CHAPTER 9

CISG Part II in Nordic Context

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1. General Introduction and Overview

As we celebrate the 100th anniversary of the Nordic Contracts Acts (NCA), there is also good reason to celebrate the fact that – due to very recent developments – the original field of application of our Nordic legislation has been *narrowed* in one important respect.

In particular, the contract formation rules in *NCA Chapter I* – which for nearly 100 years applied by default to *all* contracts – *no longer apply to contracts for the international sale of goods.* As regards this latter significant contract category, Chapter I of the NCA has (except for inter-Nordic sales) been *pre-empted*, i.e. *replaced*, by Part II of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).

See (e.g.) § 9 a of the Danish NCA (*Aftaleloven*: LBKG 1996-08-26 no. 781; L 2011-12-28 no. 1376) which provides that NCA Chapter I does not apply to sales within the CISG scope.

The CISG Convention, which entered into effect in 1988, is the first sales law treaty to win acceptance on a worldwide scale. The current list of some 80 CISG Contracting States includes 11 of the so-called G12 Group, as well as (e.g.) Brazil, China and Russia. These CISG States account for more than *three fourths of all world trade*, and the importance of the Convention is further underlined by thousands of decisions where the CISG has been held to apply, thus evidencing the conduct of countless international traders who – by default or by express choice – regularly subject their sales contracts to the Convention regime.

The rules in CISG Part III, which regulate the *rights and obligations* of the parties to an international sales contract, have been in effect in Denmark, Finland, Norway and Sweden since the late 1980's, when these States first ratified the CISG. But the *contract formation* rules in CISG Part II did not take effect in these States until 2012-2014, during which period they all – one by one – *withdrew their CISG Article 92 declarations*.

As regards these Article 92 declarations, see the discussion under head II below. Iceland, which did not ratify the CISG until 2001, did not make an Article 92 declaration.

According to the *Article 94* declarations made by all the Nordic States (including Iceland), the CISG does *not* apply to *inter-Nordic* sales. Since these (also highly controversial) declarations have *not* been withdrawn by any Nordic State, *no part* of the CISG applies when the parties reside in different Nordic States. See Joseph Lookofsky, UNDERSTANDING THE CISG (4th ed. Copenhagen 2012) § 8.6. See also Jan Ramberg & Johnny Herre, INTERNATIONELLA KÖPLAGEN (CISG) (3rd ed. Stockholm 2009) Ch. 18.7.

So although the subject of most papers in this volume is the NCA, the present paper is focused on the *international* sales contract formation rules in *CISG Part II*, i.e. the rules which (apart from purely Nordic transactions) have *trumped Chapter I of the NCA*.

2. The Rise and Fall of the Scandinavian Article 92 Declarations

The rules of contract formation set forth in Chapter I of the NCA differ in certain respects from the corresponding rules in CISG Part II. For this and other reasons, most of the Nordic countries (Denmark, Finland, Norway and Sweden – but not Iceland) made their *original* CISG ratifications subject to (highly controversial) Article 92 declarations, with the result that – in respect of matters governed by CISG Part II – these countries were *not* CISG 'Contracting States' within the meaning CISG Article 1(1).

The *first* (and main) argument made by those Nordic jurists who argued in favour of making these declarations relates to CISG Article 16(1), which, as a starting point, makes an offer (to sell goods) *revocable*. In this respect, these jurists viewed the CISG Part II rules as unduly influenced by corresponding *Common law* rules (which also maintain revocability as their starting point).

The *second* main argument advanced by those who advocated the Article 92 reservations was tied to the fact that CISG Part II regulates only sales contract *formation*, in that the Convention, by its own terms, is not concerned with sales contract *validity*. For this reason, it was feared CISG Part II would lead to 'uncertainty.' Jan Kleineman comments on that prior Nordic view: 'To understand why the Nordic countries could accept the sales of goods part of CISG but not its principles as to the formation of contracts as espoused in

Part II, one should keep in mind that the Contracts Act with its chapter on the formation contracts has a broader scope of application than the Sales of Goods Act. [...] Having a specific act for the formation of contracts regarding the sales of goods would be a somewhat narrow approach in countries not relying on a general codification or having a judge-made law approach.' See Jan Kleineman, *The New Nordic Approach to CISG Part II: Pragmatism Wins the Day?* In THE CISG CONVENTION AND DOMESTIC LAW: HARMONY, CONFLICT OR PEACEFUL CO-EXISTENCE (Copenhagen 2014).

Upon closer analysis, neither of these anti-Part II arguments seemed convincing then, nor do they seem so now. First, as regards the revocability issue, the starting point in paragraph (1) of CISG Article 16 is modified by significant exceptions which greatly narrow the gap between CISG Part II and Danish domestic law, just as the Scandinavian domestic starting point (that offers are binding) is also subject to significant exceptions: see head IV(d) below. As regards the allegation that the application of CISG Part II might lead to increased uncertainty, the rules on contract formation laid down in Chapter I in Scandinavian Contracts Acts are clearly distinguishable from the rules on contract validity in Chapter III of those same Acts, not least (and quite obviously) because a separate legislative chapter applies to each of these essentially separate subjects. So the suggestion that the replacement – within the context of international sales transactions – of Scandinavian domestic rules of contract formation (Chapter I of the NCA) with international law (CISG Part II) could hardly have been expected to lead to increased uncertainty, especially when one considers that the private international law (PIL) rules of the forum CISG State themselves often lead to the application of non-Scandinavian domestic rules of validity.

Equally important, Article 92(2), which rendered (e.g.) Denmark a non-Contracting State with respect to CISG Part II, did *not* preclude the application of CISG rules of contract formation in many cases when the choice-of-law rules of the forum State pointed to the substantive sales law of a *non*-Scandinavian Contracting State, a proposition confirmed by a Danish High Court of Appeal. See Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, http://www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html.

In any case, since no CISG State outside Scandinavia made an Article 92 declaration, one could hardly expect courts in the dozens of non-Scandinavian CISG States to understand the complexities – and uncertainty – associated with the proper application of that reservation.

The Article 92 reservations have also entailed other disadvantages for Scandinavian merchants. As regards sales between a Scandinavian (e.g. Danish) merchant and (e.g.) a Chinese or American merchant, the effect of Denmark's Article 92 reservation, when combined with the Article 95 declarations made by China and the United States, could lead to the application of Chinese or American domestic law with respect to contract formation, i.e., rules which – for Danish and other Scandinavian merchants and their lawyers – are clearly more 'foreign' than the formation rules in CISG Part II. See generally, Joseph Lookofsky, *The Rise and Fall of CISG Article 92*, FESTSCHRIFT FÜR ULRICH MAGNUS (2014).

As time passed, those commentators who had long-regarded the Nordic Article 92 reservations as overly complex and counter-productive slowly helped to sway the views of the original CISG Part II sceptics, and initiatives were undertaken to encourage the Scandinavian States to get in synch with the rest

of the CISG world. Finally, during the period 2012-2014, the four States concerned, having realized that their Article 92 reservations were ill-advised, withdrew these reservations, with the result that the *entire CISG – including Part II – is now an integral part of the law in all Contracting States*.

CISG 97(4) provides: 'Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such *withdrawal is to take effect on the first day of the month following the expiration of six months* after the date of the receipt of the notification by the depositary.' *Finland* effectively withdrew its reservation on 28 November 2011, *Sweden* on 25 May 2012, *Denmark* on 2 July 2012 and *Norway* on 14 April 2014. As noted previously, Iceland never made an Article 92 declaration, so CISG Part II has been part of Icelandic law from the start.

3. When Does CISG Part II Apply?

As of November 2014, all CISG Contracting States – including all the Nordic States – apply essentially distinct rule-sets to domestic and international sales. While retaining their own domestic rule-sets for application in local transactions, the Nordic States are now obligated to apply the entire CISG Convention to 'international sales of goods'.

CISG States with separate sales laws applicable to 'consumer sales' (outside the CISG scope) have 3 sales law rule-sets. Until recently, the Norwegian Sale of Goods Act regulated both domestic and international sales in a single rule-set: regarding the complex and regrettable effects of the original Norwegian CISG 'transformation', see generally Viggo Hagstrøm, *CISG Implementation in Norway*. Fortunately, as a welcome side-effect of the withdrawal of the 4 Nordic Article 92 declarations, Norway totally abandoned its original, uniquely Norwegian CISG position in 2014: see the Norwegian statute LOV-2014-02-28-2.

The rules in CISG *Part I* determine the Convention's *entire* Field of Application, *inter alia*, the field of application of the rules CISG Part II. The main rule regarding this field of application is Article 1(1)(a). According to this provision, a sales contract between parties whose main places of business are in *different CISG Contracting States* – (e.g.) in China and in Sweden – automatically (by default) becomes subject to the entire treaty, including the rules in CISG Part II.

> *Illustration 1*: Merchant-buyer (B) in China orders 10 dozen designer dresses from seller-manufacturer (S) in Sweden. S purports to accept the order by e-mailing a brief confirmation to B. Later, B refuses to ac-

> cept the goods delivered, whereas S demands to be paid. (Neither the order by S nor the confirmation by B contains any provision regarding the applicable law or jurisdiction to resolve disputes.)

Depending on the jurisdictional rules which apply by default in a situation like this, B and S might end up having their dispute decided by a Chinese or Swedish court, but since both China and Sweden are CISG Contracting States, both Chinese and Swedish courts and tribunals will, by default, apply CISG Part II to determine whether or not S and B have entered a sales contract. If, by application of the CISG rules on sales contract formation, the court in question determines that the parties have in fact formed a contract, it will then use CISG Part III to determine the parties' respective obligations, their rights and remedies for breach, the passing of risk, etc.

CISG application is not limited to sales between parties located in (different) Contracting States. By virtue of Article 1(1)(b), the courts in *most* – though not all – CISG States also apply the CISG to international sales contracts 'when the rules of *private international law* [conflict-of-laws] lead to the application of the law of a [single] Contracting State.' See Joseph Lookofsky, UNDERSTANDING THE CISG, §§ 2.4 and 8.7. Regarding jurisdictional and choice-of-law issues in sales transactions, see also Joseph Lookofsky and Ketilbjørn Hertz, EU-PIL: EUROPEAN UNION PRIVATE INTERNATIONAL LAW IN CONTRACT AND TORT (2nd ed. 2015), Chapters 2.2.2 and 3.3.3.

> *Illustration 2*: Merchant-buyer (B) in China accepts an offer by seller-manufacturer (S) in Sweden for the sale of 10 dozen designer dresses. The offer – and thus the contract – is expressly made subject to the NL Standard Terms and Conditions, and according to these Conditions, the contract is governed the 'Vendor's law'.

Significantly, the choice-of-law provision in this contract is *not* likely to be interpreted as removing the transaction from the CISG scope, simply because the *CISG is an integral part of* 'Vendor's [Swedish] law' – i.e. the part which applies to international sales!

Indeed, in a situation like this it seems *highly unlikely* that S – the only party who conceivably might favor the application of Swedish domestic law – could produce clear and convincing evidence that *both parties intended* that their contract would be governed Swedish *domestic*: what Chinese party would agree to that? Regarding *CISG contract interpretation* under Article 8, see Lookofsky, UNDERSTANDING THE CISG, § 2.13.

Indeed, numerous CISG precedents confirm that an express contractual choice of (e.g.) 'Austrian law', 'Minnesota law', 'the laws of Switzerland', 'the laws of the Province of Ontario, Canada', or 'the law of the seller's country [Russia]', is rightly *understood as an express contractual reaffirmation* of the CISG (the rule-set which would apply without a

choice-of-law clause). An alternative explanation, leading to the same result, is this: when S and B choose (e.g.) 'seller's law,' Article 1(1)(b) leads to the application of the Convention because the rules of *private international law* which recognize party autonomy lead to the application of the law of a Contacting State' (Austria). See Lookofsky, *id.*, § 2.7.

4. CISG Part II

4.1. Introduction

Many of the solutions to contract formation issues provided by Part II of the Convention represent necessary – and in some respects difficult – compromises among diverging domestic views, including the Nordic view, and we could hardly expect jurists with fundamentally different domestic backgrounds to praise all aspects of the result. But now that non-Nordic courts and tribunals have had some 25 years to interpret and apply the Part II rules, it seems clear the Convention's contract formation tools are quite adequate for their purposes, and that even includes tools suitable for modern (e-commerce) needs.

4.2. Offer and Acceptance under CISG Part II

Offer and acceptance are the two essential elements in the contract formation process. In order to constitute an offer to sell or buy goods in an international sales transaction, a given proposal must meet certain minimum Convention requirements.

According to the first sentence in CISG Article 14(1), an offer must – as a general rule – be addressed to one or more specific persons; the offer must also be sufficiently definite and indicate the intention of the offeror to be bound. The second sentence of Article 14(1) defines a proposal as 'sufficiently definite' if it (a) indicates the goods and (b) expressly or implicitly fixes the price.

For example, a purchase order which identifies a given computer program and the compensation to be paid for it will satisfy these requirements, just as an order for chinchilla pelts of 'middle or better quality' or a contract for the supply of 'commercial quantities' of a chemical ingredient are sufficiently definite under Article 14.

As is the case under Nordic domestic law, the Convention distinguishes between an offer, which binds the offeror, and an 'invitation to make offers' which has no such binding effect. A proposal not addressed to one or more specific persons is, as a starting point (presumption), interpreted merely as an invitation to make offers. However, one who expressly indicates an intention to be bound by such a proposal will be treated as having made an offer, and the various more general Part II rules pertaining to offers (and their acceptance) in CISG Articles 15 *et seq.* will then apply.

Assuming a given proposal constitutes an offer under CISG Article 14, the next step is to determine when that offer takes effect. This may be significant, for example, when calculating the time-period during which an offer remains open, whether a subsequent acceptance by the offeree arrives in time, etc.

According to Article 15(1), an offer becomes effective when it *reaches* the offeree. An oral offer, which reaches the offeree instantaneously, is considered effective when made, whereas a written offer first reaches the offeree when delivered to his place of business. Until that point in time, the offer may be *withdrawn*; indeed, the same is true even if the offer is *irrevocable*, a term defined in Article 16 (see head d below). Unlike the right to revoke pursuant to Article 16, the right to withdraw under Article 15(2) deals with offers which have never taken effect.

The rules in CISG Articles 14 and 15 generally accord with the corresponding NCA provisions: see Mads Bryde Andersen, GRUNDLÆGGENDE AFTALERET I (4th ed. Copenhagen 2013), Chapter 3.2.

4.3. The Problem of the Open Price Term

According to the second sentence in Article 14(1), a proposal for concluding a sales contract is sufficiently definite, thus constituting an offer capable of being accepted, if it (indicates the goods and) 'expressly or implicitly fixes or makes provision for determining the quantity and price.'

Both before and for some time after CISG Part II took effect outside the Nordic region, some commentators read a converse (*e contrario*) implication into Article 14(1): that a proposal which does *not* fix or make provision for determining the price is *not* 'sufficiently definite' and therefore *cannot* constitute an offer which forms the basis for a binding CISG contract. Other CISG commentators, rejecting such an implication, noted that Article 55 provides a default-rule reference to the price 'generally charged' in cases '[w]here a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price'; and since Article 55 provides a method of dealing with (and effectively closing) a potential price gap (in at least some CISG contracts), it was argued that Article 55 could serve to negate the inference that the absence of a price term is necessarily fatal under Article 14.

This latter interpretation accords with *Nordic domestic* law. As regards the Danish Sales Act, see Joseph Lookofsky & Vibe Ulfbeck, KØB: DANSK INDENLANDSK KØBSRET (4th ed. Copenhagen 2015), Chapter 4.3.a.

The prevailing view today is based on a more fundamental argument, and this is the freedom which parties to a CISG contract always enjoy. For this reason, we should attempt to discern the *intention of the parties*, not only be-

cause Article 14 can be said to reflect this principle, but also because Article 6 lets the parties derogate from or vary the effect of all CISG provisions which pertain to contract formation, including Article 14(1).

So, to discern the parties' intentions with respect to open-price terms, we should *interpret* the parties' 'statements' in accordance with the principles set forth in Article 8. If, on this basis, it appears that the parties concerned *intended to be bound* without a fixed price clause, the parties' intention should prevail. See Lookofsky, UNDERSTANDING THE CISG, § 3.3.

4.4. Revocation (Article 16) and Rejection (Article 17)

Once an offer – properly made and not effectively withdrawn pursuant to Article 15(2) – reaches the offeree and takes effect, we need to consider the offeror's right to revoke.

The Convention rules on this point in Article 16 may be viewed against the background of competing conceptions in domestic law. In Germanic and Nordic systems, the default rule is that an offer, once communicated, remains binding and thus irrevocable, at least for a reasonable time. In Common law systems, however, the traditional starting point is that a communicated (but still unaccepted) offer can be freely revoked. Article 16 of the CISG represents an international compromise between these two domestic 'extremes.'

The starting point in the Convention compromise on this issue is that offers are freely *revocable*: according to Article 16(1) an offer may be revoked if the revocation reaches the offeree before she has dispatched an acceptance. The underlying logic here is that the offeror, as the master of the offer, should remain free to revoke it, at least until the offeree accepts that offer, thus concluding the contract and binding both parties to the deal. Why (a Common lawyer might ask) should one CISG party be bound when the other is not?

Assuming that a given offer is irrevocable under Article 16(2), the offeree can – by definition – accept it even after a subsequent attempt by the offeror to revoke. According to Article 17, however, an offer is terminated when the offeror receives a rejection from his offeree, and this is true even if the offer was irrevocable under Article 16. Upon receipt of such a rejection, the offeror is free to take his business elsewhere.

Although Article 16(1) accords in most respects with the traditional Common law view, it should be noted that – contrary to Common law precepts – the general CISG rule that an offer can be *revoked prior to acceptance* does *not* carry any implications as regards the point in time when a contract is deemed *concluded*: as to this see Article 23.

Paragraph (1) of Article 16 represents but a starting point which must be read in conjunction with the two significant modifications contained in paragraph (2). The first important modification to the revocability rule is that an offer to

enter an international contract of sale cannot be revoked if it *indicates that it is irrevocable*. The simple idea underlying Article 16(2)(a) is that a CISG offeror enjoys the freedom to limit her own future course of action; so if the offeror indicates to the offeree that she (the offeror) will not revoke (by stating a fixed time for acceptance or otherwise), she is bound by her word.

Suppose, for example, the offeror makes an offer on January 1 which states that the offer 'will be held open until March 31'; since this represents a clear indication of irrevocability, that offer cannot be revoked before March 31 (i.e., even if the offeror in the interim comes to regret her indication to the offeree).

One aspect of Article 16(2)(a) has provoked a good deal of academic debate. The issue is whether an offer which 'fixes a time for acceptance' should – for *that* reason (i.e., without more) – be read as irrevocable. Suppose, for example, that the offeror states merely that the offeree's 'acceptance must be received before January 1st.' Some might read this statement as relating only to the time frame which the offeror has fixed for acceptance; others might say that this statement – by virtue of subparagraph (2)(a) – should also be construed – or at least presumed – to indicate irrevocability. There is no fixed solution to this (academic) problem. Since the offeror is generally treated as the master of a given CISG offer, that offer should be interpreted on its own terms. Depending on the words used by the offeror, the individual circumstances and the larger contractual context, the fact that an offer contains a statement relating to the time for acceptance may – but does not necessarily – imply a (binding) indication of irrevocability by the offeror. Judging by the reported CISG Case Law, the issue seems to have little relevance in practice. See Lookofsky, UNDERSTANDING THE CISG, § 3.6.

Turning now to Article 16(2)(b), we see an additional modification of the starting point set forth in paragraph (1): an offer may not be revoked if the offeree acts in reasonable *reliance* on the offer.

> *Illustration 3*: S (in CISG State X) sends an email offering to supply cloth at a given price to a potential buyer B-1 (in CISG State Y). B-1, who regularly does business with S, calculates her manufacturing costs on the basis of that offer and then offers to sell finished goods (coats) to B-2. Just after B-2 accepts the offer made by B-1, S revokes its offer to B-1. Denying the effect of that revocation, B-1 accepts the original offer by S.

Since the offer by S did not fix a time for acceptance, S remained free to revoke prior to B-1's acceptance, unless the reliance exception in Article 16(2)(b) applies. In this case, a court might say it was reasonable for B-1 to have relied on the offer as being irrevocable, for example, if the prior dealings between the parties gave B-1 reason to anticipate that S would not revoke. Although the rule in subparagraph 2(b) does not expressly require that

the act of reliance itself be reasonable, it can be persuasively argued that only reasonable acts in reliance by the offeree deserve protection.

These significant exceptions to the principle of revocability bring the net CISG result quite close to the Nordic domestic (NCA) system which, as its starting point, embraces the 'firm offer' principle – subject of course to the exception that an NCA offeror (as master of her offer) can expressly restrict the scope of the offeree's right to accept.

Against this background of rules and exceptions, Mads Bryde Andersen sees reason to ask provocative (rhetorical) questions: Do Nordic jurists need to decide the 'battle of religions' between the offer principle and the contract principle? Is the conflict between these two principles so important that legislators or academics must rush to the rescue? Or might it be that feelings rather than practical solutions are mainly at stake here? Andersen's answer is that hard and fast rules on contract formation are not well equipped for international harmonization, because they often invoke difficult ideologies: 'The conceptually loaded question of whether, and if so when, a given party is 'bound' by a given promise can be difficult to answer. Then again, that question can often be resolved by means of practical solutions that are not easily translated into formulas and principles. Article 16 with all its compromises is a living example of this. The rule (including its exceptions) may work well in practice, but the underlying conflict between opposing ideologies (which themselves rely on value judgments) remains. [...] To solve such ideological battles by claiming that this or that principle should prevail may impose unwanted obligations on parties with different perceptions as to what is binding, either in a legal or moral way.' Mads Bryde Andersen, *CISG Article 16: A Well-placed Principle in the Law of Contract Formation?* In THE CISG CONVENTION AND DOMESTIC LAW: HARMONY, CONFLICT OR PEACEFUL CO-EXISTENCE (Copenhagen 2014).

4.5. Acceptance

CISG Articles 18-22 deal with acceptance by the offeree, and 18(1) defines the essential elements. As under Nordic domestic law, an acceptance may consist of a statement or of other conduct. The key element in an acceptance is the offeree's 'indication of assent'.

Since the CISG does not charge the offeree with a general duty to reply, silence or inactivity does not – in itself – amount to an acceptance and the offeror cannot circumvent this rule by stating in the offer that silence by the offeree will be taken to indicate the offeree's assent. If, however, the offeree initiates a transaction by soliciting an offer, she (the offeree) may choose to bind herself in advance by indicating that an offer, if made, will be deemed accepted (e.g., absent contrary indication by the offeree within a specified period of time).

Under CISG Article 18(2) an acceptance becomes effective when the offeree's indication of assent 'reaches' the offeror, assuming the indication reach-

es the offeror in time. (If so, the CISG contract between the parties is deemed to have been concluded at that time.)

Actual notice of the acceptance is not required: it is sufficient that the acceptance reaches the offeror's sphere of business, so she at least has an opportunity to take notice of it.

If no specific time for acceptance is fixed in the offer, the CISG default rule is that the acceptance must reach its destination within a reasonable time, taking due account of all the circumstances. In this connection, an offer sent by e-mail will ordinarily require a more prompt reply than an offer sent by post. Absent contrary indication, an oral offer requires an immediate acceptance.

Article 18(3) applies where the offeror requests, or impliedly condones, acceptance by the performance of an act, (e.g.) shipping goods ordered by the offeror. Such an acceptance by conduct may accord with an established practice between the parties, or with a broader usage within the trade: see Article 9. Assuming the performance is timely, the acceptance becomes effective when the act is performed (or performance commenced). The logical consequence is that the offeror cannot revoke (an otherwise revocable offer) if the purported revocation reaches the offeree after the act requested has been performed.

According to Article 21(1), a late acceptance is nevertheless effective if the offeror promptly notifies the offeree to that effect. Article 21(2) deals with a more complex situation: the late acceptance shows that it was sent in such circumstances that, if its transmission had been normal, it would have reached the offeror in time. In this respect the CISG adopts the German and Nordic rule: the late acceptance is effective as such, unless the offeror promptly informs the offeree that he considers his offer as having lapsed. It follows from Article 22 that an acceptance may not be withdrawn after it has become effective. Once the acceptance is effective, a binding contract is made, so a purported withdrawal of an acceptance after this point will constitute an unjustifiable revocation and thus a breach by the offeree.

4.6. Rejection and Counter-Offer

The main Article 19 rule is that an acceptance, to be effective, must correspond to the offer which it purports to accept. In this respect, Article 19(1) reflects the traditional (Nordic and other domestic law) conception that an acceptance must match the offer – be its mirror image, so to speak. Conversely, a reply which purports to be an acceptance, but which does not actually reflect the terms of the offer, constitutes (not an acceptance, but) a rejection and counter-offer instead.

> *Illustration 4:* S offers to sell goods to B at a stated price X, and B purports to 'accept' by agreeing to buy the same goods at price Y (which is lower than X).

There is no meeting of minds in Illustration 4, since B's purported acceptance does not mirror the offer by S. For this reason, B's reply serves as a rejection which effectively kills the offer originally made. Note, however, that the re-

jection also serves as a counter-offer, (i.e.) a new offer, capable of being accepted on its own terms. So, if S replies to B, agreeing to sell at price Y, these two parties' minds can be said to have met.

Not every reply (response) to a CISG offer will purport to be an acceptance of the offer received. A reply might, for example, make inquiries or suggest the possibility of different or additional terms, thus exploring the willingness of the offeror to bargain (accept terms more favorable to the offeree), while at the same time allowing for the possibility that the offeree might still be willing to accept the offeror's original terms.

> *Illustration 5:* S offers to sell goods to B at price X. B replies: 'I am certainly interested, but would you consider selling these goods for price Y?'

This illustration contains a so-called independent communication, and while its effect is not expressly settled in the Convention text, it should not be interpreted as a rejection (coupled with a counter-offer), simply because it does not itself purport to be an acceptance. The corresponding Nordic domestic principles would seem to accord.

4.7. The Battle of Forms

The foregoing illustrations (4 and 5) involve relatively clear cut indications of the parties' intent. But parties who negotiate international sales contracts do not always discuss, let alone reach an express agreement on all relevant points. In one common scenario, S might attach her standard term invoice as part of a generally positive reply to the (very differently formulated) purchase order by which B initiated the transaction in question. In some related situations, the parties first exchange brief communications which cement the key contract terms (goods, price, delivery date); only later do the parties provide, exchange – or perhaps even engage in a 'battle' of – (standard business) forms.

In situations such as these, where one party supplies terms not expressly agreed to by the other, or where the parties supply terms which do not match, the judge or arbitrator needs first to ask whether a binding contract has been formed; if the contract is held to exist, the decision-maker must then determine the terms of the deal. Prior experience at the domestic level confirms that questions like these are not easily resolved.

According to the international compromise which Article 19(2) of the treaty reflects, an acceptance must – as a starting point – correspond to the offer it purports to accept. Non-material modifications, however, need not break

the deal; in other words, a purported acceptance containing additional or different terms which do not materially alter the offer constitutes a true acceptance. Only if the offeror, without undue delay, objects to the immaterial discrepancy should the offeree's otherwise conforming reply be treated as a rejection; and so, if the offeror does not so object to the non-material modifications, these become part of the CISG deal.

Compared with some domestic solutions, Article 19 might seem to represent a rather conservatively formulated exception to the mirror-image rule, especially since paragraph (3) lays down a long and non-exhaustive (among other things) list of provisions considered to be material in the Article 19(2) sense. Indeed, based on this list, some CISG commentators have found it difficult to even imagine modifications that would not be material. Other scholars, inspired by more progressive transnational paradigms, have advocated a more flexible application of Article 19(3), with some (in Germany) even suggesting that the rule merely establishes a rebuttable presumption of materiality.

Since clauses relating to the settlement of disputes are among the items listed in Article 19(3), the highest court in France (*Cour de Cassation*) has characterized a jurisdiction clause in one party's form as a material term; on a different occasion, however, that same court held that the adjustment of a mechanism for determining the price did not constitute a material alternation. In an arguably bolder contract-preserving step, a German court held a clause requiring notice of defects within 30 days after the date of the invoice not material under Article 19(2), notwithstanding the fact that the buyer's failure to notify within the stated time period effectively insulated the seller from all liability claims based on non-conforming goods. See Lookofsky, UNDERSTANDING THE CISG, § 3.8.

Whichever approach a given court prefers, it is submitted that Article 19 should not be read in isolation from other Convention provisions.

To take one important example, a reply containing an additional term (as opposed to a modification) which conforms to international trade usage (under CISG Article 9) should not be held to constitute a material addition, even if it deals with an otherwise 'material' topic listed in paragraph (3).

Nor can Article 19 be said to provide the only solution – let alone the only effective solution – to all problems relating to standard business terms and/or the battle of forms. The inadequacy of simple mirror-image solutions is especially prominent in cases where the documents exchanged at the contract formation stage do not match (e.g. where only one party's form limits liability for breach), but where the parties proceed nonetheless to perform their main obligations (to deliver and pay), i.e., without regard to the contractual discrepancy and its potential consequences. In such cases – since neither the

parties nor the court can 'go back in time' – a CISG contract must be said to exist (have been made), i.e. even though a material term in that contract is now in dispute.

In some such situations, Article 19 might lend itself to the formalistic approach, first established in Nordic and other domestic battle-of-forms cases, which favors the terms of the party who, by putting forth the last (standard) document, gets the 'last shot'; according to similarly conventional wisdom, a buyer's acceptance of goods shipped and delivered might be held to imply an acceptance of the seller's standard terms.

A different – often less arbitrary and more logical – alternative is to adopt the 'knock-out' approach which simply cancels out the conflicting terms in the forms submitted by both parties and looks instead to the otherwise applicable default solution. Fortunately, the language of Article 19 does not preclude a solution based on this approach, thus permitting decisions (e.g., by the highest Court in Germany in 2002) which are more in line with the progressive *UNIDROIT Principles of International Commercial Contracts*.

If, for example, one party's form designates the courts in its jurisdiction as competent, whereas the other party's form does not, the default solution under the knock-out approach would point to the default rules as regards the jurisdiction of national courts: see (e.g.) Lookofsky and Hertz, EU-PIL: EUROPEAN UNION PRIVATE INTERNATIONAL LAW (2nd ed. Copenhagen 2015).

According to Kasper Steensgaard, the main solution to the battle of the forms conundrum under *Nordic* contract law is the *last shot* rule. The *knockout* rule also has its supporters, but in Steensgaard's view there is nothing in the NCA that suggests that sec. 6 should not apply. See Kasper Steensgaard, STANDARDBETINGELSER I INTERNATIONALE KONTRAKTER. SÆRLIGT OM VEDTAGELSE UNDER CISG OG ANDRE INTERNATIONALE REGELSÆT (Copenhagen 2010).

When it comes to standard terms and conditions, Steensgaard opines that the shift to CISG Part II (in international sales) and away from the Nordic Contracts Acts may cause a fundamental – and desirable – change in outcomes. Although there is no uniform understanding of the problem under the Convention, the courts in some countries, including Germany, tend to apply the knockout solution rather consistently in the CISG context. Under that view, not even a conscious effort to fire the last shot may suffice to ensure incorporation under the CISG. See Kasper Steensgaard, *Article 19 CISG & Scandinavian Domestic Law: Conflict or Peaceful Coexistence?* In THE CISG CONVENTION AND DOMESTIC LAW: HARMONY, CONFLICT OR PEACEFUL CO-EXISTENCE (Copenhagen 2014).

Replying to Steensgaard, Torgny Håstad notes that battle-of-forms disputes seldom concern non-material modifications. For this reason, conflicting standard terms normally fall outside the scope of CISG Article 19(2) as well as sec. 6(2) of the Nordic Contracts Acts, with the result that the proffered conflict terms constitute a rejection combined with a counter-offer. Sometimes the acceptor may believe and have reason to believe that his standard terms will be accepted if the offeror does not object without undue delay; in that case an 'extended application' of sec. 6(2) may be appropriate provided the offeror cannot

be unaware of the acceptor's belief, in which case performance by the offeror may be regarded as an acceptance of the acceptor's standard terms. In Håstad's opinion it should, however, be possible for the offeror in advance to exclude inclusion of other standard terms or to object to them upon receipt of a purported acceptance. But if the offeror does neither, the question is left open: should he be bound by the acceptor's terms (last shot); should the knock-out solution apply (also after performance, as recommended in DCFR and CESL); or should the result be that no contract exists? See Torgny Håstad, *Article 19 CISG & Scandinavian Domestic Law: Conflict or Peaceful Coexistence?* In THE CISG CONVENTION AND DOMESTIC LAW: HARMONY, CONFLICT OR PEACEFUL CO-EXISTENCE (Copenhagen 2014).

According to case law, once a contract has been validly *concluded* (orally or in writing) in accordance with CISG Part II, a subsequent unilateral communication – from one contracting party to the other, perhaps including the communicator's standard business conditions – does *not* become part of (or modify) the agreement originally reached.

This point was made clear in a case decided in 2003 by a U.S. Court of Appeals. A Canadian winery (B) *agreed by telephone* to buy 1.2 million corks from a seller (S), the U.S. subsidiary of a French manufacturer. With respect to each of the 11 shipments which ensued, S sent its standard invoice, stating (in French) that 'Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan [France].' B took delivery and paid for each shipment, but made no objection (or comment) in relation to the clause. Later, claiming that wine bottled with the S-corks was tainted by cork flavors, B filed suit in a U.S. Federal Court against S (and its French parent). Reversing the District Court's decision, the Court of Appeals held that the forum clauses proffered by S had not, by virtue of CISG Article 19 or otherwise, become part of the oral agreement between the parties.

See http://cisgw3.law.pace.edu/cases/030505u1.html.

4.8. Sales Contract Validity and Defenses to Contract Enforcement

As confirmed by CISG Article 4, Part II of the Convention deals with contract formation, but not with contract validity – this latter subject being left mainly for determination by (domestic) rules outside the CISG. In other words, Part II of the Convention was designed to govern the mechanics of consent (offer, acceptance etc.), but not defenses to enforcement of the agreement so made. And although a CISG contract is usually formed upon timely receipt of the offeree's acceptance (Article 23), there may still be no real consent and thus no binding contract in the concrete case, e.g., if the offeree can establish a viable defense to contract enforcement, such as fraud, duress, misrepresentation, etc.

The Convention drafters had no choice but to draw the line, but the distinction between formation and validity sometimes seems difficult to maintain, since both these (seemingly

separable) subjects deal with the overall process by which a contract comes to be. And although the Convention is 'not [generally] concerned' with validity, it does in fact address a few matters which clearly impact upon that very subject.

Among the factors which sometimes generate problems of validity are contractual *disclaimers or limitations of liability* (and similar clauses likely to be contained in a CISG seller' standard terms). Here as elsewhere, the CISG leaves the parties free to 'contract out' of *its* default-rule regime, but if one party alleges that the other's standard terms overreach, domestic rules of validity must be used to delimit the boundaries for the acceptable exercise of the freedom which CISG contracting parties enjoy.

As an exception to Article 4, Article 29 applies to a subject relating to sales contract validity. According to this rule, a sales contract may be modified or terminated by the mere agreement of the parties. Therefore, a sales contract modification – (e.g.) whereby the seller agrees to deliver the goods for a price lower than originally agreed – is generally binding and cannot be attacked for lack of (what Common lawyers call) 'consideration.' Article 29 does not, however, address duress or other validity issues, so CISG lawyers may need to draw the line between lopsided agreements made under the influence of threats and extortion (economic duress) and agreements which satisfy the (Article 7) requirement of good faith in international trade. It remains to be seen whether courts and arbitrators will seek the solution to such problems within the Convention itself or whether they will turn to sources outside of the CISG. See also Lookofsky, UNDERSTANDING THE CISG, § 2.6.

5. Formation of E-Commerce Contracts

Commercial legislation cannot always keep up with the fast pace of commercial trade, and this is especially true when it comes to legislation at regional or international levels. Since the CISG was negotiated in the 1970's and not even opened for signature until 1980, one can hardly blame the Convention drafters for not taking the special problems of modern electronic commerce – including e-contract formation – into account.

Now, in the 21st century, we see the beginnings of special legislation designed to regulate e-commerce – not only in domestic contexts, but also at regional and international levels. But just as jurists dealing with domestic transactions still need to look to traditional NCA rules of law to regulate e-contract formation, contracts made by international e-traders must, for the time being at least, remain subject to the CISG Part II regime.

Although the amenability of CISG Part II to e-trade has not yet been tested in the courts, Convention commentators have been willing to provide both predications and recommendations, and most of these seem quite positive.

Just as Part III of the Convention seems well-suited to the regulation of contracts for the sale of computer software (Lookofsky, UNDERSTANDING THE CISG, § 2.5), we have good reason to expect that the CISG Part II rules can deal adequately with the process of e-contract formation. Electronic communications occupy a functional position somewhere be-

tween traditional letter and telephone communications, and there should be no great difficulty pressing EDI and email into the Convention's traditional offer and acceptance grid. Nor should electronic signatures raise special concerns as regards those few CISG sales contracts which need to be evidenced by a (signed) writing. Indeed, electronic contracts are not fundamentally different from paper-based contracts. And while there may be a need to supplement CISG Part II rules to achieve greater certainty in electronic contracting, the few areas where the approach or solution followed in the CISG might be problematic stem not from the use of more modern forms of communication, but rather from structural or conceptual deficiencies that existed from the outset and are applicable to all forms of communication. CISG courts and arbitrators will hardly be unduly hampered by these deficiencies, so – both as regards e-commerce and otherwise – we can surely make do with Part II of the Convention for a good time to come. See sources cited in Lookofsky, id. § 3.11.

6. Conclusion

Provided we take account of not only the relevant general rules, but also the applicable exceptions, the bottom line would seem to be that few (if any) of the rules in CISG Part II represent substantial departures from the domestic contact formation rules set forth in Chapter I of the Nordic Contract Acts. For this and other pragmatic reasons, the Nordic countries have now, with the exception of inter-Nordic sales, joined all other CISG Contracting States in designating the *entire Convention* as the rule-set which applies, by default, to international sales of goods.

The practical consequences of this Nordic move seem positive indeed. During the quarter-century reign of Article 92, the contract formation rules applicable to a sales contract between a Nordic party and (e.g.) a Chinese party could only be determined by a conflict-of-laws approach, inevitably leading to an all-or-nothing domestic law result: in this case *either* the NCA (a rule-set totally foreign to the Chinese trader) *or* Chinese domestic law (totally foreign to the Nordic party concerned) – this not to mention the Nordic and Chinese lawyers charged with the obligation of protecting the interests of their respective clients.

Since 1980, the CISG has held out the promise of a level playing field for international sales of goods – not only as regards the rights and remedies of the parties, but also as regards the rules of sales contract formation. Until very recently, the Nordic Article 92 reservations kept the rules of contract conformation on an uneven keel, especially for traders residing in our part of the world. Now, at long last, the withdrawal of those CISG Part II reservations has levelled out the field. Let's all be thankful for that.