

The Scandinavian Reservation under Art. 92 CISG

Ulrich Magnus

1	Introduction	196
2	Reasons for the Reservation	197
3	Consequences and Problems of the Scandinavian Reservation under Art. 92 CISG	199
3.1	Consequences and Problems with Respect to Private International Law	199
3.2	Consequences and Problems of the Substantive Law on Contract Formation	204
4	Shortcomings of the CISG's Formation Part Justifying the Reservation?	209
4.1	Incorporation of Standard Terms	209
4.2	Battle of Forms	211
4.3	Letter of Confirmation	212
4.4	Other Specific Forms of Conclusion of Contract	214
5	Further Arguments for a Ratification of Part II of the CISG	214
5.1	Coherency Between Part II and III of the CISG	215
5.2	Uniformity within the CISG Family	215
6	Conclusion	216

1 Introduction*

When ratifying the CISG the Nordic countries Denmark, Finland, Iceland, Norway and Sweden declared some of the various reservations the CISG allows. The most important of these reservations is the one under Art. 92 CISG which allows a partial ratification of the CISG, namely either without its Part II (the formation part, Art. 14–24) or without its Part III (the material sales law or contract part, Art. 25–88).¹ Only the four Scandinavian countries Denmark, Finland, Norway and Sweden – but surprisingly not Iceland which is a Nordic but no Scandinavian country – made use of this possibility and ratified the Sales Convention without its formation part. No other of the now 72 CISG Member States declared the reservation under Art. 92 CISG. I will deal with this peculiar Scandinavian reservation, its consequences and problems. The aim is to collect arguments for an answer to the question whether the Scandinavian CISG-States should maintain this reservation or should withdraw it.

* The following works are cited in an abbreviated form: Wilhelm Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, in: Ensthaler (ed.), *Gemeinschaftskommentar zum Handelsgesetzbuch mit UN-Kaufrecht* (7th ed. 2007); Bernard Audit, *La vente internationale de marchandises* (1990); Heinz Georg Bamberger/Herbert Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch vol. 1* (2nd ed. 2007) (– Ingo Saenger); Herbert Bernstein/Joseph Lookofsky, *Understanding the CISG in Europe* (2nd ed. 2003); Cesare Massimo Bianca/Michael Joachim Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (1987); Christoph Brunner, *UN-Kaufrecht – CISG* (2004); Franco Ferrari/Harry Flechtner/Ron Brand (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (2004), Rolf Herber/ Beate Czerwenka, *Internationales Kaufrecht* (1991); Vincent Heuze, *La vente internationale de marchandises – Droit uniforme* (2nd ed. 2000); John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd 1999); Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)* (1997); Joseph Lookofsky, *Understanding the CISG* (3rd ed. 2008); *id.*, *Understanding the CISG in Scandinavia* (2nd ed. 2002; cited Lookofsky, CISG in Scandinavia); *Münchener Kommentar zum Bürgerlichen Gesetzbuch vol. 3* (5th ed. 2008); *Münchener Kommentar zum Handelsgesetzbuch vol. 6* (2nd ed. 2007); Burghard Piltz, *Internationales Kaufrecht* (2nd ed. 2008); Gert Reinhard, *UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (1991); Peter Schlechtriem, *Internationales UN-Kaufrecht* (4th ed. 2007); Peter Schlechtriem/Ingeborg Schwenzer (eds.), *Kommentar zum Einheitlichen UNKaufrecht – CISG –* (5th ed. 2008); Hans-Theodor Soergel (ed.), *Bürgerliches Gesetzbuch, vol. 13: CISG* (13th ed. 2000); Julius von Staudinger (– Ulrich Magnus), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG)* (2005); Wolfgang Witz/Hanns-Christian Salger/Manuel Lorenz, *International Einheitliches Kaufrecht* (2000).

1 The other Nordic reservation on which the Nordic countries insisted and which all Nordic countries – including Iceland – declared is Art. 94 CISG. This provision allows states with the same or a closely related sales law to apply it instead of the CISG if the parties have their places of business in those states. Among the Nordic countries the CISG is therefore excluded and replaced by the Nordic Sales Act as implemented in the Nordic States (*see further infra under II.*)

2 Reasons for the Reservation

The Scandinavian opposition to the formation part of the CISG has several roots and reasons. The first is a historical one. It appears to have been due to the influence of the Scandinavian countries then represented by the Swedes Algot Bagge and Martin Fehr² that already Ernst Rabel's first Draft of a Uniform Sales Law in 1935 was split into two parts, one on formation and one on the contractual rights and obligations of the parties.³ This separation into two independent conventions was still maintained when the CISG's unlucky predecessor,⁴ the Hague Uniform Sales Law of 1964, was concluded and led to the so-called ULIS⁵ and ULF.⁶ When UNCITRAL⁷ took over the task to unify the substantive law for international sales contracts in 1968 it was one of its earlier decisions to merge the two Hague instruments into one.⁸ But again, the Scandinavian influence achieved that the reservation – now under Art. 92 CISG – was made possible to accept the Convention only in a reduced form.

One of the arguments advanced in favour of the Art. 92 reservation was that it would facilitate a broader ratification of the Uniform Sales Law because countries could then choose either to adopt the CISG as a whole or only its formation part or only its contract part.⁹ The inner reason was however that the Scandinavian countries were not content with some of the contents of the formation part because it differed from their – unified – domestic law. In particular, they were opposed to the general revocability of an offer as provided for by Art. 16 (1) CISG. The background for this opposition is the following: The Nordic countries (Iceland included) maintain since long its well known and very intense judicial and legislative cooperation within the Nordic

2 Besides them and Rabel the French scholars Capitant and Hamel, the English scholars Hurst and Gutteridge as well as the German Ficker as secretary belonged to the working group which prepared this draft for UNIDROIT.

3 The text of the Draft on the material sales law is published in RabelsZ 9 (1935) 1 et seq. with a commentary by Rabel. The Swedish government assessed the Draft. Despite some detailed points of critique it published a very positive overall assessment of the Draft: *see* RabelsZ 10 (1936) 651 (652 et seq.).

4 At the Hague Conference of 1964 it was again Algot Bagge who successfully insisted on the separation into two instruments, one on formation, one on the material sales law: *see* Actes et Documents de la Conférence vol. I (1964) p. 197. His argument was that that separation would facilitate for some states the ratification and thereby enlarge the number of contracting states. However, despite the separation into two instruments the Nordic countries did not ratify the Hague Sales Law.

5 Uniform Law on the International Sale of Goods (as annex to a respective Convention for the introduction of the Uniform Law).

6 Uniform Law on the Formation of Contracts for the International Sale of Goods (also as annex to a respective Convention).

7 United Nations Commission on International Trade Law, established in 1966.

8 The so-called New York Draft, published in UNCITRAL YB IX (1978) 14 et seq.

9 *See* already Bagge (*supra note*. 4).

Council producing many uniform Nordic acts¹⁰ which are then regularly implemented by essentially identical national acts of the Nordic countries. A fruit of this cooperation was not only the famous Nordic Sales Act of 1905¹¹ but also the Nordic Contracts Act of 1915. This Act provides that an offer is irrevocable as soon as it is communicated to the offeree (according to the so-called *lofteteorie*).¹² No consideration in the sense of the Common Law or any other cause for the binding character of an offer or one-sided promise is necessary. According to the law of the Nordic countries and in contrast to Art. 16 (1) CISG an offer is therefore generally firm.¹³

Further problems were feared which the requirement of a determinable price in Art. 14 (1) CISG could raise.¹⁴ It was feared that this requirement could cast doubts on whether a contract was concluded.

The Scandinavian countries criticised also that the CISG does not regulate the validity of the contract formation so that Part II of the CISG could create uncertainty as to the existence of a validly concluded contract.¹⁵

A further reason was the fear particularly of Norway which has enacted the (residual) CISG also as its internal law though in a very complex and confusing way¹⁶ that the discrepancy between the CISG formation law and the general contract formation law which applies to all kinds of contracts would lead to difficulties and distortions.¹⁷ The CISG's formation part could therefore impede results already achieved by the Nordic legal cooperation.

10 The Nordic Acts have the character of model acts. They do not apply by their mere existence but must be implemented by each Nordic country which is also free to modify the act.

11 This Act has been reformed and implemented in its amended form by Finland, Norway and Sweden but not by Denmark; see thereto *Lookofsky*, in: Ferrari (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. The Verona Conference 2003* (2003) 101.

12 See §§ 1–3, 7 Nordic Contracts Act.

13 See *Lookofsky* (note. 11) 104 et seq.

14 See the Norwegian Odelstingsproposjon Nr. 80, 1986/87 Ann. 5 n. III.1, IV (on Art. 14 CISG).

15 See Danish Justitsministeriet, Lovforslag (til International kobelov) Nr. 35, 6 October 1988, p. 76; also the Swedish Proposition 1986/87:128, p. 88 et seq.; further Johannsen, *Der Vorbehalt der skandinavischen Staaten gemäß Art. 92 CISG vor dem Hintergrund des Vertragsschlussrechts im deutschen, skandinavischen und UN-Kaufrecht* (2003) 43 et seq.; *Lookofsky*, *CISG in Scandinavia* 52.

16 See thereto Daniel Kotz, *Verkäuferpflichten und Rechtsbehelfe des Käufers im neuen norwegischen Kaufrecht vom 13. Mai 1988 Nr. 27 im Vergleich zum UN-Kaufrecht vom 11. April 1980 (CISG)* (1997) 29 et seq., 155 et seq.; *Lookofsky* (note. 11) 116 et seq.

17 See in this direction the Norwegian Odelstingsproposjon Nr. 80, 1986/87, p. 145.

3 Consequences and Problems of the Scandinavian Reservation under Art. 92 CISG

The reservation under Art. 92 CISG has consequences and poses problems both on the level of private international law and substantive law.

3.1 *Consequences and Problems with Respect to Private International Law*

According to Art. 92 (2) CISG a state which has ratified the Convention without the formation part is not to be considered a Contracting State with respect to matters of formation. Thus, while Denmark, Finland, Norway and Sweden are CISG States with respect to the rights and obligations of a validly concluded CISG sale they are no CISG States as regards the formation of a contract which otherwise would fall within the scope of the CISG. That does however not necessarily entail that the CISG provisions on contract formation are always inapplicable to sales of which one of the parties has its place of business in Denmark, Finland, Norway or Sweden. Namely, the mentioned States have yet ratified Art. 1 CISG so that they are bound by this provision. Art. 1 (1) (b) CISG provides that the CISG (including its Part II) is applicable “when the rules of private international law <sc. of the forum seized with the case> lead to the application of the law of a Contracting State.”. The law applicable to the conclusion of the contract must therefore be determined according to the relevant conflicts rules. They can lead to the law of a CISG state that has ratified the Convention without the reservation under Art. 92 (and also without the reservation under Art. 95 CISG which excludes the application of the CISG via private international law).¹⁸ In that case the CISG provisions on formation apply.¹⁹ The private international law path of application has the effect that different factual situations need to be distinguished because they lead to differing solutions. Only the most likely of these situations shall be sketched here:

- First situation: The offeree/buyer has its place of business in a Scandinavian country (Denmark, Finland, Norway, Sweden) and the offeror/seller in a non-

18 Art. 95 CISG allows to ratify the Convention without Art. 1 (1) (b).

19 See for instance Danish Østre Landsret UfR 23 April 1998, 1998, 1092 with note *Fogt*; Fovárosi Biróság (Hungary) 21 May 1996, CLOUT no. 143; OLG Rostock (Germany) 27 July 1995, CISG-online n. 228; *Achilles* Art. 92 n. 1; Bamberger/Roth/Saenger Art. 92 n. 2; Bianca/Bonell/Evans Art. 92 n. 2.3; *Brunner* Art. 92 n. 3; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/Mankowski Art. 92 n. 6; *Fogt* EuLF 2003, 61 (63); *id.*, Recueil Dalloz. somm. 1999, 360; *Herber/ Czerwenka* Art. 92 n. 3; *Hertz/Lookofsky* UfR 1999 B, 6 et seq.; *Honnold* n. 467; *Kruisinga* NIPR 2001, 40 et seq.; *Lookofsky*, CISG in Scandinavia 52; MünchKomm BGB/P. *Huber* Art. 92 n. 2; MünchKomm HGB/*Ferrari* Art. 92 n. 2; *Schlechtriem/Schwenzer/Ferrari* Art. 92 n. 2; *Schroeter*, in: FS Kritzer (2008) 425, 439; *Staudinger/Magnus* Art. 92 n. 5; *Witz/Salger/Lorenz/Witz* Art. 92 n. 2.

Nordic CISG state²⁰ which has neither declared a reservation under Art. 92 nor under Art. 95 CISG; no choice of law is envisaged by the parties; a court in one of these countries is seised with the case.

In such a case, the court cannot apply the CISG directly under Art. 1 (1) (a) because for formation aspects the Scandinavian country is no CISG state. But according to Art. 1 (1) (b) CISG the formation part nevertheless comes into play if private international law leads to the application of the CISG. Therefore the private international law of the forum must be examined. In this respect the following distinction must be observed:

In some cases the Hague Convention on the Law Applicable to International Sales of Goods of 1955 will apply, namely if the seised court is located in a Contracting State of that Convention.²¹ According to this Convention without a choice of law generally the law at the seller's seat governs the sale²² but there are also two exceptions: the law at the buyer's seat applies if the offer has been accepted in this country²³ and in case of sales at stock exchanges or auctions the law at the place of the stock exchange or auction is decisive.

In other cases the Rome Convention and in future the Rome I Regulation²⁴ will determine the applicable law. This is the case where the seised court is located in an EU Member State where the Rome Convention and in future the Rome I Regulation is in force²⁵ provided that that state has not ratified the Hague 1955 Convention.²⁶ Both the Rome Convention and the Rome I Regulation provide that in principle the law at the seller's place of business applies.²⁷ But there are also exceptions: the applicable law may be that of a country with which the contract is manifestly more closely connected than with the seller's country²⁸ and consumer sales (which may exceptionally fall within the scope of the CISG)²⁹ are under certain circumstance exclusively governed by the law at the buyer's place.³⁰

20 If the seller has its place of business however in Iceland Art. 94 CISG applies and the Inter-Nordic unification prevails. But where the Nordic countries have implemented the Nordic Sales Act and the Nordic Contracts Act with relevant differences it has to be stressed that then also the rules of private international law must be applied in order to determine which one of the implemented versions is applicable.

21 The Contracting States of the 1955 Convention are Denmark, Finland, France, Italy, Niger, Norway, Sweden and Switzerland. Of them, only Niger has not ratified the CISG as well.

22 Art. 3 (1) Hague 1955 Convention.

23 Art. 3 (2) Hague 1955 Convention.

24 From 17 December 2009 on; *see* Art. 28, 29 Rome I Regulation.

25 The Rome I Regulation will be directly applicable in all EU Member States except Denmark where the Rome Convention continues to be in force.

26 The Hague 1955 Convention takes precedence over the Rome Convention (Art. 21) and Rome I Regulation (Art. 25 (1)).

27 *See* Art. 4 (2), 8 (1) Rome Convention and Art. 4 (1) (a), 10 (1) Rome I Regulation.

28 Art. 4 (5) sent. 2 Rome Convention and Art. 4 (3) Rome I Regulation.

29 *See* Art. 2 (a) CISG which covers consumer sales if the seller neither knew nor ought to have known their consumer character.

30 Art. 5 Rome Convention and Art. 6 Rome I Regulation.

The stated conflicts rules lead not in all, but in most cases to the law at the seller's seat. If that is a country which has, as assumed here, ratified the CISG without a reservation under Art. 92 or 95 CISG that leads to the following result: all courts in countries where the quoted conflicts rules or similar solutions are in force have to apply the CISG provisions on contract formation. In fact, the courts of all EU-CISG Member States,³¹ including the Scandinavian countries, must apply Part II of the CISG if the sketched conditions are given, however with the exception of the Czech and Slovak Republic which have ratified the CISG without its Art. 1 (1) (b) and therefore are not allowed to apply the CISG via private international law.³²

Thus for instance, French, German, Spanish courts but also Danish, Finnish, Norwegian or Swedish courts seised with a case as outlined above have regularly to determine the conclusion of an international sales contract according to the formation provisions of the CISG.

- Second situation: In the preceding case the seller is the offeree and the buyer the offeror while all other circumstances remain the same. The solution is the same as in the preceding case. It does not matter which party is offeror and offeree. The relevant element is in principle where the seller is seated.
- Third situation: Again, there is no choice of law. The offeror/offeree/seller has its place of business in a non-Scandinavian CISG state which has declared a reservation under Art. 95 CISG and the offeror/offeree/buyer has its place of business in a Scandinavian country. At present it is China, the Czech Republic, Singapur, the Slovak Republic, St. Vincent and the Grenadines and the United States which have declared the reservation under Art. 95 CISG.

The solution will in most cases differ from that found for the first and second situation: Courts in the mentioned States would not apply the CISG via private international law but determine the applicable – purely domestic – law according to their conflicts rules. In Czekia and Slovakia the EU conflicts rules are applicable and lead in the absence of a choice of law regularly to the internal law at the seller's seat (Czech/Slovak law on conclusion of contract). Even Scandinavian courts when seised have to follow this path.

If however courts in CISG states are seised (for instance through a choice of court clause) which belong neither to the Scandinavian nor to the countries with the Art. 95 reservation the solution depends on the view there on the effects of Art. 95 CISG. The courts of 'pure' CISG states (without any reservation) may either respect the reservation which the Art. 95 States have declared and not apply the CISG when private international law leads to the law of an Art. 95 state.³³ Or, they may still regard Art. 95 states as full CISG Contracting States and apply the CISG.

- Fourth situation: the offeror/offeree/seller has its place of business in a Scandinavian country and the offeror/offeree/buyer in a non-Scandinavian CISG state with no Art. 95 reservation. Further, no choice of law has been made.

31 Only four EU Member States are not at the same time CISG Member States: Great Britain, Ireland, Malta and Portugal.

32 See below to Art. 95 which allows such a reservation.

33 For instance, Germany has declared that it will respect the reservation under Art. 95 CISG and not apply the CISG if private international law leads to the law of such a state.

The solution is now in most cases entirely different from that found for the first and second situation. The CISG's formation part can only be applied if the conflicts rules of the forum lead to a CISG state that has made no reservation under Art. 92 or 95 CISG. However, in the EU and other CISG states with similar conflicts rules the law at the seat of the seller applies and that means that Danish, Finnish, Norwegian or Swedish law on contract formation has to be applied.³⁴ Only where for instance the conflicts rules of the forum provide that the law at the place of the conclusion of the contract governs³⁵ the outcome can be different.

- Fifth situation: The offeror and offeree have explicitly chosen the CISG (wherever their places of business may be). Then, also its Part II has to be applied. Where the choice is made tacitly by selecting the law of a CISG Contracting State the solution depends on whether the chosen law is that of a Scandinavian state (no application of Part II) or of another CISG state (then application of Part II). Where the parties have on the contrary excluded the CISG even by choosing the law of a non-CISG state it is self-evident that also the CISG's formation part is inapplicable.

The reservation under Art. 92 CISG forces to apply the private international law rules of the forum also for a part of the Convention if a party of a Scandinavian country is involved. All problems with the application of the CISG towards non-CISG states reoccur here with respect to the contract formation. This complicates the application of the CISG among the Contracting States which the Scandinavian countries in essence are and entails also unconvincing distinctions. Depending on the relevant conflicts rules the reservation under Art. 92 CISG leads partly nonetheless to the application of Part II of the CISG and partly to domestic law for the conclusion of contracts. The distinction when the CISG and when domestic law applies is hardly convincing. Despite the danger of oversimplification it can be said that the CISG formation provisions are applicable in most cases where the seller is seated in a non-Scandinavian CISG state. If the seller is however seated in a Scandinavian country the respective domestic law applies. Scandinavian buyers are therefore generally confronted with the CISG formation rules, while Scandinavian sellers can generally trust that their domestic formation law will be applied. While the preference of the seller's law can be justified for private international law purposes because there a choice between divergent legal orders has to be made, such preference is in my view much less justified in international uniform law. The very purpose of uniform law is to treat parties on an equal footing. This purpose is frustrated where buyers and sellers of international sales are treated so differently.

34 See in fact following this solution, e.g., OLG Rostock (Germany) 27 July 1995, CLOUT case no. 228 (Danish seller, German buyer); Danish Østre Landsret UfR 23 April 1998, 1998, 1092 with note *Fogt* (Italian seller, Danish buyer).

35 See for instance Art. 20 (1) Syrian Civil Code. 36 See OLG Frankfurt 4 March 1994, OLGR 1994, 85; OLG Naumburg 27 April 1999, TranspR-IHR 2000, 22 (both decisions overlooked the Art. 92 reservation); OLG München 8 March 1995, VersR 1996, 1414: in a Finnish-German sale the Court applied both Finnish law and the CISG with respect to the conclusion of the contract; see thereto *Fogt* ZEuP 2002, 580, 587.

As already seen the picture just described has to be further differentiated depending on whether there is a valid choice of law, depending on the conflicts rules of the forum (in particular Hague Convention or Rome regime), on an eventual Art. 95 reservation, on the fact that exceptionally a consumer sale is covered. The reservation under Art. 92 CISG thus creates a rather confusing variety of different solutions even among CISG states and complicates the application of the CISG considerably. Even experienced practitioners like judges of some German appeal courts may misunderstand the effects of the reservation.³⁶ Moreover, even within the Nordic countries the reservation creates no uniformity in the treatment of CISG sales because Iceland has declined to declare the Art. 92 reservation.

The example of a German-Swedish sale of furniture may demonstrate the problems on the level of private international law. If the parties to such a contract disagree on whether the contract had been concluded and if they have not agreed on a choice of law, without the Swedish reservation under Art. 92 CISG the Convention had to be applied both in German and Swedish courts, no matter which party would be the buyer and the seller. Since there is ample case law and legal literature on the CISG the information costs for both sides would be low. However, because of the Swedish reservation the outcome now depends on who is the seller and where it is seated. Were the seller located in Germany and the buyer in Sweden, German and Swedish courts had to apply the formation part of the CISG due to Art. 1 (1) (b) CISG in connection with the Hague/European conflicts rules.³⁷ Were the seller located in Sweden and the buyer in Germany, the quoted provisions would designate Swedish formation law as applicable. While a Swedish court if seised would be familiar with that law a German court if seised with the case would have to search the contents of Swedish formation law, generally by way of costly and time-consuming expert opinion which the party losing the law suit had to bear. Seen from a non-Scandinavian viewpoint this is a considerable disadvantage which may add to prevent businesses to buy from Scandinavian sellers. Seen from a Scandinavian viewpoint it would be an advantage only if Scandinavian formation law would be significantly 'better', more apt for international contracts than the CISG formation part. Whether this is the case will be pursued in the next parts of this paper.

In short, the private international law problems raised by the reservation under Art. 92 CISG do not recommend this reservation.

36 See OLG Frankfurt 4 March 1994, OLGR 1994, 85; OLG Naumburg 27 April 1999, TranspR-IHR 2000, 22 (both decisions overlooked the Art. 92 reservation); OLG München 8 March 1995, VersR 1996, 1414: in a Finnish-German sale the Court applied both Finnish law and the CISG with respect to the conclusion of the contract; see thereto *Fogt ZEuP* 2002, 580, 587.

37 Absent any peculiarities of the case Swedish courts would apply Art. 3 (1) Hague 1955 Convention (also after the entry into force of the Rome I Regulation); German courts would presently apply Art. 28 (2) EGBGB (= Art. 4 (2) Rome Convention) and in future Art. 4 (1) (a) Rome I Regulation. These provisions lead to the law of the seller's seat being Germany which is an unreserved CISG State. The result may however vary as soon as it is a consumer sale, a sale at a stock exchange or auction or if the sale is concluded in the buyer's country.

3.2 *Consequences and Problems of the Substantive Law on Contract Formation*

The following part discusses in more detail the Scandinavian critique concerning the formation provisions of the CISG. Mainly three aspects were criticised: the irrevocability of offers, uncertainty on the validity of the contract and problems when the price is not determined.³⁸

a) Irrevocability of offer

It is true that the CISG in its Art. 16 (1) declares offers generally revocable while Nordic contract law provides for the opposite principle.³⁹ Insofar the CISG is closer to Common Law than to Nordic Law. But Art. 16 (2) CISG which must also be taken into account formulates far-reaching exceptions from the revocability principle so that the gap between both positions is greatly narrowed.⁴⁰ According to Art. 16 (2) CISG an offeror may fix a period for acceptance; then it is presumed that the offer is irrevocable.⁴¹ The same effect is achieved when it is “otherwise” indicated, for instance by words, conduct or circumstances, that the offer is irrevocable. In addition, an offer becomes also irrevocable “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer.”⁴² A case of that latter kind may occur where for instance the seller/offeree must first produce a prototype before it can reasonably accept the buyer’s offer. In many instances even under the CISG the offer will therefore be irrevocable.

Thus far, there is however no single reported case dealing in point with the revocability issue under Art. 16 CISG. The seven cases on Art. 16 CISG reported by the Pace Law School CISG Database⁴³ mention Art. 16 but none of them focuses on the revocability principle.⁴⁴ The hot debates on the revocability principle at the conference concluding the CISG 1980 in Vienna have indeed proved as a “tempest in the teapot”.⁴⁵ Viewed from a practical point the Scandinavian objections against this CISG provision have lost their relevance. Being of no practical importance the theoretical difference between Art. 16 CISG and the regulation in the Nordic Contract Act can in my view not justify the Scandinavian Art. 92 reservation.⁴⁶

38 See already supra under II.

39 See supra note. 12 and the text thereto.

40 In that sense also *Lookofsky*, CISG in Scandinavia 52.

41 *Honnold* n. 143.1; *Schlechtriem/Schwenzer/Schlechtriem* Art. 16 n. 9; *Staudinger/Magnus* Art. 16 n. 12

42 Art. 16 (2) (b) CISG.

43 ”www.cisg.law.pace.edu”.

44 See also *Ferrari/Flechtner/Brand*, Draft Digest 588.

45 *Honnold* n. 143.1.

46 In the same sense *Lookofsky*, CISG in Scandinavia 52.

It should be added that many continental laws, for instance Austrian,⁴⁷ German⁴⁸ and Swiss domestic law,⁴⁹ also follow the general principle of Irrevocability of an offer once it has reached the addressee. Nevertheless, these countries have ratified the CISG with its Part II and do not see problems applying Art. 16 CISG to international sales contracts and their different domestic rule to domestic sales or other types of contract. In these countries the CISG and the general contract law lead separate lives. Commentaries and textbooks on the general law on formation of contracts take rarely if at all notice of the special formation regime for international sales contracts under the CISG.⁵⁰ Moreover, the practical differences between the general formation law and the CISG formation rules are minimal. Under Austrian, German and Swiss domestic law the binding effect of an offer lasts in any event only for such a period of time within in which the receipt of an answer could be reasonably expected.⁵¹ Thereafter the binding effect generally automatically lapses. In addition, modern forms of communication, in particular e-mail, have drastically shortened this binding period of offers. The difference to the general revocability principle with its exceptions as formulated in Art. 16 CISG can therefore almost be neglected.

b) Validity of conclusion of contract

It is likewise true – as criticised by Scandinavian countries⁵² – that the CISG does not cover the material validity of the contract⁵³ though there are few exceptions to this rule.⁵⁴ The exclusion of material validity issues can result in some uncertainty on the existence of an international sales contract. However, the uncertainty is no greater than with other questions not covered by the CISG. If the Convention does not expressly settle an issue the gap has to be filled in the way prescribed by Art. 7 (2) CISG. For expressly excluded matters like the validity of the contract or any of its provisions the traditional way is applicable: the private international law rules of the forum determine the applicable substantive law. Indeed private international law may entail

47 § 862 ABGB.

48 § 145 BGB.

49 Art. 5 OR.

50 See for instance for Austria: Koziol/Bydlinski/Bollenberger (eds.), *Kurzkommentar zum ABGB* (2005) §§ 861 et seq.; for Germany: Staudinger/*Bork* §§ 145 et seq.; *Brox/Walker*, *Allgemeiner Teil des BGB* (31th ed. 2007) n. 165 et seq. The CISG is not mentioned there.

51 § 862 ABGB, § 147 (2) BGB, Art. 5 (1) OR.

52 See *supra* under II.

53 See Art. 4 lit. a CISG. The formal validity of the contract is on the contrary fully covered.

54 For instance an error on the quality of the goods is regulated by Art. 35 et seq. Redress to national rules on avoidance because of that error is excluded: LG Aachen (Germany) RIW 1993, 761; *Audit* 115; Bamberger/Roth/*Saenger* Art. 4 n. 23; *Honnold* n. 240; *P. Huber*, *Irrtumsanfechtung und Sachmängelhaftung* (2001) 283 et seq.; *Schlechtriem/Schwenzer/Ferrari* Art. 4 n. 24; *Staudinger/Magnus* Art. 4 n. 48.

problems as, too, may the examination of specific national law on the validity of contracts. This is however no peculiarity of the formation part of the CISG. It is a general problem concerning all gaps which the CISG leaves and which must be filled otherwise. The uncertainty argument concerns the Convention as a whole and, thought to its end, would be an argument against the ratification of the whole Convention. The formation provisions of the CISG do not specifically add to the uncertainty created by the fact that the CISG is no comprehensive codification of general contract law but only of sales law.

The lack of CISG provisions on the material validity of the contract delivers therefore in my view also no justification to ratify the CISG without its formation part.⁵⁵

c) Open price

Again the Scandinavian critique⁵⁶ is in essence correct that the CISG text poses some problems in case the parties do not fix the price. Art. 14 (1) CISG requires that a proposal to conclude a contract must be sufficiently definite in order to constitute an offer and must therefore expressly or implicitly fix or make provision for determining the price. On the other hand, Art. 55 CISG states a method how the contract price is to be determined when the parties have the price left open. If taken literally, there cannot be a valid contract without a valid offer and an offer is invalid if it leaves the price open. This sounds like a clear contradiction between two CISG provisions. The reasons behind the definite price requirement of Art. 14 CISG were that by the time the Convention was concluded French law strictly required a definite price,⁵⁷ that the then socialist countries, in particular the Soviet Union, opposed open-price contracts which did not fit into a planned economy and that the developing countries feared unfavourable contracts if the price could be left open.⁵⁸ These reasons have mainly vanished: the French Supreme Court has by way of interpretation almost abolished the definite price requirement;⁵⁹ most prior socialist economies have been converted into market economies with full freedom of contract. Some former developing countries belong today to the fastest growing economies. The definite price requirement of Art. 14 CISG has survived these changes but its interpretation must take notice of them.

The seemingly contradiction between Art. 14 (1) and Art. 55 can be solved in a reasonable way when the CISG's overarching principle of party autonomy (Art. 6) is taken into account.⁶⁰ Party autonomy allows the parties to tailor their

55 Similarly *Lookofsky*, CISG in Scandinavia 52.

56 *See supra* under II.

57 Art. 1591 Code civil.

58 *See in detail Schlechtriem*, Einheitliches UN-Kaufrecht (1981) 37 et seq.

59 Cour cass. 4 January 1995, D. 1996.289.

60 In the same sense *Achilles* Art. 14 n. 5 and Art. 55 n. 2; *Bamberger/Roth/Saenger* Art. 55 n. 2; *Ferrari/Flechtner/Brand/Perales Viscasillas* 271 et seq.; *Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/Mankowski* Art. 14 n. 26 et seq.; *Lookofsky*, CISG in Scandinavia 55 et seq.; *MünchKomm BGB/Gruber* Art. 14 n. 22 et seq.; *MünchKomm HGB/Ferrari*

contract as they like and need; they can derogate from or vary the effect of almost any of the CISG's provisions and certainly of the formation provisions.⁶¹ Therefore, the parties are also free to derogate from Art. 14 (1) sent. 2 CISG and to conclude a contract without fixing the price or indicating at least implicitly a method to determine the price. The offeree can accept an in this way 'invalid' offer and validate it. If both parties sufficiently express their willingness to be bound then nonetheless a contract is concluded even with an open price.⁶² And there may be even commercial needs to leave the price open in certain cases, for instance if a contract is concluded for goods which have to be delivered in the future (in the next season or year) when the market price will yet be formed⁶³ or if the parties make their agreement subject to a later agreement on the price.⁶⁴ But it must be stressed that cases are rare where even after thorough interpretation of the parties' declarations the price still remains open.⁶⁵

If this dogmatic path of the prevalence of the parties' intentions is followed with respect to open price contracts problems only arise with respect to the question when it is sufficiently clear that the parties intended to be bound. This is a traditional issue under each contract law and primarily a matter of construction of the declarations, or of the conduct, of the parties. Under the CISG this is no different. A rather clear case is the performance of the contract. After acts of performance have been done and accepted no party should be allowed to attack the contract on the basis that the contract was silent on the price. In this case Art. 55 CISG steps in and refers to the market-price. To

Art. 14 n. 32 et seq.; *Schlechtriem* n. 74 et seq.; *Schlechtriem/Schwenzer/Schlechtriem* Art. 14 n. 8 et seq.; *Staudinger/Magnus* Art. 14 n. 32 et seq.

61 The parties can however not derogate from Art. 12 CISG. If a CISG state, as some Member States have done and as the reservation under Art. 96 CISG allows, prescribes a certain form for international sales contracts then the parties cannot overturn this requirement by their own agreement.

62 See the references in note. 60.

63 See for such a case: LG Neubrandenburg (Germany) IHR 2006, 26 (price of cherries of next season left open until next season). One could have argued that the parties agreed implicitly on the market price of the next season so that the price was actually determinable. The result would then have been the same as that reached by the court which filled the open price by redress to Art. 55 CISG.

64 See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration CISG-online no. 1207. In such cases the later agreement on the price is a condition under which the contract is concluded. If later no agreement on the price can be reached the prior agreement becomes invalid. 65 For instance in a case where the seller offered a price range from 35–65 DM for chinchilla pelts of different qualities the Austrian Supreme Court held that the price was determinable, namely that the lowest quality costed 35 DM, medium quality 50 DM and highest quality 65 DM: OGH (Austria) JBI 1995, 253 with note *Karollus*.

65 For instance in a case where the seller offered a price range from 35–65 DM for chinchilla pelts of different qualities the Austrian Supreme Court held that the price was determinable, namely that the lowest quality costed 35 DM, medium quality 50 DM and highest quality 65 DM: OGH (Austria) JBI 1995, 253 with note *Karollus*.

decide otherwise would open too easy a possibility for a party to afterwards correct a bad bargain; unfair behaviour would even be rewarded.

If the contract has not yet been performed the declarations and conduct of the parties but also the circumstances of the case must be assessed whether they indicate the intention of the parties to be bound. In cases of that kind the definite price requirement of Art. 14 (1) sent. 2 CISG should be understood as a warning not too easily to presume such an intention. But the requirement does not at all exclude the possibility to establish such intention even if the price has not been fixed and the contract not yet been performed.

It has to be admitted that international case law on open price contracts under the CISG is not overly clear. The decision in the famous *Malev* case appears at least doubtful: there the Hungarian Supreme Court held that a sale of airplane engines had not been concluded because the seller had not communicated the price for all alternative engines it had offered.⁶⁶ In a German-Swedish sale of screws of different specifications a German Court of Appeal denied a valid contract equally because the price for parts of the negotiated items was not fixed but also because there was a sequence of offers and counter-offers which were not accepted.⁶⁷ Swiss courts have on the other hand accepted a valid contract even with an open price where the seller had delivered the goods and the buyer had not objected to the delivery but had invoked the invalidity of the contract only when asked to pay.⁶⁸

The definiteness requirement of Art. 14 (1) CISG poses no doubt some problems in case of open-price contracts. The main problem is whether and how the willingness to conclude a contract is sufficiently indicated when the price has been left open. This is however no specificity of the CISG but encounters in every (national) formation law. If it is further taken into account that real cases of open price contracts are very rare Art. 14 problems hardly justify a reservation under Art. 92 CISG.

d) Unfortunate differences between domestic law on formation of contract and CISG

The formation law of the CISG and the domestic formation law of the Scandinavian countries is not identical. There are differences. Although they have – not only in my view – no great practical importance they cannot be denied. It is certainly not fortunate if a country maintains different sets of rules for almost identical problems. But all CISG Member States maintain a double system of regulation: the domestic law for domestic cases and the CISG for the covered international sales cases. The Scandinavian countries have accepted this state of affairs for Part III of the CISG although there exist differences between the internal law and the unified CISG law also in this field.⁶⁹ As seen

66 *Pratt & Whitney v. Malev Airlines*, 25 September 1993, JL & Com 1993, 31 et seq. = CLOUT case no. 53.

67 OLG Frankfurt 4 March 1994, OLG-Report 1994, 85 = CLOUT case no. 121.

68 HG St. Gallen 5 December 1995, CLOUT case no. 330; HG of Canton Aargau, 26 September 1997, SZIER 1998, 78 = CLOUT case no. 217; see for a detailed discussion Ferrari/Flechtner/Brand/Perales *Viscasillas* 275 et seq.

69 See the survey given by *Lookofsky* (note. 11) 102 et seq.

the differences between the Scandinavian formation law and the CISG formation part are not of a character that they deserve another treatment and require a reservation under Art. 92 CISG.

4 Shortcomings of the CISG's Formation Part Justifying the Reservation?

More recently, Scandinavian voices have argued that also the general shortcomings of the formation part of the CISG justify the reservation under Art. 92 CISG.⁷⁰ In particular has it been criticised that the CISG codified an outmoded model of conclusion of contract and did not take sufficient account of modern forms of contracting which characterised by using standard contract terms, letters of confirmation etc.⁷¹ This critique would be justified if its assumption were true that the CISG indeed cannot provide answers to modern practices of concluding contracts in international trade. To start with the result: my view is that the CISG provides these answers. That the CISG *text* does not specifically address these problems can be criticised. For the sake of completeness of the CISG an express regulation of these modern problems might have been preferable. But this omission does not necessarily entail the conclusion that the general provisions and principles of the CISG do not allow a solution. The international case law and legal doctrine have meanwhile developed solutions under the CISG for these problems which are widely accepted and form already often a clearly prevailing view. These solutions can and should then be generally followed. One could even argue that the CISG's omission to explicitly regulate modern problems of contracting preserved the necessary flexibility to develop adequate solutions in a better way than a rigid codification of these problems in the 1980s would have allowed.

4.1 Incorporation of Standard Terms

One of the 'modern' issues not directly settled in the text of the CISG is the incorporation of standard contract terms into a contract. It is today the clearly prevailing view that the matter falls within the scope of the CISG and has to be answered on the basis of the general provisions of the Convention. Redress to the applicable national law is excluded.⁷²

Whether standard terms form part of an offer or acceptance and whether they become the contents of the contract must therefore be determined

70 See for instance *Fogt* EuLF 2003, 61, 63 et seq.

71 See *Fogt* EuLF 2003, 61, 63 et seq.

72 See, e.g., BGH (Germany) 31 October 2001, IHR 2002, 14; OGH (Austria) 17 December 2003, IHR 2004, 148; further the Draft Digest in Ferrari/Flechtner/Brand 575 et seq. with numerous references to further court decisions; *Achilles* Art. 14 n. 6; Bamberger/Roth/Saenger Art. 14 n. 7; Ferrari/Flechtner/Brand/*Perales Viscasillas* 265; Honsell/Schnyder/Straub Art. 14 n. 55; Münch KommBGB/*Gruber* Art. 14 n. 27.

according to Art. 7–9, 14, 18, 19, 24 CISG. The recognisable intent and conduct of the declaring party, the circumstances of the case, practices between the parties, international trade usages and good faith and fair dealing are the main factors which have to be taken into account. Further support can be derived from international sets of rules like the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law which explicitly provide solutions for the incorporation problem.

These rather general guidelines seem to grant courts a broad discretion. But the prevailing international case law and legal literature has established rather common requirements for a valid incorporation of standard terms into a contract.⁷³ Exceptions provided, generally three requirements must be met: First, the respective contract declaration must clearly refer to the standard terms. Second, the addressee must in what form ever consent to the terms. Third, the addressee must have had the reasonable opportunity to take notice of the terms. This requires generally that the standard terms are made available to the addressee⁷⁴ in a language understood by him. Generally, these requirements must be present at the time of conclusion of contract.⁷⁵ These rules fit and apply also in case of electronic communication.⁷⁶ It is not necessary to pursue all peculiarities of the incorporation problem here further.⁷⁷ It suffices to state that under the CISG a reasonable and widely accepted solution of the incorporation problem has been established by courts and legal doctrine. An amendment of the CISG and the insertion of a new provision on the incorporation of standard terms as partly demanded⁷⁸ may be perhaps desirable in the interest of completeness of the CISG text. But since the CISG allows satisfactory results with respect to the incorporation problem this issue requires no urgent amendment of Part II of the CISG (which would also be difficult to achieve).

73 See BGH (Germany) 31 October 2001, IHR 2002, 14; OGH (Austria) ZfRV 1996, 248; OLG Düsseldorf (Germany) NJW-RR 2001, 1562; Hof 's-Hertogenbosch (Netherlands) 23 October 2002, NIPR 2003 no. 192; *Achilles* Art. 24 n. 7; *Bernstein/Lookofsky* 174 et seq.; Ferrari/Flehtner/Brand/*Perales Viscasillas* 268 et seq.; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/*Mankowski* vor Art. 14 n. 21 et seq.; *Lookofsky*, CISG in Scandinavia 170 et seq.; *Magnus*, in: FS Kritzer (2008) 303, 311 et seq.; Münch Komm BGB/*Gruber* Art. 14 n. 29; Münch KommHGB/*Ferrari* Art. 14 n. 39; Schlechtriem/Schwenzer/*Schlechtriem* Art. 14 n. 16; Staudinger/*Magnus* Art. 14 n. 41.

74 See in particular BGH (Germany) 31 October 2001, IHR 2002, 14 discussing the point in depth.

75 Recent case examples for this proposition are *Solae, LLC v. Hershey Canada, Inc.*, 9 May 2008, 557 F. Supp. 2d 452 (US Dist. Ct., Del.); *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Ltd.*, 31 January 2007 (US Dist. Ct. Minn.), UNILEX.

76 See in particular Opinion No. 1 of the Advisory Council (CISG-AC); IHR 2003, 244; *Hahnkamper* J. L. & Com. 25 (2005/6) 147 et seq.; *Wulf*, UN-Kaufrecht und eCommerce (2003) 175.

77 See thereto most recently: *Magnus*, in: FS Kritzer (2008) 303 et seq.

78 See *Fogt* EuLF 2003, 61, 63 et seq.

4.2 *Battle of Forms*

It may be questioned whether the situation regarding the so-called battle of forms is any different from that just discussed. Again, the CISG does not contain specific provisions on when contradicting standard terms which both parties invoke become part of the contract. Again, it is common ground that the problem has to be solved by applying the general CISG provisions, namely Art. 6, 18 and 19, and that a redress to national law is excluded.⁷⁹ Under these rules an acceptance with alterations is generally a rejection of the offer and constitutes a counter-offer which in turn requires acceptance (Art. 19 (1)). But a declaration which does “not materially alter the terms of the offer constitutes an acceptance” unless the offeror objects immediately (Art. 19 (2)). Art. 19 (3) CISG declares however almost all alterations as material. And it is almost for sure that the parties’ general conditions materially deviate from each other. If Art. 19 CISG is applied literally to these cases the provision would either hinder a contract at all or favour that party that was the last to send its terms before the conclusion of the contract (last shot rule).

However, it is still disputed whether under the CISG the last shot rule or its opposite, the so-called knock out rule should be preferred.⁸⁰ Partly, it is still advocated that the last shot should decide and that that party’s general conditions should become the contents of the contract which has last sent them before the other party started performance without further sending its own conditions.⁸¹ And if both parties insist on their standard terms then their dissent hinders the conclusion of the contract at all. The opposite knock out rule pleads for maintaining only the non-conflicting standard terms while the conflicting ones are substituted by the rules of the Convention.⁸² Neither position can claim exclusivity. Both have to give room for some exceptions if they want to

79 See ### but contra for instance *Del Duca* J. L. & Com. 25 (2005/6) 133, 146 (the general principles of the CISG and private international law must resolve the battle of form problem).

80 See thereto *Magnus*, in: Jan Hellner in memoriam (2007) 185 et seq.

81 In this sense for instance OLG Hamm (Germany) TranspR-IHR 1999, 24; also for instance *Herber/Czerwenka* Art. 19 n. 18; *Honsell/Schnyder/Straub* Art. 19 n. 37 et seq. (with some exceptions); *Moccia* Fordham Int. L. J. 13 (1989–1990) 659; *MünchKomm HGB/ Ferrari* Art. 19 n. 15; *Pilar Perales Viscasillas* Pace Int. L. Rev. 2002, 157 et seq. (though with some reluctance); *eadem*, in: Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (1980) as Uniform Sales Law (2007) 318; *Reinhart* Art. 19 n. 8.

82 See BGH IHR 2002, 16; Cour de cassation, Droit d’affaires 1998, 1694; OLG Köln IHR 2006, 147 (though in ambiguous language); OLG Linz (Austria) IHR 2007, 123; AG Kehl (Germany) NJW-RR 1996, 565; *Achilles* Art. 19 n. 5; *van Alstine*, *Fehlender Konsens beim Vertragsabschluss nach dem einheitlichen UN-Kaufrecht* (1995) 220 et seq.; *Audit* n. 71; *Bamberger/Roth/Saenger* Art. 19 n. 3; *Bernstein/Lookofsky* 61 et seq.; *Brunner* Art. 4 n. 44; *Heuze* n. 187; *Karollus* 70 et seq.; *Kramer*, in: *Festschrift Welser* (2004) 556 et seq.; *Kuhl/Hingst*, in: *Festschrift Herber* (2000) 56 et seq.; *Lookofsky* 59 et seq., 160; *MünchKomm BGB/Gruber* Art. 19 n. 24; *Schlechtriem* n. 92; *Schlechtriem/Schwenzer/ Schlechtriem* Art. 19 n. 20; *Schwenzer/Mohs* IHR 2006, 244; *Soergel/Luderitz/Fenge* Art. 19 n. 5; *Staudinger/Magnus* Art. 19 n. 24; cautiously also *Meeusen*, in: *van Houtte/Erauw/Wautelet* (eds.), *Het Weens Koopverdrag* (1997) 93 et seq.

avoid unfairness and injustice. But where the parties have performed the contract or have started its performance the knock out rule is continuously gaining ground⁸³ and is indeed preferable because the parties have then made clear that they intend the contract despite differing standard terms.⁸⁴ It would then be unfair to prefer the standard terms of one party.⁸⁵ Where on the other hand one party has given in and clearly surrendered to the conditions of the other party the last shot rule remains justified.

It is indeed not fortunate that the Convention does not specifically address and solve the battle of forms problem. There is still some uncertainty concerning this problem. On the other hand, the Convention allows again a reasonable solution for the problem of conflicting standard contract terms. This solution is admittedly still in a kind of developing stage. The generality and flexibility of the wording of the CISG allows evidently adapting the interpretation of the relevant CISG provisions to changing views. Again, the lack of specific rules on the battle of forms in the CISG does in my view neither justify a general verdict on Part II of the Convention nor a reservation against this Part.

4.3 *Letter of Confirmation*

Letters of confirmation which confirm the contents of a concluded contract belong to modern trade since long. Some countries grant these letters special effects. They have developed the specific trade usage that the contents of the letter becomes irrebuttably the contents of the contract if the addressee of the letter does not object to it within rather short time and provided that both parties are business people.⁸⁶ The addressee's silence has thus the exceptional effect of assent to the contents and sometimes even to the conclusion of the contract as indicated in the letter.⁸⁷ But it must be noted that the rule is subject to good faith and fair dealing. The mentioned effect does only enter if the contents of the letter of confirmation does not unfairly deviate from what the parties had negotiated before.⁸⁸

83 Also the UNIDROIT Principles (Art. 2.1.22), the Principles of European Contract Law (Art. 2:209) and, notably, the UCC in its recently amended form (§ 2-207) prefer the knock out rule.

84 *See* the references in note. 82.

85 *See* in particular the reasoning of BGH IHR 2002, 16.

86 Germany is a country where this practice has been established by the courts since long: *see* BGHZ 7, 189; BGHZ 11, 3 and continuously.

87 Where the letter confirms the conclusion of a contract which the parties had envisaged but not yet finally concluded.

88 BGHZ 40, 45; BGHZ 93, 338; Palandt (*–Heinrichs*), BGB (67th ed. 2008) § 147 n. 15 et seq.

Again, the CISG – in contrast to the UNIDROIT Principles⁸⁹ and the Principles of European Contract Law⁹⁰ – does not deal specifically with letters of confirmation. But it orders that silence in itself does not constitute assent and does not amount to acceptance (Art. 18 (1) sent. 2). From this provision it has been inferred that the CISG formation rules do not recognise the constituent effect silence on a letter of confirmation has in some countries.⁹¹ Only if there is an international trade usage to that effect in the trade concerned or in both the country of the seller's and buyer's place of business then the constituent effect of a letter of confirmation can be acknowledged under Art. 9 (2) CISG.⁹² The same is true where the parties have established a respective practice (Art. 9 (1) CISG).⁹³

Despite the general non-effect of silence or inactivity under the CISG it should also not be overlooked that a letter of confirmation has a significant evidential value as regards the proof of the conclusion and the contents of a contract.⁹⁴ This evidential value which has to be assessed, and can be eventually rebutted by other evidence, according to the procedural rules of the *lex fori*⁹⁵ remains unaffected by Art. 18 (1) sent. 2 CISG.

It may be deplored that the CISG does not oblige the recipient of a letter of confirmation which fairly states the conditions of a bargain to quickly object to any discrepancy with the allegedly negotiated contents. But since the evidential value of the letter and of the corresponding conduct of the recipient remains unaffected the solution of the CISG does not appear to be unfair or unreasonable. It is also not visible that the lack of more specific rules on letters of confirmation has created insolvable problems. Again, it can hardly be justified to base a reservation against Part II of the Convention on this lack of more specific rules.

89 Art. 2.1.12.

90 Art. 2:210.

91 OLG Graz (Austria) IHR 2003, 71; HR of the Canton Zurich (Switzerland) 10 July 1996, SZIER 1996, 131; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/*Mankowski* Vor Art. 14 n. 7 et seq.; MünchKomm BGB/*Gruber* Art. 18 n. 24; Schlechtriem/Schwenzer/*Slechtriem* Vor Art. 14–24 n. 4; Staudinger/*Magnus* Art. 19 n. 26.

92 OLG Frankfurt (Germany) CISG-online no. 258; KG Basel-Stadt (Switzerland) Bas.Jur. Mitt. 1993, 310; Bianca/Bonell/*Farnsworth* Art. 18 n. 2.3; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/*Mankowski* Vor Art. 14 n. 9; MünchKomm BGB/*Gruber* Art. 18 n. 25; Schlechtriem/Schwenzer/*Slechtriem* Vor Art. 14–24 n. 4; Staudinger/*Magnus* Art. 19 n. 26.

93 For references *see* preceding note.

94 *See* MünchKomm BGB/*Gruber* Art. 18 n. 26.

95 The evaluation of evidence is governed by the *lex fori*. The CISG covers only the burden of proof.

4.4 Other Specific Forms of Conclusion of Contract

The formation part of the CISG is based on the traditional model of a clear sequence of an identifiable offer and an as well identifiable acceptance which must essentially match. Even today, most contracts are still concluded in that form. But also other forms of contracting occur where neither offer nor acceptance can be clearly identified but nonetheless the parties reach agreement. This can be for instance the case with matching cross-offers or long-lasting negotiations which end up with the agreement on a contract although it must be stated that respective cases are not frequent.

Again, the CISG omits to provide specific rules for these cases. Is this a major deficit? If one looks at the international sets of rules the picture is ambivalent: on the one hand both the UNIDROIT Principles (Art. 2.1.1) and the Principles of European Contract Law (2:211) foresee a specific rule for unusual forms of concluding contracts. But on the other hand, the essence of these articles is little more than the statement that the general rules on formation shall apply “with appropriate adaptations”.⁹⁶ Both sets of Principles do not contain further specific provisions on unusual forms of contracting. Under the CISG there is unanimity or at least a clear majority view that the formation part covers these special forms of contracting as well and that the general formation rules are to be applied as far as they fit.⁹⁷ The dogmatic foundation is the maxim of party autonomy (Art. 6 CISG) which allows the parties to derogate from the contracting mechanism provided by the Convention. The CISG does thus not express, but contains in substance, the same rule which the mentioned international sets of rules openly formulate.

The CISG may therefore be accused of a certain lack of clarity but to term that a major CISG deficit would certainly be an exaggeration. The CISG’s omission to expressly regulate rather rare unusual forms of contracting can also not serve as justification of a reservation against Part II of the CISG.

5 Further Arguments for a Ratification of Part II of the CISG

There are also some further arguments which militate in favour of a ratification of Part II of the CISG.

⁹⁶ See Art. 2:211 Principles of European Contract Law. Art. 2.1.1 UNIDROIT Principles merely states that agreement is sufficient to constitute a contract.

⁹⁷ *Bonell* RIW 1990, 695 et seq.; *Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger/Mankowski* Vor Art. 14 n. 6; *MünchKomm BGB/Gruber* Vor Art. 14 n. 3; *MünchKomm-HGB/Ferrari* Vor Art. 14 n. 7; *Schlechtriem/Schwenzer/Schlechtriem* Vor Art. 14–24 n. 5; *Staudinger/Magnus* Vor Art. 14 n. 5.

5.1 *Coherency Between Part II and III of the CISG*

Although the drafters intended a clear separation between Part II and Part III of the Convention there are links between the two Parts which make a partial ratification of the Convention without its Part II at least doubtful.

An implicit reference to Part II follows from Art. 29 CISG. The provision concerns the modification and termination of an already concluded contract. Under Art. 29 (1) CISG any modification or termination requires “the mere agreement of the parties”. It is an advantage if the “agreement” can be determined according to Part II of the CISG instead of having again redress to the rules of private international law with all the mentioned additional difficulties. Similar questions arise if the parties agree on a certain remedy, for instance on repair or substitution under Art. 46 (2) or (3) CISG. Under Part III the question may arise whether and according to which rules a party is bound by any of its declarations, for instance of termination, or whether the declaration can be revoked. Again, it is helpful if the provisions of Part II can be relied on and if the intricacies of private international law can be avoided. Even if the conflicts rules may correctly be applied it can be rather laborious to find correct proof for the rule under the applicable law whether or not a contract termination can be revoked.

The inner system of the Convention and the links between its different parts militates strongly in favour of an adoption of the CISG as a whole.

5.2 *Uniformity within the CISG Family*

Another reason for an unreserved ratification of the CISG is to establish and preserve uniformity within the ever growing family of CISG Member States. Most of these states, namely 67 out of 71, have seen no difficulty to ratify the CISG as a whole although certain provisions of Part II and Part III differ from their own domestic law. They regard the advantage of the unifying effect of the CISG as greater than the disadvantage which lies in the maintenance of a double regime for contracts: one for international sales of goods, another and partly different one for other sales and contracts. Among the CISG Member States the unification brought about by the CISG avoids the complications of private international law which are considerable. It is a clear advantage if within all CISG States the formation of contracts can be determined according to the same substantive provisions which are by and largely uniformly interpreted and generally dispense with the application of private international law. This is even more so since the CISG Member States today account for more than three quarters of world-trade and further Member States can be expected.⁹⁸

98 For instance Turkey is considering and probably intending a ratification.

6 Conclusion

To sum up: The reservation under Art. 92 CISG is in fact a partial ratification of the Convention. For the formation of international contracts the reservation has the effect to maintain all problems which private international law normally poses in international cases and which the CISG intends to avoid. The reservation thus complicates the solution of international sales cases and leads to unconvincing distinctions, for instance to an unequal treatment of Scandinavian sellers and buyers. On the substantive level some CISG provisions on formation differ indeed from the domestic Scandinavian law. However, these differences are of insignificant practical importance. As far as it is finally argued that the formation part of the CISG contains too many gaps and does not regulate modern techniques of contracting this overlooks that the CISG's formation rules nonetheless allow reasonable solutions for the modern problems of contracting and that there is regularly a clear majority view shared by courts and doctrine which solution should be followed. Thus, any uncertainty as regards the existence of a contract is rather less under the CISG than under many domestic laws. In my view the reservation under Art. 92 CISG is not justified and should be withdrawn.

Let me end slightly modifying of what Marc Anton says in Shakespeare's Julius Cesar „I come to bury Cesar not to praise him“: “I come to bury the Art. 92 reservation not to praise it” and in contrast to Marc Anton I mean what I say.