

# Nordic Co-operation on Legislation in the Field of Private Law

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## 1 Overview

Since 1995, Sweden and Finland are members of the European Union. Before this date, Denmark was the only Nordic Member State. The new situation has also changed the basis for Nordic co-operation in various fields. One such field is the co-operation on legislation. Below, I will put forward some conclusions and actions that the changes have brought about in this field. My experience from Nordic co-operation on legislation is drawn from a twelve-year long service in the Ministry of Justice in Sweden, most recently in 1994 - 1997 as Director General, responsible for legislation in the field of Private Law. The matters concerned are consequently regarded from a Swedish Private Law point of view. Developments until November 1997 have been taken into consideration. Let me first give you some background information.

## 2 History

The Nordic countries' co-operation on legislation goes a long way back.<sup>1</sup> A starting point may be found in the First Nordic Jurist's *rendez-vous* in 1872, which created a tradition still alive comprising of a tri-annual *rendez-vous* where lawyers from all Nordic countries confer on matters of mutual interest. The conferences held during the first few Nordic *rendez-vous* sessions were followed by specific projects for co-operation between the Law-making bodies in Denmark, Norway and Sweden. Finland, which at the time was a *Grand-Duchy* of Russia, and Iceland which was then part of Danish territory, were left outside the intergovernmental co-operation at this point. The co-operation gave valuable

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<sup>1</sup> There is extensible literature concerning this history. For this brief overview, I have drawn from, i.a. Kai Korte's paper in *Svensk Juristtidning* 1984, p. 700 f. Furthermore, it may be worth mentioning that *Tidsskrift for Rettsvitenskap* published a number of papers in 1988, giving an account for various aspects of the Nordic Co-operation on Legislation.

results in the form of near identical Danish, Norwegian and Swedish legislation in Private Law, during the last decades of the 19<sup>th</sup> century in the form of Acts on Bills of Exchange, Cheques, Trade Marks and a Maritime Code. During the first decades of the 20<sup>th</sup> century the Codes were on Sales of Goods, on Commission Business, Commercial Agents and Commercial Travellers and a Code of Contracts. In the years after the first World War, the co-operation made further way, now also incorporating Finland and Iceland. From this era one might mention the Insurance Contracts Act and Act on Instruments of Debt and renewed Acts on Bills of Exchange and on Cheques.

The co-operation was not limited to Property Law, but involved such fields as Family Law and Law of Bankruptcy. In these areas, separate Nordic treaties were concluded in the 1930's.

After the end of the Second World War, Nordic co-operation on legislation was re-opened; for obvious reasons it had largely come to a standstill during the course of the war. In the post-war era, a large number of legislations have been produced, to a lesser or greater extent as a result from Nordic co-operation. Attention to the co-operation has varied over the years, as has the degree of identity between new legislation in the various countries. Among those fields in which the co-operation has born fruit in the form of nearly identical Acts - at least in several Nordic countries - may be mentioned Sale of Goods Law, Maritime Law and Intellectual Property Law. Also in other areas, like Law of Torts, co-operation has been at an intense level at times.

In a completely different area, Social Security Law, the Nordic co-operation has brought results of importance to free movement within the Nordic area.

### **3 Legal Instruments**

For the Nordic co-operation on legislation, different legal Instruments have been adopted from time to time, being of different character from the point of view of International Law.

Sometimes the outcome of co-operation has been expressed as a Treaty between the Nordic States. I have already referred to the Treaties on Family Law from the 1930's.

A more common method, however, is to abstain from internationally binding Treaties and adopt a rather less formal agreement on a common wording of an Act, which is then implemented in each of the countries without the existence of any internationally binding undertaking. This method is more flexible, of course, and it may also be adopted at times when one can not reach a full agreement on the detailed wording of the Act. One drawback is that the non-binding form makes it easier for the government or parliament of a country to deviate from agreed wordings or to abstain from fulfilling an agreement.

The Swedish Act (1979:1001) on Recognition of Nordic Decisions in Paternity Cases may be mentioned as an example of this latter method. This Act corresponds to Acts having the same contents in the other Nordic countries. These Acts were passed following an exchange of opinions among representatives for the Ministries of Justice in Denmark, Finland and Sweden. During this exchange of opinions, unanimity was reached that it was important

to attain a uniform legislation on recognition of Nordic decisions in paternity cases without concluding a Treaty.<sup>2</sup>

Something which falls in between both these methods is to have the States conclude a framework treaty in which they undertake to adopt equally worded National Laws in a certain area. An example of this is the Nordic Treaty of 1977 on the Recognition and Enforcement of Foreign Decisions in the field of Private Law. Denmark, Finland, Norway and Sweden agreed that the Treaty of 1932 in this field should be replaced by unified legislation in each country. As a basis for the unified legislation, a new Treaty was drawn up, in which a broad reference was made to what would apply under the unified legislation. In Sweden, this led to the Act (1977:595) on the Recognition and Enforcement of Nordic Decisions in the field of Private Law.<sup>3</sup> Formally, the Treaty of 1977 may also be regarded as the basis for the Nordic Acts on the Recognition of Decisions in Paternity Cases; such decisions are not exempt from coverage under the Treaty.

#### 4 Forms of Co-operation

In the course of time, the Nordic co-operation on legislation has taken place in several different forms.<sup>4</sup> I shall dwell a while on the different forms of co-operation that have come into use. It is important, however, to point out, that this co-operation has been stimulated by an on-going discussion in different fora. The Nordic *lawyer's rendez-vous* may be the most important forum. The Science of Law has also to a large extent studied a Nordic perspective.<sup>5</sup>

One form of co-operation adopted as early as in the 1870's was to set up *Committees in the various countries* given the tasks of drawing up proposals for legislation in a given area (e.g. Law of Bills of Exchange) through joint collaboration. This form has been used on several other occasions also at later dates. Often the task set forth has been less ambitious, though. The various Committees have been given a duty of co-ordinating their views, but not one of drawing up a joint proposal. This was the case for, e.g. the Committees on Copyright in the 1980's. The task of the committees has sometimes been limited to rather small areas of Law, on other occasions the scope has been wider. As an example of the latter, one might mention the Committees set up in Denmark and Sweden in 1901 with the task of drawing up in co-operation proposals for Acts on the Sale and Barter of Property and on the conclusion of Contracts. These committees were also authorised to look into other areas of Contractual Law, if the need would arise.

Sometimes the countries have agreed to set up a *single joint committee* consisting of representatives from each country. An example hereof was the Nordic Committee on Copyright, which commenced its work in 1939. Another

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<sup>2</sup> See Departmental Memorandum Ds Ju 1979:3, pp. 4 and 20.

<sup>3</sup> See Government Bill 1976/77:128, p. 11.

<sup>4</sup> The forms of co-operation are discussed by Leif Sevón in *Tidsskrift for Rettsvitenskap* 1988, p. 509 f.

<sup>5</sup> An outline of this broader co-operation is given in Jacob W.F. Sundberg, *Från Eddan till Ekelöf*, 2:nd edition, Stockholm 1990.

example is the Nordic working group set up by Ministers of Justice in Denmark, Finland, Norway and Sweden in 1980 with the task of reviewing the chances of reaching a co-ordination of the Acts on Sales of Goods in all four countries.<sup>6</sup>

A direct interchange between *the civil servants concerned* in the various countries has taken place over the years in varying frequency and intensity. Such interchange has covered different matters, from over-all planning issues for legislation to discussions in detail of the texts of various drafts. On different occasions, the discussions have also covered the attendance from Nordic countries to negotiations in international organisations. The forms have varied for such discussions, too, all depending on the matter at hand. Many times this has involved simple matters dealt with by telephone conversation or by exchange of letters.

Evidently, the co-operation has also taken place on *a political level*. On an over-all level, issues of co-operation have been discussed at meetings of Ministers of Justice at regular intervals.

At one such meeting in 1946 - attended by Ministers of Justice from Denmark, Norway and Sweden - the 1946 legislation programme was put forth. Furthermore, a committee consisting of two delegates per country was set up. Finland and Iceland joined in at a later date. The task of the Committee was to continuously monitor the legislation and make sure that opportunities for co-operation were used and that the unity of Law that had been achieved was also maintained so far as possible.<sup>7</sup> This task of co-ordination was passed on to each Ministry of Justice in 1959.<sup>8</sup>

In 1962, *the Helsinki Agreement* came into being. This is an international Agreement between the Nordic countries and it deals with the full scope of Nordic co-operation. The co-operation on legal matters is treated in Articles 2 – 7. One purpose of the Agreement is to achieve the maximum extent of legal equality between, on the one hand, citizens of one Nordic country visiting another Nordic country and on the other hand the citizens of that country being visited (Article 2). One must facilitate the procedure for a citizen of one Nordic country of becoming a citizen of another Nordic country (Article 3). The parties to the Agreement will continue their co-operation in legal matters for the purpose of achieving the best possible harmonisation in the field of Private Law (Article 4). The States should strive for uniform regulation of criminal acts and of punishment. Investigation and litigation should be possible even in another Nordic country than the one where the crime took place (Article 5). The parties to the Agreement should strive for a mutual co-ordination of other legislation in areas where this appears suitable (Article 6). Finally, the countries should facilitate the enforcement in their own country of court decisions or decisions made by other competent authorities in any of the other countries (Article 7).

The co-operation in accordance to the Helsinki Agreement takes place, among other things, under the auspices of the Nordic council and the Nordic council of Ministers (Articles 35 and 36). The Nordic Council is an assembly of

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<sup>6</sup> See Committee Report NU 1984:5, *Nordiska köplagen* (Nordic Sales of Goods Acts).

<sup>7</sup> See Svensk Juristtidning 1947, p. 561.

<sup>8</sup> See Svensk Juristtidning 1959, p. 708.

members of the Parliaments of the Nordic countries. The Nordic Council of Ministers consists of the Nordic Ministers in a given area of government. The Ministers of Justice regularly meet in the form of the Nordic Council of Ministers.

In 1974, the Council of Ministers set up *the Nordic Committee of Senior Officials for Legislative Issues* (NÄL). NÄL's duties are to prepare the work of the Council of Ministers in their area of government, to propose the agenda for the meetings of the Council of Ministers, to be the body responsible for implementation of decisions made by the Council of Ministers and to perform other duties put to the committee by the Council of Ministers (Section 3 of the working regulation of the committee). The committee consists of one member from each country. Normally this has been senior civil servants from the Ministries of Justice. One of the main tasks of NÄL has been to ensure that all countries are kept informed about the programmes for legislation in the other countries.

Programmes for legislation also exist on a Nordic level. Thus, the Nordic Council adopted in 1988 a *Nordic Programme for Legislation*, which had been prepared by its Law Committee and intended to cover a ten-year period. In this programme, some general remarks and points of view are given on matters of procedure. The body of the programme is made up from a list of a large number of areas of Law - even such areas for which Ministers of Justice are not responsible - where the Law Committee proposes a Nordic co-operation. In a final section, some aspects of relations with the EC are discussed, on the one hand the opportunities for the Nordic countries to have an influence on the legislation in the EC, and on the other hand the influence of EC legislation on Nordic legislation.

In 1993, the Council of Ministers adopted a working programme for Nordic co-operation on legislation, consisting of a five-year Action Plan which was to be an addendum to the legislation programme of 1988. At this point, the relations to the EU had moved into the foreground. The EEA Treaty had been negotiated but had not yet entered into force. Furthermore, Finland and Sweden had applied for membership in the EU. The working programme firstly deals with 'the European dimension'. Under this heading, an overview of current tasks in areas covered by the EEA Treaty is given, stating time lines for the Nordic co-operation. A corresponding overview is then given for areas not covered by the EEA Treaty.

## 5 The new Programme of Co-operation

### 5.1 A Background

As early as in 1995, the question was raised - among other places in the Nordic Committee of Senior Officials for Legislative Issues - if the time had not arrived when the Action Plan should be reviewed. It was noted that several items in the Action Plan were already implemented or that they were to be implemented in the near future. Furthermore, it was stressed that several years' practical experience was already gathered from the organisation of Nordic co-operation in the scope of European integration. The considerations of the Action Plan concerning Nordic co-operation in Europe was furthermore based only upon the EEA Treaty. The considerations did consequently not cover the Third Pillar of the European Union and, as a consequence, it did not cover the European Union work in Family Law and Criminal Law.

A further circumstance which made a review of the Action Plan necessary was the fact that the Nordic Council had adopted a set of new governing principles in March 1995. These principles were to give a framework for the future Nordic co-operation, in the field of legislation as well. According to these governing principles, Nordic co-operation is to concentrate on three main areas (three 'pillars'), namely co-operation throughout the Nordic countries, co-operation between Nordic countries and Europe/EU/EEA and co-operation between the Nordic countries and its neighbouring areas. As neighbouring areas in this context are regarded the Baltic Region, the Barents Region and the Arctic Region. The principle of Nordic benefit should decide what activities should be conducted in a Pan-Nordic regime. For financial reasons, among other things, the work must be concentrated on issues that truly give a 'Nordic added value'. The starting point for all Nordic co-operation should be that it must concern an issue that would otherwise be dealt with on a National level, but where tangible positive effects are achieved through joint Nordic solutions.<sup>9</sup>

In its meeting on August 10, 1995 in Kolding, Denmark, the Nordic Council of Ministers called for the Nordic Committee of Senior Officials for Legislative Issues (NÄL), to submit, as soon as possible, a draft proposal for a new programme for co-operation on legislation. Before that date, the Ministers of Justice had consulted on the matter with the Law Committee of the Nordic Council at a meeting in Mariefred, Sweden on June 27, 1995. NÄL consequently prepared a two-part document: A co-operation programme dealing with procedures for the co-operation, and - as an appendix - an Action Plan prioritising various subject-matters. The Council of Ministers approved the co-operation programme and the Action Plan at its meeting in Nådendal, Finland on August 19, 1996.<sup>10</sup>

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<sup>9</sup> See also the report of the Nordic Council, *Nordiskt samarbete i en ny tid* ('Nordic Co-operation in a new era').

<sup>10</sup> The Co-operation Programme and the Action Plan have been published in 1997 by the Nordic Council of Ministers, TemaNord 1997:538.

## 5.2 *General contents of the Programme*

The idea of drawing up a separate Action Plan beside the co-operation programme is to allow the planning of actual areas of co-operation to stay up-to-date without having to reconsider the co-operation programme as a whole. It is intended for the Council of Ministers to review the Action Plan on an annual basis.

The co-operation programme consequently contains guidelines for the operation of Nordic co-operation. A goal for the co-operation is to let all Nordic countries be aware as early as possible of the plans of the European Union. Another goal is to secure a co-ordination of the actions taken at a National level in order to implement the EU *acquis*. Furthermore, the co-operation programme aims, naturally, to maintain and keep intact the procedures and co-operational routines adopted for the purely Nordic co-operation on legislation.

The key responsibilities of the Nordic Committee of Senior Officials for Legislative Issues (NÄL) are laid down by the co-operation programme. The Committee is responsible for the conduct of co-operation in accordance with decisions taken by the Council of Ministers and for a satisfactory overall operation. The Committee must consult among its members on a regular basis in order to decide which subject matters that could usefully be introduced into the framework of Nordic co-operation on legislation. The programme confers two distinct tasks to NÄL. One is to review on an annual basis the legislation programmes of the National Ministries of Justice with a view of minimising the risk of one country going so far ahead on a legislation project as to complicate the co-operation, without giving sufficient information to the other countries. The other practical duty is to draw up, and keep up to date, lists of liaison officers for various subject matters.

In the co-operation programme, the basic principles for the co-operation are laid down. The first principle is the one of 'Nordic benefit' mentioned above. According to the programme, the demand for Nordic benefit does not necessarily mean that a co-operation must lead to uniform National legislation in the Nordic countries as a result. Extended and clearly defined procedures of co-operation may in themselves be of Nordic benefit, among other things by making committee work conducted in one country useful for another Nordic country.

The second basic principle is denominated 'convergence of Law' and is used to express the ambition of the Nordic countries to mutually co-operate for a uniform legislation. This does not necessarily mean that regulations must be equally worded in all their details. 'Convergence of Law' also involves unity around the main principles in a legal area. It must also be noted that there are areas where a detailed unity can not be achieved. One must accept that the various Nordic countries have different views on some issues that are connected with their moral values. An exchange of information and experience may be useful in such areas as well, though.

The third principle is of a practical nature: In all Nordic co-operation on legislation, one must clearly state what the purpose of the co-operation is. Is it a matter of solving a common problem, is it to maintain and develop the Nordic

rule of Law or is it simply an exchange of information? The answer given to that question is of importance, among other things, for how the co-operation is to be organised in each individual case.

The programme is divided into several sections as concerns the procedures of co-operation. These sections adhere to the three pillars described in the report of the Nordic Council, *Nordiskt samarbete i en ny tid* ('Nordic co-operation in a new era'): co-operation throughout the Nordic countries, co-operation between Nordic countries and Europe/EU/EEA and co-operation between the Nordic countries and its neighbouring areas. A fourth section is added to these three: co-operation in other International Bodies.

### **5.3 *The Nordic Countries***

Concerning the co-operation in the Nordic countries, the co-operation programme recalls the role of the Nordic Committee of Senior Officials for Legislative Issues (NÄL). Apart from this, regular meetings should be held for the various subject matters in which the countries mutually inform each other about current co-operation and consult with each other about continued co-operation. It is further stated that a country which contemplates legislation in an area covered by the Nordic co-operation on legislation, should provide information to the other countries about its plans and take the initiative to nearer consultations and a possible co-ordination. Mainly, NÄL should be the vehicle for this purpose, but a more informal approach may also be suitable. Again, it is stressed that the goals for co-operation should be defined and clearly indicated.

In this context, it is also pointed out that co-operation between administrative authorities in the Nordic countries is an important element in the co-operation on legislation and that such co-operation also benefits the legislation of the individual countries.

### **5.4 *The European Union and the European Economic Area***

According to the programme, the Nordic co-operation in relation to Europe will, to a large degree, be a matter of co-ordinating the efforts of the individual countries in the EU and the EEA. The co-operation will have a less strict and more informal character than the purely Nordic co-operation, since the need may arise ad hoc and frequently on short notice.

The co-operation in matters concerning the EU and the EEA should be taken up as soon as possible, at best as early as it becomes known that the EC Commission has taken an initiative or intends to do so. In this early phase it is a matter of clarifying the intentions of the Commission in order to phrase and put forward the Nordic viewpoints at the earliest possible stage. Fixed patterns and routines for co-operation should be created in order to ensure that civil servants in the individual EU and EEA Member States inform each other about EU and EEA initiatives at the earliest possible stage. The Nordic Committee of Senior Officials for Legislative Issues is responsible for this information duty. Such fixed contacts could later on be a basis for continued co-ordination of the work involved by the EU or EEA initiative at hand. This might be a matter of



exchanging information or putting forth joint Nordic viewpoints. During negotiations concerning proposals for Directives and other legal Acts in working parties of the Council, the Nordic countries should consider whether to convene Nordic co-ordination meetings before the meetings held under the aegis of the European Council.

Those Nordic countries which are Member States in the European Union should provide information to Norway and Iceland about actions taken by the European Union and about the results achieved. One should also clarify how Norway and Iceland may play an active role in connection with the EU work.

The co-operation between the Nordic countries should continue as an EU legal Act is to be implemented in National Law, e.g. in a Nordic working party. Such work may be prepared already in the stage before the final adoption of the legal Act.

### **5.5 Neighbouring Countries**

As far as the co-operation with neighbouring areas is concerned, (i.e. primarily the Baltic States and North-western Russia), the co-operation programme refers to the Nordic report Norden och dess närområden ('The Nordic countries and its neighbouring areas'). Two items in this report are highlighted. Firstly, a Nordic strategy for neighbouring areas should be balanced against bilateral as well as multilateral work in order to achieve the best results possible. Secondly, co-operation between Nordic countries and Estonia, Latvia and Lithuania should be given a high priority with the aim of promoting democratic development in the Baltic States. Co-operation with the Baltic Assembly and the Baltic Council of Ministers should be intensified.

It is remarked that the co-operation with the Baltic states and North-western Russia must be of a different character than the traditional Nordic co-operation. The efforts in relation to the neighbouring areas have a more pronounced character of aid and development of competence as concerns legal development and legislation, i.a. in order to secure the development of societies governed by the rule of law and a continued move towards the European legal system. The character and intensity of these efforts will therefore in the beginning be guided by the wishes of the recipient countries. In a longer perspective, though, one should consider in what manner the neighbouring areas might be included in the Nordic co-operation on legislation.

### **5.6 International Bodies**

Finally, the co-operation programme notes that the Nordic countries take part in the work under international conventions in international bodies, like the UN and the UN special bodies (UNCITRAL, WIPO, IMO and others), in the Council of Europe, the Hague conference on Private International Law and in Unidroit. In connection with meetings in such bodies, the representatives from the Nordic countries should co-operate closely. This might take the form of contacts during preparation work before the meetings, by consultations during meetings and by exchange of information from meetings. In order to use

resources sparingly, the Nordic co-operation might involve distribution of the responsibility for attending meetings. This may secure a Nordic presence in as many international fora as possible.

### **5.7 Character of the Programme**

What has now been said describes the contents of the co-operation programme. One easily finds that the programme does not have any contents that are revolutionary news. The thought of a need for co-operation and the purpose of the co-operation are well-known from before. The procedures described for the co-operation have already been tried. What is new - in relation to previous programmes - is the way the co-operation programme stresses procedural matters. The various forms of co-operation used in earlier days have been set in a larger perspective and are to be used in all areas of the work in the future. What is also new is the front place that the programme affords European co-operation. In previous programmes, of 1988 and 1993, the European perspective is mentioned, but no further analysis is made. What is said in this new programme may be seen as the summing up of a number of years' worth of experience of Nordic countries part-taking more extensively in the European co-operation. The co-operation with the Baltic States and Russia is also discussed in a completely new way. This can easily be understood with regard to the development in those countries over the last few years.

One difference compared to previous programmes is the fact that the new programme does not deal with topic matters. Since the co-operation programme is directed towards procedural matters, it can be expected to stay up to date even as topic matters may come and go. This does obviously not mean that the programme will remain unchanged for all times. A revised text might follow, e.g. from continued experience drawn from European co-operation. The further development of the European Union or the Baltic States and Russia might also have this effect.

## **6 The Action Plan**

### **6.1 General Contents of the Action Plan**

Instead of raising subject matters in the co-operation programme itself, the Ministers of Justice have adopted an Action Plan connected to the co-operation programme, which describes current areas of co-operation. The Action Plan is to be revised on an annual basis, as on-going co-operation projects are completed and new projects start up. The first Action Plan was adopted together with the co-operation programme at the meeting of the Council of Ministers in August 1996. A revised Action Plan has been adopted at the meeting of the Council of Ministers in Bodö, Norway on August 25, 1997.<sup>11</sup>

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<sup>11</sup> The revised Action Plan for 1997/1998 was published with the co-operation programme in TemaNord 1997:538.

The co-operation programme was discussed in the Nordic Council at its session in November 1996. The co-operation programme as well as the Action Plan were approved. The Nordic Sub-committee, which prepared the issue in the Nordic Council gave some opinions concerning procedural issues as well as of the contents itself. Among other things, the Sub-committee was of the opinion that the annual Action Plan should be submitted to the Nordic Council for approval.

The Action Plan taken in Bodö in June 1997 contains ten areas of co-operation under the following headings:

- 1 Preventing and combating crime
- 2 EU co-operation concerning legal issues in the area of Administration of Justice
- 3 Legislation on Litigation
- 4 Public Access to Information. Legislation on Public Administration and Constitutional Law
- 5 Information Technology and Legislation
- 6 Protection of Personal Data
- 7 Family Law
- 8 Law of Property
- 9 Company Law
- 10 Maritime Law

The open wording of the heading of Item 2 chiefly refers to matters connected with the Schengen co-operation. The co-operation on legislation in Private Law is mainly dealt with in items 7 – 10, but to some degree, this is also covered by Item 5. Taking a starting point in the Action Plan, I will now say a few words about issues of co-operation in Private Law.

It is noticeable that the list of the Action Plan is neither consequent - in as much as Property Law would cover at least Items 9 and 10 - or exhaustive - there is no mention of Intellectual Property Law. These particular features may be attributed to purely practical considerations. In the real world, the areas of co-operation are divided in this manner. As for Intellectual Property Law, this field of Law is simply not the responsibility of Ministers of Justice. Sweden is the single country in which the Minister of Justice is responsible for Intellectual Property Law as a whole. In Norway, only the Industrial property protection falls under the Ministry of Justice. In the other countries, Intellectual Property Law falls under the responsibilities of other Ministries.

## **6.2 Family Law**

The Action Plan mentions two Family Law projects, one Nordic working group which considers the need for new provisions on choice of Law and jurisdiction and on recognition and enforcement of decisions in Family Law cases, and a planned seminar on the need for a wider co-operation on Family Law.

In Family Law, Nordic co-operation has existed since the first years of this century. The success has varied over the years. In *Tidsskrift for Rettsvitenskap* 1988, p. 565 f., Svend Danielsen and Peter Lødrup have given a statement of the history until the end of the 1980's. This statement closes on a rather pessimistic

note. The writers find the changes in legislation in the years after the second World War to have led to a rather lessening degree of Nordic harmony of Law. And they can not give us any hope for the future co-operation to be anything more than a rewarding exchange of thought.

Nor has the period after 1988 been very intense in the field of Family Law. Swedish Law Commissions during the 1990's (e.g. the Commission on Maintenance and Maintenance Advance in 1993, the Commission on Conflict of Custody and the Commission on the Inheritance Code) have duly regarded the situations in other Nordic countries. In general, visits have been paid to at least one other Nordic country. The purpose has been to find inspiration to useful solutions for Swedish legislation rather than to try to achieve a Nordic harmonisation. Commissions in other countries have operated in similar fashions. It has also occurred that the Ministry in one country, during the preparation of some legislation, has invited representatives for Ministries in other countries to a meeting where the plans for the legislation have been discussed. But this has simply been a matter of information and a non-binding exchange of opinions. Not even when new provisions on legal guardianship were prepared at about the same time in Denmark, Finland and Sweden were any serious attempts made to mitigate the material provisions. Probably, Nordic discussions do not take place at all in some legislation cases.

Is this a satisfactory situation? In January 1998, with support from the Nordic Council of Ministers, the Swedish Ministry of Justice will arrange a seminar with participants from all the Nordic countries in order to try to find an answer to this question.

Toward the end of the 1980's, legislators focused on international Family Law, particularly in Sweden where in 1987, a new self-contained and up to date Code of Marriage has been adopted in the form of the new Marriage Code. In 1990, the Nordic Committee of Senior Officials for Legislative Issues decided to appoint a working group consisting of representatives for the responsible Ministries in the various Nordic countries, having the task of reviewing the Nordic Family Law conventions dating from the 1930's, i.e. the convention of February 6, 1931 between Denmark, Finland, Iceland, Norway and Sweden with Private International Law provisions on marriage, adoption and legal guardianship (SÖ 1931:19) and the convention of November 19, 1934 between Denmark, Finland, Iceland, Norway and Sweden on Inheritance, Wills and Estate management (SÖ 1935:17).

This is the working group mentioned in the 1997 Nordic Action Plan. So the working group has been in existence for eight years without completing its task. Actually, it is probably only during the last few years that we have seen any significant amount of work. The first years coincided in an unhappy manner with the preparations for the EEA and later - as concerns Finland and Sweden - the accession to the EU, which called for vast legislation resources. New topics of common interest have also arrived, mainly EU negotiations for a convention in the area of Marriage Law on the Competence of Courts and Recognition and Enforcement of Court Decisions, and, in parallel to this, negotiations for a Hague Convention on the Protection of Children. These topics are of importance when reviewing the Nordic conventions from the 1930's. The working group has

been acting as a forum for deliberations on Nordic positions in the negotiations in Brussels and the Hague.

The mere number of years that these conventions have been in force is a sufficient reason to review them. In addition to this, the prerequisites have changed, among other things because Finland and Sweden, which in the 1930's based their legislation on Private International Law on the principle of Nationality, at this point are on their way to adopt the principle of Domicile, which has been applicable in Denmark and Norway for a long time. The Conventions are also incomplete, e.g. in the provisions on custody. A major question is to what degree separate Nordic provisions are required at all at this point of time. A parallel adoption of legislations with similar contents might be sufficient, in combination with the conventions that are to come from the negotiations in other international contexts, like the Hague conference on Private International Law.

### **6.3 Central Areas of Law of Property**

Under the heading 'Law of Property', the Action Plan deals with co-operation concerning two EU projects. Firstly, the Commission proposal for a Directive on the Sale of Consumer Goods and Associated Guaranties is mentioned. This will lead to co-operation on a ministerial level in order to co-ordinate Nordic positions to the proposal and to prepare an harmonisation of the provisions of the Directive to Nordic legislation on sales to consumers. Further, there is a mention of implementing in National Law of the directive adopted on 'The Protection of Consumers in respect of Distance Contracts'. This will also take place in Nordic co-operation.

Since a few years, we now have a positive experience from Nordic co-operation in EC Consumer Law. The Nordic countries may benefit from each other during Brussels negotiations concerning new legal Acts as well as in the implementation of such Acts in National Law. In this, the Danish experience after several years as a Member State of the EU has been of great value to the other countries, in negotiations as well as in the implementation phase.

Before the coming into force of the EEA Treaty, Nordic deliberations on ministerial levels took place concerning the implementation of the directives on Product Liability, Consumer Credits and Package Tours. In these deliberations, all details were not explored and the co-ordination was not complete. Especially concerning the directive on Package Tours, the results from these deliberations were less than satisfactory. At one moment, it seemed as though different provisions would apply in Sweden and Finland concerning the passenger ferry traffic between those countries. This problem was resolved during the Parliamentary procedure in Sweden,<sup>12</sup> but this event remains a memento for the future.

The directive on Unfair Terms in Consumer Contracts should have been implemented in National Law before the end of 1994. Against the background of

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<sup>12</sup> Cf. Opinion of the Parliamentary Standing Committee on Civil Law Legislation 1992/93:LU21.

previous experience, the Nordic co-operation for this directive was planned in a more ambitious manner. A special working group was set up, consisting of representatives for the concerned ministries in the various countries. The working group held five meetings, of which one was a two-day meeting. After extensive talks, the members of the working group agreed on how to construe the provisions of the Directive and which legislation was required. During these talks, the fact that Denmark had been a participant to the Brussels negotiations concerning this Directive proved to be of great value. The work resulted in a near identical legislation in all countries.

At a later date, a similar co-operation has taken place for the Directive on Time-sharing.

This is a continuation of the kind of co-operation foreseen by the Action Plan. Next in turn for implementation under National Law is the directive on Distance Contracts. A difference from before is the fact that not only Denmark, but also Finland and Sweden have taken part in the negotiations concerning that Directive and they can therefore contribute to the co-operation in a different way than before. Furthermore, at this point it is not just a matter of making new legislation on a national level, but also to co-ordinate the endeavours in Brussels. An interesting point in this context is how Iceland and Norway can take part in the negotiations.

The Action Plan is silent about legislation on General Property Law. This does not infer that Nordic co-operation is limited to EC Consumer Law. But since the work on Acts on sales of Goods was completed early on in the 1990's, no major legislation project in this field has been conducted. In General Property Law, Nordic co-operation on legislation has mainly been conducted in the same manner as in Family Law, i.e. by exchange of information within the framework of National projects. Thus, Nordic Ministerial talks were held in Stockholm in June, 1997, concerning sales Commission, as a step in the preparation of a Swedish proposal in this area.

Neither is there any mention of Law of Torts in the Action Plan. In this field, during the decades after the Second World War, great joint endeavours were made in order to reform legislation.<sup>13</sup> During the last few years, nothing far-reaching has occurred in the Nordic co-operation on legislation on Law of Torts. All that has passed is regular exchange of information.

There is reason, however, to mention an initiative of the Nordic Committee of Senior Officials for Legislative Issues (NÄL) from the end of the 1980's. A working group consisting of one scientist from Denmark, Finland, Norway and Sweden, respectively, were assigned to carry out an assessment and a listing of problems in the regulatory frameworks of the Nordic countries as concerns the right to compensation for Bodily Injury. The working group presented the results from its work in a report in April 1989. NÄL consequently initiated a discussion of these matters in a wider audience. This discussion, based on the report, took place at a symposium in Stockholm in April 1990. There have been no results from these discussions in the form of intensifying the work on Nordic legislation, though.

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<sup>13</sup> Bertil Bengtsson deals with this topic in *Tidsskrift for Rettsvitenskap*, 1988, p. 541 f.

#### 6.4 *Company Law*

Under the heading Company Law, the Action Plan simply states that a Nordic seminar is to be held concerning the development in later years in the field of legislation regulating shares/equity etc.

In the field of Company Law, a co-operation was opened up in the 1930's. It was re-opened after the War. In Sweden, the Companies Act of 1975 is a result from this co-operation.<sup>14</sup>

In 1990, a new Law Committee for Company Law was set up in Sweden and its work is still under way. The first task of the committee was to give a proposal to such changes in the Companies Act as were a consequence of European integration. After that, the Committee was to consider other matters, among other things the organisation of companies and the arrangement of protection for minority share holders. The first task was applicable also in Finland, Iceland and Norway, which, like Sweden, had acceded to the EEA Treaty. In the field of Company Law, the EEA Treaty involves an undertaking to harmonise National legislation to that of the EC. It was a natural step, consequently, to pursue the work of the committee in a Nordic co-operation. Regular talks were held with the Committees and Ministry officials taking part in the work in Finland, Iceland, Norway and Sweden. Also representatives from Denmark took part of the talks, even though Denmark, as a previous EC Member State had already implemented its legislation in accordance to EC Law.

The Swedish Company Law Committee is now at work on its second task, which has no direct international angles to it, and which is expected to lead to a proposal for a completely new Companies Act. From this part of the mission, two sub-reports have been presented, Organisation of Companies (SOU 1995:44) and Company Equity Capital (SOU 1997:22) In these reports, the Committee does not give account for any Nordic contacts. On the other hand, there are accounts for current Law in the Nordic countries and certain proposals for legislation are mentioned. Even if it is not clear from the statements of the Committee, one might assume that the situation in other Nordic countries has influenced the Committee's proposals at least to some degree.

In parallel to the work of the Swedish Committee on Company Law, a special committee, The Accounting Committee, has prepared legislation on accounting, among other things the harmonisation of Swedish Law to EC Law in this field. According to its directives, the Committee is expected to study the corresponding legislation efforts in Finland and Norway. As far as can be seen in the deliberations of the committee, contacts of this kind have not turned into any tangible results that may be found in the proposals laid forward.

It would therefore appear that no proper Nordic co-operation in the field of Company Law exists besides the EC Law. It might be so that this is the way things should be, but that is a matter worthy of discussion. It is against this

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<sup>14</sup> Accounts of this co-operation until the end of the 1980's have been made by Jan Kåre in *Tidsskrift for Rettsvitenskap*, 1988, p. 606 f., and - for subsequent periods - by Rolf Skog in Ulf Bernitz/Ola Wiklund, *Nordiskt lagstiftningssamarbete i det nya Europa*, Stockholm 1996, p. 121 f. Rolf Skog has also given an overview of ongoing legislation projects in the Nordic countries in *Svensk Juristtidning* 1996, p. 42 f.

background that the plans for a Nordic seminar on Company Law should be seen. The seminar is planned to take place in Stockholm in December 1997.

### **6.5 Maritime Law**

According to the Action Plan, the co-operation on Maritime Law is to be continued and for the future focus on possible ratification and ensuing National implementation of the HNS Convention on Liability for Transport of Harmful and Noxious Substances and of the 1996 protocol to the Convention on Global Limitations.

In the area of Maritime Law, the Nordic co-operation has a different character than in most other areas of Private Law. A new Maritime Code entered into force in Sweden on October 1, 1994. Nearly equally worded maritime codes were created at about the same time in Denmark, Finland and Norway. The Codes were based on Committee proposals which had been drawn up in Nordic co-operation. Also during Ministerial preparation, repeated talks were held between representatives for responsible Ministries in Denmark, Finland, Norway and Sweden.

These new Maritime Codes constitute a phase in a long term successive reform work in the field of Maritime Law. All the while, this co-operation has been conducted in close Nordic co-operation, partly in the framework of international negotiations on new conventions. The reform work has continued even after the entering into force of the new Maritime Codes, and has led to amendments thereof. In 1996, new provisions on salvage were created in the context of the 1989 convention in this area. In the same year, new provisions were entered into force on liability for Oil Damages, also as an effect of new provisions in international Conventions. These amendments took place in a close Nordic co-operation at the Ministerial level.

As may be concluded from the Action Plan, it is soon time to make further amendments in the Maritime code systems. At this point the topic is, on the one hand a Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (the so-called HNS convention), on the other hand amended provisions in the Convention on Limitation of Maritime Claims. These conventions were adopted at a diplomatic conference under the aegis of the IMO in London during spring 1996. During the conference, the representatives of the Nordic countries co-operated closely. Among other things, talks were held in daily meetings. It is natural that the co-operation will continue as these countries are preparing to find their positions as to whether or not to accede to these conventions.

It can easily be seen that the Nordic co-operation on legislation is wider in the area of Maritime Law than in most other areas of Private Law. The co-operation is obviously not hampered by the fact that the Ministries of Justice are responsible only in two of these countries (Norway and Sweden). In order to find an explanation of why Maritime Law takes this special position in Nordic co-operation on legislation, one might look at the international character of



Maritime Law. It should also be noted that the EC has not been very active in this area, at least not in the Private Law field.

## **6.6 *IT Law***

Under the heading 'Information Technology and Legislation' in the Action Plan, commercial aspects of digital signatures are mentioned, besides topics of litigation and of Criminal Law. It is stated that the Nordic countries should co-operate in finding common solutions in these areas, in the form of an exchange of experience. The only co-operation on Private Law that has occurred so far between Nordic countries in this area has been in connection with the work in a working group in the UN Commission on International Trade Law (UNCITRAL) on Electronic Commerce. That working group has prepared a model law on Electronic Data Interchange and it now deals with matters concerning digital signatures. The representatives from Denmark, Finland and Sweden (Norway has not taken part) in the working group have co-operated before and during working group meetings.

## **6.7 *Intellectual Property Law***

The Action Plan does not cover Intellectual Property Law; that part of Private Law does not fall under the co-operation of the Ministries of Justice. None the less, one sees that Nordic co-operation is well-developed in large areas of Intellectual Property Law. As early as in the 19<sup>th</sup> century, Trade Mark Laws were passed in close co-operation between Denmark, Norway and Sweden. The current Nordic Laws on Trade Marks and Copyright, as concerns Sweden dating from 1960, were closely adherent when they entered into force. Numerous amendments have been made since, mostly as an effect of international conventions or new EC provisions. All the same, the Acts on Copyright have retained their congruence throughout the Nordic countries. The Nordic Trademark Acts present a somewhat more differentiated situation, though. Also the Nordic Laws on Patent from 1967 came into being after a Nordic co-operation. National committees put forth a common report (NU 1963:6).

The fact that the Nordic congruence in legislation has been maintained in the area for Copyright Law is at least to some part to be attributed to the properly developed routines for co-operation. Representatives for the responsible ministries meet regularly in order to discuss common solutions - even at a detailed level - to the matters of legislation that present themselves. It also occurs that work is distributed among the countries so that each country assumes main responsibility for certain sections. This has been the fact on several occasions in the implementation of EC directives. This is because the problems are common to all Nordic countries, since they are all party to the same international conventions and they are also under an obligation to comply with the EC legislation, either as Member States in the EU or as an effect of the EEA Treaty. In this area, it would seem as though the Nordic co-operation on legislation operates as well as in Maritime Law. It is therefore worth noting that Intellectual Property Law has an international character, just as Maritime Law.

A difference from Maritime Law, however, is the fact that the EU has paid a good deal of attention to Intellectual Property Law.

In Trade Mark Law, Nordic conformity of Law has not been able to be upheld to the same degree as in Copyright Law. What might cause this difference is hard to tell. The prerequisites for co-operation have been largely the same. There have been common Laws from 1960 and a well developed Nordic co-operation on the Ministerial level. Just now, a new review has been set up, though, in order to attempt to restore the Nordic conformity of Law. National committees in the various countries - of a varying character - have been given the tasks to conduct their surveys in consultation with one another.<sup>15</sup>

To a large degree, the Nordic conformity of Law has been retained in Patent Law, even though considerable changes have taken place already in the 1970's as an effect of new international patent systems. Also, the EEA Treaty and the accession of Finland and Sweden to the European Union led to amendments which did not shake the Nordic co-operation. It has been conducted largely in the same manner as in the rest of the field of Intellectual Property Law.

## 7 Closing Remarks

As has been stated in several of the papers in *Tidsskrift for Rettsvitenskap* in 1988, to which I have made reference in the above, Nordic co-operation was in the 1980's in most areas of Private Law not very intense. The pessimistic views of the future that were expressed in the papers on Law of Torts and Family Law have also become true in the 1990's. The developments in Property Law have been largely congruent. The exceptions to the rule are Maritime Law and Intellectual Property Law.

The impact that EC Law was to have on Nordic co-operation on legislation was noted at an early date. This topic was discussed already in the 26<sup>th</sup> Nordic *rendez-vous* of lawyers in 1972 and it has been a current topic on several later meetings.<sup>16</sup> One thought that has been launched<sup>17</sup> is that the very fact that some countries are in the EU while others remain outside may lead to a vitalisation of Nordic co-operation on legislation. The development would consequently differ from the development of the Benelux co-operation, which came to a halt when all three Benelux States became Member States of the European Union. Since some Nordic countries remain outside the European Union, the Nordic co-operation can not be replaced in the same way by co-operation inside the EU.

The new programme for legislation makes the EU role its own starting point. One may further observe that Nordic co-operation actually has had a new spark. Through the influence of EC Law - also in Iceland and Norway - a new tangible

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<sup>15</sup> As for Sweden, see Committee Directives *Översyn av den varumärkesrättsliga lagstiftningen*, dir. 1997:118.

<sup>16</sup> The topic has been discussed in several other contexts, see Asbjørn Jensen in *Tidsskrift for Rettsvitenskap*, 1988, p. 524, and Ulf Bernitz/Ola Wiklund, *Nordiskt lagstiftningsamarbete i det nya Europa*, Stockholm, 1996.

<sup>17</sup> Göran Schäder in Ulf Bernitz/Ola Wiklund, *Nordiskt lagstiftningsamarbete i det nya Europa*, Stockholm, 1996, p 232 f.

role has been given to all Nordic countries, namely to implement EC legislation in National Law. This is a task which in several cases has been well suited for Nordic co-operation. The co-operation has proven to take some burden out of the individual countries' work. In that it offers a tangible example of the principle of Nordic benefit which is to be the new guideline in Nordic co-operation.

Also in the negotiation phase, the countries obviously may benefit from one another. As yet, this has not been demonstrated to any considerable degree. But we are at the beginning of something which can develop further. We can see, e.g. that the Nordic co-operation in negotiations on a draft proposal for a directive on the Sale of Consumer Goods and Associated Guarantees has been beneficial to all the Nordic countries. Also, all the Nordic countries have given their best to the co-operation in this case.

In the fields here mentioned, one might consequently foresee a continued, possibly extended Nordic co-operation on legislation. This might also rub off on some more national issues. In pompous political contexts, Nordic Parliamentarians are happy to speak of Nordic co-operation. In principle, there is a strong political wish for this. But in day-to-day work, one finds Nordic conformity of Law to be fading rather than to get stronger during the preparation of a legislation in all the national parliaments. The interest in principle for Nordic co-operation makes it a clear duty, however, for civil servants to explore the practical opportunity for such co-operation and to work for this whenever it seems appropriate. In the light of this development, the planned seminars on Family Law and Company Law will be of particular interest.