair contract. Unreasonableness in itself would not be disloyal, but rather the refusal to adjust the contract. In such situations, one might then adjust the contract on the basis of the duty.<sup>227</sup> Simonsen states that 36 § contains both the principle of reasonableness (or fairness) and the principle of loyalty, since wording of the paragraph makes it applicable to both.<sup>228</sup> Hov & Høgberg mention that both 33§ and 36§ can be applied to dismiss a contract on the basis of disloyal conduct.<sup>229</sup>

---

redelighetskravet i §33, eller den rettspraksis som har utviklet seg i tillknytning til dette og som i første rekke gjelder ulikevektige parter."

<sup>226</sup> Nazarian 2007 pp.73-76: "En vurdering av revisjon etter lojalitetsprinsippet vil etter dette ikke kunne lede til et annet resultat enn etter avtaleloven § 36 [..]. Lojalitetsprinsippet kan derfor like gjerne inngå som en del av vurdering etter avtaleloven § 36 [..]". See also *ibid.* p.239. Somewhat similarly in Dalbak LoR 10/2007 pp.610-611. Simonsen 1997 pp.157-158.

<sup>227</sup> Thorsen JV 1/1993 pp.40-41, 43: "I hvilken utsrekning domstolene etter innføringen av avtalelovens § 36 vil foreta tilsvarende avtalerevisjoner og direkte begrunne dem i lojalitetshensyn eller ikke, er imidlertid uvisst. Dog vil det fortsatt ligge lojalitetshensyn til grunn ved en avtalerevisjon."

<sup>228</sup> Simonsen 1997 p.158: "Avtl. § 36 rommer begge [rimelighetsprinsippet/lojalitetsprinsippet] prinsippene. Vilkåret om at «det ville virke urimelig ... å gjøre [avtalen] gjeldende», vil både kunne utløses av atferdsurimelighet og resultatrimelighet. Som fremhevet i litteraturen, vil avtl. § 36 dermed konsumere de øvrige ugyldighetsreglene, herunder avtl. 33§."

<sup>229</sup> Hov & Høgberg 2009 p.389, see also *ibid.* p.395.



#### 4.4. Functions of the duty of loyalty

Since the duty of loyalty cannot be excluded from contractual relationships, it limits the parties' freedom of contract. Nazarian states that one may either describe it as limiting the freedom of contract or the parties' contracting power. This way, it limits the autonomy of parties, although the parties can define what they consider disloyal in their contractual relationship. In consequence, the defining may increase transaction-costs, but it is nevertheless impossible to define all situations to which the duty could be applied, and results are always uncertain. Against this, the duty might actually reduce contracting costs; since the parties do not necessarily have to regulate all obligations explicitly, as according to the duty the contract is to be interpreted loyally and by taking the other party into consideration. This might lead to a more efficient protection for parties than an overly elaborate contract. The most notable expression of this could be the duty to disclose, as it is difficult to thoroughly define all facts that should be disclosed of. Another function of the duty is to preserve value (*verdibevarande*), through e.g. mitigating damages. Nazarian states that the autonomy of the parties is not a heavy argument against the duty as such, but it rather concerns how strict the requirement set for loyalty is.<sup>230</sup>

It has also been discussed that the duty might stimulate business people's readiness to establish contracts, in that it increases *trust* between contracting parties. Nazarian states that this view is mostly based on assumptions. One might assume that if there was no requirement for loyalty, the parties might abstain from contracting or transaction-costs might be higher, since the risk of disloyal behavior would be higher. On the other hand, a too strict duty might drive away potential business partners, but one cannot say that the duty is generally a hindrance for contracting. Because of this, her view is that when evaluating the need for the duty of loyalty one should not place much importance on whether the duty is thought to stimulate the establishment of contract or not. It can also have a function in averting conflicts e.g. through duty to disclose, since thanks to the duty both parties have more information and can better assess risks. She states that it would seem that the contract types that emphasize loyalty end up in court less frequently. Still, the unclearness and vagueness of the duty might just as well be a cause for conflict. In addition to aforementioned, other possible functions of the duty are to prevent misuse of power and

---

<sup>230</sup> Nazarian 2007 pp.162-169.

possibly to stimulate the development of markets.<sup>231</sup> Simosen suggests that one can assume that the existence of the (pre-contractual) duty promotes the effectiveness of the markets.<sup>232</sup>

The aforementioned views are not without criticism, as Dalbak explores the more negative sides the duty may have. The duty could also be invoked as an escape route from a contract that has turned sour. As she notes, such situations could as well be assessed on the basis of the doctrine of altered presuppositions (*bristende forutseneringer*), without needing to assess loyalty. It is neither certain that the duty will lead to reduced transaction costs or reduce the need for detailed contracts.<sup>233</sup>

#### 4.5. Application in contracts and consequences of disloyal conduct

The duty of loyalty affects contracts through *interpretation* and *supplementing*. Loyalty-assessment may also be a part of the requisites of a statutory norm. The loyalty-aspect may also bring an estimation of reasonableness into the interpretation of contract, since the parties are to reasonably consider each other's interests. It may also act as an independent legal basis; firstly for supplementing the contract e.g. with prohibition to compete, and secondly for setting aside contract terms. Hov & Høgberg describe the duty as a "*background norm*" (*bakgrunnsretten*) that supplements contracts the way *kjøpsloven* supplements sales contracts.<sup>234</sup> Simonsen describes the effects of the duty as constituting, defining and modifying obligations.<sup>235</sup>

As stated earlier, the duty's concrete effects vary between contract types and the duty is to be evaluated *in casu*. One must assess the contract and the contracting situation as a whole.

---

<sup>231</sup> Nazarian 2007 pp.165-173, *ibid* 166: "Det medfører at hensynet til å stimulere til at avtaler inngås ikke kan tillegges særlig vekt ved vurdering av om det bør stilles krav til lojalitet." *ibid* 170: "I enkelte kontraktstyper hvor lojalitetsplikten har en fremtredende plass, ser det ut til at færre konflikter bringes inn for rettsapparatet. Et eksempel på dette er partneringavtaler, hvor der ikke har vært en eneste retts sak i Norden."

<sup>232</sup> Simonsen 1997 p.148.

<sup>233</sup> Dalbak LoR 10/2007 p.601: "Med lojalitetsplikten innføres et nytt usikkerhetsmoment i kontraksforholdet, som igjen øker muligheten for tvist."

<sup>234</sup> Nazarian 2007 p.30, Dalbak LoR 10/2007 pp.602-603. Woxholth 2006 p.423: "Det er også mulig å peke på visse rimelighetshensyn som står særlig sterk ved avtaletolkning, som f eks lojalitetshensynet." Hov & Høgberg 2009 p.41. Simonsen 1997 p.28.

<sup>235</sup> Simonsen 1997 p.158, 239: "Lojalitetskravet er i utpreget grad en konkret plikt norm, utledet av den aktuelle situasjonen som partene befinner seg i."

The breach of the duty usually makes the normal remedies for a breach of contract available, such as liability for damages and cancellation of contract. The question if the duty can act as *independent* grounds for voidableness has been discussed by several authors, and there seems to be support among both the legal writers and the court practice for accepting such possibility (for instance see: Rt 1984 p.28 & Rt. 1995 s.1460). A contract may thus be considered voidable or a party may be excluded from invoking a certain right on the basis of the duty. This way, e.g. in case of a breach of the obligation to inform, it would be possible to either invoke the rules for non-conformity or flaw in goods of the kjøpsloven (KjøpL), or if the buyer would rather void the contract, he/she may base the claim on duty of loyalty.<sup>236</sup> Hov & Høgberg criticize the above-mentioned by stating that there is no real need for a norm of voidableness on grounds of disloyalty. The AvtLo 33§ and 36§ are themselves enough, and there is neither need for a broader non-statutory rule than the aforementioned ones.<sup>237</sup>

A contract may also be revised (avtalerevisjon) or considered invalid (bortfall av avtale) on the basis of the duty. According to Nazarian, the revision could be seen both as an obligation and a consequence. As an obligation, a party may be obliged to tolerate a revision of contract or have an obligation to re-negotiate. As a consequence, it may actualize when the contract has become unreasonable due to disloyalty.<sup>238</sup> Nazarian describes the liability for breaching the duty as a strictly assessed culpa liability (see above section 3. about the risk assessment).<sup>239</sup>

The compensation of a breach of contract requires that damages have arisen due to disloyal conduct. However, Nazarian also discusses whether it should be possible to award compensation for non-economic loss, in order to further enhance the duty. It could be applied in cases where a breach of the duty can arise, but there are no feasible remedies other than compensation. She states that it should be discussed whether there is a need for statutory rules about compensation of non-economic loss, in order to guide the conduct of the

---

<sup>236</sup> Nazarian 2007 p.35, 70: "Lojalitetsplikten må [derfor] anses å være et selvstendig ugyldighetsgrunnlag. ibid. p.362, 403. Woxholth 2006 pp.326-327: "Den [Rt.1995 p.1460] gir likevel signaler om at illojalitet kan medføre ugyldighet, *også i kommersielle kontraktsforhold*, hvis det er årsakssammenheng mellom det illojale forholdet og inngåelsen av kontrakten, og løftesmottageren ikke har vært i god tro." (italicization here) Hov & Høgberg 2009 pp.40-41, 389. See also Dalbak LoR 10/2007 p.599, Thorsen Jv 1/1993 pp.38-43

<sup>237</sup> Hov & Høgberg 2009 p.390.

<sup>238</sup> Nazarian 2007 pp. 55-57, Thorsen JV 1/1993 pp.41-42.

<sup>239</sup> Nazarian 2007 p.57: "Vurderingen av om det foreligger brudd på lojalitetsplikten, ligger svært nær culpavurderingen, men det er en streng culpavurdering."

parties in a *preventive* sense (prevensjonshensynet). These norms could be imposed for specific contract types.<sup>240</sup>

Nazarian discusses the question of *(un)predictability* of the duty by separating the situations: a.) where the contract has been established, but there is no conflict yet. b.) The situation after the conflict has arisen. She considers that in the situation a.) the effects of applying the duty are still foreseeable. In cases where there is a conflict between a contract provision and the intention of the parties, one could assess the situation by analyzing what the aim and the purpose of the said contract are. She suggests that the assessment must be based on the parties' justified/protected expectations (*beskyttelsesverdige forventninger*) and in commercial context one should be more cautious when going against an explicit contract provision. In cases where there is no provision concerning a certain problem, the duty still retains a certain amount of predictability through its connection with the common sense of justice (*rettsoppfatning*), which gives the parties a possibility to assess and predict how the problem would probably be judged in court. She discusses an example case about whether a party should be allowed to form a competing company after first agreeing on forming a company with someone else.<sup>241</sup>

I et slikt tilfelle vil de fleste kontraktsparter innrette seg etter sin egen rettsoppfatning som trolig innebærer at den konkurrerende virksomheten ikke er tillatt. [...] Fordi rettsoppfatningene blir farget av rettskulturen, og rettskulturen er grunnlaget for lojalitetsprinsippet, vil lojalitetsprinsippets innhold i stor grad stemme overens med rettsoppfatningene. Partene i det nevnte eksemplet vil derfor ha god forutberegnelighet.<sup>242</sup>

She views this applicable also to a commercial context, since the common sense of justice applies to commercial operators as well. In this context, the sense of justice is based on the same factors as the general sense of justice but with additions from commercial customs and ethics. Since the duty of loyalty also affects the commercial customs and practice, it is possible to predict and evaluate how it will be, or could, be applied. Nazarian states that the applicability of the common sense of justice in situation b.) is somewhat different, since after a conflict has arisen the parties mostly tend to assess their chances of winning

---

<sup>240</sup> Nazarian 2007 pp.57-60, p.60: "Etter min mening bør det vurderes nærmere hvilket behov det er for å styre avtalepartenes adferd ved hjelp av å innføre lovbestemmelser om erstatning for ikke-økonomisk tap ved brudd på lojalitetsplikten."

<sup>241</sup> Nazarian 2007 pp.181-188,

<sup>242</sup> Nazarian 2007 p.187.

the conflict. In this situation, the vagueness of the duty leaves more possibilities for the parties to “try their luck” than a clearly regulated norm would.<sup>243</sup>

The duty of loyalty gains emphasis in complex, long-term contracts and co-operation contracts, in which the parties are especially dependent on each other and require mutual trust. Such trust is heightened if the parties have previously worked together (e.g. Rt.1995 p.1460). The co-operation can be considered to give rise for a strict duty of loyalty as a secondary obligation, due to the nature of co-operation contracts. Joint ventures, franchising and partnership-contracts are examples of contracts that rely on co-operation. Nazarian states that since partnership-contracts require the parties to collaboratively optimize their performances, this creates an even higher demand on loyalty than in normal joint-adventure contracts. In the case of contracts that aim to aid or protect the contracting partner, such as financial advising, the duty of loyalty can be considered as an important secondary obligation or even as a part of the primary obligations. In contrast, contracts with speculative character are considered to have a lower requirement for loyalty, but without completely excluding it.<sup>244</sup>

Dalbak advocates a more restrictive sentiment, stating that there are also contracts in which the parties should be considered as adversaries. She points out that, for instance, a contract about financial options hardly has place for loyalty. In these situations, the premise should be that the contracting parties are allowed to make choices and therefore invoke rights that are established in contract provisions, even if their intentions for doing so could be considered disloyal. She is against applying the duty to increase or reduce the flexibility

---

<sup>243</sup> Nazarian 2007 pp. 187-192, *ibid* pp.187-188: "Også parter i store kommersielle kontraktsforhold har rettsoppfatninger. [...] Denne rettsoppfatningen baserer seg på de samme faktorer som for private parter, men i tillegg sedvaner i bransjen, forretningspraksis og forretningsetikk. Lojalitetsplikten vil kunne påvirkes av praksis i bransjen. Lojalitetsprinsippet vil derfor kunne gi like god forutberegnelighet i kommersielle forhold som i kontraktsforhold mellom private parter, i tilfellene hvor kontrakten ikke regulerer problemstillingen."

<sup>244</sup> Nazarian 2007 p.31, 209. 307: "Begrunnelsen for den skjerpede lojalitetsplikten er at plikten kan ses på som en biforpliktelse som springer ut av samarbeidet." *ibid*. pp.308-310, 321, 344, *cf.* Dalbak LoR 10/2007 pp.607-608. See also Woxholth 2006 p.327: The case Rt 1995 p.1460 was about the sale of stock of a company called Temco. Temco was working to develop robotic technology for oil wells. Later, the company started co-operating with a company called OTC, which was developing a new concept of an oil drilling rig. The development co-operation was based on the earlier works of both parties. The seller of Temcos stock, Kjell Haughom, had also worked in developing the said technology. After some time of co-operation, OTC was supposed to purchase Haughoms share of Temco. Before this, Haughom had personally sought to patent a concept concerning the drilling rig, which was not disclosed of at the time of the transferring of shares. Later, when the patent application was revealed to the OTC it decided to void the contract. The court approved the demand and also stated: "Ensidig spredning av bedriftsinterne opplysninger til ande, eller forsøk på til egen fordel å utnytte ideer utover det en avtale om samarbeide og tillater, vil lett måtte anses i strid med kravet til aktsom og lojal opptreden"

in contracts, and on the whole, to use it in order to assess the reasonableness of contracts. Therefore, the duty should be reserved for co-operational contracts and assessing the abuse of rights.<sup>245</sup> It is relevant to note that her article focuses on commercial affairs, which gives these statements particular relevance in this study.

## 4.6. Elements of the duty of loyalty

### 4.6.1. The duty of loyalty in different phases of a contractual relationship

The duty of loyalty affects the contractual relationship as a whole. It has various effects in its pre-contractual phase, of which the duty to disclose is presumably the most prominent. Similar assessments as in the other Nordic countries apply: neglecting to inform the counterparty of relevant facts during the negotiations is considered disloyal. Parties must also actively contribute towards the establishment of contract. An interesting example of this is the case Rt.2004 p.1256. The case was about the sale of shares of a housing company. The closing of the sale required an approval from the seller company's board of directors. The board of directors set certain conditions for the sale which the buyer refused to accept. The board then refused to approve the sale. The parties continued negotiations, but later the buyer cancelled the contract in writing. After this notification from the buyer, the board nevertheless approved the contract on the basis of the negotiations and the solutions offered there. The seller contested the cancellation, and the court declared that the negotiations had proceeded to a point where the buyer could not simply withdraw without first giving the seller a chance to work out a solution with the board of directors. The fact that the board first refused the approval did not make the contract invalid.<sup>246</sup> The duty sets a seemingly high demand for patience in negotiations, since the buyers actions were considered disloyal even when the board's approval came a few days after the buyers' an-

---

<sup>245</sup> Dalbak LoR 10/2007 pp.607-608, 607: "Utgangspunktet må også her være at en rettighetshaver må kunne utøve en kontraktsfestet rett uavhengig av om formålet med utøvelsen oppfattes som illojal." *ibid.* pp.611-612.

<sup>246</sup> Nazarian 2007 pp.55, 211-212. Rt.2004 p.1256: "Overdrageren av aksjer i et boligselskap ble ikke godkjent av selskapets styre. Vedtaket om nektelse ble senere omgjort. Ut fra en tolking av kontrakten lest i sammenheng med aksjeloven § 4-17 første ledd kom Høyesterett til at styrets vedtak om nektelse ikke alene medførte bortfall av kjøpekontrakten. *På grunnlag av den ulovfestete lojalitetsplikten i kontraktsforhold, som partene ikke kunne avtale seg bort fra, måtte kjøper gi selger en sjanse til å få styrets godkjenning før kontrakten ble krevet bortfalt.*" (Italicization here)

nouncement of cancellation. Otherwise, the writers seem to discuss the pre-contractual duty in a similar manner as mentioned previously in sections concerning Finland and Sweden, such as setting a requirement for disclosure about relevant facts.<sup>247</sup>

Simonsen has written his doctoral thesis about the pre-contractual liability. He states that the pre-contractual liability can be best described as a duty of loyalty that concerns the parties during the contract negotiations. Further, the present-day doctrine of *culpa in contrahendo* can be understood as a subcategory or ramification of the duty of loyalty. The central element of the pre-contractual duty of loyalty is its interconnection with the parties *justified expectations and trust* towards a conduct which in a reasonable manner reflects the intention to establish contract. For instance, if the contract is considered void, a contracting party who has relied on the contract being established may claim damages on the basis of the doctrine of *culpa in contrahendo*. Simonsen considers this as a manifestation of the duty of loyalty.<sup>248</sup>

Nazarian does not discuss the *non-contractual duty of loyalty* in detail, as her study only concerns the contractual duty of loyalty. Nevertheless, the evaluation of who can be identified with the contracting partner can lead to persons closely associated to a party being considered as associates of the said contracting party. On the other side, actions such as criticizing or competing with the contracting partner's other contacts, partners or the like, would not be a breach of the *contractual* duty of loyalty. In any case, Nazarian states that there is demand for loyalty even between non-contractual parties. Illustrations for such demand are the good commercial customs. The duty also has influence on situations concerning (non-contractual) rival pledgees or creditors.<sup>249</sup> As an example, Falkanger discusses the case 1994 p.775; in short, two pledgees argued whether the prior pledgee could extend the liability of the pledger so that it harmed the other pledgee. The court saw that on the basis of the duty of loyalty the prior pledgee was not allowed to extend the liability.<sup>250</sup>

---

<sup>247</sup> For a general description of pre-contractual loyalty, see Thorsen JV 1/1993 pp.38-40, Hov & Høgber 2009 p.40.

<sup>248</sup> Simonsen 1997 p.41, 48, 151: "Det prekontraktuelle ansvar kan best beskrives som en lojalitetsplikt som påhviler partene under kontraheringsforsøket [...] Læren om culpa in contrahendo må idag betraktes som en forgrening av lojalitetsprinsippet i kontraktsforhold." *ibid.* pp.171, 176-177: Simonsen divides expectations of parties into primary and secondary expectations.

<sup>249</sup> Nazarian 2007 p.230: "Det er bare avtaleparten som har kontraktsrettslig lojalitetsplikt."

<sup>250</sup> For a detailed description of the case, see Falkanger LoR 1/1995 pp.100-112, p.106: "Dersom den foranstående panthaver ikke har en *bestemt interesse* i å utvide sitt engasjement under pantet, vil det være i strid med det lojalitetsprinsipp som må gjelde mellom konkurrerende rettighetshavere om han skulle kunne gjøre dette til foretrekkelig for den prioriterte den etterstående panthaver er tilsagt."

After the contractual relationship has ended, most of the obligations caused by the duty are no longer in effect. An exception to this is the duty of confidentiality which usually loses importance gradually as time passes. Nazarian seems to be reluctant to link the duty with post-contractual or contract-external situations and rather views it as a contractual duty.<sup>251</sup> Simonsen states that the loyalty-bond between the parties weakens in proportion to the time passed after the phasing-out of the contract. Examples of the post-contractual loyalty obligations are the duty of confidentiality and the duty to disclose of relevant facts post-contractually. Simonsen also considers it possible for an abuse of a power position, which a party has gained in the course of the contractual relationship over the other party, to be disloyal.<sup>252</sup>

#### 4.6.2. Obligations stemming from the duty of loyalty

The notion of the duty of loyalty has been described as a common term for different specific obligations. The duty may also be seen as a basis for other specific obligations. Nazarian, among others, describes these specific obligations as obligations to do, allow or abstain from something, similarly as in an action for declaratory judgment or execution. If contracting parties have included the duty explicitly as a contract provision into their contract, this may further lead to the provision being interpreted as grounds for specific obligations. According to her, when interpreting a contractual provision of loyalty, the starting point should be that the parties have *not intended to limit* the duty considerably more than what would be the case with the principle of loyalty in general. Thus, the contract provision should not be seen as excluding the unwritten duty. Similarly, the unwritten “general” duty of loyalty is not excluded from areas of law where the duty of loyalty is for some parts statutorily defined. The general duty gives rise to additional obligations along with the statutory ones. Nazarian suggests that the assessment of such obligations can be done according to the above-described (section 4.3.) minimum requirements for loyal conduct.<sup>253</sup>

---

<sup>251</sup> Nazarian 2007 p.322, 526.

<sup>252</sup> Simonsen 1997 pp.39-40.

<sup>253</sup> Nazarian 2007 pp.30, 49: "Videre kan partene ved kontraktsforhandlingene ha visse plikter som følge av lojalitetsplikten." *ibid* pp.83-84, 101. See also Woxholt 2006 p.326. Simonsen 1997 p.7, 35, 157.



Concerning various contract types, Nazarian has discussed franchising contracts in detail, stating that aside from general provisions about loyalty in franchise-contracts, the loyalty obligations imposed on a franchisee include a prohibition to compete, informing the franchisor of the amount of sales and keeping the franchisors knowhow confidential. Since this study is not specifically about franchising, only certain interesting points which the author believes to illustrate the duty are mentioned in the following discussion. As for sales contracts, Nazarian considers the duty to disclose as the central obligation, with the obligations to notify of damages, mitigate damages and the duty of care in a narrower sense (for the object of purchase) also actualizing in some cases.<sup>254</sup>

#### ***4.6.2.1. Specific obligations requiring contribution to contract***

The parties are to actively contribute towards the fulfillment of contract (e.g. KjøpsL 50§). As examples for this, Nazarian mentions the obligation to take possession of goods in sales contracts and the obligation to acquire necessary permissions for the activities agreed upon in a contract. Contracting parties should strive to remove external hindrances (e.g. official permissions and financial matters) to the establishment of contract; abstaining from doing so could be considered as disloyal passivity. The above-mentioned case Rt.2004 p.1256 is an example of a situation, where the parties should have more actively sought to contribute towards the establishment of contract. As in the other Nordic countries, the obligations to take care of the counterparty's property (KjøpsL 72§ and 73§), to mitigate damages (e.g. KjøpsL 70§, 76.2) and norms concerning passivity (AvtLo 4.2 & 6.2) are mentioned as part of the duty.<sup>255</sup>

Contributing to contract may also require parties to abstain from certain behavior. As in Sweden, examples mentioned of this are *the duty of confidentiality and the prohibition to compete*, both of which can arise from the duty of loyalty. Thorsen considers it reasonable to expect the parties to conserve confidential information during contract negotiations, even when it is not specifically agreed upon. Other examples include *abstaining from cancelling a contract and publicly insulting ones counterparty*. As mentioned above, since Nazarian states that the negative effects must be linked to a contract, criticizing one's con-

<sup>254</sup> Nazarian 2007 p.354, 357.

<sup>255</sup> Nazarian 2007 pp.211-212, Dalbak LoR 10/2007 p.604, Thorsen JV 1/1993 p.43, Simonsen 1997 pp.30, 157-160, 179, 214.

tracting partner should also be relevantly linked to the contractual relationship to be considered disloyal. Nazarian states that in sales contracts there is no obligation to completely abstain from criticizing the contracting partner, even between professionals. The limits for such actions come from good commercial customs. Aside from abstaining from actions, parties may have to endure certain actions, such as contract adjustments.<sup>256</sup>

Franchising-business requires co-operation, which might limit the contracting parties' actions more than in normal sales contracts. The franchisee may for instance seek to criticize the franchisor. Such critique may be considered disloyal, although in relation to her minimum requirements for loyalty Nazarian notes that the required negative effects should be prominent. Minor negative effects for the franchisor are not enough to make the conduct disloyal. Justified criticism ("whistleblowing") should not be considered disloyal, and the loyalty-requirement should always be balanced against the freedom of speech. Nazarian has discussed franchisee-loyalty concerning negative statements against the franchisor in great detail, which illustrates the meaning of the problem, but it is not feasible to thoroughly describe this analysis here.<sup>257</sup>

Concerning other obligations in franchising, Nazarian states that in franchise-agreements the franchisor is subjected *to a prohibition to give competing franchising rights for third parties*. This is, in itself, based on the duty of loyalty, so it is not necessary for the franchisee to specifically inform the franchisor of this. In general, establishing a competing company may be disloyal, if the act is done against or at the expense of the contract partner. Concerning the requisite of negative effect, Nazarian considers competing with one's contracting partner during the franchising relationship disloyal, even if it does not harm the profits of the partner. This is due to the requirement of trust in franchising. After the contractual relationship has ended, such trust is not required anymore, and thus the competition will have to cause direct harm for the franchisor's profits to be considered disloyal. Nazarian adds that post-contractual situations should be assessed on the grounds of *markedsføringsloven*, not on the duty of loyalty. Therefore, the duty should not be seen as a normative basis (*selvstendig rettsgrunnlag*) for a prohibition to compete in post-

---

<sup>256</sup> Nazaran 2007 p.213, see also footnotes 605-608, pp. 247-248, and 412. Thorsen JV 1/1993 p.40: "Men også hvor slik taushetsplikt ikke avtales er det gode grunner som taler for at partene uansett er underlagt en slik taushetsplikt. Partene vil ha færre motforestillinger mot å fremlegge fullstendige opplysninger under forhandlingene, noe som vil bidra til å gjøre forhandlingene mer åpne." See also Simonsen 1997 pp.187-191.

<sup>257</sup> Nazarian 2007 pp.436-437.

contractual situations. Still, the premise should be that the franchisee is not allowed to practice competition with the franchisor during the franchise-contract period.<sup>258</sup>

Det aller viktigeste argumentet mot konkurrerende virksomhet er imidlertid franchisekontraktens karakter – at franchisegiver selger sin knowhow og gir franchisetaker tilgang til allerede etablert konsept. For at en slik kontraktstype skal kunne fungere, er der avgjørende at franchisegivers knowhow ikke blir misbrukt. [...] Franchisegivers interesse i at franchisetaker avstår fra konkurrerende virksomhet er dermed mer tungtveiende enn franchisetakers behov for handlefrihet. For franchising må det derfor opereres med et utgangspunkt om at franchisetaker ikke kan drive konkurrerende virksomhet.<sup>259</sup>

#### **4.6.2.2. The duty to disclose and inform**

According to writers in Norwegian jurisprudence, an obligation to disclose can be based on certain individual statutes, the AvtLo 33§ or the (non-statutory) duty of loyalty. There are some specific statutory norms of the duty to disclose, and they usually necessitate that the required information is essential for the contract. One must assess how much benefit certain information would bring for one's contracting partner, but knowingly giving false information is always disloyal. Some norms are also partially based on a loyalty-assessment, such as those concerning notification of damages (reklamasjon). Nevertheless, Nazarian views it somewhat dubious to place the obligation to notify amongst the loyalty obligations. Finally, as usual the duty to perform necessary investigations acts as the counterpoint for the duty to disclose.<sup>260</sup>

Det sentrale ved at informasjon gis, er at lojalitetssubjektet opprettholder tilliten i kontraktsforholdet på grunn av åpenheten. Dette gjør seg gjeldende i alle kontraktsforholdet hvor tillit er av betydning.<sup>261</sup>

Informing promotes openness in contractual relationships. As long as the contracting partner has all relevant information, he/she can of course consent to actions that would

<sup>258</sup> Nazarian 2007 p.401: "Ettersom det følger av lojalitetsprinsippet at franchisegiver er underlagt et konkurranseforbud, er det ikke behov for opplysningsplikt om dette i norsk rett [...]" *ibid.* p.477, 482, 486, 492, 523, 526. Woxholth 2006 p.320: "Den største praktiske betydning har 33§ hvor løftesgiveren har hatt ufullstendig informasjon om forhold av betydning for avtaleinngåelsen [...]"

<sup>259</sup> Nazarian 2007 p.492.

<sup>260</sup> Nazarian 2007 pp.199, 204, 210-213, 359. *Ibid* 212: "Selv om reklamasjonsreglene dels er begrunnet i lojalitet, er det ikke sikkert det er hensiktsmessig å behandle plikten sammen med øvrige lojalitetsplikter."

<sup>261</sup> Nazarian 2007 p.324.

otherwise be disloyal. Economic investments made before closing a contract increase the importance of actually establishing the contract and because of this, the obligation to disclose gains significance during contract negotiations in order to prevent unnecessary investments. Owing to the duty to disclose, the parties have better possibilities to assess risks of their investments. As a more specific example of the duty, Nazarian mentions the obligation to warn (*frarådningsplikt*). She describes it as being mostly applicable in situations where a party offers counsel for the other.<sup>262</sup> Simonsen mentions a relatively similar duty to give prior notice (*varslingssplikt*) for the contracting partner about one's intended actions which would affect the contractual relationship drastically (e.g. cancellation of contract, *KjøpsL* 39.2). Another example of an obligation to give notice could be a situation during far-advanced contract negotiations, where one of the parties begins or has begun similar negotiations with a third party.<sup>263</sup>

As in the other Nordic countries, the paragraphs 19§ (goods sold "as they are"), 17.2 (quality of goods) and 20§ (buyer's bad faith) of *kjøpsloven* are discussed in conjunction with the duty of loyalty and used as comparative material for defining the obligation to inform that is based on the non-statutory duty of loyalty. Unlike in the Swedish *Köplag* 17§, the Norwegian law does not explicitly state that a deviation from the buyer's justified expectations would be considered as a non-conformity, but Nazarian states that such expectations are relevant for the assessment of conformity.<sup>264</sup>

Nazarian summarizes the *criteria for disclosing during the establishment of contract (avtaleinngåelse)* based on the non-statutory duty of loyalty as: a seller is to disclose a buyer of a fact concerning the object of purchase that he/she knew or should have known and that the buyer could rely to be informed of, in so far as the information can be of relevance to their contract. The information must therefore be linked to the contract, have affected the sale of goods and caused a risk of negative effects. The reprehensibility aspect comes into play in that the party must have acted negligently, meaning that he/she knew or should have known about the need to inform the other party. Thus, the seller must inform the buyer when he/she has a concrete and reasonable doubt that there might be a flaw in the object of purchase. The buyer has a duty to investigate the object, but Nazarian states that the seller's duty to disclose takes precedence over the buyer's duty to investigate in

<sup>262</sup> Nazarian 2007 pp. 210-211, 256, 277, 324, 359. See also Dalbak LoR 10/2007 pp.605-606, Simonsen 1997 pp.192-195.

<sup>263</sup> Simonsen 1997 pp.159, 224-225.

<sup>264</sup> Nazarian 2007 pp.360-362. Thorsen JV 1/1993 pp.40-44, see also pp.44-46 for creditors obligations.

situations where the seller has disloyally neglected to disclose. Similar points of view also apply to the disclosing during the contractual relationship, with the exception that the required negative effects may vary more.<sup>265</sup>

Selgers opplysningsplikt går imidlertid foran kjøperens undersøkelsesplikt, jf. kjøpsloven § 20 andre ledd. Dersom det var illojalt å unnlate å gi opplysninger, vil det ikke ha betydning at kjøper har mislighold undersøkelsesplikten.<sup>266</sup>

A seller may likewise have to disclose legal facts that are relevant for the use of the object of purchase; especially, when the object is a target to specific norms that the buyer might not be familiar with. In any case, the seller does not have to disclose his/her knowledge of the market situation or expectations for the future. The parties should be able to reasonably use their information-advantage, and if the contract is by its nature a speculative affair between professional actors, disclosure is usually not needed. Though in some cases, it is possible that the facts that the future expectations are based upon need to be disclosed of, even though the expectations themselves need not to be disclosed of. As an example, Nazarian mentions the case Rt.1919 p.494, which was about the sale of the shares of a ship (skipsaksjer). The seller of shares knew that the company's only ship had suffered an accident, which was something that could and would probably affect the value of the shares in future.<sup>267</sup>

Also a buyer can have the obligation to disclose relevant information. Premise for this assessment is the same as with sellers' obligation. If a buyer has information that the seller could expect to be disclosed of, then neglecting the disclosure can be considered disloyal. An example of this could be a sale of a piece of art, where the buyer knows that the object is remarkably more valuable than the seller thinks. Aside from that, the fact whether a buyer should disclose information about his/her financial state has also been discussed in Norway. According to Nazarian, in accordance with the minimum requirement the relevant question is whether such information could have affected the contract (e.g. Rt.1987 p.1205, in which the buyers obligation to disclose information was dismissed, since it had not affected the establishment of the contract). A similar assessment of effects may be eminently

---

<sup>265</sup> Nazarian 2007 pp.362-366. Nazarian states that there is no need for direct losses; the risk of negative effects is enough, *ibid.* p.366: "Det kreves dermed ikke umiddelbart økonomisk tap eller fare for tap. Det følger av dommen [Rt.1995 p.1460] at det er tilstrekkelig at adferden er egnet til å skape risiko for negative effekt." *ibid.* p.368, 370, 530.

<sup>266</sup> Nazarian 2007 p.375.

<sup>267</sup> Nazarian 2007 p.377: "[På denne bagrunn] mener jeg at selger som utgangspunkt har risikoen for kjennskap til lover og forskrifter." *ibid.* pp.378-380

relevant in franchising contracts, since a franchisor would most likely be hindered or unable to perform accordingly if he/she were insolvent.<sup>268</sup>

Simonsens has also discussed the topic of disclosing during contract negotiations. First and foremost, a party has to inform the other party if he/she has no more intentions of establishing contract. Letting the negotiating partner rely on a vain expectation of establishing contract is disloyal conduct. On the other side, facts concerning general risk developments (e.g. market or trade branch developments) are generally not included in the duty to disclose. The risks would have to be more specific for the duty to arise. One such case is that the risks are unforeseeable for the other party. Other such possible specific risks are troubles in getting financing for the contract's objective and a requirement of an official's permission. Simonsen considers it disloyal not to inform the other party of one's imminent insolvency. In case of misinformation, one must assess whether the information motivated the other party to act in a way that caused losses for him/her. Aside from this, the information must not have been presented as uncertain or speculation. Therefore, a requirement of causality between the misinformation and the actions is required. An example would be a situation, where a party had invested funds based on the thought that the contract will be established.<sup>269</sup>

---

<sup>268</sup> Nazarian 2007 pp.382-383, 393-399, see also pp.397-398 for a more detailed description of the information needed in franchising contracts.

<sup>269</sup> Simonsen 1997 pp.184, 195, 199-203, 204: "En umiddelbart truende insolvens vil det fremstå som illojalt ikke å gjøre oppmerksom på."

## 5. Denmark

### 5.1. The legal basis of the duty of loyalty

Henry Ussing is mentioned as the first in Denmark to mention of an obligation of the contracting parties to consider each other's interests. The inspiration for this is said to have come from the German doctrine (BGB § 242). It should be reminded that many Danish writers refer to Norwegian cases and authors (and *vice versa*). Jens Evald for instance mentions Stang and Knoph in his description concerning the history of the duty. Therefore, the facts and opinions that have been stated concerning the Norwegian doctrine can be considered (at least for some parts) applicable to the Danish doctrine.<sup>270</sup> However, this section of the study will only cover the opinions of Danish writers.

The duty of loyalty is defined similarly in the Danish legal doctrine as in the other Nordic countries, that is to say, that there are some specific statutory norms which constitute specific obligations (e.g. norms of Købeloven, Sale of Goods Act, KBL and Handelsagenturloven 5§), which are then seen as expressions of a more general duty of loyalty. This general duty is an unwritten principle of law. There are also some court cases in which the Supreme Court expressly refers to loyalty or applies argumentation which could be considered as being based on the duty of loyalty. (UfR 1981.300 H, in which there is a mention of a *requirement for loyal conduct*, UfR 1995.366 H: “[..] efter den almindelige kontraktsretlige grundsætning om pligt til loyal hensyntagen til den anden parts interesser [..]”).<sup>271</sup>

### 5.2. Definitions for the duty of loyalty

Since there is no doctoral thesis written about the duty in Denmark, the descriptions about the duty in legal literature are not that detailed. The authors usually describe the individual aspects of loyalty e.g. disclosure, but then settle for stating that the duty is vague. In any case, the general description of the duty is the same as in the other Nordic countries

<sup>270</sup> Evald 2001 pp. 39, 270–271. Evald refers among other to the writings of Hov, Thorsen and Arnholm, see pp.276-279.

<sup>271</sup> Gomard 2006 p.50, the case UfR 1989.622 SH is also mentioned.

([.] det påhviler hver part at tage rimeligt hensyn til den anden parts interesser). The duty is considered to give rise to specific obligations to look after and take care of the counterparty's interests, such as to prevent and mitigate damages, when the other party is hindered from doing so him/herself. Gomard states that it is not possible to give an exhaustive explanation concerning the existence of individual loyalty obligations and their exact meaning.<sup>272</sup>

Further, the duty is described as a secondary obligation (biforpligtelse) which plays a part in all contracts as an obligatory obligation (*naturalia negotii*). Therefore, the parties cannot exclude the duty from their contracts. Evald remarks that such terms as "loyal conduct" (loyal adfærd) and "loyal interests" (loyal interesse) are used by some authors in the context of the sale of goods. However, he considers that the said terms do not really have an independent legal meaning. Even the terms used to describe the duty of loyalty vary from author to author.<sup>273</sup>

Loyalitetspligten er beskrevet som en "tanke", et "princip", en "grundsætning", en "retningslinje" og en "regel."<sup>274</sup>

Evald also evaluates the criteria of the duty of loyalty presented by Thorsen (see Norway 4.2.). He states that the criterion of reprehensibility is left somewhat unclear, since Thorsen does not explicitly define whether it is supposed to be subjective (the contracting party should have him/herself understood that his/her conduct is disloyal) or objective (the conduct can in general be considered disloyal). Otherwise, he seems to consider the criteria adequate for assessing whether a conduct is disloyal and approves of them if the criterion of reprehensibility is assessed in accordance with the objective meaning. However, he considers it problematic if the culpa assessment in general becomes too much bound to a loyalty-standard.<sup>275</sup>

---

<sup>272</sup> Gomard 2006 p.50.

<sup>273</sup> Evald 2001 pp.267, 274, 281-282.

<sup>274</sup> Evald 2001 p.279.

<sup>275</sup> Evald 2001 p.298: "Hvis man imidlertid i rene culpatilfælde er opmærksom på ikke at indhulle cuplavrurderingen i loyalitetsdragen, er der god hjælp at hente i de opstillede kriterier ved bedømmelsen af, om handlinger er illoyale."



### 5.3. The duty of loyalty in relation to other principles and norms

The relationship between the duty of loyalty and the principle of *the prohibition of the abuse of rights* has been under discussion in Denmark. Gomard discusses this interrelationship, describing the prohibition as a mirrored form of the requirement to consider the contracting partner's interests. Rights that the contract bestows upon a contracting party are to be used in a reasonable fashion.<sup>276</sup> Evald, who has written his doctoral thesis about the doctrine of the abuse of rights, views the doctrine as an institute of law that *limits the use of subjective rights*. By contrast, the duty of loyalty is more about setting certain *requirements for contracting parties* (e.g. to act in a specific i.e. loyal fashion). He points out that the duty of loyalty only applies to contract law, whereas the prohibition of the abuse of rights influences the whole sphere of private law (*formueretten*). Even if acts of chicanery are considered disloyal, one gains nothing by categorizing it or the other elements of the doctrine of the abuse of rights under the duty of loyalty. Evald suggests that it would be better to *detach* such elements of the abuse of rights that were earlier discussed under the concept of loyalty, and to place these elements under the independent concept of the rule of the abuse of rights.<sup>277</sup>

As one might expect, the closeness of the principle of reasonableness (and the Contracts Act, AftL, 36§) with the duty is mentioned in Danish texts. Andersen & Madsen state, however, that 36§ should not be seen as a direct codification for the duty.<sup>278</sup> It should rather be considered as an "expression" or a "manifestation" (*udtryk*) of the duty.<sup>279</sup> The AftL 36§ has at times been applied alongside the duty in order to justify resolutions in court practice. In the reasoning of the case UfR 1981.300 H, the Supreme Court referred to "loyalty" as well as to 36§. The reasoning of the court was said to be based on a broader assessment of the norms of contract law, court practice and 36§. This means that the resolution is not directly or solely based on 36§ and that the duty also played a role in the assessment of the case. Evald states, in concerning the influence of the duty (and referring

---

<sup>276</sup> Gomard 2006 p.51, see also Andersen 2005 p.474.

<sup>277</sup> Evald 2001 p.267, 301, 329: "Der er derfor god grund til, som foreslået, at betragte retmisbrugsreglen som en selvstændig regel, der ikke lever sit liv i skyggen af – men sammen med og i samarbejde med – lojalitetsreglen."

<sup>278</sup> Andersen & Madsen 2006 p.445: "Det ulovfæstede lojalitetskrav har klart træk til fælles med rimelighedsstandarden i aftalelovens §36, uden at denne sidste dog må opfattes som en ren kodificering af eller afløser for lojalitetskravet."

<sup>279</sup> Madsen UfR 1982 B p.165.

also to Jo Hovs assessment), that it is uncertain whether the duty could be invoked as a sole reason for voidableness of contract or if the assessment of voidableness is based on the statutory norms of the AftL and the duty only affects the interpretation of the aforementioned norms.<sup>280</sup>

#### 5.4. Functions of the duty of loyalty

Several writers consider the duty of loyalty as a sign of a social-oriented view of law. As in the other Nordic countries, the functions of preventing the abuse of rights and strengthening co-operation between contracting parties are mentioned as important purposes of the duty. The requirement of loyalty is said to bring more nuances and flexibility to contracting, especially in partnering contracts in which the contract can be described as more of a guideline for striving towards a common goal.<sup>281</sup> Similarly as in Finland and particularly in the works of Taxell, Madsen describes the recent development the duty as a sign that the contract is being viewed more as co-operation of the parties. The duty also upholds and promotes trust between the contracting parties.<sup>282</sup> Evald mentions the duty as an example of reasonableness and *bona fides*-type of thinking:

I det retvidenskabelige litteratur er der bred neighed om, at kontraktparternes pligt til at vise hinanden hensyn hviler på bona fides, rimelighed og billighed.<sup>283</sup>

Aside from these mentions, the author has not come across more specific descriptions about the functions of the duty. The general descriptions of the functions seem to be quite similar as in the other countries, especially concerning the trust aspect. Evald's description mostly compares and defines it in relation to the prohibition of abuse of rights. Since the duty of loyalty supplements contracts and is considered as a *naturalia negotii*, it is also delimits the contracting freedom of the parties and functions in supplementing and complementing the contract when the parties have neglected to agree about something or intentionally left it incomplete.<sup>284</sup>

---

<sup>280</sup> Evald 2001 pp.300–301.

<sup>281</sup> Andersen & Madsen 2006 pp.445, 449-450.

<sup>282</sup> Madsen UfR 1982 B p.165, 167.

<sup>283</sup> Evald 2001 pp.38-39.

<sup>284</sup> Evald 2001 p.267.

## 5.5. Application in contracts and consequences of disloyal conduct

The duty gives rise to obligations that were not explicitly agreed upon in the contract. The influence of the duty and consequences for violating it are described in a similar fashion as in the other Nordic countries (liability for damages, cancellation of contract, interpretation, and supplementing of contract: UfR 1982.4 H, see below 5.6.2.1, etc.).<sup>285</sup> Andersen & Madsen state that a neglect in disclosing during contract negotiations may lead to the contract being considered void, most probably on the basis of AftL 36§. The duty may also directly cause an alteration in the obligations of contracting parties and the legal effects of their contract. An example of this is the case UfR 1981.300 H, where a lessee had taken a loan from a lessor and given a promissory note secured by a pledge (*skadesløsbrev*) as a guarantee. This note later hampered the use of the property for the lessee, so the lessee asked to swap the note for a bank guarantee. The lessor refused this. The Supreme Court then later decreed that the lessor must accept the offered bank guarantee, since there was no loyal reason (*loyal grund*) to refuse the swap. The conduct of the lessor was described as chicanery. The decision was said not to be directly based on 36§, but rather on a more “broader” assessment of the rules of contract law. Andersen & Madsen state that this illustrates how the duty affects the validity of contracts. A party must have “loyal” grounds for refusing a reasonable alteration of the contract. The assessment of contract is not solely based on what a party has promised to do or abstain from doing in the contract terms.<sup>286</sup>

Konsekvensen af dommen [...] synes imidlertid at være, at *loyalitetsskravet* i kontraksretten kan rumme en egentlig modification til reglen i aftalelovens § 1, jf. DL 5-1-1, om, at man er bundet af, hvad man har lovet.<sup>287</sup>

Aside from a possible obligation to tolerate reasonable changes to contract, an obligation to clearly *notify* one’s contracting partner of a refusal to change the contract according to the other party’s wishes has been described as part of loyal conduct. This exemplifies again the relation of the duty with passivity sanctions. Another possible application of the duty due to changed circumstances is that it could be considered disloyal to invoke a certain

<sup>285</sup> Gomard 2006 p.49, Andersen & Madsen 2006 p.453, Moalem 17/2004 B pp.133-134, Madsen UfR 1982 p.169.

<sup>286</sup> Andersen & Madsen 2006 pp.446–447, 448: “Et rimeligt begrundet ønske fra en kontraktspart om ændringer i en indgået kontrakt må man således under særlige omstændigheder anføre “loyale grunde” for at kunne modsætte sig.” See also Evald 2001 pp.26-27, Madsen UfR 1982 B pp.168-169.

<sup>287</sup> Andersen & Madsen 2006 p.448.

contract provision (UfR 1981.295 H). In broad terms, the aforementioned cases concern the question of abusing contract obligations.<sup>288</sup>

## 5.6. Elements of the duty of loyalty

### 5.6.1. The duty of loyalty in different phases of a contractual relationship

The influence of the duty makes its way into contracts gradually. It affects contractual relationships from negotiations to the time after the contractual relationship. As one would expect, the Danish contract law acknowledges the concept of *culpa in contrahendo*. Andersen describes its application as strict with the emphasis on the norms nature as an exception to the general rule. The premise for applying *culpa in contrahendo* should be that acts constituting *culpa in contrahendo* require an evident breach of right, such as chicanery or clear infringement of the rules of contract negotiations.<sup>289</sup> As in the other Nordic countries, during the contract negotiations the parties may have duties to disclose information and abstain from disloyal competition that could harm the negotiating partner.<sup>290</sup>

Like in the other Nordic countries, there are mentions of loyalty obligation that might still be in effect after the contractual relationship has ended. Especially the previous cooperation of the parties might generate loyalty obligations which stay in effect for some time after the contractual relationship. As one might expect from the previous chapters of this study, the prohibition to compete and the duty of confidentiality are mentioned as such obligations.<sup>291</sup> The contract-external duty does not appear to have been discussed much in the literature. There are mentions of situations where the duty does not apply. Andersen states that there is no loyalty requirement for creditors who seek to realize their monetary claim. A creditor is allowed to seek the best possible means to realize his/her claim over other creditors.<sup>292</sup> This seems to be contrary to what has been described in the section 6.1 concerning Norway (see case Rt. 1994 p.775).

<sup>288</sup> Andersen & Madsen 2006 p.452.

<sup>289</sup> Andersen 2005 p.117.

<sup>290</sup> Madsen UfR 1982 B pp.166–167

<sup>291</sup> Evald 2001 p.274, Madsen UfR 1982 B p.170.

<sup>292</sup> Andersen 2005 p.474: "Når en kreditor forfølger sit krav, har han et berettiget krav på at klare sig bedst muligt over for andre retsforfølgende kreditorer."

### 5.6.2. Obligations stemming from the duty of loyalty

As in most other Nordic countries, the duty of loyalty is considered to give rise to more specific obligations. The individual statutory obligations are described as expressing and/or embodying the duty of loyalty.<sup>293</sup> Evald seems to consider the non-codified duty of loyalty as being at least somewhat separate from statutory loyalty-norms. He states that as the duty becomes more codified into the legislation, the sphere of the non-statutory duty becomes more limited. As for example in the context of the sale of goods, the statutory norms of *Købeloven* have been defined during the law-drafting process by assessing the interests of contracting parties in general. Because the definitions of these norms are mostly clear and firmly established, it is not strictly necessary to refer to them as loyalty obligations. Evald considers it on the whole better to have a certain fixed group of loyalty obligations which are statutorily defined (mainly in *Købeloven*). This would be more in accordance with the interests of trade and legal security (predictableness) than a vague and broad duty of loyalty. Evald considers (at the time the doctoral thesis was written) that there is at least some amount of unwillingness in legal doctrine to apply the duty of loyalty in the context of the sale of goods and commercial law. He also point out that there might be an inconsistency between the opinions of legal doctrine and the court practice. With the case UfR 1997.974 H the Supreme Court might have sharpened the loyalty requirements set to contracting parties in the sphere of the sale of goods and commercial law. Evald points out, however, that this interpretation of the case is uncertain.<sup>294</sup>

Evald is generally skeptic towards the use of loyalty-based terminology. He considers the formulation of the general duty of loyalty as circular reasoning, since it is based on inductive reasoning that conceives individual (loyalty) obligations as being derived from the general duty of loyalty. He thinks that the meaning and the extent of these individual obligations can be more adequately described without the concept of loyalty. The use of loyalty-terminology also indicates a tendency among authors to confuse certain obligations' content with the justification of their content.<sup>295</sup>

---

<sup>293</sup> Andersen & Madsen 2006 p.447, Moalem UfR 17/2004 B p.133, Madsen UfR 1982 B p.167.

<sup>294</sup> Evald 2001 pp.274, 281-284, 282: "Inden for køberetten kan der således af retsikkerheds- og omsætningshensyn være god grund til at fastholde en afgrænset gruppe af (loyalitets)pligter, hvis indhold og omfang er nærmere fastlagt (først og fremmest) i købeloven."

<sup>295</sup> Evald 2001 pp.296–297

### 5.6.2.1. *Specific obligations requiring contribution to contract*

As usual, the duty to mitigate damages is considered to be a loyalty obligation (KBL 33§ and 35§ are mentioned as examples for this). The parties must reasonably consider each other's interests which gives rise to an obligation to prevent and mitigate damages that would fall on the contracting partner when the partner is unable to prevent such damages him/herself. The passivity norms of AftL 4.2 and 6.2 are mentioned in conjunction to the duty of loyalty, as are the duty of confidentiality and the sellers' duty to care for goods during a delay caused by a buyer. If a party has a certain right to make a choice (e.g. which debt to pay off), the choice should be done by taking the other party's interests into consideration.<sup>296</sup>

Disloyal competition is also mentioned, e.g. in case a party confidentially gains information of counterparty's customers or products. An example of disloyal competition is presented in the case 1982.4 H which was about a publishing contract. An author had made a deal with a publisher for publishing books about health and diet(s). Later, the author wrote several articles about the same topics to a weekly magazine. The articles were later published by the magazine in a book-form. The publisher then successfully sued the author as well as the magazine. The court held that the publishing contract, even without an explicit provision, contained a prohibition for the author to publish books which would cause unfair competition with the previous publisher's books. The contract was therefore supplemented with the prohibition to compete that was considered as being implicitly agreed upon in the contract.<sup>297</sup>

### 5.6.2.2. *The duty to disclose and inform*

The norms requiring disclosure about the object of purchase have been described as a part of the more general doctrine of loyal disclosure. As mentioned already in chapters concerning the other countries, sellers are to inform buyers about relevant facts concerning the

<sup>296</sup> Andersen 2005 pp.116, 121-122, 205. Madsen UfR 1982 p.167.

<sup>297</sup> Andersen & Madsen 2006 p.446, 453: "Pligten til at afstå fra "ubillig konkurrence" kan opfattes som implicit indlagt i *aftalen*, men må øvrigt anses nærmere fastlagt med udgangspunkt i *konkurrencerettens* almene redelighedskrav. Da der er tale om at "udfylde" *aftalen* med et loyalitetskrav, der ikke udtrykkelig er opregnet i *aftalen*, men som må inlægges i denne ud fra retlige overvejelser, er det helt i overensstemmelse med sædvanlig fortolkningslære at lade dette krav udforme efter bl.a. *konkurrencerettens* almindelige principper."

object of purchase, which the seller knew or should have known. The liability for absent disclosure is described as being either culpa or dereliction. Unless the seller fulfills his/her duty to loyally disclose information, the object of purchase is viewed as flawed. Gomard uses the term “loyale oplysningspligt” for this obligation.<sup>298</sup> At this point of the study the existence of this obligation does not come as a surprise, but there are also other definitions for the duty to disclose. Andersen speaks of a duty of diligence (*diligenspligt*) in the context of commercial contracts. As one would expect, it sets a requirement for the contracting parties to disclose of relevant facts. He also mentions the notification of damages (*reklamation*) as one of loyalty obligations. Disclosing estimations about the future of a trade branch is not required (UfR 2001.1293 H).<sup>299</sup> Madsen mentions the notification of damages and unforeseen events, the loyal disclosure, and pointing out surprising and harsh terms of a standard contract as loyalty obligations.<sup>300</sup> Since all of the aforementioned obligations have already been discussed in the previous chapters, there is no need to repeat their definitions.

David Moalem has analyzed the duty of loyal disclosure (*loyale oplysningsplikt*) in more detail. He views the norms concerning disclosure and withholding information as having a common legal foundation that is the duty of loyal disclosure. He describes this duty as comprising of the following: the doctrine of voidableness (*aftaleretlige ugyldighedslære*), parts of the doctrine of default (*misligholdelselære*) and restitution due to culpa in *contrahendo*. It is also a common frame of reference for assessing the meaning of a contracting party’s neglect of disclosure in accordance with the AftL 30§, 33§ and 36§, the doctrine of presuppositions (*forudsætningslære*) and sellers’ duty to disclose. All of the aforementioned norms, which aim to prevent the abuse of informational asymmetry, can be seen as codifications of the general duty of (loyal) disclosure. Moalem further states that the requirements for liability due to a breach of the duty are that: 1.) the information that was withheld must have been decisive (*bestemmende*) for the other party and 2.) the party withholding information must have acted negligently. In case of unsure information (e.g. risks) one must objectively assess how probable it is for some events to occur, and what

---

<sup>298</sup> Gomard 2006 pp.174-175 & Gomard 2003 p.96, 159: "Den oprindelige svigs- og garantiregel i KBL 42, stk.2 er således blevet udvidet i retspraksis med en regel om oplysningspligt, og denne praksis er blevet kodificeret for så vidt angår forbruger køb i KBL § 80, stk 1, nr. 2 og 3. Reglerne i § 80 gælder kun direkte om forbruger køb, men har karakter af kodificering af almindelig købsret og har derfor også betydning for kommercielle køb."

<sup>299</sup> Andersen 2005 p.121, 400.

<sup>300</sup> Madsen UfR 1982 B p.166.

kind of influence they would have on the contractual relationship. This means that a contracting party must disclose of highly probable and decisive events. Furthermore, if an event is not that probable, but it would be highly influential on the contractual relationship, then it must be disclosed of.<sup>301</sup>

In discussing the more specific elements of disclosure, Moalem states that for withholding information to be disloyal, one must also assess the type of the information in question. Information about *the performance required by the contract* is usually encompassed by the duty of loyalty. Of course, there are some exceptions to this. As a rule, contracting parties do not need to disclose information that is generally available for everyone. If the information is considered internal, so that it is available only to one of the parties, then the party in question should share this information. Naturally, trade secrets are not encompassed by the duty, although there might be some exceptions to this, especially if the holder of the information would gain an unreasonable advantage (see Moalem pp.138-139 for more details). The contracting parties are not required to give information about their *motives for taking part in the contract*, (e.g. purchasing an item). Neither is there an obligation to disclose *information about the market situation or conditions*, which means that e.g. the seller does not have to inform the buyer that an item can be purchased cheaper elsewhere. Parties are also allowed to benefit from their commercial skills and experience. Aside from the aforementioned facts, Moalem states that an express violation of the duty of loyalty can cause the duty to disclose to arise even when such obligation would not normally exist.<sup>302</sup>

---

<sup>301</sup> Moalem UfR 17/2004 B pp.133-136, 134: "Min tese er, at disse [det fælles indhold af den obligationsretlige regulering af fortællelser ved kontraktsindgåelsen] har et fælles retsgrundlag, og at dette kan udtrykkes i en tværgående retsgrundsætning om den loyale oplysningspligt, der antages at omfatte den aftaleretlige ugyldighedslære, dele af misligholdelseslæren i købe- og obligationsrettens almindelige del, og erstatningsretten ved culpa in contrahendo."

<sup>302</sup> Moalem UfR 17/2004 B pp.138–140.



## 6. The comparative analysis

This chapter is dedicated for comparing the various aspects of the duty of loyalty in Nordic law. The structure of this analysis will be the same as with the individual countries before, and the author seeks to fit all relevant material under the same topics as they were discussed in the earlier chapters. This, however, is not always possible, since the different aspects overlap and blur at some points. Because of this, there are some references that point to different chapters than the one being discussed. To prevent repetition, the ideas presented by various authors will only be referred to by their names and sometimes with a short description. References to the individual chapters, where one can find the whole descriptions, will be given in brackets.

The idea of this chapter is to compare the various definitions and discussions concerning the duty of loyalty. First and foremost, the author will analyze definitions and elements of the duty and discuss whether *individual authors* agree or disagree about them. Besides this, the author will also deliberate if it is possible to find differences on *national levels*. It is interesting to see if one can discover national differences in the interpretation of the duty, but such generalizations should always be treated with caution. The author reminds that such generalizations are more or less the authors' estimations, and they are done on the basis of the source material used in this study.

### 6.1. The legal basis of the duty of loyalty

The (general) duty of loyalty is a *non-statutory legal principle and norm* in all Nordic countries. Nevertheless, all these countries have one or more statutory norms which in some way explicitly constitute an obligation of loyal conduct towards the contracting partner, usually in laws concerning commercial agents. There are also mentions of the duty in certain law-drafting documents.<sup>303</sup> One could therefore state that a general idea of *loyalty* is accepted and acknowledged by legislators as a part of contract law in all of the countries, even though there is no general statutory norm for it, unlike in case of the principle of rea-

---

<sup>303</sup> E.g. Finland: TSL 13§, and in other countries the laws concerning commercial agents: Sweden: Lag (1991:351) om handelsagentur 5.1, Norway: Agenturloven 5§, Denmark: Handelsagenturloven 5§.

sonableness/fairness (i.e. 36§ of the Contract Acts). This is not to say, however, that the *duty* of loyalty would be statutorily acknowledged. Some authors in jurisprudence consider certain norms as “manifestations” or “expressions” of the duty of loyalty, especially particular norms of the Trade Act(s). These will be discussed in detail below. In any case, the most relevant matter for the subject of this study is of course the attention which the duty has gained in jurisprudence and court practice.

There is no doubt that *authors in jurisprudence* nowadays acknowledge the duty of loyalty as one of the rules of contract law. There are some differences as to when the acknowledgment is said to have taken place. Naturally, it is impossible to give exact answers, as the duty is considered to have existed in some form already in Roman law. In Finland, most authors refer to Taxell’s writings from the 1970’s as the first ones to give the duty a detailed description and an important place in the law of contract. Also, many writers in the other Nordic countries refer to Taxell’s works as well, so one could say that they have retained their relevance to this day (see footnote 11). Interestingly, Taxell’s views still seem to represent a broader conception of the duty than the views of some more recent authors. This will be discussed in more detail below.

There are some mentions of the duty already around the 1930’s in Norway and Denmark, e.g. in the work of Stang and Ussing. In these countries the German rule of *Treu und Glauben* (BGB 242§) is often mentioned as a source for inspiration for the duty. The duty was acknowledged especially early in Norway, and it probably has the broadest acceptance in Norwegian doctrine.<sup>304</sup> An indicium for this is the fact that the (Norwegian) doctoral thesis by Lasse Simonsen from 1997 puts a rather heavy emphasis on loyalty argumentation. In addition, Nazarian describes the duty as having a strong support in legal literature.

In case of Sweden, the duty seems to have been adopted later into the doctrine of contract law than in the other Nordic countries. As Munukka and Holm have stated, the duty did not become widely accepted until towards the end of 20<sup>th</sup> century. The publication dates of the source material used in this study indicate that this was the time when the duty became somewhat broadly discussed in all of the Nordic countries. Nowadays, one can say that the situation has changed as there are several doctoral theses written about the duty in Sweden.

---

<sup>304</sup> See also Björne 1994 p.7: “[...] On [ensinnäkin] pantava merkille norjalaisten voimakas yliedustus lojaliteettiperiaatteen kannattajien joukossa.” Cordero-Moss NJM 2008 p.627: “Videre har partene ingen lojalitetsplikt overfor hverandre I engelsk rett, [...] mens denne er fremtredende i norsk rett.” and Björne 2005 p.170.

At the moment, it would seem that the Swedish writers are heading the discussion about the duty.

The *Supreme Court practices* in the Nordic countries seem to acknowledge the duty of loyalty. All of the countries court practices feature resolutions which refer to the duty, although their context and subject matter varies (e.g. KKO 1993:130, NJA 1990 p.264, Rt.2004 p.1256, UfR 1995.366 H). There are some court resolutions which do not explicitly mention the duty, but they contain argumentation which some authors have interpreted as being based on the duty (e.g. 3.1 Munukka, see also footnote 112, 4.5 Rt.1995 p.1460). It seems to the author that the Supreme Court practice concerning the duty is especially pronounced in Norway. In contrast, the Supreme Court of Sweden has been described as being reluctant to apply the duty of loyalty and mention it in its reasoning. Aside from this, there are also some dissenting views in Swedish jurisprudence (also in Finland) as to whether the duty can be used as an independent principle to justify resolutions. This will be discussed in more detail below (6.5).

It would seem that the court practice in Finland is somewhere in between these two opposites. The duty is generally considered as being acknowledged by the Supreme Court, although it would seem that the Court has begun to apply the duty later than in Norway. As there is no Danish doctoral thesis about the duty, the author has some difficulties in deciding where to place Denmark regarding the court practices. Since the case UfR 1981.300 H is often mentioned in conjunction with the duty of loyalty, one might consider it as a starting point for its usage in court practice, although one might also be assuming too much. All in all, it is not that relevant in which country the duty was applied first. In summary, as a general principle of law the duty of loyalty has mostly been developed through jurisprudence and court practice in all of the Nordic countries. As Nazarian states, it could be also be seen as a part of the Nordic legal culture (kulturarv, see 4.1).

## 6.2. Definitions for the duty of loyalty

### 6.2.1. Superordinate concepts above the duty of loyalty

The nucleus of this study is to analyze how the duty of loyalty is defined and how it can be applied to commercial contracts. As stated above, the standard definition of the duty is generally the same in all of the countries (see part 6.2.2). Nevertheless, many authors criticize and disparage the duty for its vagueness. This is understandable, since the general definition leaves the concrete meaning of the duty rather impalpable and challenging to fathom. Therefore, the following discussion will mostly concern the more detailed descriptions of this general notion. The portrayal of the discussion (and the debate) concerning the definition(s) of the duty will proceed as follows: the author will start from the broadest sphere of definition(s) and narrow the scope of the analysis towards the end. This means that the approach is to start systematically from the “top layer-definitions” and work towards the narrowest definition available.

First of all, the topmost level the duty has been discussed on, by the authors mentioned in this study, is the one concerning the major developments and trends of the law of contracts. An example of this discussion is the doctoral thesis of Votinius concerning the (philosophical) relationship between *the friendship-paradigm and the opponent-paradigm* (3.1). The friendship-paradigm concerns roughly speaking a similar idea mentioned by Taxell (2.1, among others) that contracts are to be seen as co-operation of the contracting parties. The question is to what extent the contracting parties should be seen as adversaries and to what extent as partners in co-operation.<sup>305</sup> The concept of loyalty is a central element in this discussion.<sup>306</sup> Since this study is about legal dogmatics and not about philosophy, the said discussion will not be described in detail. The second broadest definitions would probably be the two mentioned by Björne (2.2). The distinction between the *general level* and the *concrete level* of loyalty divides the duty into a *philosophy* of law perspective and a *legal dogmatic* perspective. The general level is similar to the friendship-paradigm. The concrete, legal dogmatic level of the duty inspects the obligations that the duty bestows upon the contracting parties. Therefore, the following study inspects this concrete aspect of the duty and seeks to define it further.

---

<sup>305</sup> This paradigm is of course not without criticism, see Dalbak LoR 10/2007 and Wilhelmsson SvJT 4/2005.

<sup>306</sup> Norlén has discussed the virtue of loyalty which could also be included into this category (3.1, footnote 113, 3.3).

The second broadest level of definition would most likely be the notion of the *requirement of loyalty* (lojalitetskrav) devised by Munukka (3.3.). It is defined as a superordinate term that is above the notions of the prohibition of the abuse of rights, the duty of loyalty and the norms of reasonableness/fairness. Due to the difficulties in defining the duty in relation to the aforementioned legal aspects (which will be discussed further in 6.3), the requirement of loyalty seems to be an attempt to solve this issue by giving the individual norms a common “background-concept.” The requirement would make it less necessary to define the abuse of rights as either part of the duty of loyalty or the other way around etc. As such, it might make it possible to keep the said concepts separate and defined, without losing the element of loyalty that links these concepts. The material used in this study does not present any other attempts to construct a similar superordinate term, which means there are no other concepts to compare it to.

It can be noted, however, that Karhu considers the duty as having less influence in the system of contract law than the principle of reasonableness and the protection of the weaker party, which might be considered problematic if one seeks to superimpose loyalty in relation to reasonableness (2.2). In his own analysis concerning the system of the law of contract, Karhu mentions loyalty *under* the topic of acts contrary to good morals (contra bonos mores) and bona fides, which implies it having a less pronounced place in the system.<sup>307</sup> Not regarding this, in itself the requirement of loyalty seems to be a feasible way to approach the problem of defining interrelationship between the above-mentioned concepts. Nevertheless, as the study will also later point out, it is disputed whether loyalty should have such a broad interpretation.

### 6.2.2. The definitions for the concrete duty of loyalty

The third level is the *actual definition of the duty of loyalty*: the contracting parties must consider each other’s reasonable interests and expectations, (without unreasonably risking their own). On a general level, most authors define the duty as: 1.) a principle of law and/or 2.) a legal standard 3.) an unwritten rule 4.) a reciprocal obligation 5.) a secondary obligation 6.) an obligatory obligation which the parties may not exclude from their contract (naturalia negotii) 7.) an editable obligation, meaning that the parties may further define

---

<sup>307</sup> Pöyhönen 2000 p.99, 117

what they consider disloyal in their contractual relationship. The aforementioned aspects appear in virtually all of the countries inspected in this study (see the chapters concerning the definitions) and it would seem that most authors, who approve of the duty, accept them. Other individual descriptions of the duty are: a norm of exception (Munukka 3.2), a principle of natural law (Nazarian 4.1), and a complex principle (Karhu 2.4). Further, some authors emphasize the duty as an ethic principle (*i.a.* Holm 3.1, Taxell 2.1) Lehtinen has divided the duty's general definition into a passive form (a party must refrain from disloyal conduct) and an active form (a party has to actively co-operate), which illustrate the obligations that the duty may constitute (2.2, see also Nazarians definition in 4.6.2).

Munukka has compiled and analyzed some possible *formal criteria* for the duty (see 3.2). The first criterion of the duty being a legal obligation is probably generally accepted, unless one dismisses the existence of the duty altogether. None of the more recent writers uphold such view.<sup>308</sup> As this study will later point out, the second criterion of the duty being a (solely) contractual obligation is generally controversial. The duty has been applied to liability in contract negotiations and some authors have even discussed about a non-contractual duty (see 6.6.1). The third definition of indivisibility has not really come across in the texts of the other authors and it would seem to be a too narrow definition. The fourth criterion (reserve-rule) has been a topic of debate especially in Finland (2.6.2). The conflicting views about whether the duty should be understood as comprehending individual statutory rules will be discussed in part 6.6.1. It is sufficient to say at this point that this criterion seems to be dismissed in the Swedish and Norwegian literature, whereas in Finland it has some supporters. Jens Evald seems also to support the criterion (5.6.2.). In short, the criterion is therefore disputable. The fifth criterion of vagueness is somewhat open to interpretation. Munukka does not consider it as a criterion but rather as a description. Most authors agree that the duty *is* vague, but whether they consider it as its criterion is questionable. It is often stated that the duty cannot be exhaustively defined, which suggests that vagueness is considered as a characteristic of the duty. Nevertheless, it must be said that authors (Munukka, Nazarian, Holm etc.) often promote a more detailed definition of the duty. Therefore, it seems that only the first criterion is generally accepted, whereas the second and third are commonly considered too narrow. The fourth criterion has its supporters and opponents, and the meaning of the fifth is somewhat open to debate.

---

<sup>308</sup> For the critique see Aurejärvi LM 8/1989 and LM 7/1993, although Aurejärvi mostly criticizes the broad and vague use of the duty as a concept.

The aforementioned definitions give some idea of the overall portrayal of the duty, but they do not describe the concrete applications the duty might have. Munukka's five-part dissection of the duty (3.2) gives more insight into this aspect. In the context of commercial contracts, the first definition (*tillvaratagandedefinition*) is usually excluded, since the parties are not (without an explicit contract provision) required to set the contracting partners interests before their own (3.1). To what extent the second one (*kontrolldefinition*) applies is debatable, since contracting parties are generally expected to look after their own interests in commercial contracts. The last three definitions (*aktsamhetsdefinitionen*, *samverkansdefinitionen* and *missbruksdefinitionen*) will probably apply to most commercial contracts, although the requirement for co-operation varies between different contract types. The last two (missbruk & aksamhet) are the most narrow ones, and they probably apply to almost all contracts. One could therefore summarize that the co-operation definition (samverkan) applies to commercial contracts depending on the contracts type, and the abuse (missbruk) and diligence (aktsamhet) definitions usually apply to all contracts.<sup>309</sup>

The Norwegian authors Nazarian and Thorsen have sought to define *the minimum requirements* for applying the duty (4.2). To avoid repetition, only a short summary of them will be given. Both authors mention the requirements: a.) reprehensible conduct and b.) economic losses for the contracting partner, which are caused by such conduct. However, Nazarian's definitions of the requirements are broader. She suggests that negative effects or risks of such effects are enough to constitute liability, which means that economic losses are not necessarily required. According to Nazarian, the parties are to: 1.) abstain from causing negative effects 2.) prevent and mitigate negative effects and 3.) promote the interests of the contracting partner. She states that the conduct of the parties is evaluated by assessing the protected expectations of the contracting partner. If a contracting party's protected expectations call for any of the acts in 1.-3, then the contracting partner must act accordingly. One can notice certain similarities between Nazarian's and Munukka's definitions. The items 1.-2. correspond to Munukkas diligence (aktsamhet) and abuse (missbruk) definitions and the third one is comparable to the guarantee (tillvarata), control (kontroll) and co-operation (samverkan), depending on how broad the third definition one is considered to be. Preventing negative effects may also be considered parallel to the co-operation

---

<sup>309</sup> The three loyalty models discussed by Munukka are not mentioned here, since only the participation model is relevant to the subject of this study.

(samverkan) definition. In addition, all of these aspects exemplify the division of the duty into passive and active aspects.

Nazarian's definition of the minimum requirements constitutes a somewhat broad liability for damages that a violation of the duty could lead into (4.2, 4.5). Since only negative effects are required and the effects do not necessarily even have to be financial, the liability seems to be far-reaching. As a reminder, Nazarian's definition is intended for the duty of loyalty in general. Here one might ask if such a broad definition for damages is applicable in commercial context, as it probably would make the application of the duty unpredictable, as stated by Dalbak (4.3 & footnote 233). Of course, a disloyal act causing a complete loss of trust for one's contracting partner is such non-economic negative effect which one must take into account. In any case, Nazarian seems to set an above-average demand for the consideration the contracting partners should show for each other in commercial contracts (e.g. due to difference in power balance and experience, see 4.2). In any case, these minimum requirements give a sensible basis for the assessment of the duty or at least they can be used to remove some of the vagueness in loyalty-assessment.

### **6.2.3. Restrictions to the concept of the duty of loyalty**

Some writers have suggested definitions which are narrower than the above-mentioned ones. Lehtinen has defined the duty of loyalty as a *neutral duty*. This means that during contract negotiations the duty focuses on the contracting partner, whereas during the actual performance phase the duty is fixed on the contract itself. This means that during the contractual relationship the duty of loyalty means loyalty to the contract, as opposed to the contracting partner (2.6.1). Also Korhonen has stated that loyalty is to be assessed by weighing up the contracts purpose, balance and risk-distribution, which might be interpreted as an approval of the said idea (2.6.1). Munukka explicitly rejects this restriction by stating that the duty also protects the interests of the contracting partner (3.2). Nazarian does not seem to explicitly comment this, but judging by her views concerning the need to protect a weaker party also in commercial contracts, the fact that the minimum requirement protects the expectations of the parties, and other statements that imply a party-oriented perspective, one could assume that the concept of neutral duty is not in accordance with her views (see e.g. 4.2).



In general, authors who emphasize loyalty as being assessed according to the counterparty's expectations probably would reject the idea of neutrality. Similarly, authors who emphasize contracts as co-operation of the contracting parties might consider the definition as narrow, although the concepts of neutrality and co-operation may not be mutually exclusive. Nevertheless, in the field of commercial contracts it might be recommendable to take a neutral and goal-oriented view, since it could give the assessment a more accurate focus. This is also in line with the predictability argument, since it is typically easier to orient one's actions in accordance with a mutually agreed and (hopefully) clearly defined contract purpose than the other party's expectations. In any case, the concept of a neutral duty seems to be disputed.

The Finnish writers have dissenting opinions concerning the *independent nature of the principle of loyalty*. Mononen defines it solely as a principle for systematizing norms, which cannot be used to justify resolutions (2.2). Aurejärvi has criticized the broad use of the term loyalty, especially in cases where a legal concept or notion (e.g. mitigating damages) is already an established independent norm (2.2). As mentioned, Karhu considers the duty as having less influence inside the system of contract law than certain other principles, such as reasonableness and the freedom of contract (although he considers it to be growing towards becoming one of the fundamental principles of contract law, 2.2.). Lehtinen describes it as a "support-instrument" or an auxiliary principle of the *bona fides*-principle (2.3). As his attitude towards the protection of a weaker party in commercial contracts is generally negative<sup>310</sup>, it can be assumed that he would reject the more permissive interpretations in this regard (e.g. Nazarian's). Similar attitudes have also come across in the other Nordic countries. Dalbak has also spoken for a more restrictive interpretation of the duty (4.5), stating that it should be restricted to assessing the abuse of rights and co-operation contracts. Evald has also been somewhat skeptical towards loyalty based terminology (5.6.2.).

However, other Finnish writers (Taxell, Häyhä, Tolonen, Ämmälä) give the principle (and the duty) a greater significance and emphasis as an independent principle (2.2.). All of the authors who have written their doctoral theses about the duty (Munukka, Holm, Nazarian) consider (unsurprisingly) the duty an independent principle. Generally speaking, the majority of the authors mentioned in this study seem to consider the duty an independent

---

<sup>310</sup> Lehtinen 2006 pp.242–253.

principle (and duty). The restrictive view seems to be mostly represented by (some) Finnish writers, although it should be noted that, as mentioned above, the attitudes towards the duty were earlier generally unfavorable in Sweden<sup>311</sup>. Aside from Dalbak, the opinions towards the duty seem to be mostly favorable in Norway.<sup>312</sup> Concerning Denmark, with the exception of Evald, the author of this study has not found specific mentions about the duty's independence or the lack of thereof. Karhu states that of the Nordic countries loyalty-based argumentation is probably used the least in Denmark. He suggests that the reason for this is the tendency of the Danish courts to apply the 36 of AftL. Therefore the courts uphold validity of contracts by merely adjusting them, and they refrain from solely applying 33§.<sup>313</sup>

### 6.3. The duty of loyalty in relation to other principles and norms

The duty of loyalty has a nebulous interrelationship with certain principles and statutory norms. It is clear that no legal entity exists in a void, and abstract definitions such as loyalty can hardly have a crystalline definition in relation to other norms. Various authors have suggested linking the duty of loyalty with certain statutory norms, and they sometimes cite the latter ones as codification(s) of the duty. Also, some suggestions aim to merge the duty with certain principles and doctrines, such as the prohibition of the abuse of rights. To begin with, one can state that there is no consensus on this matter, and some authors dismiss the linking of the duty with specific norms as unnecessary (e.g. Lehtinen, Muukkonen 2.1.). In the following part, the duty will be discussed in relation to: the Contracts Act 33§, 36§ (and the principle of reasonableness), the prohibition of the abuse of rights and *bona fides*.

The most often suggested (usually indirect) legal basis for the duty of loyalty seems to be the *Contracts Act* 33§. In Finland, the authors seem to be divided by this question into the ones that are in favor of accepting it as a legal basis (Ämmälä, Von Hertzen, Huhtamäki) and the ones that oppose it (Muukkonen, Mähönen, Nystén-Haarala, see 2.3,

---

<sup>311</sup> See Munukka 2007 pp.54–58.

<sup>312</sup> Although, the point of Dalbak's criticism is directed at the use of the duty to promote flexibility and assess the reasonableness/fairness of contracts, see Dalbak LoR 10/2007 p.598. Her views of the duty are not wholly unfavorable.

<sup>313</sup> Karhu 2008 p.108.

also footnote 33). The main argument against the former view appears to be that 33§ is formulated too narrowly to act as a basis for the duty. The material concerning Sweden shows that 33§, although usually mentioned, is not seen as its legal basis as often as in Finland. Munukka has stated that 33§ has been applied restrictively in Sweden and since applying the norm requires subjective evaluation, it is not suited for being a basis for the objectively evaluated duty (3.1, also footnote 114). It would seem that the Swedish doctrine has been more interested in inspecting the duty in relation to 36§.

In Norway, 33§ is described as having attained a greater prominence than in Finland and Sweden (4.1, 4.3).<sup>314</sup> There the duty has been applied in conjunction with 33§, but sometimes even independently. The duty is described as having a broader applicability and higher emphasis on the meticulousness than 33§ (4.3, 4.5). The duty has also been treated as an independent basis for voidableness of contract, although Hov & Høgberg expressed reservations concerning this (4.5). In any case, it would seem that the Norwegian doctrine emphasizes the 33§ the most in relation to the duty, but the writers still consider the duty being a much broader notion. The Danish texts mentioned in this study seem to have covered this aspect very scarcely.

*The Contracts Act 36§* (and the principle of reasonableness) is usually separated from the duty by defining 36§ as a norm concerning and adjusting the contractual balance (*equivalence-orientation*). The duty, on the other hand, is a norm that constitutes obligations to act and consider the interests of the contracting partner (*action-orientation*). As mentioned, Karhu stresses the importance of the principle of reasonableness over loyalty and considers the duty more as a background norm for the application of 36§. Most of the Finnish writers in jurisprudence seem to consider the duty and 36§ as fairly intertwined, but do not view 36§ as a legal basis for the duty. (2.3, 2.4)

In Sweden, 36§ is accentuated more. Munukka's description of the requirement of loyalty has been discussed above. The requirement highlights the closeness of these principles, but its name would imply that loyalty is the dominating aspect behind the subcategories. Munukka separates these categories by their function (correcting/complementing) and applicability. It might be interesting to point out Munukka's statement that the high threshold for applying the 36§ to commercial contracts should not be transferred to assessing disloyal conduct, since the duty can have milder consequences than the adjustment of contract.

---

<sup>314</sup> See also Björne 2005 pp.170-171, 182-183.

Holm has defined 36§ as being part of the duty and a “codified legitimation basis” for it. Norlén spoke of the principle of loyalty as one of the fundamental values behind 36§. Because of this, disloyal actions are generally considered as reasons for adjusting contracts by applying 36§. (3.4)

Of the Norwegian authors, Nazarian, Thorsen, Hov and Høgberg seem to view disloyal conduct as a basis for adjusting contracts, but they still separate the duty from 36§. Simonsen is an exception, as he considers 36§ to contain both the duty as well as the principle of reasonableness and that the duty can be applied through 36§ (4.3, footnote 228). Danish writers also regard the duty as being close to 36§, but they do not seem to consider 36§ as a basis for the duty, and in the case UfR 1981.300 H the duty was applied without directly referring to the 36§. (5.3)

To summarize, it would seem that all authors agree that the duty and 36§ have a similar value background. Finnish authors seem to emphasize 36§ over the duty and separate the principles, whereas the opinions of Swedish and Norwegian authors vary more. Most of them seem to consider the duty as a separate, parallel or background norm in relation to 36§. However, Simonsen and Holm speak of 36§ as a statutory codification of the duty (3.3 footnote 128, 4.3). It would seem that the duty is generally accepted as being intertwined with 36§, but usually they are separated by their orientation (equivalence – activity). However, opinions on their exact interrelation diverge.

*The prohibition of the abuse of rights* is a doctrine that can more or less be considered either as a part of the duty of loyalty or as a norm parallel to it. Generally, it is agreed that abusing rights to harm ones contracting partner is disloyal conduct. Some Finnish authors have considered the prohibition of chicanery a form of the duty and the prohibition as conceptually close to it (2.6.2.1). Munukka places both under the requirement of loyalty, but keeps them separate resulting from his view of loyalty having a broader definition and applicability. Still, he considers it possible to view either of them as a part of the other. Also Holm and Thorsen view the concepts as being very closely tied together, and Dalbak has supported Munukka’s idea of viewing the duty and the prohibition under the same notion (4.3). The clearest opponent against this idea is Evald who suggests removing all elements of the abuse of rights from notion of the duty of loyalty and transferring them into the sole concept of the prohibition. In contrast to Munukka who views the duty as having the broader definition and applicability in contract law, Evald states that the prohibition of the

abuse of rights has the broader applicability in general civil law. Evald separates these concepts by defining the prohibition as limiting the use of subjective rights and the duty as creating obligations to act (5.3). In the end, it seems that also the relationship of these concepts is disputable. However, since many authors seem to agree that the definition of the duty is closely related to the prohibition, Munukka's solution of viewing them under a superordinate term seems to be a functional way to explain their relationship.

There seems to be some kind of a consensus about the distinction between the duty and the concept of *bona fides*. *Bona fides* seems to be mostly defined as a technical norm which means an evaluation about the fact if a person knew or should have known something. Both concepts aim to protect the justified expectations of the contracting parties. As mentioned above, Lehtinen emphasizes the *bona fides* considering the duty merely as supporting it. In commercial context this aspect might gain more importance (2.3, footnote 24).

Finnish authors have also discussed the duty in relation to the protection of the weaker party. Karhu's opinion about this has been already mentioned. The opinions differ, but it seems that many authors (e.g. Ämmälä, Tolonen 2.3, Munukka 3.1, Nazarian and Hov & Høgberg, 4.2) agree that the power balance between the contracting parties may affect the loyalty assessment. But it should be noted that Lehtinen and Dalbak, who both focus especially on commercial contracts, have both strongly opposed this view.

To summarize this part of the comparison, the author of this study suggest that to explain the duty the Finnish authors refer either to 33§ or consider it as a wholly unwritten norm. Swedish authors seem to emphasize 36§ more, although the way it is referred to varies. In Norway, 33§ seems to have the spotlight, and in case of Denmark the question cannot be answered with certainty. The relationship between the prohibition of the abuse of rights and the duty is disputed, whereas the definition between the duty and the *bona fides*-term seems to be mostly clear. The relationship between the duty and the aspects of protecting a weaker party also divide opinions. Concerning the subject of this study, the more wary opinions might be highlighted, since the assessment of commercial contracts usually places less weight on a contracting party's person and assumes that professional actors are capable of looking after their own interests. The predictability aspect can also be underlined.

## 6.4. Functions of the duty of loyalty

The most commonly mentioned function of the duty is creating and upholding *trust* and *co-operation* between the contracting partners. There are also some reservations concerning this view (see Nazarian in 4.4). Most authors seem to consider the duty's supplementing function important, since it could decrease the need for overelaborate and lengthy contracts (Karhu, Häyhä, Lehtinen 2.2 Munukka, 3.2 Nazarian, 4.2). Aside from these two functions, there are a number of individual functions that are more or less often mentioned. Munukka's categorization (see 3.4) of such functions seems to be the most detailed one. Many authors probably approve of the title and linking function. These functions help to group together various norms and therefore focus on the system of the law of contracts. This idea is mentioned among others by Karhu, Mononen, Häyhä and Nazarian. Prevention of opportunism and damages is also probably widely accepted, since in itself it is a part of the trust aspect. Although, since Evald has spoken for detaching some of these elements from the duty in favor of the doctrine of the prohibition of the abuse of rights, the emphasis given to this aspect may vary. Nevertheless, the aforementioned aspects are the largely accepted ones. In the context of commercial contracts the trust function is probably the most vital.

The opinions concerning the *flexibility* function seem to be mostly favorable, although Dalbak has criticized this aspect (4.5). The main issue here is probably the extent of this function and to what extent it can be applied in conflict with the parties' freedom of contract. The same can be said of the correcting function. Many authors also approve of the materialization function that links statutory norms to the duty. Although as discussed earlier, (6.2.2) some authors, especially in Finland, oppose such linking. Certain authors also maintain that the duty promotes the functionality of markets and exchange (Munukka, Nazarian, Simonsen). A counterargument against this is that the duty increases unpredictability in contracts, which then increases transaction costs. Since the definitions and opinions about the duty vary, authors emphasize different aspects of the duty. One could assume that the authors who stress the importance of predictability in commercial contracts probably would oppose the emphasizing of the flexibility and correcting functions.

The primary source for debate seems to be about how far one can highlight the duty at the cost of the contracting parties' freedom of contract. Munukka has described the duty as "avtalsfrihetens antagonist." He considers it possible to apply the duty even contrary to the explicit terms of contract, although this statement concerns the duty in general (3.4, footnote 138, see also Mäenpää's opinion, footnote 20). Whether he views the same applying to commercial contracts is questionable, although the statement implies an overall attitude towards the issue. Nazarian has also placed a rather considerable weight on the duty in relation to the freedom of contract (see e.g. 4.2, 4.4, 4.6.2). In general, since most authors suggest that the duty should be applied according to the justified expectations of the parties, going against explicit contract terms is most likely disapproved of. Some authors have also placed the freedom of contract above loyalty (see for instance Karhu, Dalbak, Lehtinen). Giving a pellucid answer to this question is not possible, but one could say that the more recent studies and doctoral theses seem to put an increasing amount of emphasis on the duty. One can also assume that sentiments towards restricting the freedom of contract in commercial context are normally more negative than in other fields of contract law.

## 6.5 Application in contracts and consequences of disloyal conduct

### 6.5.1. The applications of the duty

As has been said, perhaps *ad nauseam*, there is no certain consequence for (a breach of) the duty and its applicability is to be assessed *in casu*. It is undisputed that the duty may: 1.) be applied to contract *interpretation* and 2.) to *supplement* a contract. The duty is considered to constitute an obligation to interpret contract provisions loyally and not too one-sidedly. Loyalty-based interpretation fulfills the above-mentioned functions of the duty. Many authors name the parties' expectations as a basis for loyalty interpretation (see below). Therefore, the extent of the interpretation which the authors attribute to the duty also varies depending on which functions they wish to underline. Some writers, who are sceptic towards individual loyalty obligations, place more emphasis on the interpretation aspect (e.g. Mähönen 2.5, Ramberg 3.5). Holm has also pointed out that the loyalty aspect might add a goal- or purpose-oriented view into the interpretation. (3.5, footnote 147)

The supplementing of contract brings new or previously “hidden” obligations into a contractual relationship. Some authors emphasize the supplementing feature of the duty (Munukka 3.5). In Munukka’s view, the supplementing of contract can be based on *dispositive norms, the type of contract in question or in casu assessment*. The first part of this view is likely opposed by the authors who speak for the separation of statutory norm from the notion of the duty. One interesting question is the relation between the norms of the *Trade Act* and the duty. As this study will later point out, certain norms of the *Trade Act* are often associated with the duty. This might speak for supplementing a contract with the norms of the *Trade Act*, even when the contract does not refer to the *Trade Act*. Still, the *Trade Act* is dispositive law, but the duty is considered a non-discretionary background norm, and therefore it cannot be completely excluded from contracts. Concerning contracts in which the *Trade Act* has been explicitly excluded, one might ask if it is possible to supplement the contract with the duty of loyalty, even if such supplementing would, in fact, lead to the norms of *Trade Act* being incorporated into the contract. It might be problematic if such obligations seep into a contractual relationship even when the parties consider them excluded. Lehtinen and Dalbak have stressed that the provisions added to a commercial contract through supplementing should not be conflicting against the explicitly stated provisions (2.5 & 4.5).

### **6.5.2. The consequences of disloyal conduct**

Regarding the *consequences of breaching the duty*, the following ones are fairly acknowledged possibilities: 1.) *the liability for damages* 2.) *the voidableness of contract* 3.) *the cancellation of contract* and 4.) *the passivity sanctions*. The liability for damages is almost always mentioned, and the type of liability is usually described as culpa-liability. Nazarian has spoken for a somewhat stricter liability (4.5) and also pondered whether it would be possible to award damages for non-economic loss, which would serve as a preventive warning. It might be doubtful that such loss would be compensated in a commercial context. The possibility for price reduction has also been mentioned (2.5, 3.5). The voidableness of contract is often mentioned in conjunction with the *Contracts Act* 33§. There has also been some discussion, especially in Norway, over possibility to void a contract solely by applying the duty of loyalty (4.5). In Finnish and Swedish texts, such possi-



bility is not usually discussed in detail, since the voidableness is usually tied to 33§ or 36§, with loyalty influencing their interpretation (see Mähönen 2.5). Although this issue seems to be disputed in Norway (see Hov & Høgberg 4.5), it seems to have gained support in jurisprudence and court practice. This would imply that the duty has a *stronger* influence over the consequences of disloyal conduct in Norwegian doctrine than in Sweden and Finland. This issue has also been discussed in the Danish doctrine, although the author of this study has not found any definitive statements. Andersen & Madsen define 36§ as a basis for the voidableness of contracts in case of disloyal conduct (5.5).

Concerning the cancellation of contract, the main issue is often the trust required for the co-operation of contracting parties. If such trust is (materially) violated it is usually seen as a justification for cancelling the contract. On the other side, one must consider the interests of the contracting partner when measuring whether or not to cancel the contract. Lastly, certain passivity sanctions are seen as being part of the duty. These include the possibility for a party to lose his/her right to invoke certain contract terms. The writers have also discussed a possibility to *revise* contracts on the basis of the duty. The Danish case UfR 1981.300 H is an example of a situation where the refusal to adjust the contract was be considered disloyal. Further, an obligation to renegotiate is mentioned as a milder variant of such co-operation. Nazarian, (4.5) Holm (3.6, 3.6.2), Thorsen (4.3) and Andersen & Madsen (4.5, footnote 286) seem to consider it possible to adjust a (usually long-term) contract in situations where a party has no loyal justification to refuse it.

It would seem that the Norwegian jurisprudence considers the duty as having a greater influence in relation to the consequences of disloyal conduct than the legal doctrines of the other Nordic countries. Nazarian seems to take this view to the furthest. This influence is illustrated by the fact that some Norwegian authors consider it possible to void and revise contracts solely on the basis of disloyalty. The authors in other Nordic countries seem to consider the duty more as being applied through other statutory norms, although the writers disagree on the independent nature of the duty. One can assume that authors who see the duty solely as a background principle rate its influence low. As mentioned before, the Finnish writers have stated dissenting opinions on this matter. (2.2). The Swedish authors Munukka and Ramberg disagree whether the duty can be used to constitute a claim in a legal dispute. This disagreement is focused on the interpretation of the case NJA 2009 p.672 (3.5). It would seem that the applicability of the duty as an independent principle is

(at least to a degree) disputed in Sweden and Finland, whereas Norwegian and perhaps also Danish writers see it as a more independent legal entity.

### **6.5.3. Possible criteria for the duty of loyalty and contract types with particular emphasis on loyalty**

Whether the problem of unpredictability in applying the duty can be cured has been a source for debate. Writers have discussed various criteria on how to assess (dis)loyalty. Naturally, these criteria overlap each other and do not exclude the others. The assessment of contracts is to be done on a holistic basis. These criteria are accentuations which focus on a certain aspect of the contractual relationship that is considered pivotal for the loyalty-evaluation. Suggestions for such criteria are: 1.) *reasonableness* (Muukkonen, 2.5) 2.) *the expectations of the parties* (of what is normal or what is typical for the contract type in question) (Häyhä 2.5, Munukka, Holm 3.5, Björkdahl 3.6.1, Nazarian 4.5, Simonsen 4.6.1.) 3.) *the contracts purpose/goal* (Korhonen, Lehtinen 2.5) and 4.) *the common sense of justice* (Nazarian 4.5).

The principle of reasonableness and its interrelationship with the duty has been discussed above (6.3). Muukkonen has mentioned reasonableness as the main criterion of loyalty. The contracting parties are to *reasonably* consider each other's interests. Reasonableness is of course always an aspect to consider, but the subsequent authors have rather emphasized the parties' expectations as the main criterion. It seems that the (2.) aspect has gained the most support in the recent legal literature. The reasonableness aspect in itself might be fairly vague and easily mix 36§ with the duty. The perspective of contracts purpose or goal (3.) can perhaps be defined as a narrower part of the parties' expectations. It could also be described as the more objective perspective which focuses on the contract, and thus the parties expectations are perceived through the contracts goal. The perspective of the parties' expectations (2.) might be a bit more subjective, even though this assessment is done by evaluating what a party normally or commonly would expect in the situation in question. Therefore, as stressed by *i.a.* Lehtinen, the third aspect might be best suited for assessing commercial contracts.

Nazarian has analyzed the unpredictability problem in two situations (see 4.5). If there is a contract provision to be interpreted, one is to follow the parties' expectations. If there is

no provision, one can reduce the unpredictability by assessing the expectations on the basis of the common sense of justice. As this might appear as somewhat credulous, it must be reminded that Nazarian discusses these situations as predictability *before* a conflict has arisen between the parties. The validity of the common sense of justice argument is diminished after the parties are in conflict. Finally, both Munukka and Votinius argue that the duty does not make courts evaluation of a contracts wording necessarily more unpredictable, especially if the wording in itself is unclear. In these situations, the duty of loyalty might even promote predictableness. (3.5)

The duty of loyalty gains more emphasis and significance in certain contract types, first and foremost in *long-term contracts*. Its importance for such contracts is undisputed, and for instance Nystén-Haarala mentions it as being possibly the most important principle in them (2.5). Individual evaluations still vary, as Munukka has accentuated the meaning of a contracts complexity over its duration (3.5). Examples of loyalty-dependent contracts are: franchising contracts, joint-venture contracts and partnership-contracts. As mentioned, Holm considers it possible to adjust long-term contracts on the basis of the duty loyalty. This due to the fact that it is not possible to prepare for all possible future changes in a contract (3.6). On the other side, it is understandable that simple sales contracts do not require much consideration for the other party's interests. Even more so, contract types that have a speculative character are cited as having the lowest requirement of consideration for the other party's interests (4.6.2.2).

## **6.6. Elements of the duty of loyalty**

### **6.6.1. The duty of loyalty in different phases of a contractual relationship**

The duty of loyalty influences contracting relationships from beginning to end. The concept of pre-contractual liability caused by a breach of the duty during negotiations seems to be generally accepted in jurisprudence. The relationship between the doctrine of *culpa in contrahendo* which itself is not a clearly defined doctrine and the duty of loyalty has had various definitions in jurisprudence. Generally, authors seem to use the term *culpa in contrahendo* for pre-contractual liability and the duty as a factor in the assessment of this liability. There are some exceptions. Huhtamäki has described the duty as a *continuation of*

*the culpa in contrahendo* and suggested that both terms are used in conjunction with each other (2.6.1). Simonsen seems to merge the *culpa in contrahendo* with the duty, so that the former is considered part of the duty (4.6.1). Björkdahl has defined the duty as a “threshold factor” of the pre-contractual liability. If the negotiations have advanced to a stage in which the parties can rely on the fact that the contract will be concluded, then they must act in accordance with the duty of loyalty. Before this, the negotiations are non-binding. (3.6.1.1)

It would seem that the interrelationship between the duty of loyalty and the doctrine of *culpa in contrahendo* is hard to unambiguously define. Of the above-mentioned definitions the one mentioned by Björkdahl seems to be the most concrete, unless one plainly merges both terms into (either) one.<sup>315</sup> Merging the terms does not, however, make the concept of the duty much clearer. Lehtinen’s definition of the neural duty which focuses the duty on the contracting parties during negotiations has been mentioned above. The evaluation of the duty is generally based on the parties’ *justified expectations of establishing contact*.

Aside from its relation to *culpa in contrahendo*, the influence the duty has during the negotiations-phase varies. Since the pre-contractual liability is an exception to the rule, it is usually applied restrictively. One might see some variations on how strictly this restrictiveness is applied (see for instance Norway Rt. 2004 p.1256), and Nystén-Haarala has spoken for a somewhat broader interpretation of loyalty during negotiations (2.6.1 footnote 67). Beside these examples, it is not possible to describe the influence of the duty without delving deeper into the doctrine of *culpa in contrahendo*, which is not possible in the bounds of this study.

An even clearer deviation from the norm, the *non-contractual or contract-external* duty has been discussed the most by the Swedish authors. Holm and Björkdahl refrain from using the term duty of loyalty in non-contractual situations (3.6.1.2). Munukka has evaluated the possibility of applying the duty in situations that are contract-like (*kontraktsliknande*) and Kleineman (3.6.1.2 footnote 166) contemplates the possibility of using loyalty-based assessment in certain third-party situations. Usually authors leave the non-contractual duty outside the scope of their texts, which implies it being considered more or less excluded. Nazarian has delimited the subject of her doctoral thesis to exclude contract-

---

<sup>315</sup> See also Heidbrink JT 4/2007-08 p.971. In his review of Björkdahl’s book, Heidbrink states that Björkdahl’s thoughts about the duty of loyalty in pre-contractual situations are fit for use (*användbar*) and at least so convincing that they cannot be ignored.

external loyalty, although she mentions the possibility of its existence in some cases. Especially the Norwegian case Rt.1994 p.775 was about loyalty between two rival pledgees, which is mentioned as an example of loyalty between rivals (4.6.1). A more specific account of the non-contractual duty would go past the subject of this study, since it would be more about property law than contract law. To summarize, there seems to be some interests in applying the duty to non-contractual cases, especially in Sweden and Norway. This view, however, is disputed. The main issue is the problem with expanding the concept of loyalty which means co-operation and consideration for the contracting partner, to a third party who is not bound by the contract. This causes not only a conceptual problem but also increases the practical problem of unpredictability.

There are also some mentions of post-contractual loyalty obligations of which the most notable ones are the duty of confidentiality and the prohibition to compete (Tieva 2.6.1, Munukka 2.6.2.1, Nazarian, Simonsen 4.6.1). The authors describe post-contractual obligations as being based on the protected trust between contacting parties. Such obligations then may extend to the time after the contractual relationship. It is questionable to what extent it would be possible to supplement a commercial contract with a post-contractual obligation. In these contracts it would be quite unpredictable to supplement the contracts with an extended prohibition to compete, without such contract provision having previously been, at least in some form, an explicit part of the contract.

### **6.6.2. Obligations stemming from the duty of loyalty**

The questions whether the duty of loyalty can act as a basis or a source for more specific obligations (such as the duty to disclose) and whether statutory obligations can be viewed as loyalty obligations are disputed. The two opposing views in the Finnish discussion have been mentioned (3.6.2). The more restrictive view which sees the duty purely as a non-statutory norm has also been supported by Evald (5.6.2). In contrast, the author of this study has not come across similar opinions in the material concerning Sweden and Norway. The *narrowest view* suggested by Muukkonen and Mähönen demarcates all other obligations which can be reasonably well defined (e.g. duty to disclose, duty to cooperate), outside the general duty of loyalty (2.6.2). The specific statutory norms are considered as specific loyalty obligations, which are considered as being apart from the gen-

eral duty. Also the negotiations loyalty is separated from the general duty. *A degree less restrictive view*, suggested by Hemmo and Evald, considers statutory norms separate from the duty and the notion of the duty as the foundation only for obligations which have an ambiguous normative basis in contract law (2.6.2, 5.6.2). Evald has also criticized the inductive reasoning behind deriving individual obligations from the general duty of loyalty. These views by Hemmo and Evald could be described as *formal*, since the statutory nature of the norm defines whether it is a loyalty obligation. These two views generally seem to strive for a more precise use of terms, without the need for linking individual obligations to the duty.

Aside from the above-mentioned views, it would seem that most authors mentioned in this study speak for a broader definition of the general duty of loyalty. The author of this study has not come across similar restrictive definitions in the Swedish or Norwegian material used in this study. A moderate amount of Finnish and some Danish authors consider the duty as a basis for more specific obligations. It would seem that Nystén-Haarala's idea that the broader version(s) of loyalty has in the last years become more favored than the narrow one hits the mark (2.6.2 footnote 75). The upholders of the broader definition(s) generally speak for a more "holistic" outlook, in that the individual (statutory) obligations (e.g. the Trade Act) are to be assessed by taking into account their loyalty-background which guides their interpretation. They also use the term specific duties, but it usually indicates specific duties that are derived from the general duty. Therefore, as mentioned by Munukka (3.1, 3.4, materialization function), it is possible that if certain norms become seen as loyalty obligations, their interpretation may change accordingly. The division between the specific and the general duty does not exclude or totally separate the latter from the former, but rather considers the specific duties a subcategory or a derivation of the general duty. The definitions mentioned by Votinius are worth reminding of, although they are somewhat broader and overlap the other above-mentioned definitions, which is why they are not discussed here in detail (3.6.2).

The specific duties can be described as secondary obligations that have a loyalty-based assessment. As Munukka (3.6.2) and Nazarian (4.6.2) have stated, their type varies between passive and active obligations. Nazarian seems to give the general duty of loyalty the broadest definition, since in her view contract provisions and statutory norms of loyalty do not exclude the general duty. This means that the general duty is not to be seen as being excluded or diminished, even if there are contract provisions or statutory norms that define

or alter the duty, as long as they do not explicitly demarcate it. How one defines the more specific duties differs, but the categorizations drafted by Munukka seem to be quite adequate. As mentioned before, in this study the author has chosen to discuss the duty to disclose under its own headline, since most authors tend to focus on it in their texts. Some authors see the duty to co-operate as being identical to the duty of loyalty or claim that the duty to disclose is the same as the co-operation (2.6.2). Still, it would seem to be possible to, at least somewhat, distinguish these duties and this is why they are discussed separately in the following chapter. Of course, one must bear in mind that the authors who separate the notion of the duty of loyalty from other specific obligations would probably disagree with the following categorizations.

#### **6.6.2.1. Specific obligations requiring contribution to contract**

The following specific obligations attributed to the duty of loyalty seem to be almost always mentioned in the legal literature of all the Nordic countries: 1.) *The duty to co-operate* (or contribute) which is defined as an obligation to work towards fulfilling the contracts goal. The Contracts Act 50§ has often been mentioned as a statutory example of this duty (2.6.2.1, 3.6.2.1, 4.6.2.1). Commonly, co-operation is defined as an obligation to remove obstacles and seek means to adequately effectuate the contract and its purpose, which means e.g. applying for official permissions and seeking financial support. Passivity in this respect can be regarded as disloyal. Interestingly, the norms 4.2 and 6.2 of the Contracts Act are often mentioned as such passivity sanctions. (3.6.1, 4.6.2.1) 2.) *The duty to mitigate (and prevent) damages*, which is often linked to the Trade Act 70§ in Sweden<sup>316</sup> and Norway and 33§ or 35§ in Denmark. The Vahingonkorvauslaki 6:1 is mentioned in the Finnish literature, although it actually concerns delicts rather than contracts. As mentioned (by, amongst others, Aurejärvi, 2.6.2.1) the duty to mitigate damages applies, in fact, to broader contexts in civil law than the duty of loyalty, which makes linking it to loyalty, or especially regarding it as its subcategory, somewhat troublesome. On the other side, abstaining from mitigating damages is probably commonly considered disloyal. 3.) *The duty of care*, which is linked to Trade Act 72§ and 73§ in Sweden and Norway. For its definition, see 3.6.2.1.

---

<sup>316</sup> see footnotes 113 and 187.

Aside from the aforementioned obligations (and the duty to disclose) there are some obligations which are only mentioned in certain countries in the material used in this study. The prohibition of chicanery has been mentioned by Finnish writers, but this aspect was discussed above in part 6.3. 4.) *the prohibition to compete*, which is mentioned in all the other countries except in Finland. What makes this duty interesting is that some authors (Holm, Munukka, Nazarian, Andersen & Madsen) consider it possible for such an obligation to be supplemented into the contract on basis of the duty of loyalty. Munukka and Holm suggested that supplementing a contract with this obligation should be based on at least an implicit agreement of its existence in the contract (3.5, 3.6.2.1). Nazarian considers the prohibition to be less relevant in sales contracts, but sees it possible to consider it as a part of franchising contracts, even when it is not agreed upon in the contract (4.6.2.1). In any case, supplementing a commercial contract with a prohibition to compete would be a far-reaching alteration of the contract. 5.) *The duty of confidentiality*, which is mentioned in Swedish (3.6.2.1), Norwegian (4.6.2.1) and Finnish (2.6.2.2) texts, can be especially relevant in close co-operation contracts where parties share information. The author of this study has not found mentions of it in conjunction with the duty of loyalty in Danish texts. The description given for it in 3.6.2.1 probably illustrates its relevant aspects.

One can notice that the duty is perceived the most far-reaching by the recent Swedish and Norwegian authors. It would seem that in relation to the specific obligations, the Finnish authors uphold the most restrictive outlook. This could be explained by the fact that there is no doctoral thesis about the duty, unlike in Sweden and Norway. One can also understand why there have been no mentions of the prohibition to compete, since it is probably one of the most potent ways to alter a contract. The author of this study has not encountered mentions of the duty of confidentiality in the Danish literature, but otherwise it seems that the all other aforesaid obligations are mentioned at least by one author.

#### **6.6.2.2. *The duty to disclose and inform***

The duty to disclose is mentioned together with the duty of loyalty in all of the Nordic countries in question. It is usually defined as an obligation to adequately inform ones contracting partner in situations where one party has information that is of importance for the common goal of the parties. The *duty to inspect or investigate* is usually mentioned as its



counterpart. The level of diligence required from the inspection varies. Nazarian places the duty to disclose before the duty to investigate in general (4.6.2.2), although it is unclear whether this statement concerns commercial contracts. Also, the skill and expertise possessed by a contracting party may require him/her to disclose information that the other party is not able to gain him/herself. As Lehtinen points out, commercial actors are usually expected to have and seek expertise on their own. Munukka delimits the duty to inspect outside the duty of loyalty (3.6.2.2 and footnote 198).

Some individual aspects of disclosing have been discussed in more detail. 1.) *an obligation to notify* (reklamation), has often been mentioned in conjunction to the duty in all of the countries (Taxell, Madsen, Andersen, Munukka, Nazarian), although Munukka (3.6.2.2) and Nazarian (4.6.2.2, footnote 256) have expressed some doubts whether notifying should be considered as a loyalty obligation. 2.) *obligation to warn* (Munukka 3.6.2.2, Nazarian 4.6.2.2), although Nazarian discusses it in conjunction with advising, whereas Munukka uses a broader definition. The duty to give notice mentioned by Simonsen is quite similar to the duty to warn, but the latter focuses rather on a contracting party intending to exercise certain rights (4.6.2.2). Also the Trade Act 17.2 is mentioned as conveying an obligation to warn. Although the duty to warn is not explicitly mentioned by Finnish authors, one may still argue that the general definition of the duty to disclose usually includes the duty to warn. 3.) *an obligation to inform of performance hindrances*. (Rudanko 2.6.2.2, Munukka 3.6.2.2, Madsen 5.6.2.2.). 4.) *An obligation to clarify*, which actually means explaining or correcting the others false impressions (Votinius 3.6.2, Nicander 3.6.2.2). These two aspects could also be included in the general definition of the duty, but it is difficult to say if the authors in general would accept them as such. 5.) *The duty to answer* (Munukka 3.6.2.2.), and 6.) *the duty to point out harsh terms in standard contracts* (2.6.2.2, 5.6.2.2.). In addition, it can also be mentioned that Moalem gives the duty to disclose a broad scope of applicability and definition, linking it to several legal doctrines (see 5.6.2.2).

Aside from categorizing numerous types of obligations, some authors have sought to form more intricate *criteria for assessing* the duty to disclose. Such authors mentioned in this study are: Norlén, Nazarian, Simonsen and Moalem. The following aspects are usually same: 1.) a party knows (or should know) certain information 2.) The information must be relevant or decisive 3.) The party possessing the information knows (or should know) of its relevance to the contracting partner. Nazarian has also added a condition that a party (e.g.

buyer) relies on the fact that he/she will be disclosed about the facts in question (4.6.2.2). Generally, parties are not required to give information about their economic status. However, the opinions concerning this are more nuanced. Norlén (footnote 163) and Simonsen (3.6.2.2) consider an imminent bankruptcy as something that needs to be disclosed of. Also Nazarian seems to hold it necessary, if the minimum requirements for disclosing are fulfilled (3.6.2.2). Björkdahl generally opposes such view (footnote 163). Norlén seems to take the need to disclose quite far by stating that even if information is by its nature uncertain, it is not excluded from the duty to disclose (footnote 192). Simonsen seems demarcate uncertain information outside the required disclosure (4.6.2.2).

Certain classifications for the types of information included in the scope of the duty have been mentioned. Norlén mentions *the destructive, retributive and productive facts* (3.6.2.2.) and Moalem facts relevant *to the effectuation of contract, motives for contracting and information about market situations*. Moalem further mentions the *probability and influence* of relevant events as additional factors of the assessment (5.6.2.2.). The first categories mentioned by both authors are probably generally considered to be part of the duty to disclose. It is clear that withholding destructive facts is disloyal. The destructive facts are also related to the effectuation of contract, since they usually directly hamper it. Aside from these facts, one can understand why withholding facts important to the effectuation of contract is considered disloyal. The redistributive facts focus on the balance of contract, which means facts that would drastically change such balance are to be disclosed of. This is probably something that authors disagree on and especially in the context of commercial contracts. Usually it is agreed that the parties are allowed to use their expertise and knowledge to gain advantages and profits. Moalem delimits information about the markets and parties motives for taking part in contracts outside the scope of the duty. Lastly, as is understandable, Norlén leaves the productive facts outside the duty, although he perceives it possible for them to be included into the duty in exceptional circumstances.

The general rule is that *legal facts* are not included in the duty. Exceptions are still possible, as Lehtinen considers such obligation imaginable in the context of international trade (2.6.2.2). Nazarian considers it possible as well, when the object of purchase requires especial legal expertise e.g. in tax law (4.6.2.2.). Munukka considers a gross mistake or misleading of a party as grounds for considering a neglect of disclosure disloyal (3.6.2.2).

## 7. Conclusions

### 7.1. The Nordic duty of loyalty – a broad definition

At first sight, the duty of loyalty seems to be intangible and almost ethereal. The general definition does not seem to give one much to build on, but as one looks deeper into the ideas presented in jurisprudence, one notices that eventually the duty seems to branch into numerous offshoots which are entangled with other entities of the legal system. Since the duty is an unwritten rule, principle, standard, guideline, idea and whatnot, it is also rich soil for authors in jurisprudence to plant and develop their ideas. Most definitions and categorizations given for the duty are developed by authors, and these definitions are then later developed further by others. If one would try to present an illustration of the most extensive form that has been given to the duty in accordance to the notions presented in the chapter 6.2, one could present something like the figure 1. on the page 119. The graph starts from the general and abstract definitions and descends into the concrete and explicit ones.

The top level of the figure holds the definitions of Björne, Votinius and Norlén, and most of its latter parts are based on the categorizations presented by Munukka, especially in the case of the requirement of loyalty. Whether one places the concrete duty above or next to the requirement of loyalty is a matter of taste. It could also perhaps just be merged with the (principle) notion of the duty of loyalty, but here it is used to describe the difference between the views of legal dogmatics and philosophy of law, which admittedly might not match Björne's original definition. Nevertheless, the figure also contains categorizations made by other authors. One could of course include the ban of chicanery into the duty of loyalty or the prohibition of the abuse of rights but, as mentioned, this is debatable (but then so are all of the categorizations) and it was therefore left out. It would also be possible to place Munukka's five definitions for the duty of loyalty and the three models (3.2) somewhere between the duty of loyalty and the individual obligations. The contract type dictates which ones of the obligations present themselves in a contractual relationship. Of course, in commercial contracts the duty might mostly influence contracts through interpretation and by supplementing them with the duty to disclose, but none of the above-mentioned duties and obligations seems to be completely excluded from such contracts.

In addition to these categorizations, Thorsen and Nazarian have sought to find suitable minimum criteria for evaluating contracting parties conduct. Since these criteria are by their nature quite universal, they can be considered fairly suitable for measuring the conduct of contracting parties, although in commercial contracts one might want to specify the definition of negative effects and the level of diligence the parties must maintain for each other. It might be better to set a stricter requirement for negative effects and less for diligence, since the parties are expected to see to their own interests. One might also ask if it would be better to take the criterion for assessing loyalty more to the direction of the *contracts goal and purpose*, since it might be the most objective and possibly predictable aspect of the contract. Of course, the criteria merge together more or less but the contracts goal might be a valid focus point.

Further, one could use the categories mentioned by Norlén in a broader fashion to assess the parties conduct, meaning that actions are divided between destructive, redistributive and productive in relation to the contracts goal. Destructive actions are always disloyal and so are redistributive, if they change the contract balance so that the contract (goal) loses its meaning or value for one of the parties. The definition of productive actions might have to be adjusted so that it refers to actions, such as competing activity in the markets or deals with third parties, which generally are allowed, unless they significantly harm the contracts purpose.

Is it possible to speak of a common Nordic duty of loyalty? The general definition of the duty is the same in all of the countries. Most of the individual elements are also acknowledged, such as the duties to disclose and co-operate. The consequences for breaching the duty are agreed upon on a general level, although specific descriptions vary. The more recent articles and doctoral theses give the duty all the more broader definitions. The figure 2 seeks to illustrate the various aspects and applications the duty can have. The figure does not include all of the aspects mentioned in this study; especially some of the specific functions are left out. Lastly, it is also interesting to note that Taxell's definition of duty, which was published in the 70's, still seems to be among the broader perspectives of the duty.

FIGURE 1

The definition's perspective:

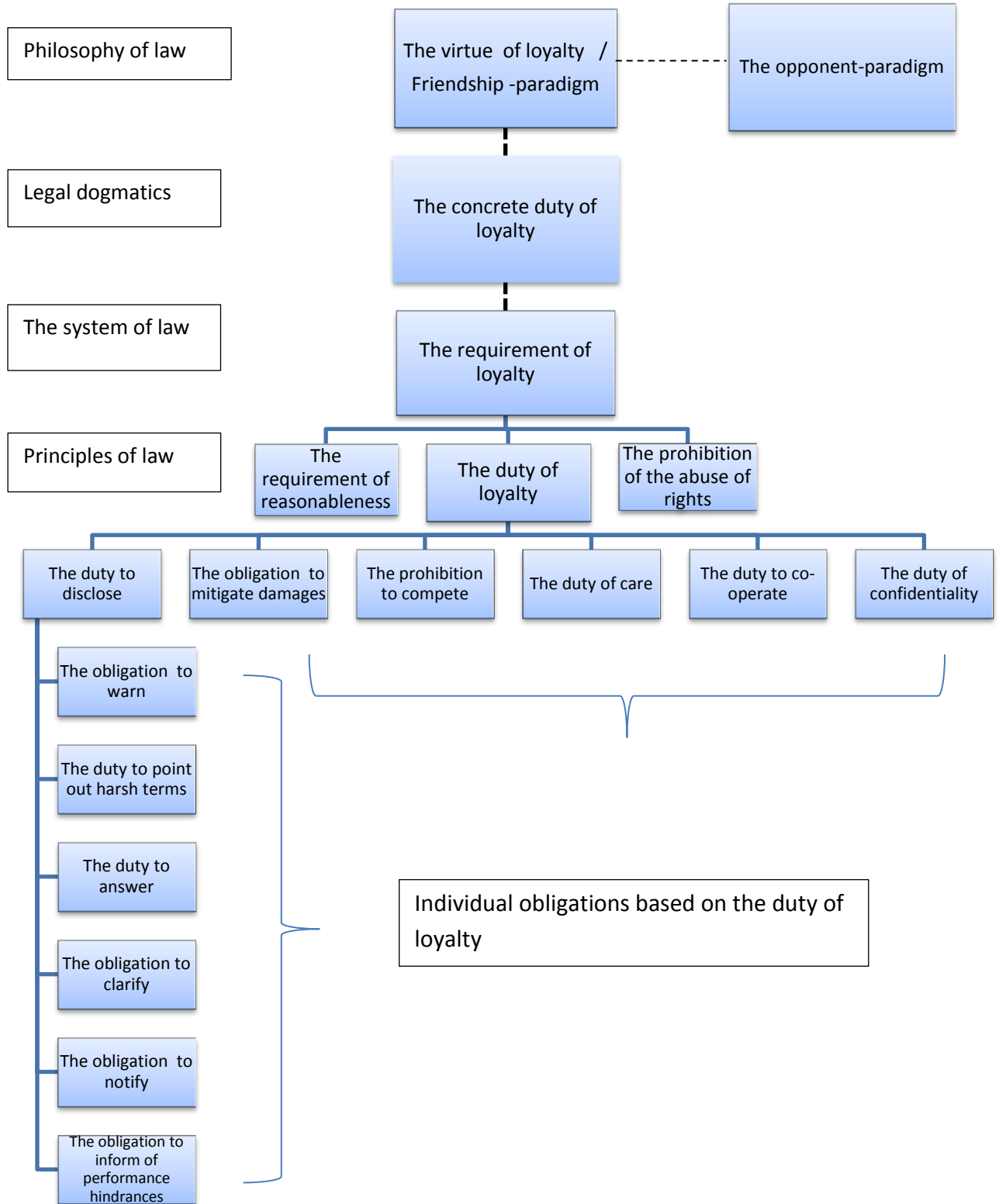
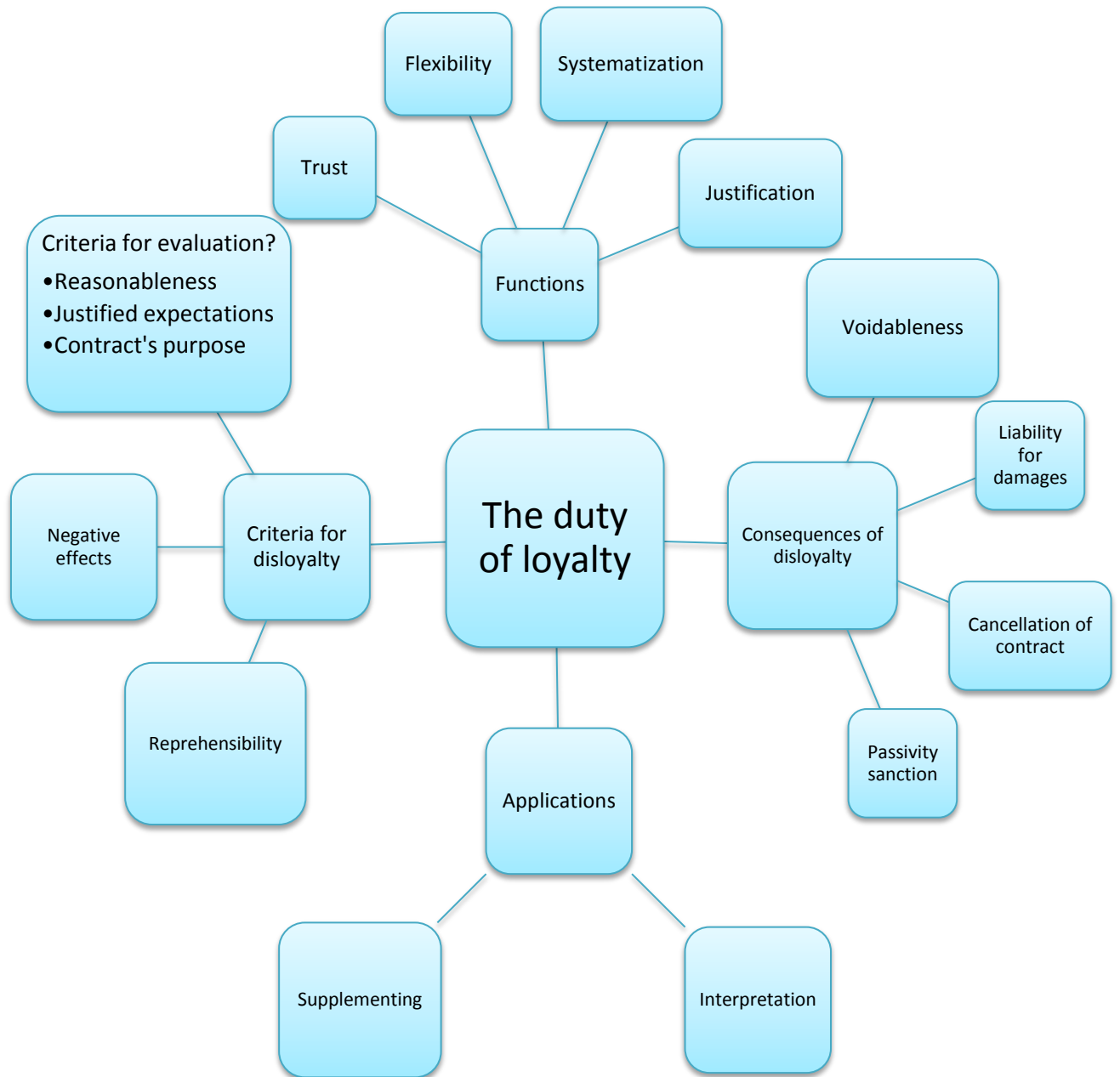


FIGURE 2



## 7.2. The Nordic duty of loyalty – a critical approach

As one has seen when studying the opinions stated about the duty of loyalty, not all authors wish to see it in such a broad scope. Mostly the authors who have written their doctoral thesis about the subject seem to be the most willing to give it an all-encompassing definition. The arguments against the duty are: 1.) that it is too vague and therefore creates uncertainty, 2.) it is unnecessary to view individual and well defined norms as loyalty obligations and that 3.) most of these obligations (e.g. mitigating damages) are already in themselves established doctrines of contract law, which do not need a loyalty based evaluation. Considering, for instance, the norms of the Trade Act as loyalty obligations might also make their applicability more unpredictable, since the duty cannot be excluded from contracts.

Especially concerning the interpretation of commercial contracts, one can ask if it is justified to place much emphasis on loyalty and this way limit the parties' freedom of contract. Nevertheless, it is generally agreed that complex long-term contracts and partnership-contracts always require loyalty from both contracting parties. Whether this loyalty should be applied in a form of contract interpretation or supplementing depends on the contract type and commercial customs of the branch of trade in question. Still, relying on one's contracting partner and the friendship-paradigm might be somewhat naïve.<sup>317</sup> Perhaps the friendship-paradigm does not have to be so emphasized in commercial contracts, and maybe it would be possible to assess the duty with a more goal-oriented and functional perspective.

So is there a consensus on the duty outside the general definition? It would seem that, aside from this general notion, one can find more or less restrictive perspectives which seek to give the duty narrower and stricter definitions. The categorizations mentioned in the figure 1 are by no means undisputed. Some wish to use the duty mainly for the systematization function, which might then give tools for interpreting different legal entities. In any case, the author of this study perceives most of the recent authors giving the duty a broader definition than just the systematization function would allow. Whether this is neces-

---

<sup>317</sup> See for instance Karhu's review of Munukka's thesis in JT 3/2007-08 p.756-757: "Betoningen av lojalitet kan i några ekonomiska kontexter vara litet orealistisk och ge intrycket av en snäll och naiv juridik. [...] (M)ånga ekonomiska aktörer strävar hellre efter förutsebarheten med långa och tämligen formella avtal som tolkas och används strikt i anda av rigor commercialis (jfr s. 52) än efter vad de ser som allmänna och vaga principer." and Dalbak LoR 10/2007.

sary and if it will solve the problems of flexibility attributed to e.g. long-term contracts, is left for future discussion to decide.