International Commercial Law from a Nordic and Baltic Perspective:

Status and Current Challenges

by

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Nordic Journal of Commercial Law
Issue 2014#2

Abstract

On 18 September 2014 the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) and the department of law at Aarhus University hosted a joint conference to take stock of the recent changes in the field of international commercial law in the Nordic and Baltic region. The region had long been a place of numerous reservations against the full and unrestricted application of the 1980 UN Sales Convention (CISG). When Finland decided to withdraw one of its reservations in the spring of 2012, a change in the legal framework for international commercial businesses was a fact. The withdrawal by Finland was followed by withdrawals by Sweden, Denmark, Latvia, Lithuania and Norway. Hence, the need to reconsider the legal framework surrounding international business was born. This is a summary report of the conference held at Aarhus University on Thursday the 18th of September 2014 covering various commercial law aspects relating to globalisation, the role of the CISG, legal traditions, uniformity in text and application, formation of contracts, battle of forms, form requirements, validity issues, withdrawal of reservations, contract drafting and visualisation, and INCOTERMS. The full Audiovisual Conference Book is available online at CISGNordic.net.

1 Introductory Remarks

On 18 September 2014 the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) and the department of law at Aarhus University hosted a joint conference to take stock of the recent changes in the field of international commercial law in the Nordic and Baltic region. The region had long been a place of numerous reservations against the full and unrestricted application of the 1980 UN Sales Convention (CISG).[1] When Finland decided to withdraw one of its reservations in the spring of 2012, a change in the legal framework for international commercial businesses was a fact. The withdrawal by Finland was followed by withdrawals by Sweden, Denmark, Latvia, Lithuania and Norway. Hence, the need to reconsider the legal framework surrounding international business was born. Though withdrawals of reservations to the CISG in the Nordic and Baltic countries increased textual uniformity, the conference identified a number of aspects that scholars, practitioners and businesses should be aware of. This is a summary report of the conference held at Aarhus University.

The conference invited scholars and practitioners with knowledge of the region to share their views on what they believed were important issues affecting international trade. The purpose of this report is to extract some of the underpinning thoughts of each speaker's topic to the benefit of future scholarship. The content of this report is attributed to the present author, and so are any mistakes in the reproduction of the speakers' presentations. Readers are encouraged to refer to the keynote speeches made on the day of the Conference.[2]

2 Globalisation of the Region

2.1 The Many Facets of Promoting the CISG

Legal Officer Luca Castellani (hereinafter Castellani),[3] representing the Secretariat of UNCITRAL, outlined the strategies of UNCITRAL and the impact of its work. Starting with the CISG, which he described as one of the pillars in the unification of international

[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] Thomas Neumann (ed.) 'Audiovisual Conference Book' (*CISG Nordic*, 14. November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[3] Luca Castellani is Legal Officer at the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). See the following for full biography and keynote speech: Luca Castellani, 'The Many Facets of Promoting the CISG: Broader Adoption, Scope of Application, Uniform Interpretation and Domestic Use' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

commercial law, *Castellani* explained how the UNCITRAL strategy for the adoption of the CISG is two-fold.

The first part is aimed at states for which the CISG may assist in the modernisation of commercial law and in avoiding regional fragmentation occurring due to regional legislative efforts not adequately considering the global level. An example of successful regional use of the Convention has been seen in the region of the former Yugoslavia, where all successor states are now party to the Convention.[4] In addition, countries with scarce local legal capacity may find the adoption of the CISG to be a cost-efficient solution. Though the adoption of the CISG is widespread, it is not yet universal as large economies like those of India, Indonesia, Iran, Thailand and the United Kingdom are yet to adopt the Convention.

The second part is aimed at trading parties, who may adopt the CISG through a contractual opt-in, where the Convention would not apply on a default basis. To encourage adoption of the CISG by parties, the Secretariat of UNCITRAL finds it important to communicate the benefits and application practice of the CISG. Currently, the CLOUT programme and the UNCITRAL Digest of case law help businesses, their advisors, and adjudicators in achieving a uniform interpretation of the Convention text. Legal Consultant and Senior Researcher Helena Haapio (hereinafter Haapio) later submitted further ideas on communication of legal instruments and contracts.[5]

Elaborating on the work of states in regard to the Convention, *Castellani* described that the Secretariat of UNCITRAL has now adopted a proactive approach facilitating review of existing reservations. A certain number of states have made reservations, which effectively hinder uniformity of the Convention, and some of these reservations do not seem to be relevant anymore. Such reservations could be removed and new adopting states should be careful considering possible reservations. Associate Professor Thomas Neumann (hereinafter Neumann) and Ph.D. Candidate Aleksandra Tolea (hereinafter Tolea) elaborated on the undesirable effects of reservations later on. In addition, Professor Jan Ramberg (hereinafter Ramberg) described it as a breach of international obligations to retain reservation no longer warranted by domestic circumstances.[6]

Though the CISG has won widespread adoption, *Castellani* pointed out that UNCITRAL is the host of several other instruments that supplements the CISG. Among these, *Castellani* made a

[4] The territory of Kosovo is neither a member state of the United Nations nor a CISG contracting state according to United Nations, 'Member States of the United Nations' (*United Nations*, unknown publication date), <http://www.un.org/en/members/index.shtml> accessed 29 October 2014; United Nations Commission on International Trade Law, 'Status of CISG' (UNCITRAL, 2014) <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 14 October 2014.

[5] See *infra* page *21*.

[6] See *infra* pages 8, page 10, and page 4 respectively.

point of two instruments in particular. The first one was the 1974 Limitation Convention[7], which introduces legal certainty in regard to the temporal limits for bringing legal proceedings in disputes relating to international sales of goods. The instrument complements the CISG and was originally part of the drafting process of the CISG, but due to technicalities it was removed from the CISG. Though the Limitation Convention brings legal certainty to its field, it is not as widely adopted as the CISG. This is due in part to prioritisations by local parliaments and to the fact that the matter covered by the instrument is sometimes considered a public policy issue. Moreover, the early adoption of the Limitation Convention by then-Socialist countries might have created confusion on its actual scope and content.

The second instrument mentioned was the 2005 Convention on Electronic Communications.[8] The CISG does not expressly deal with the many aspects of electronic communication in international contract for the obvious reason that it was drafted before the birth of the Internet. Furthermore, many issues, such as private international law issues, pose special challenges in regard to the use of electronic communications in international contracts. The Convention on Electronic Communications would eliminate the need for private international law analysis by introducing a uniform system regulating practical issues like electronic contract formation, input errors by users, automatic sales systems etc. As such, the instrument is an important supplement to the CISG, especially with respect to updating its part II, but yet again, the instrument is not as widely adopted as the CISG.

Despite the fact that the CISG has its limits, it does introduce uniformity for the international sale of goods. And even more, the Convention serves as a blueprint for the modernisation of regional and domestic legislation. Mr. Tadas Klimas (hereinafter Klimas) later gave an example on point in his presentation.[9] Acting as a basis for legal reform is a task that is beyond the typical purpose of a convention, but due to its drafting history the rules of the Convention suit any legal family or economic system. Hence, it is possible to trace inspiration from the CISG in the domestic legislation of several countries, such as China, or in regional instruments like the Draft Common Frame of Reference (DCFR).

Finally, *Castellani* made reference to the question, whether UNCITRAL should undertake the drafting of new texts to promote further unification of international sales and contract law. The debate was opened by an official proposal to revise the CISG made by Switzerland in 2012.[10] It was noted that this has not been done since 1983. The debate on whether UNCITRAL is the right forum for new legislative work in the field is open.

[7] United Nations Convention on the Limitation Period in the International Sale of Goods, (adopted 14 June 1974, entered into force 1 August 1988) 1511 UNTS 99.

[8] United Nations Convention on the Use of Electronic Communications in International Contracts, (adopted 23 November 2005, entered into force 1 March 2013) UN Doc. A/60/515.

[9] See *infra* page 11.

[10] United Nations Commission on International Trade Law, *Possible future work in the area of international contract law*, U.N. Doc. A/CN.9/758 (8 May 2012).

2.2 Regionalism and Globalism

Ramberg[11] addressed the issues of regionalism and globalism in the Scandinavian region. The legislative cooperation between Denmark, Norway and Sweden has a long history, especially in the field of maritime law. In the field of sales law the cooperation resulted in the countries having practically identical domestic sales laws that came into force in 1905 to 1907.[12] When the first international uniform sales law (ULIS) was brought about in 1964, the Scandinavian countries, except for Denmark, chose to modernise their sales laws instead of ratifying the ULIS.[13] When the adoption of the CISG later became relevant, the question resurfaced whether the Scandinavian states should retain their common legal heritage or let the international trend, represented by the Convention, supersede. Practical considerations of not creating unnecessary confusion or uncertainty called for bringing domestic sales law in line with international trends. And so, Finland, Norway and Sweden decided to revise their domestic sales laws to bring them in line with the CISG.[14] Denmark was expected to follow suit, but decided to safeguard the common legal heritage by retaining its original sales act of 1906. *Ramberg* predicted that this position would not change anytime soon, as the shortcomings of the revised sales laws in the other countries become more apparent over time.

When the Nordic countries chose to adopt the Convention, they opted for an exclusion of the rules on formation of contracts contained in CISG Part II pursuant to Article 92. This was partly due to the fact that the Scandinavian states did not want to abandon their common legal heritage, but also because the matter of formation of contract was considered to be one of general contract law, already covered by domestic law thereby leaving no particular need for specialised rules on formation of contracts regarding the sale of goods. Therefore, all Nordic countries except Iceland made a declaration according to Article 92 upon the ratification of the Convention. In spite of the resistance to abandoning the common legal heritage, the confusion created by the Convention now triggered the withdrawal of these reservations.

Upon ratification of the Convention the Nordic states also chose to make a declaration according to Article 94 according to which the CISG is excluded in inter-Nordic trade. *Ramberg* emphasised that the reservation is permissible in situations, where legislation of the reservation countries is »closely related». Since we now know that Denmark did not follow suit, when the other Nordic countries modernised their sales laws, it could be argued that the Nordic states are obliged to withdraw their reservations, as it would otherwise render the countries in breach of their international obligations due to the fact the domestic laws in relation to Denmark are no

[11] Jan Ramberg is Professor Emeritus at Stockholm University. See the following for full biography and keynote speech: Jan Ramberg, 'Regionalism and Globalism from a Nordic Perspective' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[12] For historical reasons Finland did not turn towards the Scandinavian legislative tradition until the 1960ies.

[13] Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

[14] Iceland followed with a revision inspired by the Norwegian Sale of Goods Act in year 2000.

longer closely related. This is not the same as saying that courts should not apply the inter-nordic reservation. Quite the contrary, since the reservation is still in effect.

The concept of Scandinavian sales law may experience a change, as the adoption of the CISG and its principles continues to influence the region. One day this could lead to the withdrawal of the reservation according to Article 94. It could also lead to the abandoning of the inappropriate distinction between direct and indirect loss contained in the Finnish, Norwegian and Swedish sales laws, replacing it with rules compatible with Articles 74 and 79 of the CISG.

Increased influence by the CISG and its principles in the region does not mean that the Convention will always govern in practice. Parties may still choose to opt out of the provisions of the Convention and should be encouraged to do so, when they seek more certainty than what they get from the open and abstract rules of the Convention. In this respect the International Chamber of Commerce provides assistance.

With Part II of the CISG on formation of contracts now in force in the Nordic region, the question of a possible revision of the Scandinavian contract laws once again becomes relevant. Also Prof. Kai Krüger (hereinafter Krüger) raised this issue in his speech.[15] As also pointed out by *Castellani*, some laws fail to address formation of contract other than by offer and acceptance and so do the Scandinavian contract laws. They also fail to address the effect of precontractual behaviour and how to deal with contract interpretation. The laws contain abstract terms that provide little guidance for the specific case. Of course case law and scholarly works can be of assistance, but it is not the same as legislation. *Ramberg* suggested that the best might be to let the contract laws remain as a reminder of a glorious past and instead turn to a reform, relying on soft law like the UNIDROIT Principles and Principles of European Contract Law (PECL). In such reform other important instruments of UNCITRAL should of course be considered.

Ramberg posed the rhetorical question, whether legal problems are better solved by way of hard law or soft law. He advocated that hard law like the CISG is not always the best way, if the goal is to achieve uniformity. Usages, standard forms and general principles sometimes serve the business community better. This is recognised in the Nordic laws according to which usages supersede the law. Also the use of standard terms provides an important cooperation between the law and commercial interests in certain trades, such as the NL09 or NSAB2000.

In conclusion, *Ramberg* stated that regionalism will continue to exist in important commercial sectors, but that this does not impede the globalisation of legislation and principles, when global trade has to be considered. This would be the case in many fields, such as sales, finance, insurance, and electronic communications.

[15] See *infra* page 16.

3 Status and Experiences from the Nordic Region

3.1 The Nordic Legal Tradition – An Obstacle to Uniform Application?

Professor Camilla Baasch Andersen (hereinafter Andersen)[16] started by challenging the current comparative legal scholarship in which the Nordic legal family is rarely treated as a separate entity. While the Nordic legal tradition neither belongs to the civil legal tradition nor the common law one, it bears resemblance of both systems, thus forming its own. As a caveat to anyone studying the Nordic legal tradition, *Andersen* pointed out that there are variations in legal style between the Nordic countries. Hence, the Finnish view on precedential value and legal reasoning in court decisions appear to be rather different from the Danish and to some extent the Scandinavian style. For example, the lack of transparent reasoning by Danish courts that can be traced through 100-year old scholarship contributes to a failure to develop autonomous international law.

Continuing with her focus on legal reasoning, *Andersen* stressed that international law like the CISG requires a different approach and the consultation of legal sources not typical for domestic disputes. The different method is warranted by Article 7 of the Convention, according to which it is necessary to consult scholarship and previously decided disputes involving the CISG, also from the courts in other countries. *Andersen* refers to the global jurisconsultorium – a term coined to encompass the need for global sharing of experience in applying the Convention.[17] Only by doing so is it reasonable to expect the development of some uniform application of the Convention, though it was pointed out that only 3% of more than 3,000 publicly known CISG-related decisions make a clear reference to either scholarship or case law. Those cases are often characterised by containing very extensive legal reasoning by the court, thus making the decision transparent.

Acknowledging that complete uniformity in the application of the CISG is utopia, judges as well as lawyers have a responsibility for applying the Convention in accordance with the autonomous method laid down in Article 7. Often, a judge will only refer to material presented to the court by the counsel, but this is no guarantee. Actually, even when a judge is presented with the sources required by Article 7, the Nordic legal tradition may affect the style of the decision.

[16] Camilla Baasch Andersen is Professor at University of Western Australia. See the following for full biography and keynote speech: Camilla Baasch Andersen, 'Nordic Legal Tradition - An Obstacle to Uniform Application?' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[17] The *'[...] process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule of a uniform law'* is described as the global jurisconsultorium according to Camilla Andersen, 'The Global Jurisconsultorium of the CISG Revisited' (2009) 1 Vindobona Journal of International Commercial Law & Arbitration 43, p. 47.

An example of the possible effect of the Nordic legal tradition is a case before the Copenhagen Maritime and Commercial Court involving an international sale of frozen goods.[18] *Andersen* explained that the counsel for the seller brought case law of Dutch origin to the court's attention, and that the final reasoning of the court resembles the persuasive arguments of those cases. However, the Danish court makes no transparent reference known in its decision. In effect, such court decisions resemble court decisions affected by the unwanted homeward trend, but may not necessarily be so. Actually, the decision is in line with the well-established international practice requiring buyers of frozen goods to thaw and examine a sample of the goods upon delivery.

Andersen thus concluded that although the non-transparent legal reasoning in Danish court decisions makes it impossible for judges, practitioners and scholars to decipher the court's reasoning, the Nordic style is not in itself detrimental to the uniform application of the Convention. As long as the international reasoning is followed, autonomous international principles are being created and upheld albeit without citations, which make it apparent, that this is in fact happening.

3.2 The Nordic Article 92 Reservations and Their Withdrawal: Implications and Problems

Neumann[19] opened by pointing out that the Convention's goal of uniformity is threatened not only by the homeward trend in practice but also by domestic transformations, translations and reservations. The focus of *Neumann's* presentation was on the problems relating to the reservations against the full and unrestricted application of the Convention that exist in the Nordic region.

All Nordic nations declared that upon ratification the Convention should not be applicable to inter-nordic sales according to Article 94. As pointed out previously by *Ramberg*, the reservation could now be considered a breach of international obligations, since the Nordic countries no longer have closely related sales laws.

As the only Nordic country Denmark chose to exclude the application of the CISG from parts of its territory, namely the Faroe Islands and Greenland, thus undermining uniformity. Businesses involved in international transactions in those parts of the Danish reign would have to consider rules of private international law to determine the applicable sales law.

[18] [31 January 2002] Copenhagen Maritime and Commercial Court, Denmark, CISGNordic.net ID: 020131DK.

[19] Thomas Neumann is Associate Professor at Aarhus University. See the following for full biography and keynote speech: Thomas Neumann, 'The Nordic Article 92 Reservations and Their Withdrawal: Implications and Problems' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

Four out of the five Nordic countries, being Denmark, Finland, Norway and Sweden, also chose to exclude the application of Part II, again undermining uniformity since the need to resort to the rules of private international law remained. In Norway, the incorporation method further impaired uniformity, since the Convention was transformed and translated to a domestic hybrid law in the Norwegian language intended for both domestic and international sales. It was believed that Norwegian businesses could do with one law for all types of sales. The argument neglects the fact that the Norwegian hybrid law would only apply, when the rules of private international law points to Norwegian law. Authors have described the transformation as a major mistake, and is now rectified with the withdrawal of the Article 92 reservation and the decision to incorporate the authentic versions of the Convention. *Krüger* later elaborated on the Norwegian position.[20]

Iceland, which did not make a declaration according to Article 92, also decided to transform and translate the Convention upon its incorporation into Icelandic law. When doing so, inspiration was taken from the Norwegian hybrid law, and thus the exclusion of Part II effective in Norway carried over into Icelandic law, where Part II is still not in effect today. Ironically, the only Nordic country not having declared that it will not be bound by CISG Part II, is the only Nordic country, where Part II is not in force now that the remaining countries all have withdrawn their reservations. In this regard it is worth noting that the withdrawals were made at different points in time and that Part II therefore enters into force at different points in time in the Nordic countries.

The withdrawal of the Article 92 reservations creates a new challenge. The challenge of knowing which contract formations will fall under the new Part II regime. Article 100 prohibits retroactive effect of the Convention and so does, for example, the Danish law incorporating Part II and general treaty law. The provision states that the CISG will only apply, when a proposal to conclude a contract has been made after the Convention has entered into force. Therefore, one may ask what the definition of a proposal is, as this will be decisive. Looking within the Convention itself, Article 14 addresses proposals. Some proposals are considered offers, if certain requirements are met, and other proposals may merely be invitations to make an offer. If an invitation to make an offer falls before Part II has entered into force, and the following offer and acceptance fall afterwards, it will be pivotal to know the definition of the word proposal.

If the word proposal and the definition of an offer are equated, Part II will govern the above negotiation situation in its entirety. This would to some extent introduce a retroactive effect in regard to the invitation to make an offer and the period falling before Part II's entry into force, and it would be contrary to the understanding of the word 'proposal' within the context of the Convention itself. The alternative would be to let proposals also include invitations to make an offer. Under such view, Part II would not govern the contract formation period mentioned

[20] See *infra* page 16.

above. This solves the problem of retroactive effect and definition of the word proposal, but may lead to a position, where it is the very first contact between the parties that decides the application of Part II. Such an interpretation would seem arbitrary, coincidental and artificial. The problem is exacerbated, if the contract formation period consists of a number of offers and counter-offers taking place across the date for entry into force of Part II, or when no clear offer and acceptance model has been followed by the parties. The problem will arguably be increasingly irrelevant as time passes, but it will be relevant for all contracts entered into whenever a country withdraws a reservation or adopts the CISG. How a Nordic court would handle this conundrum is hard to guess, particularly in the light of the fact that the Nordic judiciary has yet to strongly prove that they have a sophisticated grasp of the CISG.

In summary, *Neumann* listed the improvements to textual uniformity that has taken place in the Nordic region. Firstly, the withdrawal of the Article 92 reservations and secondly the incorporation of the authentic versions of the CISG in Norway. Challenges for the future include firstly the interpretive challenge of the definition of a proposal in relation to the entry into force of Part II. Secondly, a rectification of Iceland's incorporation and translation of the Convention could be considered. Thirdly, uniformity still has territorial limitation due to the exclusion of the Faroe Islands and Greenland according to Article 93. Finally, the exclusion of the Convention in inter-Nordic sales has lost some of its rationale and may be a breach of international obligations.

4 Status and Experiences from the Baltic Region

4.1 The Baltic Reservations Against Freedom of Form: Background, Withdrawal, and Status

Tolea[21] provided an overview of history, legitimacy and current challenges in regard to the declarations made by the Baltic countries' not to apply the rules on freedom of form. Such exclusion was allowed upon the adoption of the CISG according to Article 96 with the prerequisite that the country making the declaration must have domestic writing requirement for sales contracts.

Latvia adopted the Convention and made the reservation according to Article 96 in 1998, Lithuania in 1996, and Estonia in 1994. In Lithuania and Estonia the reservation appeared to be justified, since these two countries had domestic form requirements for sales contracts at the time. In Lithuania the old socialistic civil code containing strict form requirements was still in force. In Estonia, the general part of a new civil code was in force containing a principle of

[21] Aleksandra Tolea is PhD Candidate at Syddansk University. See the following for full biography and keynote speech: Aleksandra Tolea, 'The Baltic Reservations Against Freedom of Form: Background, Withdrawal, and Status' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

freedom of form, however it was supplemented by an old socialistic code containing form requirements for sales contracts. Thus, the reservations were justified at the time. This position later deteriorated, when both countries abolished the domestic form requirements.

By contrast, Latvia did not have domestic form requirements for sales contracts when the CISG was adopted, since the civil code in force at the time contained the principle of freedom of form. Thus, there were no objective reasons for the reservation, and the decision may best be explained by historical factors. *Klimas* later elaborated on some of the historical and political factors that affected the legislative process in the Baltic region, particularly in Lithuania.[22]

All Baltic countries have now withdrawn their reservations[23] and in regard to Latvia and Lithuania this happened upon the initiative of the Secretariat of UNCITRAL. *Castellani* earlier explained about the active role of the Secretariat in processes like this one.[24] Though the withdrawal increases the textual uniformity of the Convention, it is important to point out that uniformity is just as important in practice. *Klimas* and to some extent Attorney and Partner Karsten Duch Lynggaard (hereinafter Lynggaard) developed this aspect further.[25]

A particular paradox pertaining to the exclusion of freedom of form can be identified. Though they are only relevant in the Baltic countries preceding the withdrawal of the reservations, they are still relevant in countries, where a similar reservation still is in force. The first problem relates to the handling of a reservation against the freedom of form, when the basis for it has deteriorated. The theory outlines two options. One possible way is to resort to the rules of private international law, which in turn will point out the relevant domestic law applicable. The other way is to apply the rules of the reserving state directly. Each solution may lead to the application of a domestic law in which no form requirement exists and in turn lead to results contrary to the reason behind the exclusion of freedom of form in the Convention in the first place. This is not to say that courts should not apply the reservation, since according to Article 97(4) reservations are effective until the expiry of at least six months after notice to the UN depositary has been given. With such paradox in mind, *Tolea* rhetorically asked what could be learned from the Baltic experience so far.

[22] See *infra* page 11.

[23] Estonia (18 March 2004) depositary notification C.N.276.2004.TREATIES-1; Latvia (13 November 2012) depositary notification C.N.638.2012.TREATIES-X.10; Lithuania (1 November 2013) depositary notification C.N.900.2013.TREATIES-X.10.

[24] See *supra* page 2.

[25] See same page immediately below and *infra* page 13 respectively.

4.2 Reception of the CISG in the Baltics: An Epidemiology

Klimas'[26] presentation was devoted to explaining the reason why the reception of the CISG in Lithuania has been cold. At the outset in his experience with developing a law school in Lithuania and his time as chief counsel for the chairman of the Lithuanian parliament, *Klimas* began by describing a general problem with legal reforms and setting the historical context.

The modernisation of contract law is faced with an uncomfortable truth: The fact that there is a general resistance towards any legal reform and that a widespread denial of a problem in receiving western laws in Lithuania exists. The reason for this can be traced back to the perestroika – restructuring and reformation – of also Lithuania. *Klimas* asserted that no proper reform of the legal system ever took place. There is no mentioning of reform or the former Soviet legal system to be found in Lithuanian legal textbooks. The country as such never decided how to handle its independence from the Soviet Union. Hence, the country never broke with its past legal system. Doing so would require deciding what to do with the large proportion of people involved in the old system, many of which belonged to the judiciary and government. Rightfully so, this was a delicate and precarious matter. Consequently, nothing was done, and so the path of ignoring the need for reform was chosen. This put the country in a position, where it became even more difficult to reform the legal system, since a reform would have to involve the offices and people that were eschewed in the first place, and because the existing functional legal system could be used as an argument against a need for reform.

Even though the existing legal system was a functional one *qua* its police, judiciaries, recognition of contracts etc., it was fundamentally different to that of western countries. Where the old Soviet legal system had the purpose of retaining order, the traditional western legal systems had the purpose of delivering justice. And even though many, also from Lithuania, would claim a similar purpose of the Lithuanian legal system, the two are fundamentally different. Where delivery of justice is based on principles, the retaining of order is not.

The fact that the chance for reform was never grasped also meant that old thought-patterns were retained. This slows the adoption process of more modern legal regimes like the CISG, since they require a completely different mind-set. This explains perhaps why it is problematic to logically explain, why the Baltic countries made reservations upon the ratification of the CISG. As also pointed out by *Tolea*[27] there simply is no logical explanation.

[26] Tadas Klimas is Attorney at the Law Offices of Tadas Klimas. See the following for full biography and keynote speech: Tadas Klimas, 'Reception of the CISG in the Baltics: An Epidemiology' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[27] See *supra* page 10.

Two specific examples from contract law were given to illustrate the effects of the resistance towards legal reform.[28] First, the test of foreseeability as a limitation for damages is a well-reasoned and well-known one. However, the idea has been rejected in Latvian law, since it appears alien. Upon the ratification of the CISG the test of foreseeability was also adopted, at least on the books. But this raises the question of the efficacy of the ratification of the CISG, since the concept of foreseeability, an inherent part of the CISG, is unwanted and indeed unknown in the Latvian legal system.

Second, the CISG also contains the concept of fundamental breach. Similar concepts are known in many domestic legal systems. The concept of fundamental breach is one that provides the aggrieved party with the right to terminate the contract. Not only businesses in Lithuania but also, upon observation and belief, a great many lawyers, lack an understanding of the concept and its underlying idea that businesses have to act or demonstrate facts, e.g. fundamental breach, to access remedies. Instead, a very passive role is adopted. Most contracts contain provisions that display an ignorance of the concept of fundamental breach as providing an option, which permits termination by the aggrieved party. The disputing parties instead insist that there must be *agreement* to terminate. The majority of contracts also seem to equate termination with the unlawful cessation of performance. In general, it often appears that the parties expect to have their relations checked by some authority. This is of course due to the fact that this is the way the system used to be. *Haapio* later developed the idea that new ways of information design of legal documents, such as contracts or the CISG, are needed in international business.[29]

Finally, *Klimas* concluded his epidemiology of the reception of the CISG in Lithuania by pointing out an important improvement. The fact that the CISG has been adopted has raised the level of the legal discourse in the country. As also pointed out by *Castellani*,[30] the adoption of the Convention in itself has created a need to understand the legal concepts contained within it. This is the first step towards a critical attitude towards the existing domestic legal system and possibly reform. Countries not adopting the CISG may never trigger such development. Though it may be a slow process, the reception of the CISG and its concepts are changing for the better.

[28] For more on the experience with the CISG in the Baltic states, see Tadas Klimas, 'Baltic States, Belarus, and Ukraine' in Larry A. DiMatteo (eds), *International Sales Law. A Global Challenge* (New York, Cambridge University Press 2014) pp. 331-337.

[29] See *infra* page 21.

[30] See *supra* page 2.

4.3 Ten Years Later: A Practitioner´s View of the Future

In order to flesh out the environment that internationally trading businesses are faced with *Lynggaard*[31] gave a number of examples that demonstrated how different countries are in regard to law, history, politics, and moral. The introduction of the CISG was supposed to remove at least some of the legal uncertainties threatening business, and it has done that to some extent. *Lynggard* made reference to the reluctance of Danish courts to clearly make reference to the CISG and case law from other countries as also addressed by *Andersen*[32] and added that the problem is also seen within the field of EU law. The courts of Denmark are known for being very reluctant in using the opportunity to refer questions for preliminary ruling to the European Court of Justice. Asking courts to openly consider decisions by courts from other CISG states appears to be too much to ask for. However, the reluctance of Danish courts is also partly due to practice among lawyers of not utilising the CISG or case law from other jurisdictions. This is ostensibly rooted in the fear of being excluded from the bar association or insurance company – which might be the result, if a lawyer advises on foreign law. However, this neglects the fact that the Convention and CISG related case law from other jurisdictions are not foreign, but Danish law. Naturally, if the lawyers are reluctant to use certain legal sources in their proceedings, this will in turn influence the courts.

The Convention is part of the law in the Baltic region, and here it plays a less significant role in the daily life of the contract lawyer. Though the Convention acts as a gap-filler, there is a need for very explicit contracts particularly in cross-border transactions involving parties with very different background. The sanctity of a contract is honoured in the Baltic region and salient parts like performance, delivery, limitation of liability and remedies will therefore often be agreed upon. This may not necessarily be the position in jurisdictions, where the contract is not considered more than a piece of paper. However, this is not the case in the Baltic region, though the courts may be reluctant to openly use the Convention and its sources. Knowing this it has been observed that parties decide to opt-out of the CISG and choose a domestic law instead, since in case of dispute a judge would act more predictably if presented with a more familiar legal regime. Thus, the Convention is serving its gap-filling purpose and contemporary legal problems are often hidden elsewhere.

A rapidly developing sector of international business is the development and sale of software, where rapidly growing firms are seen overtaking old well-established enterprises in revenue and value. Compare for example the world's largest shipping company, the 100-year old MEARSK with a market value of USD 458 billion to GOOGLE who reached a market value of more than USD 4000 billion in less than 20 years. The fast growing trend is the same in smaller software

[31] Karsten Duch Lynggaard is Attorney and Partner at Magnusson. See the following for full biography and keynote speech: Karsten Duch Lynggaard, 'Ten Years Later: A Practitioners View of the Future' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[32] See *supra* page 6.

firms, and these often have a wish to abide by the law, but face significant barriers in informing themselves. The problems occurring most often in practice relate to international consumer sales, sale to children, trustworthy payment, virtual currencies, and marketing standards, such as incentives for sharing information or references to weapons in games. The software firms are faced with enormous costs of clarifying these legal questions, since they potentially may be selling and marketing their products in every country in the world. This is where future legislative efforts for example by the United Nations could assist international trade and the development of business as has been done through the CISG. *Lynggaard* pointed out that such legislative efforts would not only be for the sake of consumers, but very much also for law-abiding businesses. As long as no public regulation is being drafted, the private actors in the market will set the standard through contracts and the platforms they provide for trading. This is already happening in business-to-business transactions with the platform ALIBABA.

5 Formation of Contracts

5.1 The Problems Caused by CISG Part II

Professor Ole Lando (hereinafter Lando)[33] began by welcoming the incorporation of CISG Part II into Nordic law. The reservations excluding the application of CISG Part II was made according to the wish of the Nordic states to retain, in their eyes, the better rules contained in the Nordic contract acts. Though it may be true that some rules contained in the Nordic contract acts were more suitable in the 1980ies, the reservations created legal uncertainty for international trade. Not until criticism by the International Chamber of Commerce was it possible to obtain enough political momentum to have the reservations withdrawn.

Though the incorporation of Part II in the Nordic laws would deal with this uncertainty, it brings with it a number of problems that deserve to be pointed out. First, the role of good faith in the CISG becomes relevant in context of also formation of contract. The Convention states in its Article 7(1) that in the interpretation of CISG regard is to be had to the observance of good faith. *Lando* pointed out that a restriction of good faith to the interpretation of the Convention is too narrow.[34] As the soft laws, the UNIDROIT Principles, the Principles of European Contract Law (PECL) and the Common European Sales Law (CESL), several courts have adopted good faith as a general obligation for the parties to abide by and so could the

[33] Ole Lando is Professor Emeritus at Copenhagen Business School. See the following for full biography and keynote speech: Ole Lando, 'The Problems Caused by CISG Part II' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[34] See for more on good faith, for example Ole Lando, 'Is Good Faith an Overarching General Clause in the Principles of European Contract Law?' in Mads T. Andenæs (eds), *Liber Amicorum Guido Alpa: Private Law Beyond The National Systems* (British Institute of International and Comparative Law, London 2007).

Nordic courts. However, the role of good faith is contested in the literature as well as in case law.

Second, with Part II follows the price conundrum. On one hand Article 14 requires an offer to contain a way to determine the price. On the other hand, Article 55 provides a gap-filling rule for contracts not specifying a price. It is possible to consider a proposal without a price an offer that implicitly incorporates the market price according to Article 55. The root of the conundrum is the requirement of price for a proposal to be an offer. Soft law systems, including the UNIDROIT Principles, the Common European Sales Law, and the Principles of European Contract Law do not operate with such a requirement.

Third, the issue of revocability of offers presents itself. The Convention contains a compromise between differing legal systems and this may result in ambiguities. When Article 16(2)(a) states that an offer fixing a time for acceptance is irrevocable this may be understood differently depending on whether one has outset in the common law or civil law tradition. Determining whether an offer containing a fixed time for acceptance is to be considered irrevocable therefore depends on an interpretation according to Article 8. The rule may lead to uncertainty where it is unclear whether a civil law offeree knows or should know that the common law offeror, who states a fixed time for acceptance of his offer, considers it to be irrevocable according to Article 8(2).

Fourth, CISG Part II contains a gap regarding the battle of forms. Since the conclusion of contracts very often does not follow a simple offer and acceptance model, the rule of material alterations in Article 19(1) is insufficient. The provision in Article 19(1) determining that an acceptance may not contain material alterations has been understood in two ways in the literature. One way is to see the provision as a 'last shot' doctrine concluding the contract on the basis of the terms presented last. However, it seems arbitrary to let a coincidental fact like the last shot be decisive. An alternative way is to see Article 19 as a 'knock out' doctrine according to which the contract is concluded on the basis of only the terms between the offer and the acceptance that are common in substance. This has been the position of German case law, the UNIDROIT Principles, the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and the Common European Sales Law (CESL). Associate Professor Kasper Steensgaard (hereinafter Steensgaard) later elaborated on the problems relating to the battle of forms.[35]

Before turning to his conclusion, *Lando* briefly pointed out that CISG insufficiently deals with hardship, commercial letters of confirmation, validity, and that one could consider revising or amending the CISG as has been proposed by the Swiss government or perhaps in the form of a

[35] See *infra* page 18.

world contract code.[36] Admitting at the same time that such ideas would require enormous effort by states and individuals, they would enable dealing with some of the insufficiencies just mentioned. In conclusion, *Lando* pointed out that in spite of its flaws, the CISG has been a success. It meets the needs of modern commerce. It has helped abolishing ancient relics of a dead past. It has inspired national legislative drafting, and it has gained widespread adoption by states. Future discussion will decide if it is worth the extensive efforts to revise or amend the Convention.

5.2 Point of No Return - Threshold for Binding Commercial Agreements in the CISG Part II Setting

Krüger[37] outlined a number of effects that the adoption of CISG Part II will have in Norwegian law. Since CISG Part II entered into force in Norway on 1 November 2014[38], it has replaced domestic law in regard to the definition of offer and acceptance, the concept of »knowledge» as a key requisite with the concept of »reaches» instead, and the rules on late or non-conforming acceptance.

It was emphasised that Part II does not entirely replace Norwegian domestic law on formation of contracts and sales. This is true of course outside the scope of the Convention, such as consumer sales or private sales. In business-to-business transaction it is seen that due to discrepancies in the definition of »goods» creates room for the domestic rules in international transaction of shares or stock. The parties may also displace the rules of the Convention with one of their choice according to CISG Article 6 or following a usage according to Article 9. And of course, domestic law is still the applicable law, when the international transaction is taking place between parties located in two different Nordic countries according to the reservations made pursuant to CISG Article 94.

A number of important issues for international transactions are not regulated in the CISG and will thus have to be referred to domestic law. Matters relating to burden of proof, agents' authority to form contracts and voidable statements pursuant to the Norwegian Formation of Contracts Act § 36 remain applicable. *Krüger* then pointed out that Norwegian courts have developed rules for handling formation of contract by other means than the offer-and-

[36] See Michael Joachim Bonell and Ole Lando, 'Future prospects of the unification of contract law in Europe and worldwide: a dialogue between Michael Joachim Bonell and Ole Lando on the occasion of the seminar in honour of Ole Lando held in Copenhagen on 29 August 2012' (2013) 18 Uniform Law Review - Revue de droit uniforme 17; Ole Lando, 'A Vision of a Future World Contract Law' (2005) 2 Uniform Commercial Code Law Journal 3.

[37] Kai Krüger is Professor Emeritus at University of Bergen. See the following for full biography and keynote speech: Kai Krüger, 'Point of No Return - Threshold for Binding Commercial Agreement in the Forthcoming Nordic CISG Part II Setting' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[38] See the Norwegian incorporation law LOV-2014-02-28-2, *Lov om endringar i kjøpsloven og avtaleloven*.

acceptance model and that these probably will be applicable, since the Convention's Part II does not govern such modes of formation (Article 9(2)).

Looking into the future it would be important to consider how the CISG regime is going to affect Norwegian law developed by the courts in regard to letters of intent, tacit agreements and customary form requirements. Perhaps the introduction of the CISG in Norway might challenge the law in areas not covered by the Convention. One such welcome challenge would be of the concept »dispositivt utsagn» by the Convention's »reaches». Continuing his focus on case law, *Krüger* pointed out that due to the shortage of publicly known case law on the CISG in the Nordic region, it would be necessary to look outside the region to find case law guidance on matters now introduced into Norwegian law.

If the introduction of Part II in Norwegian law could trigger reconsiderations of the old Norwegian Formation of Contracts Act, then perhaps it is time to revitalise the Nordic jurists' meeting of 1990 in which the focus was on replacing the Nordic formation of contract acts. In fact, a Norwegian commission worked on the idea for two years, only to abort it due to a lack of interest in the region. Should such work be reopened it could now derive inspiration from tools like the Principles of European Contract Law (PECL), the UNIDROIT Principles, the Draft Common Frame of Reference (DCFR) and the Common European Sales Law (CESL) and would certainly have to consider issues of interpretation, good faith, merger clauses, battle of forms, confidentiality and negative interest protection.

The final point of *Krüger* was that since the CISG does not contain rules on choice of law, it is still up to the parties to decide on the law applicable. If they do not, the system of rather intricate rules will be decisive. As a rule of thumb the law applying to a dispute relating to a contract being negotiated would follow from the »would-be» rule. Otherwise the rules applicable in Norway, also after the introduction of CISG Part II are those of the seller's law in sales disputes and the law with the closest connection in other disputes.

In summary, a number of rules have been displaced in Norway, though domestic rules of formation and sales are not being replaced in their entirety. Some changes are welcome, some insignificant, and some are introducing new challenges, such as the introduction of new concepts that questions the existing body of case law.

5.3 From Section 6 NCA to Article 19 CISG. New Rules on Non-conforming Acceptances: - Overlaps and Pitfalls

Steensgaard[39] addressed the new rules on contract formation with particular focus on conflicting standard terms and conditions. *Steensgaard's* position was that many businesses will go about doing their business as usual and that this could lead to unfortunate surprises with the implementation of Part II of the CISG in the Nordic region.

Both the Convention and the Nordic contract laws contain the mirror image principle according to which an acceptance must mirror the terms of the offer for a contract to be concluded. If the acceptance deviates from the terms of the offer, it is considered a rejection together with a new offer. In case an acceptance merely contains additional terms that would otherwise be implied according to the default law, such as passing of the risk at first carrier, it follows from both the Nordic contract laws and the Convention that an effective acceptance in substance has been given and a contract has been concluded.

In the situation where the offeree neither accepts nor rejects the offer, but merely wishes to continue negotiations by asking for different terms, the Convention's Part II may lead to results different to especially the Danish contract law. According to a Danish Supreme Court decision[40] it is considered a rejection of the offer to request new terms, whereas it is a common view that merely asking for different terms under the CISG is not a rejection of the offer. Hence, the offer can still be accepted in the time for acceptance until it is revoked. So even though both Nordic domestic contract laws and the CISG build upon the mirror image principle, they may lead to different outcomes.

A number of exceptions to the mirror image principle exist in both the Nordic contract laws and the Convention. Even though they all lead to a duty for the offeror to object to a non-conforming acceptance unless he wishes to be bound by it, they are triggered by different circumstances. The Nordic contract acts require in Article 6(2) that the offeree must believe that the acceptance was conforming and the offeror must not be unaware of this – the so-called double subjective standard. This renders the exception extremely narrow. In comparison, the exemption under the CISG Article 19(2) is based on a materiality test. The test is supplemented by a non-exhaustive list of terms considered material if altered according to Article 19(3). Though the list has the effect of narrowing the exemption to a degree, it is difficult to find

[39] Kasper Steensgaard is Associate professor at Aarhus University. See the following for full biography and keynote speech: Kasper Steensgaard, 'From § 6 NCA to Art. 19 CISG. New Rules on Nonconforming Acceptances - Overlaps and Pitfalls' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014; Kasper Steensgaard, 'Chapter 5. Article 19 CISG & Scandinavian Domestic Law: Conflict or Peaceful Coexistence?' in Joseph Lookofsky and Mads Bryde Andersen (eds), *The CISG Convention and Domestic Contract Law: Harmony, Cross-Inspiration, or Discord?* (DJØF Publishing 2014).

[40] [1994] Ugeskrift for Retsvæsen, p. 344 *et seqq.*, UfR.1994.344H.

examples of non-material alterations. Though a few examples exist in case law, there is no clearly discernable tendency giving guidance on the materiality test.

Turning to the standard terms and conditions *Steensgaard* stated that the adding of standard terms will break the mirror image rule according to both the Nordic contract laws and the CISG, and that none of these contain any provisions dealing with standard terms. Neither is any of the exceptions suitable for solving issues relating to conflicting standard terms.

In domestic laws the matter is treated differently. In some legal systems, often common law ones, the typical solution to the conflict of standard terms is to consider that last presented terms accepted by way of conduct – a last-shot doctrine. Also this is the commonly held position under the Nordic contract laws. In contrast, other legal systems, such as the German one, a knockout doctrine is preferred from the view that there has been a manifest intention to contract on the basis of some of the terms. This too is the trending position under CISG when applied by German courts. However, when applied by courts of the United States, a last-shot doctrine is favoured exclusively.

Hence, the trading parties may experience unfortunate results of their contract formation behaviour under the new Part II regime, as they may experience that asking for new terms would be considered a rejection of the offer. They may also find that the exception to the mirror image principle is triggered by different circumstances and that no uniform solution to the conflict of standard terms applies.

6 Shortcomings and Challenges

6.1 INCOTERMS and CISG Article 30 et seqq.

Professor, Dr. and Partner Burghard Piltz (hereinafter Piltz)[41] gave from his outset also as a practicing lawyer his view on some of the challenges relating to the seller´s obligations following the CISG and the INCOTERMS.[42] When listing the seller's obligations following from the CISG and the INCOTERMS respectively, it appears that the former imposes a duty to transfer the property right in the goods, whereas the INCOTERMS is silent on this matter. Vice versa, the INCOTERMS contains further obligations for the seller to deal with documents, give notice in relation to shipping and dealing with customs and security clearance. However, the two documents may also appear quite similar, when it comes to some of the rules on passing of the risk of accidental loss or damage to the goods during transport.

[41] Burghard Piltz is Attorney and Partner at Ahlers & Vogel. See the following for full biography and keynote speech: Burghard Piltz, 'INCOTERMS and CISG Article 30 et seqq.' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[42] See *Incoterms® 2010 English Edition* (International Chamber of Commerce (ICC) ICC Publication No. 715E, 2010 Edition).

For the sake of trading businesses, *Piltz* began developing the differences between the two instruments. The outset was taken in CISG Article 31, which deals with the seller's obligation to deliver the goods. The article encompasses three situations, but more importantly, it deals with two issues; the act that the seller has to perform to deliver and the place of delivery.

First, in regard to the seller's act of delivery a distinction has to be made between handing over the goods and placing goods at disposal. This distinction is known to both the CISG and the INCOTERMS. In Article 31(b), Article 31(c) and the INCOTERMS E-group clauses, D-group clauses and the FAS clause, the seller has an obligation to place the goods at disposal. This does not involve for example dealing with loading of the goods. In contrast, CISG Article 31(a) and INCOTERMS C-group clauses , and the FOB clause require the seller to hand over the goods to the carrier. The distinction in both instruments is a deviation from the obligations laid down in many domestic laws, including those of Germany, Italy and Spain.[43] In domestic law it is commonly observed that the seller has a duty to hand over the goods to the buyer, but no such obligation exists neither in the CISG nor in the INCOTERMS.

Second, in regard to the place of delivery it is necessary to determine, if the sale involves carriage. The mere fact that an international sale is taking place is not sufficient to conclude that carriage is involved. One way to determine this would be to determine, if the place where the seller is obliged to deliver is different from the place, where the buyer is to take delivery. In those situations a carrier must naturally be involved. On one hand, such a situation exists when the parties have agreed to apply INCOTERMS clauses CIP, CPT, CFR or CIF and such situation is presupposed by Article 31(a). On the other hand, Article 31(b), Article 31(c), INCOTERMS clauses EXW, FAS, FOB, FCA, DAT, DAP and DDP operate with the same place for the seller's delivery and the buyer's taking of delivery and would thus not presuppose involvement of a carrier. The lesson here is that the common contention by businesses that Article 31(a) and the FOB clause are equivalent is wrong, since the former operates with a difference in place of delivery and place of taking delivery, whereas the latter does not.

Before coming to his conclusion, *Piltz* pointed out yet another caveat for businesses; that the INCOTERMS D-group clauses are in no way reflected in the CISG. Applying a D-group clause to the contract would impose many additional obligations on the seller than what follows from the CISG.

Piltz summarised his findings and emphasised that though it seems innocuous to equate the CISG and the INCOTERMS where these appear to be similar an agreement to apply the INCOTERMS is a displacement of the rules in the CISG according to Article 6. And thus, *Piltz* raised the important question, whether a single reference to for example FCA in the contract is sufficient to conclude a meeting of the minds in regard to all of the ten pages of stipulations in

[43] This is true also for the Scandinavian countries according to the Danish Sale of Goods Act (LBK nr. 140 af 17/02/2014) § 11, Swedish Sale of Goods Act (Köplag 1990:931) § 7, Norwegian Sale of Goods Act (LOV 1988-05-13 nr 27) § 7(1) og § 7(2).

the ICC booklet on the INCOTERMS. The question was left for future discussions to reflect upon.

6.2 Responding to the Challenges: Making Contracts and the Law Work for Business

Haapio[44] brought to the conference the voice of the in-house counsel, with a focus on promoting business success and preventing disputes. Businesspeople often see lawyers as dispute-oriented people. Cross-border contracts involve many challenges. One problem is that businesspeople are unfamiliar with the default legal framework for international trade, such as the CISG. Where the CISG was supposed to remove barriers, encourage trade and create uniformity, it sometimes fails to do so. This problem is aggravated by individual states' reservations against the unrestricted application of the Convention.

Another problem is that many contracts are overly complex for the businesspeople involved. If contracts are hard to understand, they may not be implemented or interpreted the way they were intended. The complexity is partly linked to the use of language. Though English is the language of business, it is quite a different matter to negotiate a deal in »broken English» than it is to understand legal English. Still contracts are often drafted with the legal community in mind, forgetting the business community. No wonder business people are reluctant to read contracts. The problem is rooted in the legal dominance, mindset and lack of design that features in contract drafting. Instead of engaging and guiding the trading partners, contracts often alienate them. This is essentially a failure to communicate.[45]

A shift away from a dispute-oriented paradigm, where the focus is on the legal community, to a user-oriented paradigm, where the focus is on helping the business community to succeed in their ventures and prevent problems, would promote trade as envisaged also by the drafters of the CISG. The shift could be built on proactive law, with simplification and visualisation as tools for drafting and communicating the law and contracts. It entails helping businesses understand contracts and the underlying laws, as well as assisting contract drafters in crafting contracts that clearly communicate what the business parties want and what they should do and not do.

[44] Helena Haapio is Legal Consultant at Lexpert Ltd. and Senior Researcher and University of Vaasa. See the following for full biography and keynote speech: Helena Haapio, 'Responding to the Challenges: Making Contracts and the Law Work for Business' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

[45] Helena Haapio, *Next Generation Contracts: A Paradigm Shift* (Helsinki, Lexpert Ltd. 2013); Helena Haapio, 'Using the CISG Proactively' in Larry A. DiMatteo (Ed.), *International Sales Law. A Global Challenge* (New York, Cambridge University Press 2014), pp. 704–724; George J. Siedel and Helena Haapio, *Proactive Law for Managers – A Hidden Source of Competitive Advantage* (Farnham, Gower Publishing 2011).

Though contracts will continue to serve as instruments of protection in case of a dispute, it is essential that the contracts act as a blueprint for performance, if businesses are to realise benefits and opportunities. One may actually say that contracts that end up in court have already failed. However, there is a tendency in the legal community not to learn from such mistakes. Good contract drafting is a puzzle involving all parts of the business, such as financial, technical and operational aspects, and not just the legal part. A contract must be seen as a business or management instrument rather than solely a legal document.

Haapio concluded with the optimistic point that we in the legal profession already have access to the necessary skills and tools to improve the communication of law and contracts. There is plenty of literature and case law to learn from, but there has been a tendency in academia to omit communication of this to businesses in their language, which is not necessarily limited to text only. The next step in *Haapio's* view is to make the law and contracts user-friendly by means of simplification and visualisation. Several examples of this already exist, and one should not forget to mention that this has been the tradition for a long time in the communication of the meaning of the various INCOTERMS trade terms. In addition, a prototype of a visual guide to the CISG already exists.[46]

6.3 Unreasonable Contract Terms, Domestic Validity Rules and the CISG: How far do the Fundamental Principles of the CISG Replace and/or Supplement Domestic Contract Law, including the Nordic Contracts Act § 36?

Professor René Franz Henschel (hereinafter Henschel)[47] opened by rhetorically asking whether the principles of the Convention supplement, replace or perhaps coexist with domestic validity rules? The question is relevant for example in determining whether contract terms are reasonable or not.

Validity issues have been excluded from the scope of the CISG according to Article 4, unless the matter is expressly governed in the Convention. An example of a validity issue that is expressly governed by the Convention is the rules on form requirements. The wording of Article 4 is a deviation from the general method laid down in Article 7(2), where it is stated that matters governed, but not expressly settled in the Convention, are to be solved by applying general principles underlying the Convention. Domestic law is referred to as a last resort. The

[46] Stefania Passera, Helena Haapio, Rob Waller, Oliver Tomlinson, Christopher Edwards, Olivia Zarcate, Gonzalo Arellano, Julia Mariani, *Visual CISG – A Prototype of Legal Information Design*, 10 October 2013 <http://legaldesignjam.com/wp-content/uploads/2013/11/CISG_booklet.pdf> accessed 20 October 2014.

[47] René Franz Henschel is Professor at Aarhus University. See the following for full biography and keynote speech: René Franz Henschel, 'Unreasonable Contract Terms, Domestic Validity Rules and the CISG: How far do the Fundamental Principles of the CISG Replace and/or Supplement Domestic Contract Law, Including the Nordic Contracts Act § 36?' (*Audiovisual Conference Book*, 14 November 2014) <www.cisgnordic.net/conferencebook.shtml> accessed on 14 November 2014.

requirement in Article 4 that the matter must be expressly governed by the Convention seems to lead to the conclusion that there is no room for underlying principles in regard to validity matters. Consequently, a literal interpretation of the Convention supports a direct referral to domestic law. However, looking into the literature and case law gives a different result.

According to the literature, domestic validity tests are influences by the rules of the Convention, thus establishing a connection between the two. The connection is seen in at least two court decisions. The first one by the Appellate Court of Zweibrücken.[48] Here the court stated that a waiver of liability must not be contrary to the fundamental values of the CISG. Granted that the validity test is one of domestic character, it does in fact establish a connection to the values embedded in the CISG. The second decision by the Supreme Court of Austria[49] confirms the position taken by the German court. In addition to the stand that contract terms may not contradict the fundamental values of the CISG, it was stated that neither must domestic validity rules contradict such values.

Though these two cases have also been criticised, they do form part of the body of case law that should be considered when applying the global jurisconsultorium.[50] *Henschel* summarised the alternative interpretation of validity rules in relation to the CISG as follows. Where domestic rules on validity provide the mechanism for example a test of the reasonableness of contract terms, the Convention provides the values that act as the guideline for carrying out the test. In a Nordic context, such a domestic validity mechanism is seen in the Danish Contract Act's § 36. The possible interplay between the Convention and domestic law may affect the parties' inclusion of liability limiting clauses found in standard terms and conditions.

7 Conclusion

The conference took stock of the field of international commercial law and its many facets. The withdrawal of the CISG reservations in the Nordic and Baltic regions yields an increased textual uniformity. Specifically, the introduction of CISG part II to the Nordic countries has a positive effect insofar as Norway has rectified the mistake of translating and transforming the Convention. For the sake of uniformity one could hope that Iceland would follow suit, since the incorporation of CISG part II is currently in limbo in Icelandic law, where it has neither been incorporated into domestic law nor justified by a declaration to the United Nations.

When it comes to the domestic rules on formation of contracts, the decades old legislative cooperation among the Nordic countries seems to have withered, and there are no compelling reasons why the inter-Nordic reservation should remain. Now that the Nordic rules on

[48] [31 March 1998] Appellate Court Zweibrücken, Germany.

[49] [7 September 2000] Oberste Gerichtshof, Austria.

[50] See Andersen *supra* fn. 17.

formation of contracts are no longer closely related, the inter-Nordic reservation can no longer be justified. In fact it may be a breach of international obligations to retain the reservation.

The conference questioned whether the form requirement in the Baltic countries was justified at the time of the adoption of the CISG, and if the justification had later deteriorated. It was pointed out that even though the Convention and some of its concepts were subject to a cold reception in those countries, the Convention has in fact raised the level of discourse in the region, which is a prerequisite for legislative reform to take place in the future. The Baltic countries' choice not to adhere to the principle of freedom of form for international sales contracts has now lost its grounding, since none of the countries imposes form requirements on domestic sales contracts. The withdrawal of reservations in this regard is therefore welcomed.

The withdrawals of reservations have changed the legal framework in the Nordic and Baltic region, and they increase textual uniformity and bring new interpretive challenges to the table. Courts, legal advisors and businesses in the region must now familiarise themselves with the concepts and methodology of the Convention. In fact, the Convention may play a role in the application of also domestic law. The conference provided an example to the point regarding the validity of unreasonable contract terms. In the Nordic context the incorporation of CISG Part II means that new rules on formation of contract will apply, dealing with issues relating for example to the role of good faith, the conundrum regarding offers without a price and the incorporation of standard terms.

The CISG has been a significant instrument in the unification of international sales law, and it has served as a blueprint for legal reform and as a means to avoid regional fragmentation. However, the conference emphasised that the limited scope of the Convention and the inadequate regulation of for example transport risk or electronic commerce, renders supplementary instruments essential for trading businesses. In this regard the significance of soft law instruments like the INCOTERMS, UNIDROIT Principles, PECL can hardly be overstated, but also hard law like the Convention on Electronic Communications is important to deal with the concerns of modern day business. Naturally, the individual sales agreement plays a significant role in providing the parties with legal certainty and predictability. It was emphasised at the conference that much is to be gained by educating business people. The current paradigm of legal communication and drafting was challenged by the conference for example by thoughts on visualisation techniques. Scholars and practitioners in the field of international commercial law can assist international trade by considering that the business community needs more than just instruments of protection.

Looking into the future, the conference found that the fast developing online industry is not dependent on the geographic location of its customers, and therefore it challenges the current international legal framework. The online industry is by its nature highly internationalised and involves potentially all jurisdictions. Businesses craving certainty and predictability could benefit from future uniform standards in the fields of consumer law and advertising.