The Continued Saga of the CISG in the Nordic Countries: Reservations and Transformation Reconsidered

by

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1 Introduction

Recently, there have been significant legislative changes in the Nordic rules concerning formation of contracts. Some of these changes have already taken effect while others will have effect in the near future. The present article provides an overview of the current status and challenges regarding the Nordic legislative changes. The changes are related primarily to the processes of withdrawing reservations made according to article 92 of the UN Convention on Contracts for International Sales of Goods (hereinafter CISG or the Convention).[1]

Before turning to the details it is beneficial first to introduce some salient parts of the Convention history in a Nordic perspective and to define more precisely, which countries are considered to be Nordic.

The CISG is currently in force in 78 states.[2] Its purpose is to create a uniform set of rules regarding formation and performance of contracts concerning trade in goods. By providing a textually uniform framework for businesses and by demanding its uniform application, the Convention is supposed to remove barriers to trade that exist in the form of differences between domestic rules.[3] By having one and the same convention for the formation of contracts and contract performance it becomes easier for parties engaged in international trade of goods to predict their legal status, since the rules ideally are the same. Consequently, transaction costs are lowered and in the end, peace among nations is fostered. This of course presumes that both the Convention text and its application are uniform.[4]

Obviously, the trading parties are robbed of the possibility to predict their legal status, if the courts of the CISG contracting states do not apply the rules in a uniform manner. The same is true, if the Convention text that is being applied is not the same across countries. Differences in the Convention text or in its application lead to forum shopping and increase in transaction costs, which it was the intention to remove in the first place.

[1] United Nations Convention on Contracts for the International Sale of Goods, (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

[2] United Nations Commission on International Trade Law, Status of CISG, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html accessed 27 May 2013.

[3] Preamble of the CISG; 'Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees' Official Records (Vienna 10 March – 11 April 1980) UN Doc A/CONF.97/19, 195-196; Harry M. Flechtner (ed), *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edition Wolters Kluwer, Austin 2009) 117 and Camilla B. Andersen, Francesco G. Mazzotta, Bruno Zeller, *A Practitioner's Guide to CISG* (Juris Publishing, New York November 2010) 73.

[4] Joseph Lookofsky, 'Hensynet til fremmed retspraksis ved fortolkning af CISG' [2005] Ugeskrift for Retsvæsen 45; John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, Cambridge 2007) 5-6.

Uniformity faces its adversaries at the textual level in two ways. Firstly, because the Convention exists in six equally authentic language versions which have discrepancies among themselves. Secondly, the application of the Convention text as a whole is undermined, when contracting states make reservations against the application of parts of the Convention.

Though reservations may be seen as the necessary tool to provide the flexibility needed to convince states to actually adopt instruments like the CISG, they have the consequence that the provisions of the CISG are allowed to be applied differently (if applied at all) from state to state, and thus a reservation is a threat to uniformity at both the textual level and consequently also at the application level.[5]

Fortunately, a number of states are in the process of revoking their reservations. The latest notification of withdrawal was received by UNCITRAL in January 2013 and was made by China in regard to its original reservation against the freedom of form rule in the Convention.[6] Other Soviet-influenced states like Latvia and Estonia have also withdrawn their reservations against the freedom of form made according to CISG article 12 and article 96.[7] For the sake of uniformity such withdrawals are welcomed.

1.1 Terminology

In the Nordic countries we also see a movement towards greater uniformity through withdrawal of reservations. The Nordic countries are here defined as being Denmark, Finland, Iceland, Norway, and Sweden. The Nordic region includes also the five countries' associated territories.

The associated territories are the autonomous regions of Greenland and the Faroe Islands that belong to the Danish reign, and Åland that belongs to the Finnish Republic. Upon ratification of the CISG, Denmark excluded the application of the Convention in regard to Greenland and the Faroe Islands and there are no signs of this being changed anytime soon.[8] Finland did not make a similar reservation in regards to Åland, so here the Convention is applicable like in the rest of the Republic.

The term *Scandinavia* is sometimes used in legal texts about the same five countries mentioned above.[9] As has been rightfully pointed out, not all of the five countries are '*... classically*

[5] Camilla B. Andersen 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG' (2012) 8 Journal of Business Law 698, 706.

[6] Depositary notification C.N.98.2013.TREATIES-X.10.

[7] Latvia in November 2012 according to depositary notification C.N.638.2012.TREATIES-X.10 and Estonia already back in March 2004 according to depositary notification C.N.276.2004.TREATIES-1.

[8] CISG article 93(1) and United Nations Treaty Collection, <treaties.un.org> as of 29 January 2013.

[9] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn Clarendon Press, Oxford 1998), 277. See also this material for a description of Nordic legal history, pages 276 to 285.

Scandinavian …'.[10] This is due to the fact that the term Scandinavia traditionally relates to a region that comprises Denmark, Norway, and Sweden only. Even though only two of these countries are located on the Scandinavian Peninsula, they are grouped together because of the strong linguistic, cultural, and political ties the three countries share.[11] As an example, the languages of the three countries are mutually intelligible, whereas the Finnish, Greenlandic, Icelandic, and Faroese languages are not.

Despite that Denmark, Norway and Sweden have common legal characteristics that could be of interest, it is more correct to select a broader term like *Nordic,* since it includes the remaining countries that have the same characteristics being discussed at present without redefining an already established cultural-linguistic term as *Scandinavia*.

The term *Fennoscandia* could be considered as it includes Finland. But since this term is a geological term covering Finland, Norway, Sweden, and parts of Russia, but leaves out Denmark and Iceland, it is unsuitable for the present context.[12]

For these reasons, the five countries are described as the Nordic countries. This is consistent with the fact that the governments of the same countries' have designated their formal cooperative *the Nordic Council*.[13]

1.2 The Nordic Reservations

When the Nordic countries became CISG contracting states more than 20 years ago, they all, except Iceland, excluded part II of the CISG from being applicable and thus, they disturbed the uniformity of the Convention text.[14] The reservation against part II is permitted by article 92. In fact, the provision was included in the CISG on the initiative of the very same countries, and only

[10] Camilla B. Andersen 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG' (2012) 8 Journal of Business Law 698, 706.

[11] A distinction is made between the 20th century Nordism covering the five countries and the older 19th century Scandinavism taking place in Denmark, Norway and Sweden, which left its mark for example in the Norwegian national anthem of 1864 confirming that the community was considered to cover only three countries; '*… now we three brothers stand united …*' [author's translation] by Bjørnestjerne Bjørnson, 1859-1668.

[12] See for example Naturhistoriska Riksmuseet, Geology of Fennoscandia, http://www.nrm.se/en/menu/researchandcollections/departments/laboratoryforisotopegeology/moreaboutisotopegeology/geologyoffennoscandia.291_en.html updated 30 September 2009, accessed 16 November 2012.

[13] See <norden.org>, accessed on 14 November 2012.

[14] Iceland did not become a contracting state until about 10 years after the other Nordic states.

the Nordic countries have made use of it.[15] This position is currently changing, since the other four countries are in the process of withdrawing their reservations and incorporating part II.

The concerns that led to the reservations according to article 92 were two-fold. First, the rules on revocation of offers in CISG article 16 were common law inspired rules which were too different from the current domestic rule. Since the rule of revocation of offers in the Convention contains a number of exceptions, this argument has been described as *'... provincial nitpicking...'*.[16] Second, the lack of regulation of validity issues in the CISG would increase legal uncertainty. Also this argument is less persuasive, since adoption of part II would not necessarily create more uncertainty than adoption of part III and the reservation would in any event be limited to the situations where the rules of private international law point to the application of the laws of one of the Nordic countries.[17]

Though a removal of the reservations against the application of CISG part II is to be welcomed, the process presents a number of challenges. The purpose of this article is to provide an insight into the background and current process of the Nordic withdrawals, thus clarifying the current state of the process and outlining some of the particular challenges that the Nordic countries are facing in this period of transition.

It should be pointed out that Iceland, despite what has been noted elsewhere in the literature, did not make a reservation against part II according to article 92.[18] Iceland only made a reservation according to article 94, thus excluding application of the CISG in inter-Nordic sales.

2 Current Status

Even though scholars previously have pointed out that the reservations should be revoked, it was not until recent criticism by the International Chamber of Commerce that the process of

[15] Ingeborg Schwenzer (Ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn Oxford University Press, Oxford 2010) 1182.

[16] Joseph Lookofsky, 'The CISG in Denmark and Danish Courts' (2011) 80 Nordic Journal of International Law 295, 300.

[17] Joseph Lookofsky, 'The CISG in Denmark and Danish Courts' (2011) 80 Nordic Journal of International Law 295, 300.

[18] Harry M. Flechtner (ed), *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edition Wolters Kluwer, Austin 2009) 699. Compare with United Nations Treaty Collection (treaties.un.org) and Joseph Lookofsky, *Understanding the CISG* (4th edn DJØF Publishing, Copenhagen 2012) 167 fn 17.

withdrawal sparked.[19] The Nordic governments decided to start the process by first mapping the pros and cons of a possible withdrawal under the auspices of the Nordic Council of Ministers. The conclusion of the work was, perhaps unsurprisingly, that a withdrawal would increase uniformity, enable prediction of legal status and reduce transaction costs.[20]

The process of withdrawal in the Nordic countries involves two levels. At one level, the national legislature must pass the necessary laws to make part II part of domestic law. Domestic law governs this part. At another level, the state must notify the UN, so that the withdrawal can take effect. This part is governed by international law. Though a reservation must be permitted by the treaty or convention affected, it may subsequently be revoked at any time,[21] requiring only a notification to the depositary at the United Nations.

According to article 97(4), a withdrawal takes effect on the first day of the month, six months after notification of withdrawal has been received by the UN depositary. This appears to be a straightforward rule. However, the Nordic countries have (some may say 'had') strong bonds of brotherhood, which are reflected also in their joint drafting of legislation. So, when time for notification came about, UNCITRAL expected a joint deposit of notification, as this was the way that the original reservation against part II was made.[22] The fact that a joint notification was not made, when Finland went solo already on 28 November 2011, meant that it had to be clarified, whether UNCITRAL had to await notification of all Nordic states, before the 6-month period would start running.[23] If not, the period would start running on an individual basis.

Whether or not the fact that no joint notification was made can be taken as a change in the Nordic common legal culture is not to be explored at present. The relevant point in this regard is that UNCITRAL is not demanding a joint withdrawal, and that the Nordic countries are not

[19] Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 18 Journal of Law and Commerce 289, 289-299; Joseph Lookofsky, 'The CISG in Denmark and Danish Courts' (2011) 80 Nordic Journal of International Law 295; Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012) 5.

[20] Jan Kleineman og Tom Madell, *Avtalsslutande vidinternationella köp avvaror* (507 TemaNord / Nordic Council of Ministers, Copenhagen 2009) 11-14 and 61-71.

[21] Ingeborg Schwenzer (Ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn Oxford University Press, Oxford 2010) 1182; The Vienna Convention on the Law of Treaties (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331, article 22(1): '*Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.*'

[22] Camilla B. Andersen 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG' (2012) 8 Journal of Business Law 698, 708.

[23] Camilla B. Andersen 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG' (2012) 8 Journal of Business Law 698, 708.

expecting them to do so, thus permitting individual notifications and dates of entry into force of part II.

Currently, Denmark, Finland, and Sweden have completed the necessary paperwork at both domestic and international levels.[24] Therefore, CISG part II entered into force in Finland on 1 June 2012,[25] in Sweden on 1 December 2012,[26] and in Denmark on 1 February 2013.[27] Norway has not yet notified the UN, which is due to the fact that a hearing had to be completed during the summer of 2012, thus slowing the domestic process.[28] The domestic legislative results of the hearing is still pending.[29]

Considering that the official standpoint of the Norwegian Ministry of Justice is to incorporate part II, it is justified to say that '*... there is ample reason to remain optimistic - eventually the reservations will be removed ...*' with the effect that part II will apply throughout most of the Nordic region.[30] Upon a closer look, particularly Norway and Iceland may be facing challenges in the withdrawal process. These are accounted for immediately below.

3 Considerations Regarding Norway and Iceland

3.1 Two Doctrines

To put it simply, there are two approaches that states can have to international treaties, a monist one and a dualist one. On one hand, treaties may become part of the notion of 'law' in a monist state without further legislative acts. On the other hand, treaties must be made part of a dualist state's domestic law by way of legislative act for the treaty to become part of the 'law' in

[24] In Denmark: Lov om ændring af international købelov og lov om aftaler og andre retshandler på formuerettens område (LOV nr 1376 af 28/12/2011); in Finland: Valtioneuvoston asetus kansainvälistä tavaran kauppaa koskevista sopimuksista tehdyn yleissopimuksen voimaansaattamisesta sekä yleissopimuksen eräiden määräysten hyväksymisestä annetun lain voimaantulosta annetun asetuksen 2 §:n muuttamisesta (Suomen säädöskokoelman n:o 265/2012); In Sweden: Lagom ändring i lagen (1987:822) om internationellaköp (SFS 2011:852).

[25] Journal of the United Nations (30 November 2011) No. 2011/230.

[26] Journal of the United Nations (26 May 2012) No. 2012/102.

[27] Journal of the United Nations, (4 July 2012) No. 2012/128. See also Thomas Neumann, 'De nordiske landes tilbagekaldelse af forbeholdet mod CISG del II' (2012) 4 Juristen 186, 188.

[28] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012); Ole Lando, 'Danmark tilslutter sig de internationale regler om købeaftalers indgåelse' [2012] Ugeskrift for Retsvæsen 149, 150.

[29] The process can be followed at http://www.regjeringen.no/nb/dep/jd/dok/hoeringer/hoeringsdok/2012/hoyring--forslag-om-a-trekkje-den-norsk.html?id=682611 accessed 27 May 2013.

[30] Camilla B. Andersen 'Recent Removals of Reservations under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG' (2012) 8 Journal of Business Law 698, 708.

such a state.[31] The difference being that the citizens of the state can derive rights and obligations from the treaty directly in a monist state whereas a citizen in a dualist state must await approval of the domestic legislature. This approval can simply be a reference to the treaty, thereby incorporating the treaty into domestic law, or other methods, such as transformation.[32] As long as a dualist state has not taken legislative steps towards incorporating a treaty it may very well be in breach of the agreement made between the states, but the citizen (businesses in case of the CISG) can do nothing to remedy this fact.[33]

The Nordic countries follow the dualist approach and therefore they all took domestic legislative steps to incorporate the Convention.[34] Denmark chose to adhere to the CISG by making a reference to it in its authentic form and at the same time leaving the domestic Sale of Goods Act from 1906 for domestic sales. Sweden and Finland created new sale of goods acts meant for domestic sales, and at the same time they did like Denmark and left the CISG (also in its authentic form) for international sales by way of reference.

At the ratification of the Convention (excluding part II) in the 1980ies Norway chose to transform and translate the Convention into the local language in order to create one law for both domestic and international sales. Iceland did the same, but since Iceland took inspiration from the Norwegian transformation law without having made a reservation against part II like Norway, the Icelandic Merchant and Trade Act[35] now contains the transformed version of CISG part III on the performance of contracts, but not part II on contract formation.

The fact that Norway and Iceland follow the dualist approach to international law the citizens of the two states can only rely on the rules of the CISG to the extent that it they have been incorporated by the domestic legislature. In the case of Iceland, a business would not be able to rely on CISG part II since this part has not been given effect yet by the national legislature, despite that the necessary international paperwork has been done.[36] However, this position needs further qualification since now potentially two different versions of the CISG are in play. Therefore, it must be determined whether the rules of private international law point towards the non-Icelandic party's law according to article 1(1)(b). If it does and that particular state has adopted also part II of the Convention, then part II is to be applied to the contract whereas if the rules of private international law point to Icelandic law it does not apply.

[31] Martin Dixon, *Textbook on International* Law (6th edn Oxford University Press, Oxford 2007) 88-90.

[32] Peter Germer (ed), *Statsforfatningsret* (2nd edn Jurist og Økonomforbundets Forlag, København 1988) 276-278.

[33] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn Cambridge University Press, Cambridge 2007) 188.

[34] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn Cambridge University Press, Cambridge 2007) 195.

[35] Icelandic Merchant and Trade Act. Lög um lausafjárkaup, 2000 nr. 50 16. Maí.

[36] Meaning notification to the UN and the expiry of the subsequent waiting period of twelve months according to CISG article 99.

A similar situation occurs in Norway since part II has not (and was not supposed to be) incorporated. However, the problem is exacerbated further in the two countries because of their choice of incorporation method. Upon ratification, Norway decided to transform the CISG into a Norwegian language act. It is this act that has been approved by the domestic legislature and therefore it is this act that businesses can rely upon when the rules of private international law names Norwegian law as being applicable.

One could say that there would be no danger in applying a Norwegian language version of the CISG compared to using one of the other six authentic UN versions. However, this is not true. Allowing another linguistic layer also adds another layer of uncertainty since a Norwegian judge may interpret concepts and notions in the Norwegian language in conformity with Norwegian domestic sales law. And even if this would not happen, a party would not be able to rely on the wording of the provisions in the authentic versions of the CISG when these have not been transformed into Norwegian domestic law, such as for example article 80, which have no direct equivalent in the Norwegian act. More on this further below.

Again, the position is modified to the extent that a full and unrestricted authentic version of the CISG is to be applied by virtue of the rules of private international law according to CISG article 1(1)(b). Both the reservation against part II of the Convention and the choice to transform the CISG into the local language counteract the predominant purpose of the CISG – to create a uniform sales law.

Since there are no current signs of changes being made to the Icelandic model, the focus in the following is on Norwegian law, though the problems may be equally true for Icelandic law. It should however be pointed out that Iceland has not taken any steps yet to incorporate CISG part II, neither by reference nor by transformation.

3.2 The Transformation Model

The rationale in Norway for choosing the transformation model was that particularly small Norwegian enterprises would not have the capacity to comprehend and operate with two parallel frameworks. They would, it was believed, benefit from having only one sales law that would govern both kinds of sales.[37]

The Norwegian Ministry of Justice has in their hearing notice repeated the original intention of not excluding any CISG provisions in the process of translation and transformation, but they

[37] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012) 8-9.

also point out that the current structure of the Norwegian sales code is different to the authentic CISG texts, and that the goal of uniformity thereby is not promoted.[38]

The original solution of translation and transformation has been described as *'... a major mistake ...'*, among other reasons, because it creates discrepancies between language versions, which in turn question whether the Norwegian legislature intended to depart from the authentic CISG rules or merely made a mistake.[39]

Even worse – the purpose of informing in particular SMEs is counteracted, if the Norwegian hybrid law does not contain a loyal translation of all provisions from the authentic CISG texts, since the same SMEs would then have to consider whether the rules of private international law make the authentic texts or the Norwegian text applicable according to article 1(1)(b).

To illustrate; despite the intentions, a rule like article 80 CISG has no clear equivalent in the Norwegian version. It appears simply to have dropped out. Looking closely at the Norwegian Sale of Goods Act (NSGA) and reading its preparatory works reveals that the drafters were of the opinion that they had included article 80 in NSGA § 22(1) and § 30.[40] However, it has been questioned, whether the different systematic placement and transformation has changed the function of the provision[41] and in turn, whether the Norwegian language version is to prevail over the six authentic UN language versions of the CISG.

Similar problems appear in the countries that chose to incorporate the Convention by reference, since they attached to the law as an appendix a local language translation of the Convention. However, in these situations the local translations are provided for information purposes. Legally, it is the authentic UN versions of the CISG that has been incorporated into domestic law by way of reference. Hence, the UN versions supersede the local translations in these situations.

In the case of Norway this is different. Norway is a dualist state like the other Nordic countries, and therefore Conventions and other international agreements must receive parliamentary approval to become law in the state. Since Norway approved the transformed version of the Convention, this version is in principal the law in Norway and is the applicable version, when the rules of private international law lead to the application of Norwegian law. However, from an international law perspective it is for the state to ensure that all state bodies implement the

[38] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012) 9.

[39] Kai Krüger, *Norsk Kjøpsrett* (4th revised edn Alma Mater, Bergen 1999) 671-672.

[40] Norwegian preparatory works, Ot. prp. nr. 80 (1986-1987), Om A Kjøpslov B Lov om samtykke til ratifikasjon av FN-konvensjonen om kontrakter for internasjonale løsørekjøp, vedtatt 11 april 1980, 184.

[41] Thomas Neumann, *The Duty to Cooperate in International Sales* (Sellier European Law Publishers, Munich 2012) 211-215.

agreements entered into by the state.[42] This means that Norway has promised the international community to implement the CISG in its authentic form – the UN versions. From the perspective of international law, the authentic language versions of the Convention supersede the Norwegian one. Only the latter view supports the UN's – and therefore also Norway's – original goal of creating a uniform sales law to the benefit of world trade.

3.3 Full or Partial Incorporation

In August 2012 the Norwegian ministry of justice completed a public hearing of the proposal to revoke the reservation against CISG Part II.[43] A long range of associations and public institutions were invited to consider two aspects. First, whether the reservation against part II should be withdrawn or not. Second, which method should be used to incorporate part II into domestic law in case a withdrawal was supported.

Considering that the Convention originally was transformed and translated, the ministry outlined two possible methods of incorporation. One where only CISG Part II would be incorporated into Norwegian law in its authentic form by reference. Another where the entire CISG including Part II would be incorporated in its authentic form by reference, thus abolishing the old translated version.

The Ministry of Justice points out in its hearing paper that the advantages of the second option is that the authentic texts of the Convention would be applicable, thus making it possible for non-Norwegian trading parties to get informed of the applicable law and predict their legal status when trading with a partner from Norway.[44] The ministry has thus recognized that the original solution has such significant drawbacks that it should not be repeated.

The Norwegian Bar Association,[45] the Legal Advisor to the Norwegian Government,[46] and the Confederation of Norwegian Enterprise[47] has expressed their support for the withdrawal and

[42] Anthony Aust, *Modern Treaty Law and Practice* (2nd edition Cambridge University Press, Cambridge 2007) 179; Mark E. Villiger, *Commentary On The 1969 Vienna Convention on The Law of Treaties* (Martinus Nijhoff, Leiden 2009) 366; and Article 26 of The Vienna Convention on the Law of Treaties [VCLT] (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331. Granted that Norway has not ratified the VCLT, but a similar principle of *pacta sunt servanda* follows from customary international law.

[43] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012).

[44] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012) 1 and 10.

[45] Letter of 13 August 2012 by Den Norske Advokatforening, http://www.regjeringen.no/pages/37887275/DNA.pdf accessed 28 November 2012.

the method of incorporation through reference to the entire text of the Convention. Also UNCITRAL expressed that a withdrawal would be beneficial to trading parties and would promote uniformity, though the question of the method of incorporation is not addressed in the letter to the Norwegian Ministry of Justice.[48]

No authority has expressed support for maintaining the reservation, though a number of bodies declared that they had no remarks. This is most likely due to the fact that the CISG applies to an area of life that these bodies are not concerned with.[49]

The Ministry of Justice points out in its hearing letter that an argument against the withdrawal could be that Norwegian businesses will then be faced with two parallel frameworks for entering into contracts – one for domestic contracts and one for international ones.[50] The point made is in line with the rationale for the original transformation – not to have two parallel sets of rules. However, it is also pointed out that it would only be possible to maintain the existing domestic/international hybrid law in situations, where the rules of private international law point towards the laws of Norway being applicable. This could perhaps muddy the waters even more, since Norwegian enterprises would have to use the domestic hybrid law *and* the authentic CISG texts depending whether the rules of private international law point to Norwegian law or another state's law. The default and simpler alternative is to let the requirements for applying the (authentic versions) CISG be decisive.

For the sake of simplicity, for obeying international law, and in order to promote uniformity and predictability of legal status for both Norwegian and non-Norwegian enterprises it appears to be most correct to remedy the choice of transforming and translating the Convention by now incorporating the Convention in its full authentic versions. Should Iceland reconsider the current model of incorporation too, the same would apply there.

[46] Letter of 15 August 2012 by Regjeringsadvokaten, http://www.regjeringen.no/pages/37887275/REA.pdf accessed 28 November 2012.

[47] Letter of 25 June 2012 by Næringslivets Hovedorganisasjon, http://www.regjeringen.no/pages/37887275/NHO.pdf accessed 28 November 2012.

[48] Letter of 6 August 2012 by United Nations Commission on International Trade Law, http://www.regjeringen.no/pages/37887275/UNCITRAL.pdf accessed 28 November 2012.

[49] The bodies that refrained from taking a stand on the question are concerned with labour law, rights of children, fishing rights, culture etc.

[50] Norway, Justits- og Politidepartementet, 'Forslag om å trekkje den norske reservasjonen mot FN-konvensjonen 11. april 1980 om kontraktar for internasjonale lausøyrekjøp (CISG) del II om avtaleinngåing og spørgsmål om gjennomføring av del II av konvensjonen i norsk rett m.m.' (Snr. 201203482, May 2012) 7.

4 Common Considerations for the Nordic Countries

Aside from the particular challenges that Norway is currently considering, there are at least two features of general nature that should be pointed out, as they relate to the withdrawal process in all of the four countries concerned.

4.1 Temporal Problems

When part II enters into force, it is relevant to consider, in which factual situations the new rules will apply, in particular in the time near to the entering into force.[51] At some point offers and acceptances being made will have to move from being governed by domestic law to being governed by CISG part II. The problem here is to determine which point in time is relevant for deciding whether a contract formation process has taken place before or after part II entered into force. When part II has entered into force, time will render such temporal problems increasingly irrelevant, but for now they may play a role.

The starting point is that in line with the general prohibition against retroactive effect and the recommendation made by the Nordic Council of Ministers the withdrawals of the reservations and the current domestic laws of incorporation are not meant to give CISG Part II retroactive effect.[52]

Therefore, and according to article 100, part II will not apply to contract formation processes that have taken place entirely before the date of entry into force. The remaining parts of CISG will of course apply, since these are already in force in the Nordic countries.[53]

Determining which conduct will change this position is significant for the contracting parties, in particular if there have been attempts of revoking or withdrawing an offer. In this regard, article 100 states that the Convention only applies when '*... the proposal for concluding the contract is made on or after the date when the Convention enters into force ...*'. The significant time is thus the *proposal* to form a contract.

[51] Bernhard Gomard and René Franz Henschel, 'Ophævelsen af de nordiske landes forbehold for del II i FN's konvention om aftaler om internationale køb (CISG)' (2012) 2 Erhvervsjuridisk Tidsskrift 103, 106-108. See also CISG article 100 and Ingeborg Schwenzer (Ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn Oxford University Press, Oxford 2010) 1197.

[52] Harry M. Flechtner (ed), *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edition Wolters Kluwer, Austin 2009) 702. Also The Vienna Convention on the Law of Treaties (Adopted 23 May 1969. Entered into force on 27 January 1980) 1155 UNTS 331, article 4. Jan Kleineman and Tom Madell, *Avtalsslutande vidinternationella köp avvaror* (507 TemaNord / Nordic Council of Ministers, Copenhagen 2009) 70.

[53] This presumes that the reservation according to article 94 does not apply and that the general requirements for applying the CISG are fulfilled.

The choice of the word *proposal* in article 100 is ambiguous. On one hand, there can be little doubt that a proposal for concluding a contract comprises offers according to the requirements set forth in article 14.[54] However, a proposal can be more than just offers. This is confirmed directly in article 14(1), where it is stated that some proposals constitute offers, when a number of requirements are fulfilled. If a proposal does not meet the requirements of article 14(1), it is an invitation to make an offer according to article 14(2), but the notion *proposal* is still used. Thereby, it is seen that the notion *proposal* is a collective name that covers at least offers and invitations to make an offer.

The Danish Bar Association has criticised the Danish domestic incorporation law for the very same ambiguity and suggested that the word *proposal* should be replaced by *offer* to make it clear that the decisive time is the making of an offer.[55] However, the choice to include words that contain the same ambiguity as in CISG appears most loyal, and specifying that the relevant time in Denmark is the time, where an offer is made would be to deviate from the authentic text of the Convention again and to ignore the fact that the drafters of the CISG chose the word *proposal* over the word *offer*.

The simplest interpretation would be to equate the term *proposal* and *offer*. This would make it easier to determine, whether a proposal fulfils the requirements for being an offer, and whether the offer was made before or after part II entered into force or not. However, under the interpretation that the term *proposal* covers also invitations to make an offer, it is possible to apply part II to the entire negotiation period of the parties and at the same time consider that part II itself is meant to regulate proposals already from the time that they are mere invitations.

A third possible interpretation would be to let the time of the first contact between the parties be significant for the application of part II. In this way the parties can predict that the applicable law for contract formation will remain the same from the very beginning of a negotiation and not change during the negotiation period, merely because of a distinction between proposals and offers. Such interpretation would consider situations of contract formation, where the parties have not followed a clear model of offer and acceptance.

Since there is justifiable doubt regarding the decisive time for applying part II, the trading parties should be particularly aware when entering into negotiations around the time, where part II enters into force. Businesses with the capacity to investigate and decide on applicable laws could consider doing so, but small businesses without such capacity are left with the default rules and the courts should a dispute arise.

[54] Bernhard Gomard and René Franz Henschel, 'Ophævelsen af de nordiske landes forbehold for del II i FN's konvention om aftaler om internationale køb (CISG)' (2012) 2 Erhvervsjuridisk Tidsskrift 103, 107.

[55] Bernhard Gomard and René Franz Henschel, 'Ophævelsen af de nordiske landes forbehold for del II i FN's konvention om aftaler om internationale køb (CISG)' (2012) 2 Erhvervsjuridisk Tidsskrift 103, 107.

Should domestic courts get the chance to decide over a dispute involving a temporal issue like the one described here, it should be careful in considering and justifying its view. Only by doing so is the obligation to promote future uniformity in article 7(1) clearly obeyed.

When the offer, acceptance, and the first contact between the parties takes place after part II enters into force, there is no doubt that part II is applicable. Further, it should be stressed that no matter when the proposal for concluding the contract has been made, the discussion outlined above is only relevant, when the rules of private international law point to the laws of one of the four withdrawing Nordic countries according to article 1(1)(b), assuming that the other party has his place of business in a non-Nordic state, where part II is in force. Otherwise the inter-Nordic reservation renders the CISG inapplicable in total.

4.2 The inter-Nordic Reservation

The current processes of withdrawal that are taking place in the Nordic countries address only the reservations made according to article 92. In order to get the full picture, it should be emphasised that all Nordic countries, including Iceland, have made reservations according to article 94.[56]

The reason for this is that all of the five Nordic countries used to have rather similar domestic sales laws, despite the fact that Finland and Iceland did not participate directly in the law making process like the other countries.[57] When the CISG was adopted by the Nordic countries, they decided to exclude application of the CISG altogether, when the trading parties had their place of business in each their Nordic country.[58] The rationale being that some uniformity in the domestic sales acts had already been achieved.

Since the reservation according to article 94 was made, each country has chosen different legislative paths. Denmark chose to incorporate the authentic versions of the CISG by reference and at the same time leave the original domestic sale of goods act from 1906 for domestic sales. Sweden and Finland created new domestic sale of goods acts, but at the same time they incorporated the authentic CISG texts for international sales. Norway and Iceland chose to translate and transform the CISG completely turning it into a new hybrid law meant for both domestic and international sales. These different developments have undermined the original

[56] United Nations Commission on International Trade Law, Status of CISG, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html accessed 13 November 2012.

[57] Berte Elen Konow, John Egil Bergem and Stein Rognlien, *Kjøpsloven 1988 og FN-Konvensjonen 1980 om Internasjonale Løsørekjøp: Med Kommentarer* (3rd edn Gyldendal Akademisk, Oslo 2008) 23.

[58] Denmark, Finland, Iceland, Norway and Sweden have all made a reservation according to CISG art. 94.

rationale for excluding the application of the CISG in inter-Nordic sales, and its justification has rightfully been questioned.[59]

One may wonder why the Nordic governments have not taken the initiative to withdraw also the reservation made according to article 94. In fairness, it should be mentioned that the Nordic contract acts still show great similarity, and that the changes primarily have been in the sales acts.

In relation to the current processes of withdrawing the article 92 reservations it is worth noting that even though part II will soon be applicable in all of the Nordic countries part II is inapplicable when both parties are from Nordic countries as long as the reservation according to article 94 is still effective. There are currently no indicators that this reservation is about to be withdrawn.

5 Conclusion

The processes of withdrawing the exclusion of CISG part II can be summarized as being a step ahead in promoting uniformity, since the Convention moves closer to applying in its full authentic versions in all of the Nordic countries.

As part II enters into force in the respective countries, it is necessary to consider that this affects only situations falling under one of the Nordic legal systems according to article 1(1)(b). Further more, trading parties and most definitely courts should be aware that not only contract formation processes starting with an offer being made after part II enters into force may be governed by part II, though this question is open to interpretations.

The withdrawal processes are running on a parallel and individual basis instead of being made jointly. This means that part II will enter into force at different times in the following order; Finland, Sweden, Denmark and most likely also Norway.

Norway is facing particular challenges due to their particular way of transforming and translating the Convention. The withdrawal process has the benefit that the CISG may now finally be applicable in Norway in its full authentic form. For the sake of uniformity, this is welcomed.

Also Iceland chose to transform and translate the CISG upon ratification, but did not take a reservation against the application of CISG part II. If Norway decides to incorporate the full

[59] Joseph Lookofsky, 'The CISG in Denmark and Danish Courts' (2011) 80 Nordic Journal of International Law 295, 301-302; Jan Ramberg and Johnny Herre, *Köplagen* (Fritze, Stockholm 1995) 47; Joseph Lookofsky, *Understanding the CISG* (4th edn DJØF Publishing, Copenhagen 2012) 169.

authentic versions of the Convention, Iceland will be left as the only country sticking to this unfortunate method. There are at present no signs of this changing.

Common for all the Nordic countries are that they have excluded the application of the Convention according to article 94, when the sale is taking place among two parties with a place of business in each their Nordic country. This position remains unaffected by the current processes of withdrawal of the reservation according to article 92.

For the sake of the uniform development, increased predictability of legal status, lowering of transaction costs and eventually fostering of peace among nations, the withdrawals that are currently taking place are to be acclaimed. One can only point out that reservations like the ones for inter-Nordic sales according to article 94 and the ones outside the Nordic region regarding form requirements according to article 93 could be reconsidered as they impair a uniform application of the Convention.