

Scandinavian Contract Law and its Implication on CISG – the Danish Approach

Torsten Iversen

1	Introduction	108
2	The Reasoning behind the Article 92 Reservation	108
3	Is CISG Part II Really that Hard to Live with? Comparisons between CISG Rules and Scandinavian Rules	109
4	What did the Scandinavians Achieve by Making the Article 92 reservation?	112
5	The Way Forward. Possibilities, Perils and Pitfalls	114

1 Introduction

The background for this essay is that the Scandinavian countries ratified the CISG subject to the declaration made possible by article 92. In the following I shall refer to this declaration as a reservation.

In consequence of the reservation made, the Scandinavian states are not contracting states with respect to CISG Part II on the formation of contracts.

By the way, Denmark did not only make an article 92 reservation. We made reservations according to article 93 (Greenland and the Faroe Islands) and article 94 (neighbour-state declaration). Apart from article 95 (on CISG as *lex causae*) and article 96 (on written form), we took the “full set” of reservations, you might say.

When ratifying the CISG about a decade after the Scandinavian states, Iceland did not make a reservation with regard to CISG Part II. At that time, Iceland did not make a neighbour-state reservation according to article 94, either, but later Iceland did (notification effected 12 March 2003).

2 The Reasoning behind the Article 92 Reservation

The reservation as regards Part II can be traced back to the advice given by the Scandinavian Working Group established in connection with the preparatory work to reform the Sales of Good Acts. The final result in this respect was, by the way, that Norway, Sweden and Finland got new acts while Denmark still has the Sales of Good Act dating back to 1906.

In the recommendation from the Working Group (consisting of 2 experts from each of the participating countries) it simply says:

”As regards Part II of the convention on international sales contracts, the working group recommends that a reservation is made so that Part II is excluded”.¹

The reason for this recommendation is not given in this connection, but a few paragraphs earlier the following is stated:

”Part II (art. 14–24) contain rules on the formation of international sales contracts. On a number of issues these rules differ significantly from the rules of Chapter I of the Nordic Acts on Contracts”.²

In the official comments accompanying the proposal for the Danish 1988 act that implemented the other parts of CISG into Danish law, this reason is elaborated a little:

1 Cf. NU 1984:5, Nordiska köplagar (1985) p. 503. (My translation.)

2 Cf. NU 1984:5, Nordiska köplagar (1985) p. 503. (My translation.)

”The rules of the convention – which have been influenced by the contract law of Common Law countries – differ from the corresponding rules of the [Danish] Act on Contracts, especially as regards the rules on offers and the possibility to revoke an offer. In this way, the rules seem alien to Danish law. Furthermore, as the convention does not regulate the question of validity of contracts, cf. article 4(b), an implementation of Part II into Danish law would mean that the convention rules were to be applied with regard to the question of formation whereas the Act on Contracts were to be applied as regards the question of validity. This would lead to uncertainty as to whether a binding contract has been entered into or not”.³

These arguments did not seem very convincing at the time. Indeed, they did not have the power to convince the first Danish authors on the subject back in 1989–1990.⁴ The arguments seem even less convincing today.

The arguments put forth in Norway and Sweden follow the same outline, but differ on some minor points. I will not go into details here.⁵

3 Is CISG Part II Really that Hard to Live with? Comparisons between CISG Rules and Scandinavian Rules

The arguments that some of the rules of CISG may seem alien or strange and that a distinction between formation and validity of contracts is necessary are true to a certain extent, but they are not more true for Scandinavia than for many other states around the globe.

Yet, the Scandinavian countries are the only countries that have excluded part II of the convention.

To take the last point first, most states – I take it, in reality *all* states – make a distinction between formation and validity. Why, then, should the problems created hereby be impossible to overcome only in Scandinavia?

As is evidenced from the citations given above, the focal point from the Danish side was the fact that according to CISG, an offer can be revoked. From a traditional Danish point of view this amounts to little less than heresy. It affects the most sacred edifice of our contract law: the promise principle – the principle that an offer is binding for some time, either set forth in the offer itself, or to be calculated according to section 3 of our Act on Contracts (*aftaleloven*). The Scandinavian promise theory goes a little further than the

3 Folketingstidende 1988–89, 1. samling, tillæg A, sp. 1020. (My translation.) – On the Danish grounds Cf. also Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) pp. 51–52 and Fogt, Morten M. in *The European Legal Forum* 2003 p. 64.

4 Cf. Lookofsky, Joseph, *Internationale køb* (1989) p. 47 and, adopting Lookofsky’s view, Gomardk Bernhard & Rechnagelk Hardy, *International købelov* (1990) p. 64.

5 Cf. Sevon, Leif in JFT 2006 p. 433 (on different reasons in the Scandinavian countries), Herre, Johnny & Sisula-Tulokas, Lena in Festskrift till Lars Gorton (2008) p. 151 (on the Swedish reasons) and Woxholth, Geir *ibid.* pp. 702–703 (on the Norwegian reasons). It is worth noting that Leif Sevon was a member of the working group mentioned in the text. He has first hand knowledge on the reasons.

other civil law systems which also consider a promise to be binding, but, again, there is no need to go into details here.⁶

According to the rule of CISG article 16 an offer may be revoked, provided the revocation reaches the offeree before he has dispatched his acceptance. The last part of this rule is commonly referred to as the *mail box rule*.

There is no argument that this rule seems strange to Scandinavians. There really is a difference – a fundamental difference – between the principle of Scandinavian law (and, it should be noted, along with Scandinavia, the law of nearly all other civil law countries) that an offer is binding and the principle of CISG article 16 that an offer is revocable. But is the difference between these two principles really big enough to give sufficient grounds for not including CISG Part II into Scandinavian international sales law? Surely not!

First of all, the principles in themselves are just starting points, both as far as Danish law and as far as the CISG is concerned.

The principle that an offer is binding is not a mandatory rule in Danish or Scandinavian law, and it certainly does not have any *ordre public* connotations. A Danish offeror may state in his offer that he will only be bound after an acceptance has been posted by the offeree or at some other point of time. Theoretically, such an “offer” may not always qualify as an offer according to the strict definition in Danish law, but practically it can certainly lead to a contract anyway. An oral offer is not binding unless it is accepted right away. In most cases, an offeror sets forth a fixed time for an acceptance. Only in rare cases, he will rely on the gap filling rule of the Act on Contracts. In reality, the Danish rule is no strict *dogma* that must be adhered to no matter what.

This is even more true for the opposite rule set out in CISG article 16(1) that an offer is revocable. If the offeror has fixed a time for acceptance, he will more often than not be bound by his offer, and revocation is not an option, and the same result may follow from other circumstances, cf. article 16(2).⁷ Clearly, the CISG rule makes concessions to the promise principle so that the end result in CISG can indeed be seen as a compromise between common law and civil law.⁸ A compromise, which all CISG contracting

states seem to be able to live with – except only for the Scandinavian states which are by no means the only states to honour the principle that an offer is binding in their domestic legislation.

6 Cf. Lassen, Jul. *Haandbog i Obligationsretten*. Almindelig Del, 3. udg. (1917–20) pp. 35–36; Rabel: *Das Recht des Warenkaufs*, 1. Band (1936) pp. 70–71; Fogt, Morten M. in *The European Legal Forum* 2003 p. 64.

7 Cf. Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 59 (“no fixed solution”) and Ramberg, Jan & Herre, Johnny, *Internationella köplagen (CISG)*, 2. uppl. (2004) p. 150 where it is noted that article 16(2) is only an interpretation rule, arguably stating a presumption that the offer is irrevocable when it sets a fixed time for acceptance.

8 Cf. Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 57 and Ramberg, Jan & Herre, Johnny, *Internationella köplagen (CISG)*, 2. uppl. (2004) p. 150. It might be argued that this compromise is intentionally ambiguous, Cf. Woxholth, Geir in *Festskrift till Lars Gorton* (2008) p. 708. It is going too far to claim that it is quite devoid of meaning, Cf. Håstad, Torgny in *Forhandlingerne på Det 32. nordiske Juristmøde*, Reykjavík, del II (1990) p. 253.

It is hardly possible to see any of the other rules contained in CISG Part II as an affront to Scandinavian contract law, either.

Article 14(1) that lays down what is to be understood by an offer is also somewhat problematic from a Scandinavian point of view. There is no need to go into detail with the open price term problem or the interrelation between articles 14 and 55 of the CISG, though the wording of article 14 seems to have played an important role for the Norwegian objections to CISG Part II.⁹ But again, the rule clearly has a compromise character. It might arguably be intentionally ambiguous when it states that an offer has to be “sufficiently definite”,¹⁰ but, again, this does not constitute a bigger problem for Scandinavians than for anyone else.

It is also true that the distinction between “withdrawal” and “revocation” in articles 15 and 16 seems strange to Scandinavian – and other civil – lawyers. I have already dealt with article 16. The rule of article 15 that an offer can be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer is practically the same in Scandinavian law. The same goes for the corresponding rule in article 22 on the withdrawal of an acceptance. There is the tiny difference that according to Scandinavian law a withdrawal is timely if it reaches the addressee before or at the same time as he took knowledge of the withdrawn declaration. The distinction between “reaching” and “taking knowledge of ” is not well founded.¹¹ As far as I know, it has never been decisive for the outcome of a Scandinavian contractual dispute. The Scandinavian rule was an abnormality even in the early 20th century when the Acts on Contracts were passed. E.g. the German BGB, which entered into force on January 1st 1900, contained the same rule as CISG in this respect.

Article 17 on the effects of a rejection concurs with Scandinavian contract law.

Article 18 on the effects of an acceptance and related issues does not differ from Scandinavian law in any significant respect.

The rules in article 19 on “non corresponding acceptance” and article 21 on “belated acceptance” seem to be in quite good harmony with the corresponding articles of the Act on Contracts (article 6 and 4, respectively). Indeed, the CISG provisions seem clearer and easier to apply than the Scandinavian rules which contain a double subjective standard (the offeror must have understood that the offeree had reasons to believe that his acceptance was not “non corresponding” or belated).

This is not to say that article 19 is perfect. It applies the traditional mirror image technique where offer and acceptance should correspond almost perfectly.¹² The real world is less perfect, and at least where there has been an

9 Cf. footnote 5 *supra*.

10 Cf. Woxholth, Geir in *Festskrift till Lars Gorton* (2008) p. 705.

11 Cf. Ussing, Henry, *Aftaler*, 3. udg. (1950) pp. 46–47, Kruger, Kai, *Norsk kjøpsrett*, 4. utg. (1999) p. 676, Sevon, Leif in *JFT* 2006 p. 434 and Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 165.

12 Cf. Lando, Ole in *UfR* 1988 B p. 1 and pp. 5–6 and Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 62.

exchange of goods and money some kind of contract must exist, regardless of discrepancies between offer and acceptance.¹³

Article 20 contains rules on the calculation of time limits. These rules are pretty different from the Danish rules, but then there are different rules on calculation of time limits in different Danish acts and statutes. With rules of a technical nature like this, a compromise clearly must be reached. As far as I know, no one has ever argued that article 20 is a reason to make a reservation.

I have dealt with articles 21 and 22 already and go on to articles 23 and 24. They deal with the question when a contract is deemed to have been concluded, and when different declarations are deemed to have reached their addressee. Neither of these provisions should be able to stir any controversy from a Scandinavian point of view.

Finally, in Scandinavian law we have a special rule in Sec. 40 of the Act on Contracts according to which certain notices are sent at the risk of the addressee, that is to say that the notice is effective if it has been sent off by mail or other proper means of transport, even if it is lost in transit. In effect, the CISG has much the same rule in articles 19 (2) and 21(2) according to which it is sufficient that a notice is dispatched.¹⁴

From a Scandinavian point of view the rules of CISG on formation of contracts are perhaps not a dream world, but they are certainly not worse for us than they are for other contracting states. In some respects, the rules are arguably superior to the Scandinavian ones.

It is not the topic of this essay to examine the problem areas of CISG Part II – such as the problems of areas not covered, disharmonious interpretation and consequent possibility of forum shopping – but to point out some areas where CISG Part II and Scandinavian law are at odds with another as far as the formation of contracts is concerned.

4 What did the Scandinavians Achieve by Making the Article 92 reservation?

Today we know that very little was achieved by making the article 92 reservation. No other countries followed suit, and consequently, CISG Part II will be applied in a vast number of cases involving a Scandinavian party. If e.g. a Danish buyer concludes a sales contract with a French seller, due to the Danish reservation, CISG Part II is not directly applicable, but it becomes so, if French international private law rules are decisive because they point to

13 Cf. Lando, Ole in UfR 1988 B p. 7 and Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 65.

14 Cf. Iversen, Torsten in Lars Hedegaard Kristensen et al. *Lærebog i dansk og international køberet*, 3. udg. (2004) p. 250 as opposed to Gomard, Bernhard & Rechnagel, Hardy: *International købelov* (1990) pp. 77–78 and p. 81 footnote 4. Cf. Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 164 and p. 166.

CISG.¹⁵ This result, which flows from the connection between article 1(1) (b) and article 92, was hardly noticed when making the reservations in the late 1980's.¹⁶

Not only has the reservation little effect compared to what was originally anticipated. The reservation has serious side effects. China and the U.S. have so-called article 95 reservations and declared that they will not be bound by CISG article 1(1)(b). That is to say that courts in China and the U.S. are not bound to apply CISG rules on formation of contracts in cases involving a party from a non contracting state.¹⁷ As regards Part II, the Scandinavian states are non contracting, and thus, depending on the circumstances, Chinese or e.g. Texan contract law may be applied. One might argue that these uncertainties and results are a high price to pay to avoid CISG Part II.

It is a matter of theoretical interest only whether the decision to make the reservation was well founded at the time or not. From a practical point of view, what matters is whether the reservation can be considered sound today or not, and, consequently, whether the reservation should be given up or not.

Without in any way defending the reservation, I trust that I offend no one by saying that back then it was not so obvious whether CISG would be a worldwide success or not, and whether or not a significant number of states would make reservations according to article 92. At least, in the Swedish preparatory statements on the implementation law, it was hinted that the world might change, and that the reservation could be given up later. Since then, a lot of states have signed up the CISG. At the time when the Scandinavian states made the reservation, only 11 states had done so; now the number is 71.¹⁸ Apart from the Scandinavian states, no other state in the world has made article an 92 reservation.

On this background, it is hardly surprising that the legal scholars of Scandinavia now seem unanimous in their rejection of the reservation to CISG Part II. The reservation itself and the grounds given for it have been criticised by almost every author on the subject, and presently almost everyone who has stated an opinion on the subject advocates the withdrawal of the reservation.¹⁹

15 Cf. Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 182 (and p. 19) and . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) pp. 154– 157.

16 Cf. Hertz, Ketilbjorn & Lookofsky, Joseph in UfR 1999 B p. 7 and p. 9 with further references, Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 19 and *Leif Sevon* in JFT 2006 p. 436.

17 Cf. Ramberg, Jan & Herre, Johnny, *Internationalla köplagen (CISG)*, 2. uppl. (2004) pp. 652–657 on the – difficult – implications of this in different settings.

18 As of 4th July 2008 according to the CISG Database run by Pace Law School, available at www.cisg.law.pace.edu.

19 Cf. (from Denmark:) Kruse, A. Vinding, *Købsretten*, 3. udg. under medvirken af Jens Møller & Peter Otken (1992) p. 62 where no criticism is put forward, which perhaps is not surprising as A. Vinding Kruse was a member of the working group mentioned in the text above. Everybody else is critical of the reservation, Cf. Lookofsky, Joseph, *Internationale køb* (1989) p. 47, Gomard, Bernhard & Rechnagel, Hardy, *International købelov* (1990) p. 64, Elmelund, Nils in Norgaard, Jorgen (ed.) *et al.: Lærebog i dansk og international*

5 The Way Forward. Possibilities, Perils and Pitfalls

The possibilities are to give up only the article 92 reservation or to give up some – or all – of the other reservations as well, or to make different combinations – e.g. give up part of the article 94 reservation.

I will not go into the details on this, but just point out that giving up the article 92 reservation means that the contract issues of CISG Part II will then be grabbed by the article 94 reservation.²⁰ Hence, in inter-state commerce in Scandinavia, our Scandinavian rules would still prevail, as there is no doubt that our rules on the formation of contracts are the “same or closely related” (which is not quite so true for our sales rules²¹).

By giving up the reservation we will have a dualistic system for formation of contracts – one for international sales contracts, and one for all other contracts. This might create problems, and though the problems should not be exaggerated,²² still they might be a forceful argument to reform the Scandinavian Acts on Contracts and try to put them in line with the CISG.²³

However, I do not in any way see a Scandinavian law reform as a precondition for giving up the article 92 reservation. It would be even more futile to demand a reform of CISG as a precondition for giving up the article 92 reservation.²⁴ Clearly, the time is ripe for giving it up now – promptly and

køberet, 2. udg. (1996) p. 235 footnote 5, Hertz, Ketilbjorn & Lookofsky, Joseph in UfR 1999 B pp. 6–7 and p. 10 Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 183, Andersen, Mads Bryde: *Grundlæggende aftaleret*, 2. udg. (2002) p. 74, Fogt, Morten M. in *The European Legal Forum 2003* pp. 64–65, Iversen, Torsten in Hedegaard Kristensen, Lars et al.: *Lærebog i dansk og international køberet*, 3. udg. (2004) p. 240, Lando, Ole in *Avtalslagen 90 år* (2005) pp. 15–16; (from Norway:) Kruger, Kai, *Norsk kjøpsrett*, 4. utg. (1999) p. 679, Woxholth, Geir: *Avtaleinngåelse, ugyldighet og tolkning*, 4. utg. (2001) p. 48, Kruger, Kai in *Avtalslagen 90 år* (2005) pp. 64–65, Hagstrom, Viggo, *Kjøpsrett* (2005) p. 36 and Woxholth, Geir in *Festskrift till Lars Gorton* (2008) pp. 702–703 and p. 710; (from Sweden:) Ramberg, Jan & Ramberg, Christina: *Allmän avtalsrätt*, 6. uppl. (2002) p. 108, Ramberg, Jan & Herre, Johnny, *Internationella köplagen (CISG)*, 2. uppl. (2004) p. 139, Flodgren, Boel, Gorton, Lars, Lindell-Frantz, Eva & Samuelsson, Per in *Avtalslagen 90 år* (2005) p. 11; (from Finland:) Sevon, Leif in JFT 2006 p. 437, . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) pp. 159–160. As mentioned in footnote 5 above, it is worth noting that *Leif Sevon* was a member of the working group mentioned in the text above. He now favours giving up the article 92 reservation.

20 Cf. Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 184.

21 Cf. Lookofsky, Joseph, *Understanding the CISG in Scandinavia*, 2nd ed. (2002) p. 185, Iversen, Torsten in Lars Hedegaard Kristensen et al.: *Lærebog i dansk og international køberet*, 3. udg. (2004) p. 241, Hagstrom, Viggo, *Kjøpsrett* (2005) p. 35, Sevon, Leif in JFT 2006 p. 432, and . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 166.

22 Cf. Sevon, Leif in JFT 2006 pp. 434–436.

23 Cf. Kruger, Kai, *Norsk kjøpsrett*, 4. utg. (1999) p. 679, and Woxholth, Geir in *Festskrift till Lars Gorton* (2008) pp. 699–702 and p. 710.

24 Cf. Fogt, Morten M. in *The European Legal Forum 2003* p. 65 who argues that a withdrawal should be made contingent upon a reform of CISG Part II.

jointly. (On the other hand, the neighbour-state reservation should not be given up, as I see it²⁵).

There might indeed be problems connected with CISG Part II – both on a more general level and as regards individual rules. On a general level, the problem of what is governed, and what is not, and what is governed but not settled. As regards individual rules, the “sweeping under the carpet” solution of article 14,²⁶ the “political compromise” character of article 16, and the rigidity of article 19²⁷ should be mentioned. It is of course a challenge to make sure that we have a uniform interpretation of the CISG. The truly international reporting of cases, the internet, and the Advisory Council on the CISG are all means of meeting this challenge for the time being. A reform of the CISG lies well into the future. When it is undertaken, it might be worth considering whether the question of validity of international sales contracts should also be covered by a convention, and whether the only way to make sure of a truly uniform interpretation is to set up some kind of international court.

The perils and pitfalls of reform undertakings are difficult to predict. However, it is much easier to reform national acts than international conventions. Still, the reform of the Scandinavian Sale of Goods Acts perhaps should not let us get our hopes up too high: Denmark’s lagging hopelessly behind,²⁸ Norway’s rather bizarre re-writing of CISG²⁹, and the not very fortunate rules on damages in the new Scandinavian acts remind us that success is never guaranteed. But if at first you don’t succeed – try, try, and try again.

25 Cf. Hagstrom, Viggo, *Kjøpsrett* (2005) and Sevon, Leif in JFT 2006 p. 437 who do not see reasons for withdrawing the neighbour-state reservation. Cf. . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 166 who seem inclined to withdraw the neighbourstate reservation *in toto*. A middle position is taken by Fogt, Morten M. in *The European Legal Forum 2003* p. 65 who advocates sticking with the neighbour-state reservation as regards Part II, but withdrawing the neighbour-state reservation as regards CISG Part III.

26 Cf. Woxholth, Geir in *Festskrift till Lars Gorton* (2008) pp. 703–706.

27 Cf. Lando, Ole in *Avtalslagen 90 år* (2005) pp. 20–21 and Leif Sevon in JFT 2006 p. 434.

28 Cf. . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 166.

29 Cf. the Norwegian criticism of the Norwegian approach Hagstrom , Viggo in TfR 1995 pp. 561–588, Hagstrom, Viggo, *Kjøpsrett* (2005) pp. 36–40 and Kruger, Kai, *Norsk kjøpsrett*, 4. utg. (1999) pp. 666–673. 30 Cf. . Herre, Johnny & Sisula-Tulokas, Lena in *Festskrift till Lars Gorton* (2008) p. 167.

