

# Nordic Hesitancy Regarding Part II of the CISG

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The Nordic countries we are proud of their common Contracts Act.<sup>1</sup> For more than 90 years it has been a landmark of Nordic legal co-operation and even today it is one of pillars of Nordic private law.<sup>2</sup> But this idyllic picture is disturbed by dissimilarities between the Nordic Contracts Act and Part II of the CISG in the rules on formation of contracts. These differences are perhaps less important from a practical than from a theoretical point of view, but they are the reason why the Nordic countries made a reservation under Article 92 whereby they would not be bound by Part II of the Convention.<sup>3</sup>

Almost everything there is to say about the CISG and Nordic Contracts Acts has already been said and printed many times. Among the latest examples are Leif Sevón's article on the 92 Article reservation<sup>4</sup> and two articles in a recently published Festschrift for Lars Gorton, viz. one from the Norwegian standpoint by Geir Woxholt<sup>5</sup> and the other written in the spirit of Swedish-Finnish cooperation by Johnny Herre and myself on the very same subject.<sup>6</sup>

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1 An unofficial translation of the Finnish Contracts Act made by the Ministry of Justice is found e.g. on "[www.finlex.fi/en/laki/kaannokset/1929/en19290228.pdf](http://www.finlex.fi/en/laki/kaannokset/1929/en19290228.pdf)". There are some minor differences the Nordic Acts.

2 The Nordic Contracts Act has even its own 90th anniversary Festschrift: Flodgren, Boel – Gorton, Lars – Lindell-Frantz, Eva – Samulesson, Per (eds.), *Avtalslagen 90 år. Aktuell Nordisk rättspraxis*, Stockholm 2005.

3 Iceland ratified the convention later than the other Nordic countries. It entered into force in 2002. Iceland did not make the 92 article reservation.

4 Sevón, Leif, *Reservationen om avtalslut i FN-konventionen om internationella köp*, Tidskrift utgiven av Juridiska Föreningen i Finland 2006 p. 431–437.

5 Woxholt, Geir, *CISG-konventionen del II – og behovet for revisjon av den nordiske avtaleloven*, Festschrift till Lars Gorton, p. 699–710, Lund 2007.

6 Herre, Johnny – Sisula-Tulokas, Lena, *CISG och de nordiska reservationerna*, Festschrift till Lars Gorton, p. 149–168, Lund 2007.

The conclusion is always the same. The Nordic countries should withdraw their reservation to Part II of the CISG.<sup>7</sup>

But how shall we do this? Here we have differing options. We can choose the quick and easy way and simply withdraw the reservation. The consequence of this solution would be a dual system for formation of contracts, one set of rules for international sales and most probably international contracts generally – the CISG model – and another set of rules for Nordic and national sales as well as all other types of purely national contracts – the Contracts Act model. Till now we have lived with a dual system however a slightly different one, and have seen its pros and cons.<sup>8</sup> It is possible to live with this solution, although it sometimes leads to uncertainty and perhaps unforeseeable surprises. As the CISG model is used in EU directives and the international and European instruments such as the UNIDROIT Principles (UPICC),<sup>9</sup> the Lando Principles (PECC)<sup>10</sup> and Draft Common Frame of Reference (DCFR),<sup>11</sup> the balance between the two models is slowly but steadily shifting. This might create problems for the Nordic countries in the future.

Doing away with the dual system would unavoidably mean that some amendments must be made to our venerable Contracts Act. Here the problems start; here we have a Pandora's Box. The act is old, and a lot of water has flown under our bridges. When we set about amending the Act, it is tempting to do a little bit more than is strictly needed by the CISG's formation of contracts rules. After all the strictly required amendments are not so many.<sup>12</sup> Here especially CISG Article 16 on revocation of an offer in comparison with the Nordic Contracts Act 3 § and CISG Article 19 (3) on terms materially altering the offer are often pointed out as problematic from a traditional Nordic point of view.<sup>13</sup>

But there is a much bigger problem. Once our venerable Contracts Act is exposed to amendments it is tempting to make other modernizations as well,<sup>14</sup>

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7 Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, Denmark 2004, p. 183, writes "The resulting complex state of affairs works to no one's advantage, and the Scandinavian States should all withdraw their ill-advised reservation to CISG Part II." See also e.g. Ramberg, Jan – Ramberg, Christina, *Allmän avtalsrätt*, p. 85, Stockholm 2007 and the extensive list of references in Torsten Iversen's paper *Scandinavian Contract Law and its Implication on CISG – The Danish Approach*, footnote 19, presented at the Stockholm CISG Part II conference, September 4–5, 2008.

8 See the literature in footnotes 4–6.

9 Cf. UNIDROIT Principles of International Commercial Contracts 2004 (UPICC), especially Chapter 2, Section 1. The UPICC covers commercial contracts.

10 Cf. Principles of European Contract Law (PECL), especially Chapter 2. The PECL covers commercial and consumer contracts.

11 Cf. Draft Common Frame of Reference (DCFR) Principles, Definitions and Model Rules of European Private Law, Sellier 2008, especially Book II, Chapter 4. The same model is used in the chapters on specific contracts, e.g. Book IV, Part A. Sales and Part C. Services.

12 E.g. in Herre – Sisula-Tulokas, p. 160-166 and Iversen's paper at the Stockholm conference.

13 E.g. Herre – Sisula-Tulokas, p. 151–153.

14 This subject has been discussed many times among Nordic lawyers. See e.g. Schmidt, Folke, *Förhandlingarna vid det 24 nordiska juristmötet i Stockholm 1966*, 182–189;

for instance to include parts of the UPICC, PECL / DCFR. In other words, how far shall we go and are the Nordic countries able to walk together, all the way? We might end up with a long list of bad amendments, and our countries might present quite different lists. For instance, already in 1990 Finland considered a Committee Proposal to amend its Contracts Act.<sup>15</sup> But in the end this proposal led to nothing because a common Nordic Act with a common jurisprudence and doctrine was considered to be more valuable than a modernized text.

The crucial question is therefore the following: if the Nordic Contracts Act is modernized beyond what is strictly required by Part II of the CISG, will all the five Nordic countries be able to agree on common amendments or will the differences between the amendments be great enough to endanger one of the main pillars of the Nordic legal tradition?

Don't misunderstand me. I am not saying "It is absolutely possible to live with the dual system. We have done it till now. Let's ratify Part II of the CISG, but leave the Nordic Contracts Act untouched." I don't even say "Make only the amendments strictly required by the CISG and stop there". I am suggesting a common Nordic three-step action plan. The first small step is simply to ratify Part II of the CISG. This step has its benefits but also drawbacks. It is technically quick and simple but it maintains the dual system, one set of rules for international CISG sales and another set of rules for national and Nordic sales and other contracts. The second step is to harmonize the Nordic Contracts Act with the established model in Part II of the CISG. The benefit of this would be rules on formation of contracts in line with the provisions of not only the CISG but also the UPICC, PECL/ DCFR and many EU directives. The third step – and this one is long and challenging – is a modernization of our Nordic Contracts Act in close Nordic cooperation, aiming at common wordings but at the same time taking into account the on-going European harmonization process.

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Håstad, Torgny, *Forhandlingerne på det 32. nordiske juristmøde i Reykjavik 1990*, Del I 245–283.

15 *Komiteamietintö 1990:20*, presented in Swedish by Häyhä, Juha, *Forhandlingerne på det 32. nordiske juristmøde i Reykjavik 1990, Del II* p. 271–277. One of the suggestions was to amend Contracts Act § 6.2 according to CISG Art. 19 (2).

