How should you word a claim for damages? Swedish Supreme Court to give new guidance on limitation provisions in General Conditions of Contract AB 04 and ABT 06

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There have been occasions when I have written on a client's behalf to another party informing the party that it is liable for a damage that has arisen without having stated the grounds for this in more detail in the letter. In certain cases – for example, damages resulting from a water leak from pipe installations – the grounds for damages have not been developed further, other than to state in the correspondence with the other party that its commitment under the contract between the parties encompasses design and installation of the pipe installations in question. I will also admit that, on occasion – and without giving it further thought – I have ended such a letter with unassuming set phrases such as *"We reserve the right to bring a claim for compensation..."*, *"we will come back to you with a claim for compensation..."* or the like. Although the recipient of the letter probably understands the message that it contains – that someone is holding them liable for a damage – I am extremely dubious as to whether in using the wording that I have, I have actually brought a claim for damages against the other party.

In recent years the Supreme Court has issued statements concerning the interpretation of provisions in the standard contracts from the Contracts Committee for the Construction Industry (Sw. *Byggandets kontraktskommitté*), and as part of this a further interpretation will shortly be published by the Supreme Court. This time it is the issue of the requirements that are to be made when bringing a claim for damages in order for the claim to suspend limitation. More specifically, it is the provisions concerning what is known as short-term limitation (Sw. *korttidspreskription*) in ABT 94 Chapter 5 Section 19 that are to come under the scrutiny of the Supreme Court (the provisions also apply, essentially unchanged, in AB 04 and ABT 06).

In the case that the Supreme Court is to examine, the injured party – a housing cooperative, acting as a client – wrote to its contractor after the warranty period had expired informing it that water damage had arisen for which the housing cooperative considered the contractor to be liable. In its letter the housing cooperative demanded that the contractor remedy the damage. Although the housing cooperative had stated a grounds for damages in its letter, both the district court and the court of appeal found that the housing cooperative's letter could not be regarded as containing any claim for damages in view of the wording of the provisions. The courts considered that the housing cooperative had demanded a different sanction, remedial action, rather than compensation for the damage.

When it comes to the letters I mentioned in my opening paragraph, these were obviously not sent for the purpose of attempting by means of convincing argument to get the other party to pay out compensation for a damage that had occurred. When the letters were sent there was quite simply no further investigation on hand to develop the grounds for damages around. The purpose of the letters was only to counter an objection of limitation from the other party. Since the right to compensation is lost if a claim is brought too late, it is also a natural reaction that a complaint concerning the damage is sent to the presumptive causer as soon as one is aware of a circumstance that could involve a damage. Since in many cases it is difficult to establish clearly when the period of limitation begins (what is decisive is the date that the damage occurred, which cannot always be objectively assessed) it is quite simply not worth waiting to complain about the damage until all the necessary investigations have been completed.

At the same time, there is no reason to have a system that gives rise to claims being brought without sufficient grounds. For a general contractor, for example, it can often be difficult to assess at an early stage which of its subcontractors is responsible for a damage. The belt-and-

braces approach is therefore to bring a claim against all of the subcontractors. If the general contractor wants to feel particularly secure, a complaint is made at the same time to the supplier of the material where the damage occurred. Although it can be the case that multiple operators are liable for a particular damage, it is also common for a complaint that has been made never to be pursued to because an investigation undertaken later suggests a different cause.

The Supreme Court's clarification of the issue that is now to be examined will, however, be of little significance for those lawyers working within the area of contract law. If the Supreme Court makes the same judgement as earlier instances, it is just a matter of adapting to a certain formality. In contrast, if the Supreme Court goes down the other route instead it will be forced to depart from its earlier principles of a restrictive interpretation of provisions in standard contracts using a fairly strict approach based on the wording of the provision. In view of the fact that the provisions already require claims to be brought in writing, I actually see no point in adding further narrow formal requirements to the provision. This opinion is reinforced when one considers that General Conditions of Contract AB 04 and ABT 06 are intended to be able to be used for both large and small projects and where in many cases the client party has no experience whatsoever of acting on the basis of all the issues that can arise in respect of a contract. In the case that the Supreme Court is to examine, there should not actually have been any doubt on the part of the contractor that the housing cooperative held the contractor liable for the damage. It is then reasonable to ask whether the contractor would have acted differently if the housing cooperative had stated in its letter that it held the contractor liable for the damage that they were going to suffer instead of calling for remedial action.

For my part, I would like to have seen the Supreme Court take the opportunity to also make a statement on when the period of limitation is to commence and the associated issues surrounding what is included in the term damage and when a damage is to be deemed to have occurred.