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### The stipulation and interpretation of freight prepaid delivery clauses under the CISG

#### Preliminary considerations for reform of Part II of the CISG and a limited withdrawal of Scandinavian declarations

Comment on the decision of the Danish Højesteret of 15 February 2001

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#### I. Introduction

The first decision of the Danish Supreme Court (Højesteret) on the UN Convention on Contracts for the International Sale of Goods (CISG), issued on 15 February 2001,<sup>1</sup> raises several important and interesting questions concerning procedural as well as substantive law problems relating to the stipulation and interpretation of delivery clauses in international trade.<sup>2</sup> The dispute involved a Danish-Italian transaction for the delivery of natural gas pipes for resale to Norway. The main legal issue addressed the stipulation and proper reading of a prepaid freight delivery clause – a question which has been answered inconsistently in CISG case law. The Bundesgerichtshof (Federal High Court of Justice, Germany), for instance, decided differently in an almost identical 1996 case

dealing with a freight prepaid clause.<sup>3</sup> This makes clear the complex interplay of practices and usages on the one hand and an internationally accepted interpretation of Incoterms delivery clauses on the other. Also coming into play are issues concerning the applicability of the CISG, the scope of the proper law of the contract and the Article 92 declaration of the Scandinavian countries with respect to Part II of the Convention. The decision thus affords a good opportunity to discuss these matters and evaluate various approaches for resolving them.

The Højesteret's decision illustrates once again the significance of alternative forms of contract formation with respect to Part II, particularly for the stipulation of essential terms such as delivery clauses. The CISG contains only a very limited rule in Article 19(2) and remains otherwise silent on these issues of practical importance. The stopgap solutions suggested by theorists and in the case law are dubious and inconsistent. It is therefore time for UNCITRAL to take up the necessary modernisation of Part II so as to keep the further development from proceeding either outside the channels of the CISG or within them, but in a nonuniform manner. The call – thus only partly justified – for an immediate withdrawal of the Scandinavian Article 92 declarations with respect to Part II should be seen in this light.

#### II. Legal issues

The germ of the Højesteret's decision was the jurisdiction of the place of performance in accordance with Article 5, point 1 of the Brussels Convention – the specific scenario being that where a buyer sues for damages on account of defec-

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<sup>1</sup> Højesteret (Supreme Court) (DK) 15 February 2001 – *Damstabl A/S v A.T.I. s.r.l.*, UfR 2001.1039 Højesteret Dom (HD), with comment by *Hertz/Lookofsky*, CISG og værneting I UfR 2001.1039 H, [2001] UfR Litterær afdeling B 588 et seq., available at [www.cisg.dk](http://www.cisg.dk) (current 12 March 2003); brief comments at <http://cisgw3.law.pace.edu/cases> (current 12 March 2003) and [www.unilex.info](http://www.unilex.info) (current 12 March 2003). On the decision, see also *Bernstein/Lookofsky*, *Understanding the CISG in Europe*, 2<sup>nd</sup> ed., The Hague/London/New York (NL/GB/USA), 2002, § 4-2, at 71, § 4-3, at 74.

<sup>2</sup> A few months earlier in its decision in a Danish-German case of 1 November 2000 – *Gastrolux GmbH v Pyrolux Production*, UfR 2001.260 HD, available at [www.cisg.dk](http://www.cisg.dk), the Højesteret (DK) had the opportunity to comment on the warranty of quality under Article 35 in connection with Article 25 CISG. Although the individual sale clearly fell under Part II of the CISG in the context of the authorised dealer contract in accordance with Article 1(a) and both parties before the Court made reference to the Convention, neither the Højesteret nor the lower court paid attention to the uniform sales law for the question of contract rescission. The dealer contract contained direct commercial provisions concerning obligations of the buyer with respect to notification of defective goods, warranty and revocation, for which the CISG could be meaningful; on this point, see *Magnus*, in: *Staudinger* (ed.), *BGB-CISG*, revised edition, Berlin (D), 1999, Article 1 CISG, para. 37.

<sup>3</sup> BGH (D) 11 December 1996, [1997] ZIP 519; on this decision, see also *infra* part VII.

tive goods. The disputed obligation within the meaning of Article 5, point 1 was therefore the (imperfect) delivery and not nonpayment, as in many other CISG decisions.<sup>4</sup> There was no clear agreement between the parties stipulating the place of delivery as the place of performance. The parties contested three fundamental matters relating to the delivery terms: the contents of the sales contract, the existence of a previous custom and the interpretation of the delivery clauses.

The first controversy turned on the possibly binding effect of a failure to reply to the Italian seller's commercial letter of confirmation and the applicability of a delivery clause contained therein. Unfortunately, the Højesteret did not address the significance of the Scandinavian Article 92 declaration; one also searches in vain for comments on the effects of a confirmation letter under the CISG. If a nonresponse to the letter had had a constitutive effect, it would have resulted in the nonapplicability of the Danish delivery clause specifying the buyer's domicile as place of performance in the offer; the freight prepaid clause of the Italian confirmation letter would have been decisive. Clarity from the Højesteret on this issue would therefore have been desirable (see *infra* parts IV and V).

The second point contested by the parties focused on the meaning of the prior and subsequent practice of the parties concerning the place of delivery. The buyer maintained that the usages between the parties in the sense of Article 9 CISG had a binding effect with respect to the place of delivery as his domicile in Denmark and attempted to substantiate this assertion through testimony and other delivered goods (see *infra* part VI).

The third dispute lay in the meaning of the delivery clause "F.CO DOMIC. NON SDOG" (*franco domicili non sdoganato*) and rests partly upon divergent perspectives under domestic law. The effect of the nonresponse to the confirmation letter and the substantive law controlling the interpretation of the applicable delivery clause – general principles of the CISG, Incoterms, or the proper law of the contract (here, either Danish or Italian law) – were material for determining jurisdiction. The Højesteret clearly followed the last variant (see *infra* part VII).

### III. Factual background

The instant case dealt with a sale transacted in 1992 between an Italian seller and a Danish buyer for acid- and rust-proof (*syrefaste og rustfrie*) natural gas pipes. The parties had ongoing business relations since 1981/82. The pipes were to be used in building a gas rig in Norway and were ordered by a Nor-

wegian construction company of the buyer's Norwegian subsidiary. The buyer was to supply the pipes. The appearance of the parent company consequently transformed what began as a purely domestic sale in Norway into an international sale between parties from Denmark and Norway – both parties to the CISG; given the Article 94 declaration of the Scandinavian states, this would have been decided on the general rules of private international law.

The buyer's telex order of 14 January 1992 was preceded by a telex offer from the seller on 10 January and a telephone conversation on 13 January. In the telex order, the buyer stipulated Denmark as the place of delivery (*levering: franko Skanderborg*, delivery: freight paid to Skanderborg (DK)) and simultaneously requested a confirmation letter from the seller. This letter arrived by fax on 16 January, but included under the heading "PORTO PORT" the preprinted delivery clause "F.CO DOMIC. NON SDOG" (freight paid to domicile, delivered duty unpaid). The buyer did not respond to this confirmation letter nor to its divergent terms for delivery. The seller repeated the differing clause without objection from the buyer in its invoice on 24 March as well as in an engagement letter of the same day to the carrier.<sup>5</sup> However, the invoice given by the Italian carrier to the seller contained a different text for the delivery terms: "EXPORT PER 8660 SKANDERBORG (...) RESA: DDU NON SDOGANATO".

In another order for pipes in November 1992, the Danish buyer stipulated "Delivery: free Skanderborg, packing incl.", which the Italian seller acknowledged on 1 December with the statement "CONDITION AS USUAL". According to the testimony of one of the seller's employees, this handwritten confirmation followed another using the ordinary Italian freight prepaid clause "F.CO DOMIC. NON SDOG".

An independent carrier designated by the seller transported the gas pipes from Italy to the buyer's place of business in Denmark; they were finally delivered in May 1993. Leaks occurred some time after the pipes were resold and installed underground in Norway. Pursuant to Article 5, point 1 of the Brussels Convention, the Danish plaintiff brought an action for a declaratory judgment obliging the seller to indemnify its Norwegian subsidiary, which had filed a claim for damages; the buyer had assumed this liability in the meantime. The buyer contended that the Danish town of Skanderborg had been stipulated as the place of performance. The Italian defendant's arguments against the international jurisdiction of the Danish courts nevertheless prevailed before the High Court as well as the Højesteret.

Ultimately, the Højesteret held that the freight prepaid delivery clause contained in the seller's confirmation letter was controlling in light of the buyer's subsequent nonresponse. The clause was interpreted in accordance with the proper law of the contract (i.e. Italian law), according to which it only

<sup>4</sup> On the application of Article 57 CISG, see the following Danish judgments: Østre Landsret (High Court of Eastern Denmark) 22 January 1996, UfR 1996.616 Østre Landsrets Dom (ØLD); Østre Landsret (DK) 23 April 1998, UfR 1998.1092 ØLD; see *Fogt, Gerichtsstand des Erfüllungsortes bei streitiger Existenz des Vertrages, Anwendbarkeit des CISG und alternative Vertragsschlussformen*, [2001] IPRax 358; County Court Randers (DK) 4 April 2000, modified on other grounds by Østre Landsret (DK) 4 December 2000, UfR 2001.713 ØLD, with comment by *Fogt, Einheitlicher Vertrag oder Aufspaltung gemäß Article 3(2) CISG bei einem Mietkauf*, [2003] IPRax (forthcoming).

<sup>5</sup> The form contained the following clause: "Condizioni resa: F.CO DOM. NON SDOG", [2001] UfR 1042.

constituted an arrangement for transport costs. The place of delivery, however, was to be determined by the rules of the CISG, under which the place at which the goods are handed over to an independent carrier designated by the seller is determinative (Article 31(a) CISG). As a consequence, the place of delivery was in Italy and the Danish courts lacked international jurisdiction under Article 5, point 1 of the Brussels Convention.

From a procedural point of view, the decision clearly demonstrates the centrality of Article 31(a) CISG in establishing the jurisdiction of the place of performance, which accordingly is the place where the goods are transferred to an independent carrier; this is the prevailing opinion confirmed on numerous occasions in CISG case law. Although the Højesteret addresses the contractual and statutory determination of the place of delivery for sales of movable property in terms of Article 5, point 1 of the Brussels Convention (which continues in force only *vis-à-vis* Denmark), its judgment also has future bearing for Article 5(1)(b) of Regulation (EC) No. 44/2001. The Regulation uniformly specifies the contractual place of performance as the *place of delivery* and explicitly authorises agreements between the parties, such as to freight prepaid clauses.

#### IV. The Scandinavian Article 92 declaration and inadequacies of Part II of the CISG

The question of the validity of the Scandinavian declaration will always arise when a court is called to rule upon an international sale under the CISG and one of the parties has its place of establishment in a state that has entered the declaration under Article 92.<sup>6</sup> Even Scandinavian courts do not always clearly comment on the applicability of the declaration; some foreign courts may ignore it entirely.<sup>7</sup> Unfortunately in the case at hand, neither the district court nor the Højesteret devoted a single word to it.

##### 1. Nonapplicability of Scandinavian declaration in accordance with Article 1(1)(b) CISG

Because of the Article 92 declaration, the CISG – initially, in any event – finds only limited application under Article 1(1)(a) in the concrete case. Under Article 1(1)(b), the applicability of the contract formation rules provided in Part II in spite of the Article 92 declaration is contingent on the proper law of the contract and therefore on Danish private international law.<sup>8</sup> The parties to the contract did not include an

agreement as to choice of law. Consequently the assumption under Article 4(2) of the 1980 Rome Convention (Article 28(2) EGBGB) was applicable; the relevant law was that of the domicile of the seller, as the party having effected the performance which is characteristic of the contract. At trial, the parties thus concurred that Italian law constituted the proper law of the contract as the law of the seller's place of business. In accordance with Article 1(1)(b), the CISG thus applied in its entirety as Italy had entered no declaration under that Convention.<sup>9</sup>

However, Part II of the CISG governs only the traditional model of contract formation through offer and acceptance. Other, more modern forms of contract formation are at least not directly accommodated, and if so, then only very inadequately.<sup>10</sup> Part II does not explicitly apply to the formation of a contract or the stipulation of additional contract clauses – often as boilerplate terms and conditions – by virtue of implied conduct or nonresponse since no consensus could be reached on these issues during the CISG negotiations.<sup>11</sup> While silence generally does not constitute acceptance under Article 18(1), it can, like all other relevant circumstances, be meaningful as other conduct for interpretation under Article 8(1) and (3).<sup>12</sup> However, there is no question that the CISG lacks a basic rule concerning the effect of nonresponse to a commercial letter of confirmation.

##### 2. Invitation for UNCITRAL to revise Part II of the CISG

After more than 20 years since efforts to harmonise sales law were concluded in Vienna, there arises the earnest question, as suggested above, as to whether UNCITRAL should begin the revision – now more necessary than ever – of Part II of the CISG.<sup>13</sup> Otherwise, the jurisprudence on modern methods of contract formation under uniform sales threatens to diverge given the absence of essential rules.<sup>14</sup> In particular,

<sup>6</sup> These states include Denmark, Finland, Norway and Sweden. Surprisingly, Iceland made no such declaration on 10 May 2001 when ratifying the CISG (which entered into force for Iceland on 1 June 2002).

<sup>7</sup> See Østre Landsret (DK) 4 December 2000, UfR 2001.713 ØLD, with comment by *Fogt* (*supra* note 4), [2003] IPRax; on disregard of the declaration by German courts, see *Fogt*, *Rettidig reklamation og ophævelse af købeaftale efter CISG*, [2002] UfR B 129, 132, Fn. 10; *Fogt*, *Rechtszeitige Rüge und Vertragsaufhebung bei Waren mit raschem Wertverlust nach UN-Kaufrecht*, [2002] ZEuP 580, 587, Fn. 22.

<sup>8</sup> See accordingly Østre Landsret (DK) 23 April 1998, UfR 1998.1092 ØLD, with comment by *Fogt*, *Inapplicabilité de la réserve de l'article 92 de la Convention de Vienne*, [1999] Recueil Dalloz somm.

360; *Fogt* (*supra* note 4), [2001] IPRax 358; *Hertz/Lookofsky*, CISG del II og værneting i UfR 1998.1092 ØLK, [1999] UfR B 6-10; *Lookofsky*, *Alive and Well in Scandinavia: CISG part II*, [1999] JL & Com. 289-299; similarly, see *Kruisinga*, *Het toepassingsgebied van het Weens-Koopverdrag: door de Deense Østre Landsret wordt aan het voorbehoud in de zinvan artikel 92 een beperkte werking toegekend*, [2001] NIPR 40.

<sup>9</sup> See also *Hertz/Lookofsky* (*supra* note 8), [2001] UfR B 558, 559.

<sup>10</sup> On the 1978 UNCITRAL draft, see *Huber*, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, [1979] RabelsZ 413, 449.

<sup>11</sup> For background on the CISG conference, see, e.g., *Huber* (*supra* note 10), 447 et seq.; *Fogt* (*supra* note 4), [2001] IPRax 358, 362-363.

<sup>12</sup> On silence after extensive preliminary negotiations creating an agreement to an arbitration clause appearing for the first time in the declaration of acceptance, see District Court S.D.N.Y. (USA) 14 April 1992 – *Filanto SpA v Chilewich International Corp.*, 789 Fed. Supp. 1229, 1240; see *Magnus*, *Aktuelle Fragen des UN-Kaufrechts*, [1993] ZEuP 87. On tacit modification of contents of contract by virtue of implied conduct, see Cass. (I) 27 January 1998, with comment by *Witz*, [1998] Recueil Dalloz somm. 312, 313.

<sup>13</sup> On desirable reforms for Part II of the CISG with respect to alternative modes of contract formation, see *Fogt* (*supra* note 4), [2001] IPRax 358, 364.

<sup>14</sup> E.g. the treatment of the effect of confirmation letters under the CISG. The following courts effectively did not address this issue under Article 9 in connection with Article 7(2): Østre Landsret (DK)

the solution backed by the prevailing opinion of “internal gap-filling” for open questions in Part II of the CISG in connection with the 1964 Hague Convention remains unpersuasive and moreover does not accord with international practice.<sup>15</sup> This can result in erroneous opinions even in countries sharing the same or closely related legal rules if a comparative law declaration of applicable trade usages is required in the context of Article 9.<sup>16</sup>

The legal unification of these questions of sales and contract law in the CISG simply did not go far enough in 1980. A possible path for further steps towards harmonisation is shown not only by national sales laws, such as Article 2-204 of the *Uniform Commercial Code* (UCC),<sup>17</sup> but also the *UNIDROIT Principles* (UP) and the *Principles of European Contract Law* (PECL).<sup>18</sup>

### 3. Occasion for limited withdrawal of Scandinavian declarations to the CISG

Such a reform of Part II by UNCITRAL – with or without consolidation of other parts of the CISG – could be occasion enough for all states entering declarations finally to reconsider their declarations on a legal-political level. Long overdue for a withdrawal is the Scandinavian neighbour declaration under Article 94 in connection with Denmark, by which the entire CISG does not apply as between the Scandinavian states. New sales laws have been enacted in the meantime and as a result there is no longer a uniform rule in the Nordic legal area.<sup>19</sup>

With the first substantively similar codification of sales law in Finland in 1987 and the new laws in Norway (1988) and Sweden (1991), these states have distanced themselves from the Danish position, which had held on to the old Scandinavian sales law. The same or closely related sales law rules, as prescribed under Article 94, no longer exist in Denmark and the other Scandinavian states.<sup>20</sup> There are only slight discrepancies in the domestic sales law of Norway and Finland/Sweden, mostly regarding systemic matters. Nevertheless, much is to be said for a complete withdrawal of the Article 94 declarations, since this would lead to the applicability of the CISG as a uniform sales law in Scandinavia. In this form, however, criticism of the existing Article 94 declaration is justified *only* with respect to sales law.

The situation is quite different in terms of the general Scandinavian contract law and the Article 92 declaration, which concerns Part II of the CISG in its entirety. The rationale behind the declaration is primarily substantive and springs from the wish to retain the *løfteteorie* (literally “promise theory”) unique to the Scandinavian states and the ensuing binding effect of an offer (as a *løfte*, i.e. a binding, unilateral promise for the seller to deliver or the buyer to pay, subject to the condition subsequent of the non-arrival of an acceptance by the other party) under §§ 1-3 in connection with § 7 of the Scandinavian law on contracts (*aftaleloven*).<sup>21</sup> There is thus a stark difference with the compromise solution of Article 16 CISG, the contents of which the Scandinavian countries found unpersuasive.<sup>22</sup> Even when Article 1(1)(b) does not exclude the application of Part II,<sup>23</sup> Scandinavian contract law with its long tradition is always applicable in Scandinavian cases via Article 94, and partly even to non-Nordic states through Arti-

23 April 1998, UfR 1998.1092 ØLD, with comment by *Fogt* (*supra* note 8), [1999] Recueil Dalloz somm. 360; *Fogt* (*supra* note 4), [2001] IPRax 358; Vestre Landsret (High Court of Western Denmark) 10 November 1999, with comment by *Fogt*, *Appréciation des délais et dénonciation des défauts et de déclaration de résolution d'un contrat d'arbres de Noël*, [2000] Recueil Dalloz somm. 438; *Fogt* (*supra* note 7), [2002] ZEuP 580; the Højesteret of 15 February 2001, discussed here. Decided differently and clearly in line with the prevailing opinion, see Zivilgericht Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238, available at [www.unilex.info](http://www.unilex.info). This latter decision seems questionable in several respects. The first relates to the determination of a trade usage under Article 9(2) CISG, because Austria, unlike Switzerland, does not provide that a confirmation letter can result in the formation of a contract; see *Ferrari*, *Relevant trade usage and practices under UN sales law*, [2002] EuLF (E) 272, 276, Fn. 76. Secondly, a usage between the parties cannot be established based on only one previous transaction under Article 9(1) CISG; on customs in the CISG, see *Fogt/Rosch*, [2003] Recueil Dalloz somm. (forthcoming); see also *infra* part VI.

<sup>15</sup> In contrast with the prevailing opinion, see *Fogt* (*supra* note 4), [2001] IPRax 358, 362-364.

<sup>16</sup> Zivilgericht Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238 (*supra* note 14).

<sup>17</sup> § 2-204. Formation in General. “(1) A contract for sale of goods *may be made in any manner sufficient to show agreement*, including conduct by both parties which recognizes the existence of such a contract. (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” (emphasis added); on “The expanded Concept of Contract in Article 2” UCC, see *White/Summers*, *Uniform Commercial Code*, 5<sup>th</sup> ed., St. Paul, Minn. (USA), 2000, § 1-2, at 28-29.

<sup>18</sup> See, *inter alia*, Article 2.12 and 2.22 UP; Article 2:209 and 2:211 PECL.

<sup>19</sup> See *Lookofsky*, *Understanding the CISG in Scandinavia*, Copenhagen (DK), 1996, § 8-6, at 129. Many other Scandinavian authors have therefore advocated the withdrawal of the Article 94 declarations. See *Lookofsky*, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in: *International Encyclopedia of Laws*,

Deventer/Boston (NL/USA), 2000, Chap. 6, § 4, Point 330.

<sup>20</sup> The goal of the working group established in Helsinki on 10 June 1980 was to maintain legal unity in the reform of Scandinavian sales law in light of the impending ratification of the CISG. See the Scandinavian memorial: *Nordiska Köplagar, Förslag av den nordiska arbetsgruppen för köplagstiftning*, in: [1984/5] NU of 30 October 1984, Stockholm (S), 1985, at 159; for a recent discussion of Scandinavian sales law, see *Kjelland*, *Das neue Kaufrecht der nordischen Länder im Vergleich mit dem Wiener Kaufrecht (CISG) und dem deutschen Recht*, Aachen (D), 2000 (on background of negotiations and previous history, at 9 et seq.; on Scandinavian cooperation, at 37 et seq.).

<sup>21</sup> The Scandinavian declaration *vis-à-vis* Part II of the CISG was grounded in fundamental differences with Nordic contract law; see *Vinding Kruse*, *En ny international og en ny nordisk købelov*, [1984] UfR B 25 (26); *Krüger*, *Kjøpsrett*, 3<sup>rd</sup> ed., Bergen (N), 1992, at 471 (in English). In comments on the Danish law incorporating the CISG, it was even said that the Convention rules – which were influenced by the contract law of common law countries – differed from similar provisions in the law on contracts, particularly with regard to offers and the possibility for their withdrawal. These rules were alien (Danish: *fremmedartet*) to Danish law; see [1988/89] Folketingstidene, Copenhagen (DK), at 1015, 1019. Critical of the rationale for the declaration, see *Lookofsky*, *International køb*, Copenhagen (DK), 1989, at 47; *Gomard/Rechnagel*, *International Købelov*, Copenhagen (DK), 1990, Introduction to Articles 14-24 CISG, at 64. For Danish literature on the *løftettheorie* in the Scandinavian *Vertragsgesetz*, see primarily *Ussing*, *Aftaler*, 3<sup>rd</sup> ed., Copenhagen (DK), 1950, at 6, 10 et seq., 93-94; in German literature, see, e.g. *Rabel*, *Das Recht des Warenkaufes*, vol. 1, reprint, Berlin (D), 1964, § 10 Point 2, at 70-71.

<sup>22</sup> See also *Huber*, [1979] *RabelsZ* 413, 441-442 (criticising the compromise solution of Article 16 CISG).

<sup>23</sup> For this reason, *Lookofsky* (*supra* note 19), *Understanding the CISG in Scandinavia*, § 8-4, at 128, advocates a complete withdrawal of the Article 92 declarations.

cle 92.<sup>24</sup> The CISG's imperfect control of several important questions concerning alternative contract formation thus does not have a negative impact in the case of intervention of the Scandinavian declarations.<sup>25</sup> Accordingly, the ideal solution would be to let the uniform contract law continue to apply within the Nordic legal area.

In fact only a limited withdrawal of the Scandinavian reservations should be advanced. If both declarations are to be withdrawn, a new Article 94 declaration, limited to Part II of the CISG, must at least be entered.<sup>26</sup> The uniform Scandinavian contract law would then continue in the internal Nordic area. A limited withdrawal should occur *only* once Part II is modernised and brought into conformity with the practice and the dubious and open questions such as gaps in the contract formation part are convincingly filled. The international unification could even accelerate and spur on the rather reserved opinion of the Scandinavian states to date regarding the CISG. Ultimately this all depends on the readiness of UNCITRAL in New York (USA) to take on Part II, pursuant to the recommendation made here.

In any case, a reformed regulation of modern modes of contract formation, more in keeping with actual practice, would provide optimal basis for getting the Scandinavian states to withdraw their declarations *vis-à-vis* Part II of the CISG. Whether a ratification of the CISG without these declarations would be advisable is a dogmatically difficult and thus dubious question. Answering it requires a basic analysis that cannot be undertaken here due to underlying principles of Scandinavian private law. Other states entering declarations – particularly those of the former Soviet Union – should also take this as an opportunity to consider withdrawing their declarations concerning formal contract requirements in Articles 11 and 29 given reforms of domestic civil law, as the case may be.<sup>27</sup>

<sup>24</sup> The decision of the Vestre Landsret (DK) of 10 November 1999 (*supra* note 14), with comment by *Fogt*, [2000] Recueil Dalloz somm. 438 provides an example of the latter case; see *Fogt (supra* note 7), [2002] UfR B, at 129 et seq.; *Fogt (supra* note 7), [2002] ZEuP 580.

<sup>25</sup> Thus in the decision of the Vestre Landsret (DK) of 10 November 1999 (*supra* note 14), the established practice of the Scandinavian courts with regard to the effect of nonresponse to a commercial letter of confirmation controlled in light of the Article 92 declaration.

<sup>26</sup> A partial exclusion is also permissible under Article 94 CISG and may be made at any time. See *Magnus*, in: *Staudinger (supra* note 2), Article 94, paras 1 and 4.

<sup>27</sup> The three Baltic states – Estonia, Latvia and Lithuania – are among those entering Article 96 declarations. It is questionable whether the maintenance of these declarations is justified. Article 1.73 of the new Lithuanian Civil Code of 2001, for example, no longer mandates a general written form for domestic or international transactions (with the exception of transactions between natural persons with a value exceeding LTL 5 000 and sales contracts on account); the consequences of non-observance of the formal requirements have been watered down even further. See Article 1.93 of the new Civil Code: Lietuvos Respublikos civilinio kodekso Komentaras. Pirmoji knyga. Bendrosios nuostatos. Justitia., Vilnius (LT), 2001, Article 1.93 (Commentary on the Civil Code of Lithuania, First Book, General Provisions); critical of the Lithuanian declaration, see *Mikelanas*, Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience, [2000] Unif. L. Rev. 243, 251.

In Estonia, the formal requirements have generally been abolished in accordance with § 11 of the statute on the law of obligations, which entered into force on 1 July 2002; text available in English translation at [www.legaltext.ee](http://www.legaltext.ee) (current 12 March 2003). Consequently, Estonia has recently become the first state to withdraw its Article 96 declaration

## V. Agreement to a delivery clause by virtue of failure to reply to a commercial letter of confirmation

An agreement between the parties concerning the place of delivery pursuant to Article 6 CISG overrides the place of delivery specified in Article 31(a). The Højesteret's decision first had to clarify whether the place of delivery was indeed specified – in other words, which delivery clause became part of the sales contract: the clause in the buyer's order or the "F.CO DOMIC. NON SDOC" clause alluded to in the pre-printed text of the confirmation letter. The High Court opted for the latter view in making its determination. Since the Danish buyer raised no objections to the contents of that letter, the delivery clause contained therein applied as part of the contract; the clause contained in the buyer's order (*Levering: franko DK*) became immaterial. This view was not contradicted by the Højesteret, which obviously upheld the lower court's decision. It remains unclear whether the decision was made inside or outside the provisions of the CISG and, in the latter case, what substantive law was applicable.

### 1. The treatment of the failure to reply to a commercial letter of confirmation in the CISG

The prevailing view in the literature sees this question as an "internal" gap in the CISG which can only be filled via Article 7(2) in connection with Article 9. Questions concerning alternative modes of contract formation, including the effect of a confirmation letter under Article 9, are to be resolved in accordance with international usages or customs between the parties.<sup>28</sup> This consequently rules out recourse to the substantive law determined by private international law.<sup>29</sup>

Some CISG decisions – including the one discussed here – have viewed this differently; although unclear as to reasoning, the findings were met with acceptance.<sup>30</sup> Under this alternative approach, the substantive law as determined by rules of private international law should be decisive, since general principles cannot fill an "internal gap" or since a question not governed by the CISG is at issue. The applicability of trade usages

(relating to formal requirements for sales contracts); in accordance with Article 97(4), this withdrawal takes effect after six months.

<sup>28</sup> Clearly following this reasoning, see, e.g., Zivilgericht Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238 (*supra* note 14).

<sup>29</sup> See *Schlechtriem*, in: *Kommentar zum Einheitlichen UN-Kaufrecht*, 3<sup>rd</sup> ed., Munich (D), 2000, on Article 14-24 CISG, para. 4; *Magnus*, in: *Staudinger (supra* note 2), Article 9 CISG, para. 27, Article 19 CISG, para. 26; *Schlechtriem*, in: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2<sup>nd</sup> ed., Oxford (GB), 1998, Article 19, para. 4; *Neumayer/Ming*, *Convention de Vienne sur les contrats de vente internationale de marchandises*, Lausanne (CH), 1993, at 169-171; to the same effect, see also *Schnyder/Straub*, in: *Honsell (ed.)*, *Kommentar zum UN-Kaufrecht*, Berlin/New York (D/USA), 1997, Article 18 CISG, paras 9-10.

<sup>30</sup> To this effect, see Østre Landsret (DK) 23 April 1998, UfR 1998.1092 ØLD, with comment by *Fogt (supra* note 8), [1999] Recueil Dalloz somm. 361; discussed at length in: *Fogt (supra* note 4), [2001] IPRax 358 (362-364); see also Vestre Landsret (DK) 10 November 1999, with comment by *Fogt (supra* note 14), [2000] Recueil Dalloz somm. 438; *Fogt (supra* note 8), [2002] ZEuP 580 (in particular at 585-586). Sceptical of the current opinion, see *Heute*, *La vente internationale de marchandises*, Paris (F), 2000, at 141, Fn. 11 in connection with p. 164, Fn. 97 with reference to *Fogt (supra* note 8), [1999] Recueil Dalloz somm. 361.

or customs between the parties under Article 9 remains of course unaffected.

Regardless of which viewpoint one follows, the stringent conditions of Article 9(2) must be fulfilled for trade usages to apply. In the case of an international sale governed by the CISG, a trade usage concerning the binding effect of the failure to reply to commercial letters of confirmation can only exist if each party has its place of business or engages in commercial activities in a legal system in which such an effect is recognised in the sense of being “widely known” and moreover “regularly observed”.<sup>31</sup> The extent to which a practice is observed cannot and may not be measured by only one party, such as the recipient of a confirmation letter. This substantially limits the possible effect of sending confirmations of trade agreements – a quite ordinary practice – in order to avoid broaching the touchy question of burden of proof should a dispute arise.

It does not seem possible to reconcile this question with the prevailing opinion in literature on the CISG and with the provisions contained therein.<sup>32</sup> The approach via Article 9 in connection with Article 7(2) is, on the one hand, difficult to traverse in practice and not necessarily plausible as a theoretical solution. On the other hand, Article 8 comes into play only as a general rule of interpretation which cannot fill in gaps in the absence of certain conditions. The rule in Article 19(2) is confined to the effect of a reply to an offer or order confirmation containing different terms; it is not amenable to a general or analogous application to the effect of a confirmation letter.<sup>33</sup> Article 19(2) and (3) can thus hardly be extended to the effects of a confirmation letter in the concrete case. Moreover, the delivery clause may not become part of the contract on the mere basis of a failure to reply, given that delivery terms were categorised as an essential divergence from Article 19(3).<sup>34</sup> Only a solution based outside the CISG under the proper law of the contract is possible, both as a general matter as well as in the concrete decision.

## 2. Unclear reasoning in the Danish judgments

In assessing the effect of the seller’s confirmation letter, the Western High Court made no reference to Article 7 in connection with Article 9, nor to any other rules of the CISG. The decision was reached either under the Italian law governing the contract or presumably – and in error – simply under

Danish law.<sup>35</sup> The Højesteret also alluded to the delivery clause contained in the confirmation letter without referring to the CISG at all or further emphasising the binding effect of the buyer’s passivity, as the High Court had. Neither court followed the prevailing opinion on the treatment of a commercial letter of confirmation in the CISG.

If one understands the absence of a reference to the CISG in the concrete judgments as expressing the view that the effect of a confirmation is an issue lying outside the Convention, this “external” gap would be filled by using the applicable law in accordance with the private international law of the forum. For the content of the contract and the effect of the confirmation letter, the Danish courts should have resorted to the proper law of the contract (i.e. Italian law) and determined its substance. Recourse to the *lex fori* – Danish law – was not only untenable, but in fact erroneous. That is apparently just what happened in the Danish case, however, as neither the High Court nor the Højesteret allude to the CISG or to Italian law. Bolstering this assumption is the fact that the Højesteret, according to the published decision, requested an advisory opinion concerning the understanding of the freight prepaid delivery clause in Italian law without querying in this context as to the effect of a confirmation letter.

## VI. No existence of customs between the parties under Article 9(1) CISG

The buyer’s contention that a customary practice existed between the parties regarding delivery to the buyer’s place of business pursuant to Article 9 was rejected without closer scrutiny in both instances, apparently due to insufficient argumentation. Although in particular the (one time) delivery of other natural gas pipes in November 1992 occurred after the contract formation at issue here, it took place before the actual delivery of the defective pipes in May 1993. Moreover, according to the statement of an employee of the seller, an additional letter containing the “Italian” freight prepaid clause came before the decisive confirmation letter of 16 January 1992. Testimony from an employee of the buyer on the subject of the initial negotiations in 1981/82 and the agreement made at that time fixing Denmark as the place of delivery was deemed insufficient.<sup>36</sup> Although it was demon-

<sup>31</sup> See accordingly *Ferrari* (*supra* note 14), 276. See generally *Magnus*, in: *Staudinger* (*supra* note 2), Article 9 CISG, para. 25; OLG Frankfurt (D) 5 July 1995, available at [www.unilex.info](http://www.unilex.info) (German-French case in which the application of this rule was correctly disallowed).

<sup>32</sup> See *Huber*, [1979] *RebelsZ* 413, 447 et seq., 450; see also *Fogt* (*supra* note 8), [1999] *Receuil Dalloz* somm. 361; discussed at length in: *Fogt* (*supra* note 4), [2001] *IPRax* 358, 362-364; *Fogt* (*supra* note 8), [2002] *ZEuP* 580, in particular 585-586.

<sup>33</sup> The negotiations relating to Article 19(2) and the suggested, but deleted provision for an Article 19(3) speak for this; see *Fogt* (*supra* note 4), [2001] *IPRax* 362-363; on the proposal for Article 19(3) CISG see *Magnus*, in: *Staudinger* (*supra* note 2), Article 19 CISG, para. 5.

<sup>34</sup> But along these lines *vis-à-vis* the decision discussed here, see *Hertz/Lookofsky* (*supra* note 1), [2001] *UfR* B, 559.

<sup>35</sup> Thus: *Østre Landsret* (DK) 23 April 1998, *UfR* 1998.1092 *ØLD*, with comment by *Fogt* (*supra* note 8), [1999] *Receuil Dalloz* somm. 361; discussed at length in: *Fogt* (*supra* note 4), [2001] *IPRax* 358, 362-364.

<sup>36</sup> For the terms of Article 9 CISG, see *Magnus*, in: *Staudinger* (*supra* note 2), Article 9 CISG, para. 13; *Honnold*, *Uniform Law for International Sales*, 3<sup>rd</sup> ed., Deventer (NL), 1999, Article 9, para. 116. One of the rare examples of the binding effect of a practice followed by only one of the parties concerning the execution of an order without acceptance by the buyer is illustrated in the decision of the *Cour d’appel de Grenoble* (F) 21 October 1999, with comment by *Witz*, *J.D.I.* 2000, at 1016 (1024); *Witz*, *Obligation de coopération à la charge des parties et non-réparation du préjudice lié à la détérioration de l’image commerciale*, [2000] *Receuil Dalloz* somm. 411-442. See also the Lithuanian judgment of 27 March 2000 – No. 2 A-85/2000, unpublished, available in Lithuanian at [www.litlex.lt/bylos](http://www.litlex.lt/bylos) (current 21 March 2003); concurring, see *Fogt/Rosch*, [2003] *Receuil Dalloz* somm. (forthcoming), in which an arbitration clause explicitly agreed to in writing on five previous occasions in the time period from May 1996 to April 1997 between a Spanish seller and Lithuanian buyer was deemed binding under Article 9(1) CISG by the mere continuation of deliveries of wooden planks

strated that there were longer lasting business relations consisting of several deliveries per year and the same handling of the sales contract, there was apparently always a hidden dissent between the parties with regard to the precise delivery terms. An individual custom and practice could therefore scarcely have developed between the parties with respect to the place of delivery – or at least proof of such a custom could not be adduced from the buyer. Both parties to the contract believed to have made a certain agreement and followed a common practice, these however being differently evaluated under the Danish and Italian rules for determining place of delivery.

### VII. Stipulation and interpretation of freight prepaid delivery clauses under the CISG and the applicable law

In contrast to some national sales laws,<sup>37</sup> the CISG contains no detailed provisions concerning the interpretation of delivery clauses – with good reason. The rapid evolution of trade and constantly changing practice with regard to modalities for sales – e.g. carriage, risk of loss, documents and data messages – necessitate the continual revision of the given interpretative rules, which is not too practicable for a convention text or national legislation and therefore difficult to implement. But the case decided by the Højesteret definitely shows that a general acceptance of a pure freight prepaid clause or at least an express designation of such a clause as nothing more than an arrangement for cost and risk would create clarity.<sup>38</sup> Likewise the Incoterms contract terms lack a clear freight prepaid delivery clause that is to be seen exclusively as an arrival clause at the buyer's place of business.<sup>39</sup> A simple freight prepaid clause of this sort was retained in § 7(3) of the new Scandinavian sales law on precisely this account.<sup>40</sup>

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without a new agreement; a custom had arisen between the parties as participants in international trade with respect to the same sales terms relating to quality, quantity, price, delivery, payment and dispute settlement. However, the decision appears dubious on the question of the compliance with the written form requirement for arbitration clauses; see *Fogt/Rosch*, *ibid.*

<sup>37</sup> The old 1906 Scandinavian sales law, Articles 62-65 (remaining in force only for Denmark); the new sales law, § 7(3) (effective for Finland since 1 January 1988 and for Sweden since 1 January 1991) and the 1988 Norwegian sales law, Article 7(3), contain simple prepaid delivery clauses. Compare UCC Article 2-239 to 2-322, which contains only shipment clauses ("shipment" contract) and no prepaid delivery clauses ("destination" contract); *White/Summers* (*supra* note 17), § 5-2, at 183, 185; see also the French law of 3 January 1969 (containing a legal definition of the FOB clause), *Heuté* (*supra* note 30), note 260, at 230.

<sup>38</sup> See also BGH (D) 11 December 1996, [1997] ZIP 519; OGH (A) 10 September 1998, available at [www.unilex.info](http://www.unilex.info).

<sup>39</sup> In both Incoterms 1990 and 2000, there are only five particular *Delivery clauses* (Group D); in the case decided by the Højesteret, the disputed DDU clause (*Delivery Duty Unpaid*) was newly adopted in the 1990 revision. For an in-depth analysis of Incoterms 2000, see *Heuté* (*supra* note 30), at 225-246; *Ramberg/Herre*, *Internationella köplagen* (CISG), Stockholm (S), 2001, at 196 et seq.; for Incoterms 1990 in the German literature, see *Bredow/Seiffert*, *INCOTERMS 1990*, *Wegweiser für die Praxis*, Bonn (D), 1994; in the Danish literature, see *Lando/Laudrup/Theilgaard*, *Kommentar til INCOTERMS 1990*, 2<sup>nd</sup> ed., Copenhagen (DK), 1992.

<sup>40</sup> *Norager-Nielsen/Theilgaard*, *Købeloven*, 2<sup>nd</sup> ed., Copenhagen (DK), 1993, at 1096; for criticism, see, however, *Ramberg/Herre* (*supra* note 39), at 215 (arguing that the acceptance was erroneous; Incoterms contain no delivery clause of this sort). That is applicable only if the Incoterms *Delivery clauses* (Group D) also determine unambiguously

### 1. Agreement to delivery clauses

Article 9 CISG, whereby existing customs as well as international usages are binding under certain conditions, comes into play when stipulating delivery clauses in an international sales contract. Clearly Incoterms can apply as usages under Article 9(1) by means of an express agreement of the parties. This declaration can be explicit or tacit, although it should not be assumed in the latter situation absent certain indications. Such an assumption was not possible in the instant case as there existed neither concrete circumstances under Article 8(3) nor a practice of the parties under Article 9(1).

On the other hand, Article 9(2) may only rarely give binding effect to a delivery clause as a trade usage. The conditions that the usage be "widely known" and "regularly observed" would be difficult to fulfil. It is disputed whether Incoterms can generally be regarded as trade usages and as a result such a view is to be rejected.<sup>41</sup> Divergent national understandings of many delivery clauses militate against such a general applicability as trade usage. Moreover, in the case of a few Incoterms, it is doubtful whether they only concern arrangements for cost and risk or whether they also designate the place of delivery. The interpretation of the Incoterms *Delivery* clause frequently varies on the basis of various national law understandings. In the concrete case, the buyer made no contention whatsoever as to its applicability as a trade usage and this issue was thus not reviewed by the Danish courts.

Incoterms should therefore obtain applicability as a contract formula only by express agreement or by virtue of conclusive conduct – namely, that usages under Article 9(1) are present or by way of an exception the strict conditions of Article 9(2) are fulfilled. Given the varying national interpretations of delivery clauses and freight prepaid delivery clauses in particular, parties are best advised to refer to the version of Incoterms used.<sup>42</sup> Otherwise they will later be faced with a dispute entailing considerable interpretative difficulties, as in the case decided by the Højesteret.

### 2. Interpretation of delivery clauses

In contrast with the actual stipulation of delivery clauses, however, Article 9(1) CISG may be extended to the interpre-

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the place of delivery; this appears correct, but remains controversial in case law on the CISG and Incoterms.

<sup>41</sup> See accordingly *Honnold* (*supra* note 36), Article 9, para. 118, at 127-128 with reference to the refusal of UNCITRAL and the Vienna diplomatic conference to incorporate Article 9(3) ULIS (Article 13(3) ULF) into the CISG; see also *Magnus*, in: *Staudinger* (*supra* note 2), Article 9 CISG, para. 8; *Witz*, in: *Witz/Salger/Lorenz*, *International Einheitliches Kaufrecht*, Heidelberg (D), 2000, Article 9, para. 14; *Neumayer/Ming* (*supra* note 29), Article 9 note 7; *Ferrari* (*supra* note 14), 276-277. Supporting Incoterms as a trade usage under Article 9(2) CISG, see, however, *Huber*, in: *Schlechtriem* (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht* (*supra* note 29), Article 30, para. 3; *Gomard/Rechnagel* (*supra* note 21), Article 9, at 54, Fn. 6 (overestimating the legal character of Incoterms by viewing them as developed on the basis of international customs [*sæd vane*]); for additional references to this effect, see *Heuté* (*supra* note 30), note 260, at 230, Fn. 55, who does not offer an opinion in response to this problem, stating simply: "on répond le plus généralement par l'affirmative".

<sup>42</sup> See, e.g., *Heuté* (*supra* note 30), note 260, at 230.

tation of a delivery clause which has already been agreed to or one which is binding on the parties for certain reasons; it can thus lead to a tacit agreement concerning interpretation if the parties do not refer to Incoterms, either intentionally or unintentionally.<sup>43</sup> The declarations and conduct of the parties to an international sales contract are otherwise preferably left to Article 8. However, if the understanding of the parties bears the imprint of local legislation, a certain practice or trade usage, Article 8(2) must be applied with caution.<sup>44</sup> In the event that the parties' understandings of a clause clearly differ – as in the concrete case, the interpretation of a neutral observer from the recipient's point of view can come in turn as a complete surprise to the other party, totally contradicting the latter's subjective intent. Article 8(1) acquires significance in connection with (3) when it applies to ascertain the parties' actual intent – i.e. their subjective representation of the contents of the contract. However, in applying this provision, not just any sign gives occasion for an assessment in favour of the seller and especially a delivery clause may not substantiate an interpretation under national law only.<sup>45</sup>

Once there is a contractual agreement to a freight prepaid delivery clause which precisely determines the place of delivery in substantive law terms as being the buyer's place of business or another place, this clause should possess a corresponding procedural effect upon the determination of the place of performance in the context of Article 5, point 1 of the Brussels Convention or the new Regulation. Whether such a clause leads to the jurisdiction of the place of performance is *not just* a matter of interpretation – it is simply something to be accepted.<sup>46</sup>

<sup>43</sup> Especially favouring this solution is *Bonell*, *Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, [1985] JBl. 385, 392; *Bonell*, in: *Bianca/Bonell* (eds), *Commentary on the International Sales Law*, Milan (I), 1987, Article 9, at 114-115.

<sup>44</sup> As correctly emphasised by *Bonell* (*supra* note 43), [1985] JBl. 385, 392; *Bonell*, in: *Bianca/Bonell* (*supra* note 43), Article 9, Point 3.5, at 114.

<sup>45</sup> In my opinion, this is taken too far in the decision of the BGH (D) 11 December 1996, BGHZ 134, at 201 = [1997] ZIP 519, in which the clauses "The price amounts to (...) free delivery to house B. duty unpaid, untaxed" (*Der Preis beträgt frei Haus B. unverzollt, unsteuerter [...]*) and "The abovementioned prices apply free delivery to Strasbourg" (*Die oben genannten Preise gelten frei Straßburg*) were held not to deviate from Article 31(c) in accordance with Article 8(1) and (3) CISG. The OLG Schleswig (D) 27 April 1995, the appellate court in the proceedings, held that the fact that the term *frei* was used in reference to price – and not to the place at which the delivery obligation would be fulfilled – militated against the existence of an agreement as to place of performance. The BGH did not object to the ensuing conclusion (as an appraisal of fact) that the formulation was intended only to regulate matters regarding carriage costs and possible risk of loss – and not place of performance. For another case with a different outcome which concerned a freight prepaid clause in an international sales contract (even without a connection to price), see OGH (A) 10 September 1998, unpublished, available at [www.unilex.info](http://www.unilex.info). The OGH held that the clause *frei Haus* as it is customarily used in commerce is not only an expense clause, but also a specification of the place of delivery as the buyer's place of business. However, the OGH deemed on another ground (unfounded) that the jurisdiction of the place of performance at the seat of the Austrian buyer was not indicated; see *infra* note 46.

<sup>46</sup> See, however, *Huber*, in: *Schlechtriem* (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht* (*supra* note 29) (initially considering a *frei Haus* or "DDU" [Incoterms] freight prepaid clause as a clear stipulation of the place mentioned as place of delivery [Article 30, para. 80], but subsequently classifies the effect for the jurisdiction of the place of performance as an interpretative question [Article 31, paras 50, 86]). See accordingly OGH (A) 10 September 1998, unpublished, available at [www.unilex.info](http://www.unilex.info). This is contradictory and incompatible with the

### 3. Decision of the Højesteret on the question of interpretation

However, a clear dissent over the meaning of a delivery clause – as in the case commented on here – will seldom develop into a consensus via Article 9(1) (consent) or Article 8(1) in connection with (3) (subjective content of representations). The parties in the concrete case clearly understood the clause to mean different things. The buyer regarded the delivery clause "F.CO DOMIC. NON SDOG" as a pure freight prepaid clause and therefore could thereby rely on § 65 of the Danish sales law.<sup>47</sup> The place of delivery was consequently the buyer's place of business in Denmark. Furthermore, the buyer maintained that this flowed from the interpretation of the clause as Incoterms "DDU" (delivered duty unpaid).<sup>48</sup> On the other hand, the seller wanted to see the freight prepaid clause as a pure arrangement for transport costs under Italian law, which comports in its view with the ordinary meaning of this clause in international sales.<sup>49</sup>

Since the CISG in the concrete case could not provide an answer to the question concerning the interpretation of the freight prepaid clause at issue, the Højesteret basically had to revert to the law applicable by virtue of the rules of private international law in accordance with Article 7(2). However, as the buyer contended, there would also have been a possible international, autonomous interpretation of the clause under Incoterms (i.e. here, the DDU clause).<sup>50</sup> There was also the bolder approach taken by the High Court, i.e. interpreting a general international understanding of a freight prepaid clause as a mere cost arrangement. In this respect, it would have been

ECJ's *lex causae* interpretation of the place of performance; correctly opposing this, see *Bernstein/Lookofsky* (*supra* note 1), § 4-3, at 74. It is beyond question that the Højesteret would have accepted a jurisdiction of the place of performance as the seat of the Danish buyer in accordance with Article 5 point 1 of the Brussels Convention in the event that the Danish freight prepaid delivery clause were part of the contract in the case discussed, UFR 2001, at 260 HD.

<sup>47</sup> On this point, see *Nørager-Nielsen/Theilgaard*, *Købeloven*, 2<sup>nd</sup> ed., Copenhagen (DK), 1993, Article 65, at 1094 et seq. The text of § 65 of the Danish sales law reads in part: "Er en vare solgt »leveret« eller »frit« (franco) på angivet sted, anses levering ikke for sket, førend varen er kommet frem til dette sted".

<sup>48</sup> The interpretation of Incoterms "D" terms, including both DDU and DDP, seems not entirely clear. The text and the ICC commentary on the 1990 version, which applied at the time of the case discussed, point to a direct provision for the place of delivery. However, the object and purpose of the provisions is to be understood as more of an arrangement for costs and risk of loss. See the 1990 ICC commentary on "D" terms: ICC Publication No. 460, Introduction, at 117-118, according to which the "D" clauses are in principle distinguished from the "C" clauses, because under the "D" clauses, the *seller is responsible for the arrival of the goods at the stipulated place of delivery*; the seller bears *all risks and costs* until arrival of the goods. The "D" clauses therefore correspond to delivery contracts (*Ankunftsverträgen*). Furthermore, the newly adopted DDU clause fulfils an important function if the seller is willing to deliver the goods to a defined destination in the country of import.

<sup>49</sup> The same holds true for German law; see (with additional references) *Bittner*, in: *Staudinger*, *Bürgerliches Gesetzbuch*, revised ed., Berlin (D), 2001, § 269, para. 14: only a transfer of costs, as well as a change in the risk of loss; the place of performance remains unchanged; *Krüger*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4<sup>th</sup> ed., Munich (D), 2003, § 269, para. 17: as a rule, it does not decide the place of performance, but rather the questions of which party bears the costs or risk of loss.

<sup>50</sup> In the Danish literature, *Lando* highlights this as the solution comporting most with the CISG's goals; see *Lando*, *Udenrigshandelens kontrakter*, 4<sup>th</sup> ed., Copenhagen (DK), 1991, Point 4.211, at 239.



desirable for the Højesteret to refer to Articles 8 and 9 and grapple with the lower court decision. Indeed, ultimately decisive was whether the interpretation was to be made under Incoterms, an international understanding (if provided), or Italian or Danish law. Rather than deal with the issue of non-response to confirmation letters, the Højesteret explicitly assumed that the proper law of the contract determines the interpretation of the delivery clause. In order to resolve the dispute as to the correct interpretation, the Højesteret requested an advisory opinion from the Italian Ministry of Justice, which stated that the freight prepaid clause used merely constituted an arrangement for costs. Consequently, there was no determination of the place of delivery and Article 31(a) was to be applied.<sup>51</sup> On the other hand, were the contract clause interpreted under Danish law, the place of delivery would have been fixed in accordance with § 65 of the Danish sales law – making the place of delivery the buyer’s place of business. With this reading, the Højesteret does not follow the internationally uniform interpretation according to Incoterms partly supported in the literature, reverting instead to the national law as determined by the conflict of law rules.<sup>52</sup>

An international interpretation is certainly advisable for delivery clauses that accord textually with Incoterms while making no reference to them. Only in this way can national courts come to a consensus as to their uniform interpretation. This in itself is not sufficient. Certain indications must be present – a certain conduct under Article 8, an implied acceptance under Article 9(1) or some other index for the intent of the parties – and these were missing in the concrete case. The delivery clause applicable to the parties (“F.CO DOMIC. NON SDOG”) was indeed the same as the DDU clause of Incoterms 1990, according to which “the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation”.<sup>53</sup> Although the named place was not provided by the Italian seller in the clause, the parties agreed on the buyer’s place of business as the proper destination. There was no reference to Incoterms in the oral negotiations or in the correspondence between the parties; moreover, each party possessed a rather clear-cut understanding of the clause’s meaning under its respective national law. The Incoterms DDU clause was expressly provided only in the invoice from the independent carrier, which as a result could not be binding for the Italian seller. The Højesteret was thus correct in not undertaking an international interpretation – even under Incoterms. Had the interpretative gauge of Incoterms been deployed, it would be un-

certain for all intents and purposes whether it addressed a pure arrangement for costs and risk.<sup>54</sup>

### VIII. Outlook

The numerous reservations to the CISG will hopefully be aligned with the changed state of the law in the many states that have entered declarations and also be withdrawn if appropriate, as in the case of Estonia. The position of the Scandinavian states is therefore understandable to make the revision of Part II of the CISG a precondition for the withdrawal of their existing declarations. In the meantime, Part II and the development of the law appear ripe for such reform through UNCITRAL.

The stipulation of delivery clauses and above all freight prepaid clauses has extreme repercussions for the rights and obligations of the parties in both substantive and procedural law. The clauses form an integral part of the sales contract in accordance with Article 19(3) CISG and for many reasons require a sufficiently clear agreement by the parties if there is to be a derogation of the rule of Article 31.

Parties need to make explicit reference to Incoterms contract rules so as to leave no room for doubt when agreeing to such terms. At present, this is apparently insufficient for the freight prepaid clauses in Incoterms (DDU and DDP). Owing to the ongoing dispute as to whether these clauses constitute a stipulation of place of delivery or rather a mere arrangement for costs and risk of loss, parties are well advised to state so specifically in the sales contract itself. Otherwise – as in the case decided by the Højesteret – they run the risk of having to clear up this ambiguity through court proceedings and numerous appeals drawn out over many years.

<sup>54</sup> See *supra*, part VII; on ICC Commentary 1990, ICC Publication No. 460 (*supra* notes 48 & 53); see BGH (D) 11 December 1996, 134 BGHZ 201 = [1997] ZIP 519; and OGH (A) 10 September 1998, unpublished, available at [www.unilex.info](http://www.unilex.info) (*supra* note 45).

<sup>51</sup> This corresponds with several other decisions on the interpretation of delivery clauses as mere cost arrangements; see *Magnus*, Das UN-Kaufrecht – aktuelle Entwicklungen und Rechtsprechungspraxis, [2002] ZEuP 533-534.

<sup>52</sup> In favour of an internationally uniform default interpretation, see *Magnus*, in: *Staudinger* (*supra* note 2), Article 9 CISG, para. 8; *Honnold* (*supra* note 36), Article 9, para. 115.

<sup>53</sup> ICC Commentary 1990, ICC Publication No. 460, at 180. DDU and DDP were kept almost unchanged in Incoterms 2000; see *Heuté* (*supra* note 30), note 271-272, at 238-239. According to *Heuté*, the seller’s responsibilities under the DDU/DDP Incoterms include delivery at the place specified: “cette obligation de livraison consiste à mettre les marchandises à la disposition de l’acheteur au lieu, à la date ou dans le délai convenus, (...)”, *ibid.* at 238.

Højesteret (DK) 15 February 2001 – Damstahl A/S v A.T.I. s.r.l.

Brussels Convention Article 5, point 1; CISG Article 92 (in connection with Articles 1(1)(b), 7(2), 8, 9, and 31(a)) – Incoterms – Jurisdiction of place of performance – (Imperfect) delivery as a disputed obligation – Scandinavian declaration to Part II of the CISG – Nonapplicability of the declaration – Stipulation and interpretation of a freight prepaid delivery clause – Failure to reply to a commercial letter of confirmation under the CISG – Customs of the parties

For the stipulation of a freight prepaid clause by virtues of non-reply to a commercial letter of confirmation in a sale governed by the CISG, the question is not decided in ac-