The New Nordic Approach to CISG Part II: Pragmatism Wins the Day?

JAN KLEINEMAN*

1. Introduction

It is fair to say that the Nordic countries pride themselves in being international in the sense that they participate in international conventions, legislation and initiatives, and do so particularly when it comes to international legislation. Such enthusiasm often is without any hesitation despite potentially conflicting national caveats.

However, now and then there is also a darker side to this coin characterised by a firm belief that Nordics do things better themselves than others can, and that the Nordic solutions are best, but such sins can also be found elsewhere. This duality can easily be seen when it comes to the CISG initiative at the beginning of the 1980's. The Nordic countries were initially eager to integrate CISG as a part of their contract law and did not perceive the existing Nordic legislation on sales law dating from 1905 as any problem.

Finland did not take part in the 1905 Nordic legislation as the country was then a part of the Russian empire. Finland, having relied instead on older Swedish legislation, particularly the Swedish 1734 civil codification and its system of codes/balks (*i.e.*, the commercial code), which of course was obsolete in Sweden by the time the discussion on CISG started, was the country most eager to get new and modern legislation, not only for the international sales of goods, but also for Nordic and domestic transactions and legal relations. As a result of this situation, all four Nordic countries (Sweden, Finland, Denmark and Norway) initially accepted integrating the sales of goods part of CISG as a part of their own respective domestic legislation. They did

* Originally published in "The CISG Convention and Domestic Contract Law: Harmony, Cross-Inspiration, or Discord?" (Joseph Lookofsky & Mads Bryde Andersen eds. DJØF Publishing 2014). Reproduced by permission.

not agree to integrate Part II CISG. However, when the practical discussion started as to how to reflect this positive attitude in the Nordic domestic legislation, tensions between the working groups became obvious. Denmark decided to accept only CISG for the international sales of goods, but not for domestic transactions, instead keeping its 1907 legislation with the result that Nordic unity as to this area of private law no longer existed.

2. The Nordic Attitude to CISG as such

In summary, while Scandinavia initially was very much in favour of a worldwide *lex mercatoria* as something that would enhance business, some doubts existed, leading to a less positive attitude as to substituting existing rules for the CISG ones. It was one thing to promote rules for international business, while substituting the domestic rules was another. Only Finland, having relics of outdated Swedish rules, was completely in favour of a total new approach. In Sweden, Professor Jan Hellner, a known expert in the field, had already in 1976 presented a proposal for a new Swedish Act on the Sales of Goods based on the 1905 Act. Hellner made it clear that CISG was not in accordance to well-founded Nordic traditions, but the Swedish Ministry of Justice followed the Finns and accepted the idea of a new codification. Norway was also accepting, but had the quite odd idea that CISG should be translated and incorporated into a new law on sales, something that not only was contrary to the Vienna Convention as such, but also to the idea of CISG. Only Sweden and Finland fully accepted the idea of two parallel legislations, domestic and international, based on CISG but slightly different from each other.

3. CISG and Nordic Contract Law Before 1990

To understand why the Nordic countries could accept the sales of goods part of CISG but not its principles as to the formation of contracts as espoused in Part II, one should keep in mind that the Contracts Act with its chapter on the formation contracts has a broader scope of application than the Sales of Goods Act. There probably is no single answer to the question why Part II was rejected, but the different answers that can be given provide an insight as to the Nordic attitude to comparative law and foreign legal solutions as hinted above. Having a specific act for the formation of contracts regarding the sales of goods would be a somewhat narrow approach in countries not

relying on a general codification or having a judge-made law approach. A general Contracts Act addressing formation, agency, defences to the contract, modifications and certain other general questions in contract law was regarded as a good solution. Parallel rules for different legal transactions was not regarded as desirable.

While only Finland promoted the idea of a new general Contracts Act, and actually presented a proposal in 1990 that was discussed at that year's Nordic meeting for lawyers, no one else at that time liked the idea. Finland, Norway and Sweden had then just accepted CISG and adopted new domestic rules for the sales of goods. This made at least the Swedes less favourable to more change. As Norway had integrated CISG with the new domestic Act and faced criticism for that solution in Norway as well as abroad, more changes were not on the agenda. Norway included in its general Contracts Act with respect to the formation of contract even real estate contracts. Sweden, on the other hand, had specific real estate legislation. As the legislation on the formation of contracts in all four countries covered a broader area than the sales of goods, these countries were not at ease with accepting a *lex specialis* for the formation of international sale of goods contracts. Basically, the discussion never came to any comparison between Part II CISG rules and the existing Nordic attitude to principles of contract formation. The individuals doing the work were exhausted and did not want more changes. The proposal presented by Finland in 1990 was not heavily criticised but more simply ignored.

Based on these factors, the four Nordic countries made reservations in two respects when they decided to ratify CISG. First, Part II CISG of the Convention was not to be included at all, the article 92 reservation. A reservation was also made in another area. Based on the premise that the Nordic countries (still) had a common law as to the sales of goods, CISG was not to be applicable with respect to a contract between parties from Nordic countries, the article 94 reservation. This exception was referred to as the *Nabo* (neighbour in Norwegian) clause. The domestic Nordic legislation was then to be used based on principles of private international law. This probably was due to the fact that the Nordic countries thought that they should be able to find, as they had always done before, a common Nordic solution. However, this did not come to be the case. Denmark wanted no new domestic sales of goods act, keeping its 1907 act. The premises underlying the Nabo clause were thus in fact based on a lie, maybe a small lie, but still a lie. The Nordic

countries excluded CISG as such in all Nordic transactions but also kept the old general Contracts Act.

Denmark, Norway and Sweden in reality went different ways after adopting CISG (with the exception for Part II). Finland, Norway and Sweden adopted a new sales of goods act for Nordic and domestic purposes based on CISG. Denmark kept the 1907 Nordic Act meaning that we Nordic countries no longer had the same domestic rules which we said that we had when we decided on the formal exception. To summarize, there was no real discussion about the arguments for and against Part II CISG when the reservation was decided. Instead, there was more of a general feeling that it had been troublesome to come as far as the working committees had come. To avoid further tensions, it was generally accepted that the principles of binding promises (binding offers as well as binding acceptances) in the Nordic Act on the formation of contracts was not to be changed. It probably appeared logical to preserve this principle even in international contracts. The problem seems to have been that the degree of ambition from the beginning had been so high that the tensions occurring during the work led to the conclusion that the Nordic countries should preserve their principle of binding promises and also avoid a two-solution approach. This was easy to do. It was declared that the contract principle of Part II CISG (that the parties are not bound in anyway until the contract is formed) was alien to Nordic traditions. This was absolutely true (!), but why this led to the conclusion that the rest of CISG, which was also alien to Nordic traditions, could be accepted was never explained.

4. Sweden and Finland v. Denmark and Norway: Differences between the East and West Nordic Countries

The reservation made by the Nordic countries in accordance to article 92 CISG excluding Part II CISG seems to be something very special. It actually is just these countries that have invoked this possibility. The reservation under article 94 makes it possible for two or more contracting states having the same or closely-related legal rules on matters governed by the Convention to exclude the convention with respect to contracts between these states. This reservation has obviously been overused by the Nordic states, at the same time as the article 92 reservation sent a very mixed message when it comes to

the Nordic attitude to the convention as such. This led to a demand by at least the Swedish Section of the International Chamber of Commerce that the reservation concerning Part II CISG be removed. This was directly supported by Finland and Denmark, both of whom seemed to have the same approach.

The Swedish Government decided to ask the Nordic Civil Servant Committee (*NÄL – Nordiska Ämbetsmannakommittén*) for the appointment of a one-person committee to reconsider whether there still were good reasons for Denmark, Finland, Norway and Sweden to have the article 92 reservation. This one-person committee comprised myself, and I immediately started my work by calling together a special reference group appointed by the Ministries of Justice from Denmark, Finland, Norway and Iceland. The role of Iceland of course was more as an observer as they already had adopted the convention without any exceptions under article 92. This seems to have been unintentional; Iceland more or less without any special motivation did not make any exception to Part II CISG. The committee however was not invited to reconsider the article 94 reservation or any changes in the domestic acts on contract formation. The degree of the initial ambitions was kept in mind, and in order to avoid new tensions between the Nordic states, the objective was that this was not to be a large project. I asked the Swedish Government whether I could discuss the article 94 reservation and changes in the Swedish general contracts act, which request was denied with respect to discussing article 94, but that we could consider doing something with the first chapter of the 1915 Swedish Contracts Act. I eventually decided to not use this possibility based on my conclusions during the later phase of the work. I return to this later.

5. Iceland – A Special Case

As mentioned before, Iceland – although part of the Nordic legal tradition, never made any article 92 reservation but did take part in the committee by having an observer in my reference group. Iceland of course is a very small nation but was of importance to me as it could be ascertained that Iceland had had no problems accepting Part II CISG. When asked why they had not followed the other Nordic states, it was revealed that this had been a mistake. They had actually forgotten that discussion and afterwards had not taken the trouble to try to get out of Part II. The fact that Iceland had suffered no marked disadvantages from this mistake could at least be used as an argu-

ment that such a change would not have negative effects. I invoked it in this way, fully aware of the fact that the smaller size of Iceland made it impossible to draw any conclusions for the other, somewhat larger Nordic states.

6. Approaching the Assignment – The Two Different Concepts of Constructing a Binding Contract

When starting this work, I had to revisit the thoughts dominating the Nordic group that had suggested that the Nordic states should make a reservation as to Part II CISG. As mentioned above, not much was found that explained why the Nordic approach was better than the CISG approach. Of course, the old debate between the principle of binding promises and the contract principle, resurfaced. Should an offeror be bound when giving a promise or should a binding effect come into play only when the offeree accepted the offer? While reliance has always been an important aspect of this debate, it is well-known that in commercial contract law, the parties often have clauses that declare that no binding effect is to be given to the contract until both parties have agreed, usually also to the extent that both parties have signed a written copy of the contract. The question I had to ask myself was whether I should start a "beauty" contest between these two different ideological approaches. Before doing this, I had to consider one more thing. Neither of these two principles is without exception. The traditional approach is that there has to be exceptions to the principle of binding promises so *i.e.*, the offeror has certain possibilities to reconsider the offer not only when there is a mistake, but also when certain events occur before the offer has reached the offeree. When considering Part II CISG, one simply has to read article 16 which gives a possibility to revoke an offer if the revocation reaches the offeree before he has dispatched an acceptance, and article 15 that states that even an offer that has become effective by having reached the offeree may be revoked if the withdrawal reaches the offeree before or at the same time as the offer does.

Even if the binding promises principle and the contract principle have totally different starting points, in both cases there arguably are exemptions making the differences in reality not so significant. CISG principles have been posited as easier to use than the somewhat diffuse principle of an offer being binding for a "reasonable" time in the Nordic legislation. While CISG is based on objective criteria that are more easy to analyse, the more subjective principles in Nordic law are somewhat less certain. To summarize; the

two approaches in theory are different but the exemptions to each render it so that many practitioners in actuality find it very difficult to say that one is better than the other. If anything could be stated, it most likely was that the CISG principle was more easy to use, but there was not much case-law that could be found demonstrating any such conclusion. My next step was to see whether there was case law from other countries that could in reality give practical example of problems with Part II CISG. The wise decision already with the drafting of CISG to catalogue decisions from different jurisdictions did not yield much when it came to Part II CISG, there simply were too few decisions from which to draw any conclusions. This lack of precedents could even be used as an argument that Part II CISG had caused no difficulties in countries where it had been introduced. I refrained however from coming to any conclusions on this point.

7. Circumnavigating the Issue of Finding the CISG Approach Better than the Traditional Nordic Approach

From the very beginning, as an advisor to the Nordic Ministries of Justice, I have to admit I was biased. I never contemplated suggesting that the Nordic system should remain intact. As mentioned above, in reality there were two lesser arguments in favour of keeping the reservation to Part II CISG. One was that it was alien to Nordic legal traditions, and the other that two parallel systems for how a contract became binding could potentially be problematic. Of course, these arguments impressed no one. The remainder of CISG that has been a part of the Nordic legal system since the end of the 1980's was also in many aspects at least initially alien to the Nordic legal tradition. That was not a problem when CISG was ratified and no problems seemed to have arisen since. Refraining from a parallel system that could be used in Finland, Norway and Sweden as the new Nordic Act on Sales of Goods was based on CISG seemed plausible. Denmark had lived with two systems and no problems seem to have arisen from that. However, not even the Norwegian, Finnish and Swedish Acts from about 1990 were accepted as copies of CISG. In Sweden, parallel systems on how a contract became binding had existed for a long time as the 1915 Contracts Act was based on the principle of binding promises, while contracts concerning real property were based on the contract principle. With the latter, not even mutual consideration was sufficient.

For a binding effect, a writing was necessary and the contract had to be signed by both seller and buyer.

My only theoretical problem was that Part II CISG was inspired by common law thinking while legal thinking in the Nordic countries is very much inspired by German law. The 1915 Nordic Contracts Act in many ways was inspired by the 1790 *Preussen Allgemeines Landrecht* and legal thinking in Scandinavia had had its golden age in Denmark where legal experts such as Ørsted, Lassen and later on Ussing very much were inspired by German legal thinking. These experts had a large impact on Norwegian and Swedish scholars. This explains in my opinion why we can still talk about Scandinavian law. When it comes to the influence of the common law system, oddities such as the concept of consideration and perhaps the even more elusive concept of promissory estoppel never have had any advocates in Scandinavia. Therefore, if I had decided to render the comparison between the traditional principle of binding promises and the contract principle into a beauty contest, I would have renewed a legal theoretic debate that was common over a century ago. I recall a German saying that the definition of a professor was "*Ein Professor ist ein Mann der anderer meinung ist*" (Eduard von Hartmann).

Even if the contract principle in CISG looked more modern and by its objective nature simpler to use, a moral argument could be made that a party should not be allowed to withdraw. Because of this risk I decided instead to promote a purely practical argument. If the Nordic countries wanted Nordic law to be able to compete when decisions were to be taken during contractual negotiations, and Nordic law was met with disapproval because of foreigners' lack of knowledge of Nordic law, it could be stated that in this area, it was well-known that CISG dominated the legal thinking in the Nordic countries. If, however, there were reservations from certain parts of CISG, a foreign lawyer might suspect that there still was an aversion in Nordic law towards CISG's well-known principles, and it could then be argued that the foreign legal system also accepted CISG but without any reservations. How well this argument was grounded in reality was beyond my knowledge but it seems to have worked well because it was a political argument promoting Nordic interests in the export industry.

8. The Nordic Reservations and their Effects

If the article 92 reservation had a negative effect on the Nordic export industry because it sent a negative message as to the willingness to accept CISG,

the article 94 reservation making it possible for the Nordic countries to make a reservation from CISG in inter-Nordic sales could be said to have had the same effect. However, addressing the article 94 reservation was off the table, which was a bit embarrassing as Nordic law in this area has since 1990 no longer been based on the same legal principles. I am not, however, criticizing Denmark for keeping its 1907 Sales of Goods Act. This legislation for more than a century has filled a gap as its principles are regarded as general principles in the law of obligations. When it comes to other contractual relations, the 1907 act could be used as a source of civil codification. The new 1990 Sales of Goods Act is more difficult to use as a civil codification. In Swedish law, there has been an ongoing debate since 1990 whether the 1905 Act is still to be regarded as the main Swedish source for general principles in the law of obligations. The 1905 Act and its famous commentaries by Tore Almén still seem to have significant impact on Swedish law. As to both reservations, it would however seem more consistent if the Nordic governments decided to remove even the article 94 reservation as it is not clear what impact the older acts at least have on the Nordic Sales of Goods Act.

9. Was the rationale behind not accepting Part II CISG in 1988 well-founded?

As shown above, the article 92 reservation seems to have been more a result of not wanting to change Nordic contract law than any real doubts about Part II CISG. I therefore decided in my investigation to not criticize the position taken by the legislators around 1988 because that could easily have increased the tension between the Nordic governments' views and also opened up for further scepticism against CISG.

Instead, I decided to make economic-political arguments in favour of Part II CISG instead of simply traditional legal arguments. After I presented my proposal, during the discussions in the Nordic countries I found that my approach seemed to have been a good idea. This was also during a period when the economic crises in Europe were on everyone's lips, and any argument promoting the Nordic export industries could not easily be challenged. I therefore regard the 1988 attitude more as a sort of resting point in an ongoing reform that just needed a pause and then could recommence. Other questions were regarded as more important, such as the Finnish and Swedish decisions to enter the EU and change legislation in other areas. Once again,

I preferred the costume of diplomat rather than a legal philosopher driven by an ideology.

10. Motivating the New Approach

By now, it must be obvious that I decided to present the differences between the two competing principles including their many exceptions so as to give the impression that they were not as different as suggested in 1988. The two principles could even be said to overlap one another to a certain extent. One could probably find situations where the end result could be different, but these were not easily found or of great importance. Neither the international literature nor the published precedents contained cases where the CISG rules produced problems important enough to mention. During the debate that followed up to the time when the Nordic Ministries of Justice had to decide how to act on my proposal, it was carefully scrutinized by industry and scholars but no objections were produced that had to be considered as new problems for Nordic contract law. To summarize, it was better to send the message that CISG was to be fully accepted rather than just partly accepted. When in practical situations, lawyers negotiating international contracts could then argue that Nordic contract law did not hide behind unknown peculiar principles but had a transparency as given by CISG.

11. Is or Was Norway Different?

During the course of my work, advice was given to me occasionally by the individuals who had participated in the work during the 1980's. The former President of the Finnish Supreme Court, Leif Sévon, advised me not to complicate matters if I wanted the proposal to be accepted. I made the difficult decision to refrain from presenting a new chapter to the Nordic Contracts Act, despite being permitted to do so by the Swedish government. The reference group initially had at least two members favouring such a proposal, my Finnish colleague and myself. My Danish colleague, Professor Iversen, from the beginning was very much against any such frivolity while on the other hand, he was very much in favour of removing the article 92 reservation. Norway's representative in the team, Professor Kai Kruger, had a completely different approach from the beginning compared to the rest of us. Norway was not in favour of taking away the reservation and was even more against the idea of a proposal for a new chapter one in the Contracts Act. The

situation for Norway however was more complicated than for the other Nordic states as they had taken the quite odd decision in the 1980's to translate CISG and put it in the domestic legislation instead of following the principles that the convention should be presented in its original language. The Norwegian Government was heavily criticized for this, among others by the late Viggo HagstrØm, the leading Norwegian expert on sales law. It therefore was a more complicated matter to restore CISG in Norway than in the other countries for where should Part II CISG then be placed?

It took a long time for the Norwegians to make up their minds. If they decided not to follow the other Nordic countries, this could mean that the Nordic approach to these problem no longer could be regarded as a united approach, which was the idea behind the article 94 reservation. The Norwegians waited until the spring of 2014, and by that prolonged the reform even in the other countries as Uncitral did not want to accept the decisions taken by the Nordic parliaments until receiving approval from Norway. However. Norway decided in the spring to follow the other Nordic countries and has now accepted Part II CISG. On the 14th of April 2014, Norway completed the process to become a party to Part II CISG. Only the article 94 reservation remains.

12. CISG in the Nordic countries: Some reflections about its position in comparison to other lex commercialis instruments such as PECL, DCFR, UNIDROIT-principles and the initiative from EU

CISG is not the only Grand Dame who would like to dominate legal principles in international commercial law. There are soft-law and semisoft-law proposals for European Union legislation as well as academic proposals. The problem may actually be that there are probably too many proposals and ideas. The first most likely was the soft-law proposal by Professor Ole Lando from Copenhagen. A proposal very much praised for its simplicity and lack of abstract theory. This was followed by the more ambitious initiative from a group of academics led by Professor Christian von Bar in Osnabruck. This enormous work is of a somewhat uneven quality but the relevant part here of the DCFR is highly influenced by the high quality work conducted by the first Lando-group. There seems to be a new Nordic group discussing a proposal for a new Nordic contracts act. Not being a member of this group, I

will not go into its agenda. Of course, there then is another soft-law initiative not to be overlooked and that is the Unidroit principles. In this context I have to make a somewhat pessimistic comment. During my work with the CISG reservation I took the initiative to attend several conferences on all these soft-law approaches to commercial contract law. It was quite a discouraging thing to realize that most practitioners dealing with international contracts were not only uninterested in all these initiatives but also could not even consider using any of these opt-in possibilities by adding clauses with such content. Instead, with a most provocative attitude practitioners suggested that they even preferred opt-out clauses when it came to CISG. This most conservative attitude reflects an attitude of relying on that which is established and well-known in the profession. Practitioners preferred the principles that they were familiar with in contrast to new principles even if the new ones are regarded as better. When it comes to the initiative taken by the Commission and the EU parliament suggesting a completely new European contract legislation, I refrain from commenting on it as I believe it to be (except for the consumer area) completely unasked for.

13. Conclusions

At the end of the day not only worldwide, but also in the Nordic countries CISG has been accepted as the general basis for contractual rules though some minor problems still have to be adjusted. The "*Nabo-rule"* which gives the Nordic countries a possibility to opt-out from CISG when there is a inter-nordic contract is still in force though Denmark has never changes the old Sales of Goods Act from the beginning of the last century and while that in itself is a highly respectable attitude it's substance makes it obvious that the Nordic principles on the law of Sales is not similar which was the foundation to have the right to use the *"Nabo-rule"* in accordance with the convention. I asked when doing my works for the Nordic Ministries if I could go in to the question of taking that exception away but no such additional directives was given to me so I had to refrain from going in to that question.

The most problematic thing with CISG that I discovered during my work was the unfounded unwillingness among qualified practitoners to accept CISG as a boiler-plate for individual agreements. They argued that it was alien to what they where used with or what they thought was the best for the client or that the client refused to accept it. It was obvious that many practitoners tried to avoid CISG, but the most difficult question to avoid was

when some very skilled practitioners asked when – if CISG was to be preferred to domestic rules – there came a so many other rules covering the same questions such as PECL, DCFR, UNIDROIT-principles and the commissions proposal for a European contract Act. It was obvious that the competition to present the "best" rules among academics, EU-bureaucrats, and others had had a negative effect on the willingness to accept anything else than oldfashion domestic rules. No negative attitude to the rules in CISG as such could however be traced and none suggested that i.e. part two of CISG including principles on how to enter into a contract was worse than the first Chapter of the Nordic contract Act.

When – quite unexpected – even Norway decided to include part two of CISG – and by that following as the other Nordic states my proposal it became obvious that CISG is fully accepted in the Nordic countries. However to preserve that attitude and to strengthen the willingness among practitioners to use CISG efforts must be made to reduce other competing legal sources.

Even after having including some pessimistic comments in this presentation it must be said that CISG has been a success in the Nordic countries and will eventually be the leading legal source as a boiler plate for Nordic law in international contractual relations.