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The CISG in Denmark and Danish Courts

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Abstract

In this article the author explores key aspects of Denmark's reception and implementation of the 1980 United Nations Convention on Contracts for the International Sales of Goods (CISG). Placing the treaty within its larger private law context, the author explains the complexity and confusion created by Denmark's refusal to ratify Part II of the Convention that regulates sales contract formation. The author then proceeds to investigate Denmark's obligation to have regard to the international character of the Convention and the need to promote uniformity in its application, underlying the problematical relationship between these international obligations and the Danish judicial tradition of formulating premises so brief that they shed little light on the decision's underlying rationale (*ratio decidendi*). Following analysis and critique of three Danish CISG court judgments which help illustrate these propositions, the author proposes corrective steps designed to further a more international (and less parochial) approach to the CISG.

Keywords

CISG; international sales; private law; declarations; reservations; case law

1. General Introduction

1.1. Private Law Harmonisation in Denmark

The focal point of this contribution to our internationalisation study is what I see as Denmark's ambivalent and in some respects parochial reception of the 1980 United Nations Convention on Contracts for the International Sales of Goods (CISG).[1] But to put that specific topic into its larger perspective it seems appropriate to begin with a brief description of Denmark's attitude towards the internationalisation of private and commercial law in general, especially as regards the harmonisation of contract and sales law during the past 100 or so years.

During the 18th and 19th centuries (and even before that), Danish contract and sales law consisted mainly of unwritten general principles belonging to the

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1) Convention on Contracts for the International Sale of Goods, 1980, <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

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larger disciplines known as the law of Obligations and Private law.[2] And although the doctrine underlying these principles was influenced by German 19th century legal theory, it was also strongly influenced by other Nordic thinking.[3] Towards the end of the 19th century the Nordic countries began to cooperate with a view towards codification of Nordic private law principles,[4] including the promulgation of model laws designed to facilitate near-uniform regulation of the law of contracts and sales in Denmark, Iceland, Norway and Sweden.[5]

The Danish codifications of these Nordic models were enacted as the Sales Act (*Købeloven*) of 1906 and the Contracts Act (*Aftaleloven*) of 1915.[6] Notably, not least in the present context, the Sales Act regulates only the rights and obligations of the buyer and seller, whereas the Contracts Act, which applies to contracts in general, regulates sales contract formation, as well as issues relating to sales contract validity (enforceability).

These Danish codifications have held up remarkably well. Apart from an addition to the Sales Act in 1979 (designed to regulate consumer sales),[7] as well as subsequent minor adjustments to the Contracts Act (designed to implement European Union (EU) consumer legislation),[8] the key provisions of both Acts stand as they did a century ago. It is, however, also important to note that the Norwegian and Swedish versions of the original Sales Act model were radically revised in the 1980s.[9] And since Denmark wisely refused to follow that lead,[10] our Sales codification law no longer resembles theirs.[11]

1.2. Introducing the CISG in Denmark

In 1989 Denmark ratified the CISG. Now in effect in a total of 76 Contracting States,[12] including six G-7 States,[13] as well as China and Russia, the Convention

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2) *See* D. Tamm, *Dansk retshistorie*, 2nd ed. (Copenhagen, 1996) p. 289.
3) *See* M. Bryde Andersen and J. Lookofsky, *Laerebog i Obligationsret I*, 3rd ed. (2010) pp. 22–25.
4) *See* Tamm, *supra* note 2, pp. 272–273.
5) *See* Andersen and Lookofsky, *supra* note 3, p. 33.
6) The corresponding Norwegian and Swedish legislation is of similar vintage. *See* J. Lookofsky and V. Ulfbeck, *Køb - Dansk indenlandsk købsret*, 3rd ed. (2007) chapter 2.1.
7) *See ibid.*, chapter 10.
8) *See* M. Bryde Andersen, *Grundlæggende aftaleret*, 3rd ed. (2008) chapter 6.5.e.
9) *See* Lookofsky and Ulfbeck, *supra* note 6, chapter 2.1; *see also* J. Lookofsky, 'KBL II og indirekte tab', *Ugeskrift for Retsvæsen*, B (1989) pp. 239 *et seq.*
10) *See generally* Lookofsky, *ibid.*; J. Lookofsky, 'The Scandinavian Experience with the Vienna Sales Convention', in F. Ferrari (ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences* (2003) pp. 114–116.
11) Nor does it resemble the Sales Act in Finland (which first codified its law of sales in connection with CISG ratification) or that of Island (which revised its Sales Act in 2000): *see* J. Nørager-Nielsen *et al.*, *Køboloven med kommentarer*, 3rd ed. (GAD, Copenhagen, 2008) pp. 56–57.
12) *See* <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.
13) The total of 76 ratifications is as of February 2011. The six G-7 States are Canada, France, Germany, Italy, Japan, and the United States, with the UK as the odd (G-7) man out.

provides the supplementary (gap-filling) contractual regime for countless thousands of cross-border sales transactions each year.[14]

By virtue of its CISG ratification, Denmark now has two, essentially distinct sales laws, both of which serve to regulate the single most important contract type.[15] As clearly laid down by the Danish legislature in 1990 (*Køboloven* § 1a, para. 4), the original Sales Act applies *only* in *domestic* (and other purely Scandinavian) contexts,[16] whereas the 1980 Convention is the *only* sales law applicable in *international* contexts,[17] provided the parties concerned have not contracted out.[18]

In Denmark, as elsewhere, breach of one sales contract is likely to cause other dominoes to fall. If, for example, merchant S in Denmark contracts to sell raw materials to merchant B in Germany, and B then uses those materials to manufacture products which she promises to deliver to third party merchant TP in Canada, a failure by S to fulfil his obligation to B is likely to mean that B cannot properly perform her promise to TP. To be sure, most merchants – in Denmark, Germany, Canada and elsewhere – keep their promises voluntarily (deliver contract-conforming goods, pay the agreed price on time, *etc.*), but when they do not, the CISG provides the glue which holds these sales contracts together. In fact, the very knowledge (and threat) that CISG remedies for breach are available (if need be) keeps the whole merchant community in line, thus helping to ensure the certainty and confidence that help keep the wheels of commerce moving smoothly and efficiently.[19]

Before the CISG became part of Danish law, a Danish court asked to decide an international sales dispute could only do so by first making a choice of law – *i.e.*, by choosing between the domestic laws of the parties in the States concerned. For example, if B in Germany brought an action for damages against S in Denmark with respect to a sales contract made in 1989, claiming that S had failed to deliver certain goods as agreed, a Danish court could not determine whether B's claim had merit without first determining whether to apply Danish or German

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14) Regarding factors indicating widespread Convention application, thus tending to refute largely undocumented claims of widespread opting out, *see* J. Lookofsky, *Understanding the CISG*, 3rd ed. (2008) chapter 1, § 1.1.

15) Even the Norwegian SGA, which represents an (unwise) attempt to "transform" and thus "integrate" domestic and international sales law into a single statute, contains various rules which apply exclusively to domestic sales or (as the case may be) to international sales. Regarding the complex and regrettable situation in the wake of CISG implementation by means of "transformation" in Norway, *see generally ibid.*, § 2.2; *see also* V. Hagstørm, 'CISG: Implementation in Norway – An Approach Not Advisable', 6 *Internationales Handelsrecht* (2006) pp. 246–248.

16) Regarding Denmark's reservation pursuant to CISG Article 94, *see* section 2.1 *infra*.

17) Most commonly, where the parties have their respective main places of business in different CISG States, but the Convention also applies when the rules of private international law lead to the application of the law of a single Contracting State. *See* Lookofsky, *supra* note 14, §§ 2.2–2.4.

18) *See ibid.*, § 2.7.

19) Lookofsky and Ulfbeck, *supra* note 7, p. 4.

domestic law.[20] Since 1 January 1990, however, the need for such a choice between Danish and German sales laws has been eliminated, because the CISG has been an integral part of both Danish and German law with respect to international sales contracts concluded on or after that date.[21] Now that S and B reside in different States that have the same international sales law,[22] neither Danish nor German courts need choose between domestic laws, simply because there is nothing to choose between!

But the international sales picture in Denmark is not as simple as it is in Germany and elsewhere outside Scandinavia, and this is because the reception of the Sales Convention in Scandinavia has not been as wholehearted as in all other CISG Contracting States. For one thing, the Scandinavian States (Denmark, Finland, Norway, and Sweden) all ratified the CISG subject to a key declaration (reservation) with respect to CISG Part II, *i.e.* that part of the Convention which regulates sales contract formation.[23] As a result, when an international sales contract is concluded between a party in a Scandinavian State and a party in a non-Scandinavian Contracting State, a court competent to decide a dispute between those parties still needs to make a traditional choice of law before it can proceed to resolve issues relating to international sales contract formation, and this includes the all-important issue of whether a sales contract has been formed at all!

In the following section, I will first discuss the background of Denmark's reservation with respect to CISG Part II. But since this Article 92 reservation is not the only factor that has made the reception of the CISG in Denmark and the rest of Scandinavia unique (as well as problematic), I will also briefly address the Danish CISG reservation that, pursuant to Article 94, makes the Convention inapplicable to intra-Nordic sales.

I will then proceed to examine Denmark's obligation under Article 7(1) of the treaty – a black-letter rule which requires all Contracting States to have regard to the international nature of the Convention and the need to promote uniformity

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[20] *See generally* J. Lookofsky and K. Hertz, *Transnational Litigation and Commercial Arbitration. An Analysis of American, European & International Law*, 3rd ed. (Juris Publishing, Inc., 2011) chapter 3, parts 3.2.2 and 3.3.2.

[21] Denmark ratified the Convention on 14 February 1989; Germany ratified on 21 December 1989. According to CISG Article 99(2): When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State … on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

[22] So although domestic sales laws (including the 1906 Danish Act) remain applicable to purely local sales transactions, sales contracts between merchants in different CISG Contracting States are now automatically (by default) governed by the CISG regime, unless the merchants concerned agree to opt out by agreement. *See generally* Lookofsky, *supra* note 14, chapter 1.

[23] To see the respective CISG reservations made by these countries, go to <www.cisg.law.pace.edu/cisg/countries/cntries.html> or <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

in its interpretation and application. Focusing on the interpretation of the Convention by courts in the various Contracting States, I will explore the CISG "case law" conception and relate those observations to Danish CISG case law in general, followed by some illustrations that show how Danish courts, including our Supreme Court (*Højesteret*), have sometimes interpreted and applied the Convention in distinctively "Danish" ways.

2. The Danish CISG Reservations (Declarations)

2.1. Article 92 Reservation

When Denmark ratified the CISG in 1989, it made two signification declarations (commonly referred to as reservations), both of which had the effect of restricting Danish application of the treaty and both of which proved to be controversial. The first – and most significant – reservation was as follows: Denmark declared, pursuant to Article 92(1), that it would not be bound by CISG Part II, which is the part of the treaty which regulates international sales contract formation. The consequence of this reservation, according to Article 92(2), is that Denmark is not a Contracting State in respect of matters governed by CISG Part II.[24]

Now, since the substantive core of the Convention consists of Parts II and III, one might say that Denmark only ratified "half" the Convention. In reality, that would be an exaggeration,[25] but the Part II reservation is certainly significant, and it put Denmark in an unenviable parochial club: out of a total of 76 CISG Contracting States, only Denmark and three other States (Finland, Norway and Sweden) elected to ratify the Convention in this highly restrictive way.[26]

Two main arguments were advanced by those jurists who (in the 1980s) advocated that Denmark ratify the Convention subject to an Article 92 reservation. First, as regards the revocability of offers, these jurists described the CISG Part II rules as "unduly influenced" by corresponding Common law rules. In particular, the right of a CISG offeror to revoke an (unaccepted) offer pursuant to Article 16(1) was perceived as inconsistent with traditional Danish legal conceptions.[27]

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[24] More specifically: not a Contracting State in relation to Article 1(1). *See also* Lookofsky, *supra* note 14, § 8.4; J. Lookofsky, 'Denmark', in F. Ferrari (ed.), *The CISG and its Impact on National Legal Systems* (2008).

[25] There are more rules of greater practical significance in Part III than in Part II. There are also some important General Provisions in CISG Part I. For a nutshell overview of CISG Parts I–IV *see* Lookofsky, *supra* note 14, § 1.3.

[26] Regarding Iceland *see* J. Lookofsky, *Understanding CISG in Scandinavia*, 2nd ed. (2002) §§ 8.4 with note 17. *See also* < www.cisg.law.pace.edu/cisg/countries/cntries-Iceland.html>.

[27] The Danish default rule for centuries has been that promises are binding – and offers *irrevocable* – for the time stated or for a reasonable time.

Secondly, it was feared that CISG Part II – which regulates only sales contact formation, but not sales contract validity – might create "uncertainty" as to whether a valid sales contract had been made.

Upon closer analysis, however, neither of these arguments seems convincing. First, as regards the Common law doctrine of revocability, the starting point in paragraph (1) of CISG Article 16 is modified by significant exceptions which greatly narrow the gap between Common and Danish domestic law;[28] so the real thing that may have bothered those who advocated an Article 92 reservation is the non-Danish structure (foreign architecture) of Article 16. If so, I would be tempted to describe the motivation underlying the reservation as provincial nit-picking, which sheds bad light on Denmark's attitude towards private law harmonisation in general.

Perhaps even easier to rebut is the second argument originally put forth in favour of the Article 92 declaration, in that the rules on contract formation in Chapter I of the Danish Contracts Act are clearly distinguishable from the rules on contract validity (in Chapter III of that Act), and this fact clearly suggests that the replacement of Danish domestic law (Chapter I) with international law (CISG Part II) would hardly create more "uncertainty" than the Danish ratification of CISG Part III.

It is in any case important to understand that the Danish Article 92 declaration has not achieved the results which the sceptical Danish legislator seemed to expect when that declaration was made. On the contrary, it is now generally recognised that Article 92(2), which renders Denmark a non-Contracting State with respect to CISG Part II, does not preclude the application of CISG Part II in cases when the choice-of-law rules of the forum State point to the substantive sales law of a non-Scandinavian Contracting State,[29] and this proposition has been confirmed by a Danish High Court of Appeal, which itself applied CISG Part II to determine whether a CISG sales contract between a Danish seller and a French buyer had been formed.[30]

Suffice it to say that this makes for a complex state of legal affairs,[31] and given the fact that no CISG State outside Scandinavia has made an Article 92 declaration, we can hardly expect non-Scandinavian courts to understand the complexities associated with the proper application of that reservation in practice. To this we might add that the Danish Article 92 reservation can lead to other practical disadvantages for Danish merchants. As regards sales between Danish and Chinese or American merchants, for example, the effect of the Danish Article 92

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28) *See* Lookofsky, *supra* note 14, § 3.6.
29) *See* Lookofsky, *supra* note 26, §§ 2.4 and 8.4.
30) *See* J. Lookofsky, 'Alive and Well in Scandinavia: CISG Part II', 18 *Journal of Law and Commerce* (n.d.) pp. 289–299, <www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html>.
31) For a fuller exposition *see ibid.*

reservation, when combined with the Article 95 declarations made by China and the United States, can lead to the application of Chinese or American domestic law with respect to contract formation,[32] *i.e.*, rules which – for Danish merchants and their lawyers – are clearly more "foreign" than those in CISG Part II.

For these and other reasons, most commentators now view Denmark's Article 92 reservation as overly complex and counter-productive. Regarding an international initiative undertaken to encourage Denmark and other Scandinavian States to withdraw the reservation see section 2.3. below.

2.2. Article 94 Reservation

When Denmark ratified the CISG, it also made declarations (reservations) pursuant to Article 94(1) and (2);[33] Finland, Iceland, Norway and Sweden made similar declarations.[34] Pursuant to Article 94(1) of the Convention, two or more Contracting States which have the same or closely related legal rules on matters governed by the CISG may declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Article 94(2) permits similar declarations with respect to non-Contracting States which share such closely related rules.

As a starting point, the matters to which Article 94 refers relate to sales contract formation (CISG Part II) as well as the rights and obligations of the seller and the buyer arising from such a contract (CISG Part III). But since the Scandinavian Article 92 reservations render the Nordic Article 94 reservations irrelevant with respect to CISG Part II,[35] the practical effect of the Danish Article 94 reservation relates to CISG Part III.

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[32] When Danish buyers contract with Chinese or American sellers, the Article 95 declarations made by China and the United States will prevent the application of CISG Part II by virtue of Article 1(1)(b). When coupled with effects of Denmark's Article 92 declaration, the likely result in these transactions is that *Chinese or American domestic* sales contract formation rules will be held to apply.

[33] The wording of this Danish reservation is as follows: "Under paragraph (1) cf. paragraph (3) of article 94, Denmark declares that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said States. Under paragraph 2 of article 94, Denmark declares that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland."

[34] To see the respective CISG reservations made by these countries, go to <www.cisg.law.pace.edu/cisg/countries/cntries.html> or <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

[35] The effect of the declarations made by the Scandinavian States pursuant to Article 92 is that a Scandinavian court would not apply CISG Part II *vis-à-vis* another Scandinavian court, and this would be true even if the Nordic States (including Iceland) had not also made declarations pursuant to Article 94.

Even to this extent, however, the Danish Article 94 reservation has become problematic, since Denmark – unlike its Scandinavian neighbours – refused (and for good reason still refuses) to radically rewrite its domestic Sales Act (*Køb*eloven of 1906) to accord with the new Scandinavian model formulated in the late 1980s.[36] As a consequence, it no longer seems appropriate to describe the Scandinavian States as jurisdictions that (all) share "closely related" domestic sales law rules, *i.e.*, as required by CISG Article 94. For this reason and others, it has been argued that the Article 94 declarations should be withdrawn.

2.3. Efforts to Withdraw the Scandinavian Reservations

The International Chamber of Commerce (ICC) is a key interlocutor on the world business stage. In the Nordic/Scandinavian region, the ICC is composed of national committees in Denmark, Sweden, Norway and Finland. On behalf of its member companies around the world, the ICC has written to the Scandinavian Ministries of Justice to bring their attention to problems created by the CISG Article 92 declarations made by Denmark, Finland, Norway and Sweden, as well as the Article 94 declarations made by the five Nordic States (the just-named States and Iceland). In the view of the ICC, the current reservations create unnecessary complexity and uncertainty, not only for the local business community but for all traders doing business with companies in the region. This is particularly true as regards the Article 92 reservations. To support its position the ICC has provided the Scandinavian Ministers of Justice with a series of concrete observations and experiences that have been reported to the ICC by its members, in Scandinavia and elsewhere:

> Nordic ICC member companies have reported that the fact that China has ratified CISG is reason enough in itself for removing the Article 92 reservations, so as to avoid undue confusion in negotiations between companies in the Nordic region and China. The same is true as regards other major trading partners such as those in the USA the EU. Most business people and lawyers from countries outside Scandinavia are not even aware of the Scandinavian Article 92 reservations. This is especially true as regards small and medium-sized enterprises. Foreign companies are often surprised to learn about these reservations, and they may be even more surprised to learn that the rules in CISG Part II sometimes apply to contracts with Scandinavian merchants anyway, i.e., notwithstanding the reservations. The CISG Part II rules on Contract Formation are, in some respects, more modern and up-to-date than the corresponding Scandinavian rules. If, for example, one compares CISG Article 19 to Article 6 of the Contract Acts, CISG Article 19 represents an improvement. Electronic contracting would, in cases involving a Scandinavian merchant, likely be facilitated by removal of the Article 92 reservations. For example, it would be easier to determine the will of the parties under CISG Part II than under the otherwise applicable domestic law. Also, CISG Articles 15 and 24 are considered to be well-suited for contracting using electronic means. Last but not least, removing the reservations would allow Scandinavian universities and business schools to spend more time

[36] *See supra* section 1.2, text with notes 9–11.

teaching students about the substantive core of the CISG, instead of wasting valuable time teaching the complex rules on application of the Article 92 reservations.

For these reasons, and since the ICC sees no compelling reasons to maintain the Article 92 reservations, the ICC has strongly recommended that they be withdrawn, as authorised pursuant to CISG Article 97(4).

More recently, according to the legislative program announced by the Danish government in 2010, the Ministers of Justice of Denmark, Finland, Norway and Sweden have declared that these States intend to adopt CISG Part II by withdrawing their long-standing Article 92 declarations. Following that announcement, however, no concrete legislative action has been taken in the States concerned, nor has similar legislative action been suggested with respect to the Article 94 reservations.

3. CISG Case Law

3.1. General Introduction and Observations

By virtue of Denmark's CISG ratification, coupled with an express amendment to the Danish Sales Act of 1906, the CISG treaty *replaced* the Danish Sales Act of 1906 with respect to international sales.[37] As a result the treaty is now Denmark's *only international sales law*,[38] and that entails that Danish courts *must apply the CISG* rule-set in cases governed by the treaty. So even if the parties are not aware of the fact that the CISG applies to a given international sale and argue on the basis of Danish domestic law, Danish judges *must* nonetheless apply the CISG on their own initiative, by reason of *iura novit curia*,[39] (a) because this time-honoured principle is *part* of the (Danish) *lex fori*[40] and (b) because the CISG rule-set is (since 1990) itself *part and parcel of Danish law*.[41]

To be sure (and as more fully elaborated elsewhere in this special *NJIL* issue) increasing complexity of the international legal landscape has put the Danish version of the *iura novit curia* conception under increased pressure,[42] but since the CISG rules are now the *only sales rules* which apply to international sales in Denmark, it can hardly be said that the obligation of Danish courts to consider

37) *See* text *supra* with notes 16–18.
38) *Ibid.*
39) *See* B. Gomard and M. Kistrup, *Civilprocessen*, 6th ed. (2007) pp. 501, 528.
40) F. Ferrari, 'Remarks on the UNCITRAL Digest on Article 6', 25 *Journal of Law and Commerce* (2006) p. 31, <heinonline.org/HOL/Page?handle=hein.journals/jlac25&id=21&collection=journals&index=>.
41) Nørager-Nielsen *et al.*, *supra* note 11, p. 89.
42) *See* section 3.5 of the contribution in this volume by C. Petersen.

and apply clearly relevant CISG rules depends on the allegations and legal arguments of the parties.

But *how* should Danish courts interpret and apply relevant CISG rules? The short answer to this complex question is this: the CISG should be interpreted and applied in an *international way*. Indeed, Article 7(1) of the CISG treaty itself expressly requires all Contracting States (and, by clear implication, their courts) to *have regard* to the international nature of the Convention and the need to promote uniformity in its interpretation and application.

The primary source of CISG interpretation is, of course, the treaty's own text,[43] but to help determine the international meaning of CISG rules whose legislative black letters are susceptible to more than one arguably reasonable interpretation, courts and arbitrators often consult *secondary sources* of CISG law. Thus, since the Convention was created by an international legislator, some courts find occasion to look to the Convention's legislative history (*travaux préparatoires*) for evidence of legislative intent. Unfortunately, however, the disjointed series of preliminary discussions and votes within the United Nations Commission on International Trade Law (UNCITRAL) regime – the United Nations organ designed to serve the interests of all legal systems – with respect to the drafting and adoption of individual CISG provisions hardly resemble the far more coherent and instructive history which usually precedes the adoption of Danish or other domestic legislation. For this reason, the CISG *travaux* rarely provide clear insights as to the international legislator's underlying intent as regards concrete CISG rules.[44] For example, although numerous scholars have searched the legislative history underlying CISG Article 79 for clues as to whether or not this liability-exemption rule was intended to comprise remedies for economic hardship,[45] the results remain inconclusive:

> As to the drafting history of this provision, isolated discussion of proposals that were dismissed or the comments by some delegates may lead one to conclude that there was some type of consensus among the members of the Working Group against the doctrine of 'hardship.' In fact, some passages of the travaux préparatiores appear to indicate that the choice of the word 'impediment' was made for the purpose of adopting a unitary conception of exemption with the intention of setting aside … hardship theories based on 'changed circumstances.' Thus, according to some legal commentators, the exclusion … of hardship from the scope of Article 79 would emerge from its drafting history. Following the successive drafts preceding what finally became Article 79, the Working Group of UNCITRAL considered but rejected a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected 'excessive damages'. Yet, a closer look at this passage reveals that after briefly

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43) *See e.g.* with respect to the proper interpretation of Article 78, J. Ramberg and J. Herre, *Internationella köplagen (CISG)* (2001) p. 524.

44) *See* Lookofsky, *supra* note 14, § 2.8.

45) As regards the CISG hardship conundrum *see* J. Lookofsky, 'Not Running Wild with the CISG', *Journal of Law and Commerce* (2011).

> setting out the arguments in support of the proposal, the report simply stated that it was not adopted, not reappearing in subsequent discussions. Other commentators have seized upon the rejection of a Norwegian proposal linked to a passage of what later became Article 79(3) in order to infer a rejection of the position that Article 79 may extend its application to a situation of genuine hardship … Although the recollection of the discussions among the participant delegates, or what should be made out of those discussions, is far from uniform, the rejection of the Norwegian proposal did not settle the issue of economic hardship because it was actually not discussed as such.[46]

In such contexts, where the international legislator's *travaux* fail to illuminate the meaning of a given treaty provision, national courts often refer to *foreign CISG case law* as a potentially more fruitful secondary source. But CISG case law can itself be problematic, *inter alia* because the term "case law" itself means different things to different jurists in different legal systems. In Common law systems, for example, the case law concept is tied tightly to the formalistically rigid doctrine of precedent (*stare decisis*) whereby a given court within a given judicial hierarchy – *e.g.* the judicial system of England, India or New Mexico – is (usually) "bound" by its own prior decisions,[47] as well as by prior decisions handed down by that jurisdiction's own superior courts.[48] For this reason alone, Common lawyers consider their own (domestic) case law – often also referred to as "judge-made" law – to be an extremely important secondary source of law.

But if we compare this Common law doctrine with the corresponding doctrine in other systems, we see that (*e.g.*) Civil law jurists have traditionally rejected the concept that judges are empowered to "make" law at all.[49] Indeed, the role assigned to the judiciary in these systems has been famously (and somewhat pejoratively) described as that of legislative "mouthpiece" (*la bouche de la loi*).[50]

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46) *See* CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 2007, <www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169>, Comments 29–30; *see also* P. Schlechtriem and P. Butler, *UN Law on International Sales* (2009) § 291 (majority view in the end was probably that also economic impossibility could relieve the debtor); *but see* J. Honnold and H. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed. (2009) p. 629 with note 37 (arguing that the rejection of proposals to include "hardship-like doctrine" during the drafting of Article 79 supports the proposition that hardship "should have no application in CISG contracts").

47) In 1966 the House of Lords, departing from its previous practice, declared that it would not be bound by its own prior decisions where that might lead to injustice. *See* G. Williams, *Learning the Law*, 12th ed. (2002) p. 111.

48) *See* Alan Farnsworth, *An Introduction to the Legal System of the United States*, 3rd ed. (1996) pp. 50–52.

49) *See* J. Lookofsky, 'Precedent and the Law in Denmark', in E. W. Hondius (ed.), *Precedent and the Law* (2006).

50) *See* K. M. Schönfeld, 'Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited', 4 *European Constitutional Law Review* (2008) p. 275, <journals.cambridge.org/action/displayAbstract?fromPage=online&aid=2164840> (in Montesquieu's positivistic view, a law text should be self-explanatory: the judge is a mere *organe machinal de la loi* who should stick to the letter of the law, "*la bouche de la loi, des êtres inanimés*").

In actual fact, however, these rough descriptions of doctrinal starting points miss the mark. As regards the Common law position, the use of precedent is better regarded as a flexible art than a rigid science.[51] Conversely, under the modern Civil law view, judges play an increasingly dynamic role. Modern French authors, for example, now question the logic of the *juge automate* account.[52]

Given the blurring of traditional distinctions between Civil and Common law systems, we should hardly be surprised that UNCITRAL regularly refers to CISG case law and has even dubbed its own dissemination system of national court judgments "Case Law on UNCITRAL Texts" (CLOUT).[53] This CISG version of the case law concept alludes to the legal precepts and refinements to statutory law which emanate from the interpretative rulings and decisions rendered by courts in CISG Contracting States, and there are indeed an abundance of these. In fact, the CISG commercial and judicial community now has online access to more than 2,500 CISG-related decisions rendered by national courts in the 76 CISG Contracting States, as well as a substantial number of CISG awards rendered by international arbitral tribunals.[54]

Not all this case law is uniform, however, the main reason being that some CISG rules are susceptible to more than one (arguably reasonable) interpretation:[55]

> One much-discussed example can serve to highlight this non-uniform state of CISG affairs: German and Austrian courts have taken a strikingly strict (seller-friendly) stance in relation to the do-or-die rule in Article 39(1) which requires CISG buyers to provide sellers with notice of an alleged non-conformity within a "reasonable" time (or forever hold their peace);[56] Finnish, French and American courts, on the other hand, have allowed CISG buyers much more leeway, thus extending the life-span of their often legitimate non-conformity claims.[57]
>
> Additional complexities arise because the scope of the treaty (the issues which it governs) sometimes seems uncertain – a problem highlighted by ongoing academic disagreement about which "matters" the Convention was designed to govern (regulate) and accompanying controversy about how matters which are held to be CISG-governed should be settled (resolved).[58]

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51) *See* Farnsworth, *supra* note 48, pp. 52–60.

52) Schönfeld, *supra* note 50, p. 278.

53) Case Law on UNCITRAL Texts (CLOUT), n.d., <www.uncitral.org/uncitral/en/case_law.html>.

54) *See e.g.* <www.cisg.law.pace.edu/cisg/text/casecit.html>.

55) *See* Lookofsky, *supra* note 45, text with notes 30–36.

56) For a particularly egregious example (concerning a large quantity of used shoes) *see* H. Flechtner, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof under the United Nations Sales Convention', 26 *Boston University International Law Journal* (2008) pp. 1–28, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1144182>, § 4.9; *see also generally* Lookofsky, *supra* note 14, § 4.9.

57) *See* Lookofsky, *ibid.*

58) According to CISG Article 7(2): Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. *See ibid.*, § 2.11.

> To take one example: although the Convention, by its own terms, governs only sales contract formation and the parties' rights and obligations arising from such a contract,[59] some academics have sought to expand the scope of CISG Article 74, which measures damages for breach, by claiming that Article 74 pre-empts (trumps) domestic rules of procedure which determine whether the losing party in CISG litigation should pay the successful party's attorney's fees.[60]

Within the confines of any given national system, such as the Danish system, a decision rendered by a lower court can of course be reversed or overruled by a higher court, thus stamping the prior lower court decision as both unpersuasive and wrong. Indeed, the highest court in a given system (in Denmark: *Højesteret*) even has the power to overrule all decisions previously rendered by the various lower courts in that system on a given point. But we cannot expect to see that kind of thing happen in the CISG context, simply because no higher international court has the power to brand any foreign CISG decision as wrong. So, although a given lower court in a given CISG State, say Germany, would surely consider itself bound by a CISG ruling emanating from a higher German court, a court in a different CISG State, say France, need not (and would not) regard a prior German decision as binding for France.

These observations help shed light on a related CISG case law problem: just as the absence of a higher private law court means that foreign precedent cannot bind, we have no established system or scale which can be used to evaluate the weight (precedential value) to be attributed to any given foreign precedent on point. So although CISG Article 7(1) commands (*e.g.*) French courts to have regard to decisions previously rendered by courts in Germany (and other CISG States), the treaty does not tell French courts how much regard they should have.

In my view, the weight (precedential value) of any given foreign decision must depend on several flexible factors, including (1) the force of the reasoning in the (foreign) opinion, *i.e.*, its persuasiveness,[61] (2) the prominence of the (foreign) judgment-rendering court, and (3) the extent to which the decision in question has support in other jurisdictions.[62] This sliding scale implies that a given view as

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59) *See* CISG Article 4.

60) *See e.g.* J. Felemegas, 'An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals', 15 *Pace International Law Review* (2003) p. 91, <cisgw3.law.pace.edu/cisg/biblio/felemegas4.html>; for an contrary view *see* H. Flechtner and J. Lookofsky, 'Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal', 7 *Vindobona Journal of International Commercial Law and Arbitration* (2003) p. 93, <www.cisg.law.pace.edu/cisg/biblio/flechtner5.html>; *see also* J. Lookofsky and J. Flechtner, 'Zapata Retold: Attorneys' Fees Are (Still) Not Governed by the CISG', 26 *Journal of Law and Commerce* (July 2006) p. 1, <www.cisg.law.pace.edu/cisg/biblio/lookofsky-flechtner.html>.

61) *Cf.* Farnsworth, *supra* note 48, pp. 52–57 (speaking of the American notion of "persuasive" – as opposed to binding – case law authority, a category which includes the decisions of courts of other jurisdictions).

62) *Ibid.*

to the proper interpretation of a CISG rule need not be given great weight simply because a few foreign courts happen to share that position, but if the extent of foreign support for a given view is *overwhelming*, a national court which decides to go against that foreign CISG flow ought to provide the CISG community with very persuasive premises to support its decision.

In any event, Danish courts remain obligated to adhere to the command in Article 7(1) of the treaty which requires national courts in all CISG States to have regard to the international nature of the Convention and the need to promote uniformity in its interpretation and application. This, in turn, must mean that Danish courts should display *some (reasonable measure) of regard* to *CISG case law* emanating from courts in other Contracting States. Regrettably, however, it seems that Danish courts have not (yet) displayed any regard for foreign CISG case law (see section 3.3), just as the special Danish style of rendering judgments (discussed in the next section) makes it hard for foreign tribunals to have much regard for CISG judgments rendered by Danish courts.

3.2. CISG Judgments, Danish Style

As I see it, considerable tension has been generated between the international obligation of courts in all Contracting States to have regard to foreign CISG case law,[63] and the strong Danish judicial tradition of formulating premises so brief that they sometimes shed little light on the decision's underlying rationale (*ratio decidendi*).[64] Indeed, as far as I know, no Danish court has itself ever cited a foreign CISG case,[65] and that conspicuous omission obviously makes it difficult to determine whether Danish courts actually have (any) regard for foreign CISG case law. Conversely, that same omission – as well as the lack of other relevant information in Danish judgments – also decreases the likelihood that foreign courts will have much regard for Danish CISG case law.

The tradition whereby Danish courts formulate premises comparable to a brief "decision-report"[66] reflects a broader legal philosophy that sees the main task of a Danish court to be the resolution of the concrete dispute brought before it, *i.e.*, to decide who wins (*e.g.* whether damages claimed by the plaintiff should be awarded or not). And since a Danish court's primary task is always to achieve a reasonable outcome for the parties concerned, and not to create a precedent,[67]

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63) *See* discussion in preceding section and Lookofsky, *supra* note 14, § 2.8.

64) *See* (placing this tradition in comparative context) Lookofsky, *supra* note 49; *cf.* L. Pagter Kristensen, 'Højesterets arbejde 1961–2011', in P. Magid *et al.* (eds.), in *Højesteret – 350 år* (2011) p. 173 (præmissernes værdi afhænger ikke af deres vidtløftighed og bredde i ræsonnementerne).

65) Although at least one published opinion refers to a foreign CISG decision cited by a party's *lawyer. See* the decision of the Maritime and Commercial Court discussed *infra* under section 3.3.1.

66) Kristensen, *supra* note 64, p. 174 (*beslutningsreferat*).

67) *See* M. Bryde Andersen, *Ret & Metode* (Gjellerup, 2002) pp. 154 *et seq.*

the *ratio* of a Danish decision can (and often will) be formulated in the very briefest of terms. Danish Supreme Court opinions, however, are sometimes supplemented by a footnote attached to the headnote of the decision in question, as officially reported in *Ugeskrift for Retsvæsen* (Weekly Law Report). These footnotes, which are formulated by Supreme Court judges who participated in the case (or who consulted with those judges who did), are themselves briefly formulated – providing only a list of secondary sources – but the footnotes are nonetheless important for those who seek to better understand the Court's underlying *ratio*, as they reflect the scholarly opinion to which the Court attached greatest significance in the concrete case.[68]

The Danish judicial tradition whereby courts limit their premises (and footnotes) to a minimum is well entrenched,[69] but that tradition can hardly justify judicial neglect of Denmark's treaty-based obligations under CISG Article 7(1). Indeed, the general failure of Danish courts to (ever) cite foreign CISG case law and academic authority in their premises might well astound judges in other jurisdictions who regularly display considerable regard for the positions taken by foreign courts,[70] as well as for foreign academic opinion. Consider, for example, the following extract from the premises set forth by the highest German Court (*Bundesgerichtshof*) in the now-famous *Vine Wax* case, thus demonstrating that Court's high regard for both German and foreign scholarly opinion on the controversial issue of whether a CISG seller who delivers non-conforming goods might be entitled to a liability "exemption" pursuant to Article 79:[71]

> Es kann dabei dahingestellt bleiben, ob Art. 79 CISG alle denkbaren Fälle und Formen einer haftungsbegründenden Nichterfüllung von Vertragspflichten umfaßt und nicht auf bestimmte Formen der Vertragsverletzung beschränkt ist und deshalb die Lieferung einer wegen eines Mangels vertragswidrigen Sache einschließt (vgl. Schlechtriem/Stoll, Kommentar zum einheitlichen UN Kaufrecht, 2. Aufl. 1995, Art. 79 Rdnr. 45 47; Staudinger/Magnus, Wiener UN Kaufrecht, 1994, Art. 79 Rdnr. 25 26; Piltz, Internationales Kaufrecht, München 1993, § 4 Rdnr. 217 f.; Herber/Czerwenka, Internationales Kaufrecht, München 1991, Art. 79 Rdnr. 8; Schlechtriem, Internationales UN Kaufrecht, Tübingen 1996, S. 164 f.) oder ob ein Verkäufer, der fehlerhafte Ware geliefert hat, sich überhaupt nicht auf Art. 79, CISG berufen kann (vgl. Nicholas, Impracticabillty and Impossibility in the UN Convention on Contracts for the International Sale of Goods, in: Galston/Smith, International Sales, New York, Mathew Bender, 1984, Chapter 5, § 5.10 bis 5.14; Tallon, in, Bianca/Bonell, Commentary on the International Sales Law, Milan 1987, Art. 79 Arm. 2.6.2.; Honnold, Uniform Law for International

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68) Kristensen, *supra* note 64, pp. 174–175.

69) *See generally* Lookofsky, *supra* note 49; Kristensen, *supra* note 64.

70) *See e.g.* the decision by the Supreme Court of Israel in *Pamesa Ceramica* v. *Yisrael Mendelson Ltd.* IsrLR 27 (Supreme Court of Israel 2009) with citations to (and discussion of) some 17 CISG precedents rendered by courts in eight other Contracting States.

71) Germany 24 March 1999 Supreme Court, English translation available at <cisgw3.law.pace.edu/cases/990324g1.html>. For a discussion of the case *see* Lookofsky, *supra* note 14, §§ 6.14 and 6.19; *See also* text, translation, abstract and additional sources available at UNILEX on CISG & UNIDROIT Principles, n.d., <www.unilex.info/>.

> Sales Under the United Nations Convention, December 1982, Art. 79 N. 427; vgl. auch Lautenbach, Die Haftungsbefreiung im internationalen Warenkauf nach dem UN Kaufrecht und dem schweizerischen Kaufrecht, Dissertation der Universität Zürich, 1990, S. 33 f.; Keil, Die Haftungsbefreiung des Schuldners im UN Kaufrecht, Dissertation der rechtswissenschaftlichen Fakultät der Ruhr Universität Bochum, Frankfurt am Main 1993, S. 18 f.).

Consider also the following extract from the official English translation of the Israeli Supreme Court's decision in the *Pamesa* case,[72] yet another *ratio* evincing high regard for CISG foreign case law on the controversial issue of whether the CISG contractual regime pre-empts a concurrent tort claim:

> 59. European case law on this question is relatively meagre. In one case the court of appeal in Germany held that a buyer of fish who did not give prompt notice (under art. 39 of the Vienna Convention) of an infection from which the fish suffered could not sue the seller for negligent carriage that allegedly caused the infection, even though the fish that were supplied caused serious damage to the buyer's stock of fish (Thüringen [Jena] Provincial Court of Appeal, 26 May 1998, 8 U 1667/97). On the other hand, the court of appeal in Belgium held (in the same vein as Schlechtriem's aforesaid article of 1988), that in a case where notice was not given promptly under art. 39, the seller can be heard in a tort action only if the alleged fault relates to a breach of a general duty of care, and not to a duty that the parties created in the contract (*ING Insurance v. BVBA HVA Koeling*). With regard to claims for unjust enrichment, the Supreme Court in Switzerland has held that the convention does not apply to such claims (Swiss Federal Court, 7 July 2004, 4C.144/2004/1ma); see also Schlechtriem, in his book (1998 edition), at p. 453).
>
> 60. By contrast, extensive and consistent American case law has, since the beginning of the twenty-first century, adopted a liberal line that permits claims based on extra-contractual causes of actions: 'The CISG does not apply to tort claims' (*Viva Vino* Import *Corp. v. Farnese Vini S.r.l.*); and elsewhere: 'The CISG clearly does not preempt the claims sounding in tort' (*Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*); for a summary as of 2004, see E.D. Lauzon, 'Annotation, Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG),' 200 *A.L.R. Fed.* 541 (2005)). There has also been similar case law in recent years: *Sky Cast, Inc. v. Global Direct Distrib., LLC*; *Teevee Toons, Inc. v. Schubert GMBH*; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*.
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> 61. There is also similar case law in the lower courts in Canada: *Shane v. JCB Belgium N.V.*; Rajeev Sharma, 'The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience,' 36 *Victoria U. Wellington L. Rev.* 847 (2005); and in Australia: *Ginza Pte Ltd v. Vista Corporation Pty Ltd*, even though the matter was not expressly considered.

As we shall see, the international approach to CISG interpretation and application illustrated by these German and Israeli Supreme Court examples stands in striking contrast with the traditional – and in the CISG context parochial – approach of the Danish Supreme Court (*Højesteret*).

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[72] *See* <cisgw3.law.pace.edu/cases/090317i5.html#w>, and J. Lookofsky, 'Persuasive Pamesa', in W. Koch (ed.), *Europe – The New Legal Realism (Festschrift for Hjalte Rasmussen)* (DJØF Publishing, Copenhagen, 2010).

3.3. Examples of CISG Interpretation and Application in Danish Courts

I shall now provide three concrete illustrations of Danish CISG case law – one Commercial Court case (decided in 2002) and two Supreme Court cases (decided in 2004 and 2008). These examples are intended to highlight the failure of Danish courts – in instances like these – to demonstrate sufficient observance of Denmark's obligations in relation to CISG Article 7(1). In these instances the courts (a) fail to cite clearly relevant treaty provisions, just as they – Supreme Court footnotes notwithstanding – (b) fail to refer to relevant secondary authority (foreign case law and academic opinion). Worse yet, the courts in these cases (c) seem to have interpreted CISG rules on the basis of clearly irrelevant Danish domestic (contract and sales) law. Granted, courts in other CISG jurisdictions have also committed serious errors like these.[73] It must also be conceded that the parties' lawyers may have contributed to various deficiencies in the Danish judgments concerned, but the parties' own ignorance of (basic) CISG law can hardly excuse the Danish judiciary.[74]

3.3.1. Frozen Mackerel

My first example is a CISG case decided in 2002 by the Danish Maritime and Commercial Court.[75] The main facts were as follows:

> A Danish seller (S) sent a telefax to a German buyer (B) offering to sell "80 tons of mackerel, Whole Round". Upon B's request for a more detailed specification, S passed on information provided by its Dutch supplier, describing the goods as "Tiefgefrorene Mackerel – Whole Round" with the Latin designation "Trachurus Symmetricus Murphyi". In this connection, the date of production was designated "November/Dezember 1996". In a subsequent telex addressed to B's Russian customer, S described the goods as "Bastardmakrele" (Bastard/Mongrel Mackerel), also adding the Latin designation. In S's order confirmation, however, as well as in the invoice sent by S to B, the goods were designated "Whole Round mackerel" without the Latin or German specifications. When the goods were shipped in frozen condition from the Netherlands to Russia, the documents designated them as "frozen Mackerel, Whole round" and also provided the Latin designation. In this connection a Dutch health certificate attached to the shipping documents provided: "The fish or/and fishery product is/are fit for human consumption." Shortly after delivery of the fish in Russia in February 1999 B's customer complained the goods did not conform to the contractual description, and B promptly passed this complaint on to S. A long correspondence ensued, during which time the frozen fish were stored in a Russian warehouse. In September 1999 the Russian health authorities declared the goods to be unfit for human consumption, designating them as "Frozen fish for furry animals". B then avoided the contract and sued S in Denmark for

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[73] For criticism of an American court decision in this connection *see* J. Lookofsky and H. Flechtner, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?', 9:1 *Vindobona Journal of International Commercial Law and Arbitation* (2005) pp. 199–208, <www.cisg.law.pace.edu/cisg/biblio/lookofsky13.html>.

[74] *See* text *supra* with notes 37–42.

[75] Copenhagen Maritime and Commercial Court, 31 January 2002, CLOUT Case 997, *Ugeskrift for Retsvæsen*, SH 2002.H-0126-98. Also at CISG Nordic, n.d., <www.cisgnordic.net/>.

damages, including the return of the purchase price. In this connection, and citing CISG Article 35, B alleged (1) that the *species* of the fish delivered did not conform to the *contractual designation* and (2) that they were of *inferior quality*, both because they had been caught prior to the time specified by contract and because they had been declared unfit for human consumption.[76] Countering these arguments, S maintained that the goods conformed with the contract, both as regards (1) and (2), while also alleging that B could in any case rely on such non-conformity, as it had not examined the goods and notified S in time.

As regards the contractual designation (1), the Commercial Court noted that S and B had traded fish on a prior occasion using Latin designations and that this practice was in accordance with the custom of fish merchants generally. On this basis alone, and without making any reference to CISG Articles 8, 9 or 35(1), the Court held that B "could not deny" that the fish delivered were of the kind (variety) specified in the contract.[77]

Now, I do not doubt that the Danish Commercial Court reached a reasonable decision on this first aspect of the conformity issue, (*i.e.*) by holding that S had delivered goods which conformed to the parties' express agreement. What I do find disappointing, however, is the fact that the *ratio* (premises) upon which that decision was based makes no mention of the CISG rules upon which that decision was (or at least should have been) based. The omission of a reference to CISG Article 35 seems particularly regrettable, and the fact that P's lawyer (as noted in the part of the case report which precedes the Court's own opinion) made brief mention of this provision in his allegations hardly fills the gap.

The next part of the Court's opinion deals both with the alleged nonconformity regarding the quality of the fish delivered (2), as well as the timeliness of B's notice of that alleged non-conformity. As regards B's examination and notice to S of alleged non-conformity, the Commercial Court at least cites the relevant CISG rules (Articles 38 and 39), but since courts in other CISG Contracting States have sometimes interpreted these rules in distinctly different (and incompatible) ways,[78] it would have been better if the Danish had better explained *why* B "under the circumstances" lost the right to rely. Obviously, such an explanation could take different forms, such as the *ratio* provided in a prior Dutch decision, also involving frozen food.[79] In fact, the lawyer for S in the Danish case referred to

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[76] "Da DAT-SCHAUB leverede en anden fiskeart end den, som Dr. Sergueev havde bestilt; hermed har DAT–SCHAUB pådraget sig et erstatningsansvar efter international købelov, jf. konvention af 11. april 1980, CISG, artikel 35. […] Også ved at have leveret fisk med en anden produktionsdato end aftalt har DAT–SCHAUB pådraget sig et erstatningsansvar efter CISG art. 35."

[77] As regards the fact that the date of production was earlier then that specified in the contract, the Court noted that the buyer could easily have adduced that fact at the time of delivery by examining the production dates stamped on the packaging.

[78] *See* text *supra* with notes 56–57.

[79] Arrondissementsrechtbank Roermond, Netherlands 19.12.1991, No. 900336, full text available in Dutch at UNILEX on CISG & UNIDROIT Principles.

that Dutch case in his own argument,[80] and the Danish Court's inclusion of this reference in its judgment (as published) provides circumstantial evidence that the Court actually took judicial notice of this Dutch CISG case law, to this extent obeying – albeit indirectly – the Article 7(1) command.[81]

3.3.2. Furniture Parts

My next example is a CISG case that, as regards the merits, reached the High Court of Eastern Denmark, and which was ultimately decided by the Danish Supreme Court (*Højesteret*) in 2004:[82]

> A Danish seller (S) and a German buyer (B) contracted for the delivery of chrome plated steel tubes for use by B in connection with the manufacture of furniture. Due to problems attributable to its subcontractor, S could not deliver all the tubes as originally agreed. In February 1999 the parties agreed that S should deliver as many chrome plated tubes as possible and at the same time deliver the remaining number of tubes in raw steel. Following delivery by S of a quantity of uncoated tubes, B ceased to place further orders. Later, in July 1999 B notified S that it would not pay for prior deliveries of uncoated tubes, claiming that uncoated tubes had been delivered later than the date agreed and that B was entitled to set off sums paid by B to a subcontractor for chrome coating. Denying that any deadline had been agreed for the delivery of uncoated tubes and further denying that it had agreed to pay for the chroming of uncoated tubes delivered, S sued B for payment. S also argued that B in any case had lost any alleged right to set off, as B first gave notice of this claim in July 1999; in reply to this argument, B argued that it was not necessary to notify S of its claim, as S had known of the delays concerned.

The District Court (first instance) found that B had accepted a contract modification in February 1999 and that there was no evidence that the parties had set a deadline for the delivery of uncoated tubes. Describing B's set-off claim as a claim for damages, the District Court held that B, by failing to notify S of its claim until July 1999, lost the right to make that claim by virtue of the Danish domestic principle: passivity (*passivitet*). But the District Court also provided an alternative, quasi-international explanation. Noting that B, by failing to notify S its claim until July 1999, had breached its duty under Danish domestic law to act loyally (*loyalitetspligt*), the Court also noted, quite oddly, that the parties' lawyers had not provided the Court with information indicating that a similar duty should not apply under the CISG, adding that it (the Court) saw no reason to assume that this duty was confined to obligations governed by Danish domestic law. On the contrary, the Court noted, the parties to an international transaction have a particular need to be able to "count on one another." Summing up in an

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80) *See* the abstract by C. Andersen at <cisgw3.law.pace.edu/cases/020131d1.html#ca>.

81) *See supra* under section 3.1.

82) No. 333/2003, 22 April 2004, *Birkemose A/S* v. *Interstuhl Büromöbel GmbH*, Reported in English as case 996 in *Case Law on UNCITRAL Texts* (CLOUT). Original in Danish Published in Danish: *Ugeskrift for Retsvæsen* 2004, pp. 1869 *et seq.*, <cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/94-2004-apr-22-sc#original>.

essentially domestic vein, the District Court held that a mutual duty of loyalty applied and that any claim for damages which B might otherwise have was therefore barred by reason of passivity, and B was therefore ordered to pay the agreed price.

Challenging this decision in the High Court of Eastern Denmark, B relinquished its claim that deliveries had been delayed, claiming instead that deliveries of uncoated steel after the alleged deadline for such deliveries constituted a non-conforming delivery.[83] Rejecting these arguments, the High Court simply affirmed the decision of the District Court of first instance, *i.e.*, without venturing any comment on the premises upon which that decision was based. (Ultimately, the High Court's decision in favour of S on the merits was also allowed to stand, notwithstanding a subsequent appeal by S to the Supreme Court on a procedural issue relating to the High Court's award of costs.)[84]

Now, I see no reason to criticise the *outcome* of this case (seller wins), but I do see reason to comment upon the *ratio* set forth by the District Court. In particular, I am referring to the premises which relate to the Danish domestic principle of passivity and to the parties' obligation under Danish domestic law to act loyally.

To be sure, both passivity and the duty to act loyally are recognised as (interconnected) general principles of Danish domestic law.[85] But the parties' rights and obligations in a CISG case like this are simply *not governed* by domestic law. For this reason, the Court should have referred (only) to CISG Article 7(1) and (2).[86] By failing to refer to these rules, as well as to the any (of the many) secondary authorities which explain how they interact in practice, the District Court conveyed the impression that it simply did not know (1) that courts in all CISG Contracting States are obligated to interpret the Convention in a way which promotes the observance of good faith in international trade, and (2) that case law and scholarly opinion strongly support the view that CISG contracting parties themselves have a duty to act in good faith.[87]

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83) Maintaining in this connection that S was barred for claiming late notice under CISG Article 40. *See* Lookofsky, *supra* note 14, § 4.9.

84) While obviously content with the High Court's decision on substance, S appealed the High Court's limited award of compensation for costs (including translation costs). The Supreme Court allowed S to prevail on that procedural point, whereas the High Court's uncontested judgment on the merits, affirming the City Court result, was allowed to stand.

85) *See* Andersen and Lookofsky, *supra* note 3, pp. 68–71; B. von Eyben, P. Mortensen and I. Sørensen, *Lærebog i Obligationsret II*, 3rd ed. (2008) p. 164.

86) Article 7(1) provides in relevant part: "In the interpretation of this Convention, regard is to be had to its international character and to the need to … the observance of good faith in international trade. Article 7(2) provides in relevant part: Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based …"

87) *See* Ramberg and Herre, *supra* note 43, pp. 109–111; I. Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed. (2010) p. 136 with numerous sources cited in note 106.

3.3.3. Japanese Motorcycles

My third example is a Danish Supreme Court CISG decision rendered in 2008.[88] The factual scenario in this case was as follows:

> Danish Seller (S) imported Japanese motorcycles and then resold large numbers of them to German buyer (B) for resale to its customers in Germany. In practice, B ordered quantities based on forecasts of anticipated sales in Germany and S then ordered corresponding quantities from its Japanese supplier (manufacturer M). The parties' practice permitted minor adjustments of the orders in question, e.g. if certain colours and/or quantities were unavailable. In the fall of 1999, B ordered some 1,600 motorcycles to be delivered in instalments. The price for each instalment was payable in yen upon delivery, whereas the total price was made subject to a bank guarantee. Later, due to exchange rate fluctuations between the Euro and the Yen, B requested that S ask M for a price reduction. When M refused, B nonetheless placed additional orders for 2000. In December 1999, however, B cancelled its orders. When S protested, the parties agreed that B would accept delivery of half the ordered quantity subject to a given discount by S and with S to attempt to secure an additional discount from M. Not satisfied with S's efforts to obtain the additional discount, B refused to take delivery of a given instalment and also cancelled the bank guarantee. Claiming that B's conduct constituted a fundamental breach, S avoided the contract, advising B that S would resell the motorcycles concerned in Denmark. In the litigation which ensued, S claimed damages equal to the difference between the contract price and the price secured under cover transactions (which took S nearly 5 years to complete), whereas B contested that S had rightly avoided the contract and that S was entitled to damages as claimed. In this connection B argued that S had not taken reasonable measures to mitigate its loss, as the motorcycles in question were resold only in Denmark, where prices were allegedly lower than in Germany (an allegation S disputed). Finally, and significantly, the parties disagreed on how interest, if payable, should be calculated.

In the first instance, the Danish Maritime and Commercial Court (*Sø- og Handelsretten*) decided in favour of S, holding that S rightfully had avoided the contract under CISG Article 72(2) and that its cover sales were made in a reasonable manner and within a reasonable time. On this basis, the Commercial Court awarded DKK 3.9 million in damages to S, corresponding to the difference between the contract price and the cover price. Then, referring expressly to CISG Article 78, the Commercial Court also awarded S interest calculated in accordance with S's claim, *i.e.*, from the date of resale (cover), noting in its premises that Article 78 "must be understood this way".[89]

Reviewing this decision on appeal, and citing CISG Article 73, the Supreme Court unanimously affirmed that S had been entitled to avoid. As regards damages, however, a majority (three of five judges) voted to reduce the Commercial Court's award by nearly 50 per cent, holding that S failed to resell the motorcycles at a sufficiently high price or within a reasonable period of time. Basing this reduction on a "discretionary" calculation, the majority voted to award damages

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88) *See Ugeskrift for Retsvæsen* (2008) 181 H (Danish Supreme Court). Reported in English as Case 993, *Case Law on UNCITRAL Texts* (CLOUT).

89) CISG artikel 78 må forstås således, at der kan beregnes renter fra forfaldsdagen.

in the amount of DKK 2 million. Finally, citing the Danish domestic Law on Interest (*Renteloven*), a majority of the Court held that S was entitled (only) to interest calculated as of the commencement of the action. (A minority of two Supreme Court judges saw no reason to criticise the cover sales by S or the damages and interest originally awarded by the Maritime and Commercial Court.)

Now, one might argue that the decision of the Supreme Court majority to undertake a discretionary damages calculation (as Danish courts often do in non-CISG cases) is supported by the premise in the majority opinion indicating (without reference to CISG Article 77) that S had not done its best to mitigate damages, but it seems nonetheless peculiar that the majority opinion contains no express reference to any CISG provisions relevant for the calculation of damages in a situation like this, although the positions expressed in the parties' arguments (as summarised by the Court) might at least suggest that the Court took Articles 74, 75 and 77 "into account".

Far more problematic is the failure of the Supreme Court to explain its decision to award interest calculated in accordance with Danish domestic law. Given the Court's failure to provide any reference to CISG Article 78 or to the abundant secondary authority (cases and scholarly opinion) interpreting that rule, we can hardly determine the underlying basis (*ratio*) for the Supreme Court's decision not to follow the Commercial Court on that point, and this is disturbing, in that the Supreme Court's decision runs contrary to mainstream CISG case law and theory. In this respect, the decision (which accords with Danish domestic law) suggests a parochial "homeward trend".[90]

The only clues as to secondary authorities upon which the Court relied with respect to damages and interest are listed in a footnote attached to the headnote which precedes the opinion published in the Weekly Law Report (*Ugeskrift for Retsvæsen*).[91] In fact, the Court's footnote-list includes a few authorities which do seem relevant for disposition of the case (Articles 72, 74, 75 and 77).[92] But the same footnote is highly problematic in other respects, since it also includes clearly irrelevant citations to scholarly accounts of Danish domestic rules with respect to the calculation of damages.[93] To be sure, irrelevant citations in a footnote might

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90) *I.e.* the tendency to think that the words we see in the text of the CISG are merely trying, in their awkward way, to state the domestic rule we know so well. *See* F. Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law', 13 *Vindobona Journal of International Commercial Law & Arbitration* (2009) pp. 15–42, http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html with note 58 (citing Honnold).

91) As regards this Supreme Court practice, *see supra* with note 68.

92) *See* references to B. Gomard and H. Rechnagel, *International Købelov* (Jurist- og Økonomforbundets Forlag, Copenhagen,1990) pp. 206 *et seq.*, 213, 290–291; *see also* references to Eyben, Mortensen and Sørensen, *supra* note 85, pp. 290–291.

93) J. Nørager-Nielsen and S. Theilgaard, *Købeloven med kommentarer*, 2nd ed. (GAD, Copenhagen, 1993) pp. 457 *et seq.*, 605 *et seq.* concerning KBL § 25, second sentence, and KBL § 30, para. 2; both these Danish (domestic) Sales Act (Købeloven) provisions are clearly pre-empted by CISG

seem less egregious than blatant (homeward trend) mistakes in a *ratio*,[94] but it must again be emphasised that CISG ignorance hardly provides an excuse for a court in a Contracting State.[95]

This brings us to the sources cited in the footnote which reflect the conflicting views of three Danish authorities (referred to here as a, b and c) as regards the proper interpretation of Article 78, in particular the issue of when interest in a CISG case begins to accrue. The first of these sources (a) contains a statement which translates as follows:

> The Convention's rule on interest calculated as of the due date of the breaching party's performance [*forfaldsdagen*] takes priority over [the Danish (domestic) Law on Interest (*Renteloven*)].[96]

Thus, according to source (a), the CISG rule on interest accrual is different from – and also *pre-empts* (trumps) – the Danish domestic rule,[97] and that view happens to accord with source (b) cited in the same note; in fact, source (b) expressly refers to and supports the position taken by (a).[98] This means the position shared by (a) and (b) is disputed only by source (c). C's minority view translates as follows:

> Article 78 does not decide the point in time from which interest accrues [*fra hvilket tidspunkt renten skal beregnes*], the sum upon which interest shall be paid, nor the rate of interest. One cannot settle these matters on the basis of CISG general principles, and so they must be settled in conformity with the [domestic] law applicable by virtue of the forum court's rules of private international law, see Article 7(2).[99]

For reasons which hardly seem clear, a majority of the Supreme Court held (in accordance with C's minority view) that interest in this CISG case should first begin to accrue on the date the plaintiff/creditor (S) commenced legal action, *i.e.*, in accordance with the usual (default) rule under Danish domestic law.[100] In so doing, the Supreme Court majority might not have known that its (and C's)

Articles 75 and 76. *See* Lookofsky, *supra* note 14, §§ 1.2, 6.16, 6.29; equally irrelevant are the references to T. Iversen, *Erstatningsberegning i kontraktforhold* (GAD Jura, Copenhagen, 2000) (with the possible exception of pp. 705–709 concerning the duty to renegotiate, a controversial subject not relevant for present purposes).

94) *See* Lookofsky and Flechtner, *supra* note 73.

95) *See* text *supra* with notes 37–42.

96) Gomard and Rechnagel, *supra* note 92, p. 218.

97) Regarding the concept of pre-emption in the CISG context, *see* J. Lookofsky, 'In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preëmption Under the 1980 Vienna Sales Convention (CISG) ', 13 *Duke Journal of Comparative & International Law* (2003) p. 263, <www.law.duke.edu/shell/cite.pl?13+Duke+J.+Comp.+&+Int%27l+L.+0263>.

98) *See* Eyben, Mortensen and Sørensen, *supra* note 85, p. 302; citing Gomard and Rechnagel, *supra* note 92, p. 218.

99) O. Lando, *Udenrigshandlens kontrakter*, 5th ed. (2006) p. 389.

100) Andersen and Lookofsky, *supra* note 3, p. 383 (unless a different calculation is agreed to in advance, *i.e.*, in the agreement between the parties concerned).

position has been rejected by the worldwide academic majority,[101] as well as by a clear majority of courts in other CISG Contracting States. As summarised by UNCITRAL in its own CISG Case Law Digest (2008), and as clearly documented by the CISG case law collected in the UNILEX database, interest under Article 78 of the Convention starts to accrue as soon as the debtor is in arrears.[102]

I doubt that a majority of the Supreme Court of Denmark would intentionally ignore the opinion held by the great majority of courts and commentators in the other 75 CISG Contracting States. For this reason, I suspect the majority of the Danish Supreme Court in this case simply did not know the worldwide majority view, but I cannot be sure, since I have no inside information, and since – as is too often the case – the premises set forth in the judgment say nothing about the reasoning upon which the Court's decision on interest accrual was based. As a distinguished Danish commentator put it, some 100 years ago:

> We regret that we cannot always learn from your wisdom to the desired degree. We are often confronted with decisions … whose scope we cannot determine, because the premises are so briefly stated or formulated in such an oracle-like fashion that they provide us with no clear guidance beyond the decision in the concrete case.[103]

Oracle or not, the Supreme Court's decision to follow the Danish domestic rule on interest suggests reliance on a single authority (c) cited in the confusing footnote attached to the headnote, and since that source hardly provides persuasive support for the Court's decision, I can only conclude that the Court showed insufficient regard to the international character of the Convention and the need to promote uniformity in its application – a failure that in this particular case seems to have been outcome-determinative, leading to what most courts elsewhere would view as an incorrect result.

4. Conclusions and Proposals

When it comes to the internationalisation of private law, both the Danish legislature and the Danish judiciary have sometimes evidenced a conspicuous lack of

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[101] For scholarly opinion supporting the calculation of interest from the date performance was due, *see e.g.* Lookofsky, *supra* note 14, p. 153 §§ 6.31 (interest accrues as of the date payment of the "sum" in question was due); Schwenzer, *supra* note 87, p. 1151 (interest payable in respect of periods during which the claim had arisen, even though precise amount not yet made certain); Ramberg and Herre, *supra* note 43, p. 526 (dröjsmålsräntan börja löpa redan när skadan uppkommer).

[102] *See* para. 3 of *Digest of Article 78 in United Nations Commission on International Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sales of Goods – 2008 revision*, 2008, <www.uncitral.org/uncitral/en/case_law/digests.html>; UNILEX on CISG & UNIDROIT Principles cases by Article (78) and issue (interest accrual).

[103] *See* Lookofsky, *supra* note 49, with note 59 citing C. Torp, 'I anledning af Højesterets 250-aarige Bestaaen', in *Ugeskrift for Retsvæsen* (1911) p. 54 (translation to English by the present author). *See also* D. Tamm, 'Af Højesterets historie i 325 år', in *Højesteret 1661 – 1986* (Copenhagen, 1986) p. 1.

enthusiasm. In some private law contexts, this kind of provincialism seems fully understandable;[104] in the CISG context, less so.

As regards Denmark's reservation with respect to CISG Part II, the time has come to correct that fundamental mistake, simply by withdrawing our Article 92 declaration.[105] The International Chamber of Commerce agrees this should be done, as do virtually all Danish and other Scandinavian commentators who have expressed an opinion on the subject. And since the Danish Ministry of Justice has announced the legislature's intention to act, the only question left in this regard is whether and when the Parliament will find time to amend the single sentence in the legislation which enabled Denmark's CISG ratification in 1989,[106] and which, when communicated to the United Nations, will finally liberate Denmark of its dubious Part II distinction.

As regards the limited extent which Danish courts have evidenced as regards their understanding of the Convention, as well as their limited fulfilment of Denmark's obligations under Article 7(1), I harbour no illusions of a quick fix. I would, however, humbly suggest two steps to improve the present situation. First, instead of relying mainly on what the parties' lawyers say, I propose that Danish judges themselves identify the key rules of law which apply in a given CISG case and then acquire some basic information about how these rules are understood and applied in the community of Contracting States. The treaty is, after all, an integral part of Danish law, and our courts are therefore required to know it: *iura novit curia*.[107] Fortunately, Danish courts and judges these days can quickly find what they most need to know online, simply by searching/surfing the wealth of well-organised information in UNCITRAL CISG Case Law Digest,[108] CLOUT,[109] UNILEX[110] and CISGW3.[111]

If our courts do that, they might also take a second important step forward, and that is to moderately expand the premises which justify their resolution of CISG cases, so as to provide us and the community of Contracting States with

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104) Not least within the regional (EU) harmonisation context. *See* J. Lookofsky, 'Desperately Seeking Subsidiarity: Danish Private Law in Scandinavian, European, and Global Context', 19 *Duke Journal of Comparative & International Law* (Fall) p. 161, <www.law.duke.edu/shell/cite.pl?19+Duke+J.+Comp.+&+Int%27l+L.+161>.

105) As clearly authorised by CISG Article 97(4). Since the negative impact of Denmark's Article 94 declaration is less severe, and since some other Scandinavian States seem determined to maintain their Article 94 declarations, I would not expect Denmark to withdraw its Article 94 declaration at this time; *see also* Article 97(5).

106) *See* the second sentence of § 1 in Law no. 73 of 1988-12-07 (*International købelov*).

107) *See supra* section 3.1.

108) *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (UNCITRAL, 2008), <www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf> or <www.uncitral.org/uncitral/en/case_law/digests.html>.

109) *Case Law on UNCITRAL Texts* (CLOUT), <www.uncitral.org/uncitral/en/case_law.html>.

110) *UNILEX on CISG & UNIDROIT Principles*, <www.unilex.info/>.

111) *Electronic Library on International Commercial Law and the CISG (Albert H. Kritzer CISG Database)*, n.d., <cisgw3.law.pace.edu/>.

better evidence of the reasoning which supports their CISG decisions, in this way confirming that Danish courts know the relevant CISG law and that they respect Denmark's treaty-based obligation to have regard to the international nature of the Convention and the need to promote uniformity in its interpretation and application.

By taking these modest steps, the Danish legislature and judiciary might help put Denmark back on a more international course, one better tuned to deeper Nordic roots and traditions, including the progressive and inclusive style of thinking sometimes referred to as Scandinavian pragmatism:

> The pragmatists denied that there could be any final answer … concentrating instead on an open-ended process of discovery, invention and revision … the country's best self is a global inheritance, its worst a parochial self-certainty.[112]

[112] J. Purdy, 'Book Review – '"Beyond the Revolution – A History of American Thought from Paine to Pragmatism", by W. H. Goetzmann – Review – NYTimes.com', 2009, <www.nytimes.com/2009/02/22/books/review/Purdy-t.html>; regarding the interaction between American, European and Nordic legal pragmatism *see* S. Blandhol, *Nordisk rettspragmatisme* (2005) pp. 30–37.