On

Formation of Contract
by Means of Comparison

or

The Current Disparity Between the Nordic Laws of Contract and the Draft Common Frame of Reference in Regulating the Formation of Contracts

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[1] DEIBEL, K. (2011) p.xvii.

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1 INTRODUCTION

Contracts are fundamental legal instruments that reach deep into our lives. Everyday, numerous contracts are entered into — creating obligations and rights for the contracting parties. The action of buying a cup of coffee or amortising investment losses are all subject to the same fundamental principles: *contractual rights and obligations*.

When contractual mechanisms are absolutely fundamental for everyday transactions, one can only ask why European citizens and entities are not subject to the same contractual legal framework following decades of European integration through the *four freedoms*. The situation bears similarities to the paradoxical and ironic way in which Sir Arthur Doyle's famous detective Sherlock Holmes referred to "The Dog that Didn't Bark"[2] — the point being that the lack of a coherent European contractual framework[3] deserves more attention. Today, every European citizen is subject to its own state's unique law of contractual obligations, and contract law, thus, remains unharmonised.

This is where the Draft Common frame of Reference, or the *DCFR* in short, enters the picture. Presented to the European Commission (EC) in 2009, the DCFR is a collection of principles, definitions and model rules of European private law. Although coined by some as being an "academic exercise"[4], the DCFR ultimately aims to serve as an inspiration to the development of a future European Civil Code, embodying all member states of the European Union (EU).

This eventuality could be interesting to the Nordics, in the perhaps overly hypothetical possibility of the Nordic states one day adopting a European Civil Code. Sharing a homogeneous legal dimension, the Nordic states have long had a tradition for extensive legal collaboration. With this in mind, it is particularly interesting to assess a situation in which the Nordic countries are subject to a future European Civil Code, and investigate if this would involve a drastic change to the current state of Nordic law. Will the Nordic countries have to

[2] DOYLE, A. (1893). p.367.

[3] FREEDLAND, M. *et al*. (2013).

[4] RICHARDSON, L. (2014).

adopt a different legal standard — or is the DCFR merely a restatement of Nordic Law as we currently know it? As of writing, I have been unable to identify academic discourse on this specific topic. And as such, the impact the DCFR hypothetically could have in the Nordic legal sphere remains unanswered.

In this bachelor thesis, I will attempt to compare and contrast the differences between the legal mechanisms in the Nordic states and the DCFR. As this is quite a task, I will, to make the research manageable, focus exclusively on the laws governing the formation of contracts, and treat the Laws of Contract in Norway, Sweden, Denmark, Iceland and Finland as one and unified *Nordic Law of Contract*.

Following this, I hope to be able to contribute to the academic debate outlined by the Common Core Evaluating Group - which so far only has been concerned with the impact of the DCFR in a small number of EU member states.[5] In continuation of this, I aim to provide an answer to the following question:

Is the Draft Common Frame of Reference (DCFR) and the Nordic Law of Contract (NLC) similar in the way they regulate the formation of contracts?

As I will argue, they differ in some fundamental ways.

5 ANTONIOLLI, L. (2011). p.39-46.

2 ACADEMIC DISCOURSE AND SCOPE

Although there is currently wide academic agreement on that the laws of obligations in each of the five Nordic states share a common "Nordic dimension"[6], it is necessary to explain why I for the purpose of this study am able to treat the legal systems of five independent states as one. In relation to describing the fundaments of the unity of Nordic law, it is also important to briefly outline the DCFR, and its reference to a future European Civil Code.

2.1 Making the Case for a "Nordic Law of Contract"

It is academically undisputed that the laws of contract in the Nordic states share the same fundamental principles.[7] Explained partly by its common history, there are also other reasons for this legal coherence on contracts in the Nordic.

As Tørum argues in his doctoral dissertation on the Nordic Laws of Obligations, there has since the mid-19th century existed an "internal market" for judicial thought in the Nordics. Nordic courts are, for example, continually and extensively referencing theory and practice from its Nordic neighbours in their respective national courts[8].

This is further exemplified looking at the general practice in Nordic legal academic literature, where practice from the other Nordic states rarely is discussed under the label of "Foreign Legal Systems", or similar. Perhaps the former dominions of the British Commonwealth realms provide a good comparison of a collection of states that enjoys the same low threshold of applying jurisprudence and theory across its borders as the Nordic states.[9] Paradoxically however, and in the same way direct Nordic cooperation has declined following the Nordic states' varying commitment to European integration, the direct legal unity suffered the arrival of legal internationalisation[10].

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6 TØRUM, A. (2007). p.563.

7 LANDO, O. *et al.* (2016). p.16-18.

8 Rt-2012-1062, Rt-2008-362, UfR-2008.2507, NJA-1998.817

9 GOULBOURNE, S. (2006). p.300-301.

10 TØRUM, A. (2007). p.560.

Nordic legal unity is impacted when the states are not signatories to the same international conventions, and when commitments to these conventions are incompatible with the established nordic traditions.[11] The different approaches to the Vienna Convention on the International Sales of Goods (CISG) and to European integration are prominent examples of such situations, in which direct Nordic cooperation suffers.[12] The result of this is, however, not that apparent with regards to the present regulation on formation of contracts.

This is because the core mechanism governing formation of contracts is rooted in old Nordic legislation and have not, in general, been subjected to the same international legal harmonisation described above. Considering this, I argue that there is still wide support for treating the Nordic Laws of Contract as *one* Nordic Law of Contract (NLC) for the purpose of this bachelor thesis' research and scope.

2.2 The Development and Status of the DCFR

The DCFR was developed during the early 2000s on the basis of an EC mandate and funding from the Commission's Research Directorate-General.[13] Rooted in extensive comparative research and analysis, the authoring groups presented recommendations to legislators creating and alternating EU legislation within the framework of the *acquis comunautaire* — in particular; the Treaties, Regulations and Directives of the European Union. In addition to being a draft for the future and more political Common Framework of Reference (CFR)[14], it could also (although now politically disputed), be considered an inspiration to the development of a future European Civil Code.[15]

11 RUUD, M. *et al.* (2011). p.63-65.

12 HELLNER, J. (1990). p.23-25.

13 EC-COM-OJ-C-63/1. (2003).

14 BAR *et al.* (2009). p.36-44.

15 COLINS, H. (2008). p.840-44.

It must, however, also be noted that as the DCFR is essentially an academic text[16] and not subject to political authorisation. Its legal status may therefore be compared to a *green paper*, similar to the Official Norwegian Reports (NOU) or the Swedish Government Official Reports (SOU) in the Nordics. Its weight, as a source of law, is however emphasised strongly, both academically and in European courts.[17] The DCFR will thus, for the purpose of this study, be treated as *the* definitive model for a future European Civil Code in governing the formation of contracts.

For a more comprehensive outline of the DCFR, please see Bar, C. *op. cit.* pages 6-38.

16 RICHARDSON. *op. cit.*

17 PHIL WILLS v STRATEGIC PROCUREMENT (UK) Ltd. (2013).

3 THE COMPARATIVE METHOD

In order to assess the academic issue regarding the similarity of these two legal systems, I will not only be concerned with a direct textual comparison of the relevant statues and black letter provisions. To ensure that the underlying considerations are brought to the surface, I will employ the comparative method, as outlined by Dr. Sacco in the Trento Manifesto.[18]

With the methodology further anchored in Prof. Cordero-Moss' work on comparative law, I have outlined the framework of analysis, in which I will utilise in order to expose the main dissimilarities between the two systems.

3.1 About the Comparative Method

One of the main authorities on comparative legal research, Dr. Sacco, argues that understanding a legal system is not merely reserved to a system's belonging jurists. On the contrary, their advantage of being able to access an abundance of information could prove a disadvantage — in the sense that "their assumptions that the theoretical formulations present in [their] system are completely coherent with the operational rules of that system".[19]

This means that the method of comparison needs to account for the possibility that the black letter rules found in the statues are not necessarily coherent with the valid operational rules. Therefore, mere textual analysis of provisions would not expose the non-statuary law, nor other latent factors of interpretation. This is something that is especially important in this study, as the Nordic Contracts Acts (NCA) originates from 1915 and its operational rules are a result of more than 100 years of legal development in five different countries.

As the goal is to discover and make visible the differences between the two systems, I must seek to expose the legal mechanisms that regulate the different contractual situations. When applying fictional cases to the different systems, I will disclose not only the legal objectives as they surface from the black letter rules, but also the non-statuary and operational

[18] SACCO, R. (1991). p.1-34,343-401.

[19] CORDERO-MOSS, G. (2004). p.13.

mechanisms. The aim of the method is to test the compared systems from within, and in this way improve the assessing of a foreign law from the outside.[20]

In order to operationalise the research further, I am mainly to be concerned with the outcome of two fictional cases, ensuring credibility of the empirical science across two different legal systems. In essence, the method ensures equal assessment on the same grounds, where the alternative would be to conduct a textual comparison of the written black letter rules. This will however run the risk of omitting the operational and non-statutory rules present in the systems.

3.2 Terms of Comparison and Legal Sources

In order to investigate and highlight the differences, I will compare both systems in terms of their regulation of the process of concluding contracts.

Concerning the NLC the main source of law is the NCA, enacted first in Sweden in 1915, and last in Iceland in 1936[21]. With an abundance of cases, non-statuary rules and principles developed over a century in five states, there are however multiple sources of law. To account for this, the main source of law for the purpose of this study is the recently formulated and overhauled black letter model rules in the volume *Restatement of Nordic Contract Law* by Lando *et al*., supplemented by relevant case law from the Nordic countries. The model rules are the result of a recent study in 2016, which developed uniform black letter rules, mirroring the current law of contract in the Nordic states. Considering the high academic quality of the work, the RNCL will be used as the main legal authority in solving the cases under the NLC.

The regulations and provisions of the DCFR have, naturally, not enjoyed non-statutory development since it was published in 2007, and is exclusively formulated as black letter model rules. The authoring groups' commentary of the DCFR is the only source of interpretation in addition to the provisions' wording I will utilise in the comparison.

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[20] BUSSANI, M., *et al* . (2012). p.149-172

[21] LANDO. *op. cit.* p.91.

The cases I am using for this study are based on Prof. Cordero-Moss' comparison of the different European legal systems from 2004, and are designed to accentuate the relevant legal mechanisms tied to the formation of contracts across different systems.

4 FORMATION OF CONTRACTS: A COMPARISON

When questions about the interpretation of a provision in a contract arise, the applicable law governs the method of interpretation and the legal effects of non-compliance.[22] The legal effects can, as this study is an example of, be significantly different depending on the application of either the NLC or the DCFR.

Although disagreements about contractual provisions are common, the question of whether or not a contract has come into existence can be even more fundamental. Like the interpretation of specific provisions, the validity of formation also depend on the applicable law.

As there are countless ways in which a contract can come into existence, it is necessary to focus on general model situations in which the mechanisms of the formation of contracts in the different systems are accentuated. Modern contract negotiations are not limited to the traditional exchange of written offers and acceptances[23], and there can also be various consequences of the legal effects of an offer or acceptance that is not delivered in conformity with the original offer.

Depending on the applicable law, a contract could be invalid due to its conclusion under undue influence, duress, mistake, or on the basis of illegality.[24] What this shows is that even a contract appearing as validly fulfilled, might be invalid on the basis of regulations in the applicable law.

What degree of conformity between offer and acceptance is needed in order to conclude a contract? Is an irrevocable offer irrevocable? These are central aspects in the formation of a contract, in which the DCFR and the NLC regulate differently.

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22 CORDERO-MOSS. *op. cit.* p.59.

23 WOXHOLTH, G. (2014). p.24-25.

24 CORDERO-MOSS. *op. cit.* p.59-60.

4.1 Common Goals and Legal Authorities

In the following sections I will present the cases in detail, and their respective solutions within the European and the Nordic framework. In the final analysis I will compare and contrast each of the systems' relevant operational rules.

Firstly however, it must be highlighted that the NLC and the DCFR have certain fundamental principles in common. Both frameworks assume that a contract reflects the will of two or more parties to regulate their respective and mutual interests at certain conditions.[25|26] They also recognise that a contract may be concluded in different ways, not only by expressing the acceptance orally or in writing, but also on the basis of the conduct of the parties.[27|28]

Apart from these common fundamental principles, the systems have slightly different aims in their regulation of the process of establishing a contract. The difference is mainly on the basis of protecting the interest of a party that legitimately relies on the conduct of the other party on one hand, and enhancing the freedom contractual parties have to arrange their interests as they deem fit on the other.[29] As these principles are opposites, I have found that the degree in which the different systems prioritise the two, impact the results of the cases.

a) NLC

Under the NLC, formation of contract is regulated under the first chapter of the NCA. As the law was ratified between 1915 and 1936, there are substantial jurisprudence and non-statutory laws to add to the codified provisions. For the purpose of coherently treating the Nordic Laws of Contract as one, I am as mentioned utilising the black letter model provisions presented in the RNCL.

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25 LANDO. *op. cit*. p.25-27.

26 BAR. *op. cit.* p.37-39.

27 *Ibid*. p.364.

28 LANDO. *op. cit*. p.69-70.

29 CORDERO-MOSS. *op. cit.* p.64.

b) DCFR

Under the DCFR, the formation of contract is regulated in Book II. As it is a non-authoritative instrument and its provisions were published as late as in 2009, there are currently no supporting case law, nor any developed operational laws. Its black letter model rules are, however, substantial in detail, and the commentary is comprehensive.

4.2 Cases and their Respective Solutions[30]

4.2.1 Case 1: Irrevocable Offer

CityConstruction Ltd. is preparing to participate in a tender for a new national museum. In developing the bid, CityConstruction requires a sub-contractor, AluminumPillars Ltd. (AP), to specify, in an irrevocable offer, the terms and conditions in which AluminumPillars would be able to supply CityConstruction with materials for the build. AluminumPillars sends an offer to CityConstruction, specifying the quality, quantity, delivery time, delivery place, price for delivery, details of payment, etc. The offer also contains a clause stating that the offer is binding on AluminumPillars and cannot be revoked before a specific date after the tender procedure is concluded.

CityConstruction presents its bid, which is based on AluminumPillars's offer, and is awarded the construction contract for the new national museum. Having been awarded the contract, CityConstruction is about to accept AluminumPillars's offer, but is informed that the offer is revoked. After re-calculating, AluminumPillars had discovered that the offer was not sufficiently profitable under the proposed terms, and in spite of still being in the irrevocable period as prescribed in the offer, AluminumPillars had revoked its offer to CityConstruction.

30 Please be advised that the relevant statues in the following analysis are not cited in-text, but may be consulted in the appendixes on pages 28-30.

a) NLC

The question is whether the sub-contractor has the possibility to revoke its offer, even if it had stated that the offer could not be revoked before a certain date.

The legal basis for this question is found in RNCL §§ 1-2 and 2-1 concerning the formation of contract, which respectively has its authority in the NCA § 1, and further originates from the Norwegian and Danish Codes (NDC) of 1683 and 1687. From these provisions it is clear that the good binding of an offer and acceptance is strongly fortified in Nordic Law. This is also carried forward in the RNCL, which is rooted in § 1-2.

From the wording of these authorities, I will argue that the enforcement is not exclusively linked to the contract itself, but also to that of the pre-contractual behaviour, such as the *promise* to enter into a contract on specific terms. This follows from both the NCA and the NDC. Support for this textual interpretation is also found in the wording of the RNCL § 1-2, stating that a contract is "binding", and can only be modified by the "terms", "agreement" or "law". From this, one can derive that even a unilateral offer, such as a promise to not withdraw an offer, will generally be binding under the *lex generalis* provisions of the RNCL.

In relation to the *lex specialis* provisions applicable to a situation of an irrevocable offer, I have identified RNCL § 2-1[31] — which compliments and takes precedence over the above general provisions.

Building on the principle deriving from RNCL § 1-2, it is clear that the binding obligations that arise, are not a result of the actual agreement between the parties, but rather the *promises* given by them. This is further supported by the wording in RNCL § 2-1, which states that an offer to enter into a contract is generally binding on the party that makes the offer.

In both the RNCL and NCA, the term "offer" must be understood to have a broad scope, as it follows from practice that offers may be given both conditionally and with non-binding clauses (or so called *invitations to treat*).[32] Therefore, a promise to not revoke an offer would constitute a binding obligation for the promisor, on the basis that the promise *itself* creates

[31] RNCL § 2-1 and the NCA § 1 is not mirrored in the Icelandic Contracts Act, but follows from general Icelandic legal principles and case law (LANDO. *op. cit.* p.92.).

[32] *Ibid.* p.105-106.

obligations, not necessarily arising from contract. In judicial literature this has been coined the "Nordic Theory of Promise".[33]

The Nordic courts have also confirmed this practice, and especially prominent are the cases in which the offeree has acted or relied on the promise in question, such as in Swedish case NJA-1977.92, Danish case UfR-1981.1914H, Norwegian case Rt-1998-946 and Finnish case KKO-2008:57. In the latter, a company had been awarded a tender, but later found out they had made a calculation error in relation to overtime payments. Here, the Finnish Supreme Court did not allow the company to revoke its offer, as the offeree had been in good faith and acted on the offer following the award.

In relation to the case presented earlier, the question was whether the AluminumPillars had the possibility to revoke its offer, even if it had stated that the offer could not be revoked before a certain date.

Taking into account that the NLC considers a *promise* binding, and the Nordic courts in addition have been lenient in awarding specific performance in cases which the counterpart has relied on such promise, the promise of not revoking the offer is to be considered a binding and enforceable promise.

Therefore, under the NLC, AluminumPillars would not have the possibility to revoke its offer, cf. RNCL § 2-1.

b) DCFR

The question is still whether the sub-contractor has the possibility to revoke its offer, even if it had stated that the offer could not be revoked before a certain date.

The legal basis for this question is found in DCFR § 4:202 concerning the revocation of offers. The third paragraph of the provision is an exemption to the general rule that the revocation must be made before the acceptance reaches the offeror.

[33] BAR. *op. cit.* p.127.

There is an additional exemption to this provision, when there is a right to withdraw in the actual terms of the contract itself cf. DCFR § 4:202(4). This rule is, however, outside of this particular assessment.

The wording of section A in the paragraph is unambiguous, and must be understood in the sense that any referral to the offer being irrevocable, will render it irrevocable. In such case, the accepted offer will result in a contract, even though it was intentionally revoked by the offeror. This interpretation is supported by the commentary to the DCFR § 4:202, sections D and E. Further, the commentary states that the "indicates"-requirement is to be understood as a term to be "communicated clearly", but that it also can be inferred from the parties' conduct itself.[34]

With regard to the case facts, CityConstruction requests an irrevocable offer, in which AluminumPillars responds to, adding a clause about the irrevocability in the final offer. Based on these facts, it is objectively clear that the offer is caught by the DCFR provision.

The sub-contractor would, therefore, not have the possibility to revoke its offer cf. DCFR § 4:202(3).

4.2.2 Case 2: Modified Acceptance

PetroleumSales Ltd. agrees to sell 300,000 tonnes of Grade 1 crude oil to OilBuyers Ltd. The parties agree by phone on a time and place for delivery, in addition to exchanging written confirmation of the details. PetroleumSales sends a confirmation of the terms that has been agreed on over the phone, specifying that the goods are to be shipped on a tanker chosen at PetroleumSales' discretion. OilBuyers sends an acceptance of such confirmation, but requests that the tanker belong to the flag state of Bermuda.

PetroleumSales does not reply to OilBuyers's acceptance. When the time for delivery arrives, the crude oil spot price is unprofitably low, and PetroleumSales decides to consider the contract as not concluded due to the circumstance that the acceptance was not in conformity

[34] BAR. *op cit.* p.326.

with the offer.

b) NLC

The question is whether the contract has come into existence in spite of the non-conforming acceptance. The legal basis for this in the NLC is expressed in RNCL § 2-6, which has its authority in NCA § 6.

From the wording of the provision, it can be derived that any alteration to the original offer will result in a de facto rejection of the offer. This however, does not seem to be the case for alterations that are purely of formal nature. From its wording, the provision aims to capture additions, restrictions and conditions, that can be categorised as material discrepancies. Merely ceremonial alternations will still conclude a contract, as will alterations in favour of the contracting counter party[35].

From the preparatory works to the NCA, it appears that the rationale behind the provision is that the offeror should be hindered as to speculate at the risk of the offeree.[36] This further supports the notion of the paragraph being concerned with the substantive alterations introduced by modifying acceptances — not immaterial ones, such as alterations corresponding to default rules, which regardless of the alteration, would have been applicable. In reality this provision constitutes a *mirror image rule,* meaning that the acceptance must correspond to the offer in every way in order to conclude a contract.

To this rule nonetheless, there exists an ambiguous exemption in the RNCL § 2-6(2).

It follows from the wording of the exemption that there are two cumulative requirements that need to be fulfilled in order to render a modifying acceptance as valid. First, the offeree needs to be *convinced* that the acceptance is in conformity with the original offer, and second the offeror must have released this. If so, the offeror must notify the offeree “without undue delay” if the offeror does not want to be bound by the contract.

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35 UfR-1989.486H

36 Ot.prp.nr.63. (1917). p.32-33.

As this provision introduces a subjective element on both parties — a so-called *double awareness test*[37] — it has little practical use. The reason for this is that it is difficult to prove before the court what the offeror and offeree did, or did not, believe. Examples are found in NJA-1977.92 and NJA-1962.276, where the offeree's modified acceptance was considered valid only upon the *utmost certainty* that the acceptance would be accepted. This practice, however, has only been applied by the courts in extraordinary circumstances.

With regard to the judgement of whether an alternation to an acceptance is material or immaterial, the courts have practiced the strict mirror image rule. Exemptions to this rule are related to circumstances in which the offeror has started performing its obligations, without informing the offeree of its invalidity. In these cases, the Danish Supreme Court sets aside the subjective requirements and allows minor alterations to the contract on the basis of the RNCL § 2-6(2). This is exemplified in UfR-2009.229H and UfR-2004.1490H.

Based on the above, it is apparent that the mirror image rule is still the main regulation and consideration in the NLC. Only minor, and strictly formal modifications to the acceptance is allowed, and would render a contract concluded. Even non-material modifications (albeit not *ceremonial* modifications) will, in general, prevent a contract of coming into existence. This interpretation is, among others, also supported by the Norwegian Supreme Court in Rt-1956-224 and Rt-1965-638, which ruled that since the acceptance did not comply with the offer, the contract was not concluded. The same was confirmed by the Danish Supreme Court in UfR-1994.861H.

The exemption in RNCL § 2-6(2) is, generally, not practiced, and I have for this reason not applied this provision. One can, however, imagine a situation in which we tried to prove whether or not PetroleumSales was aware that OilBuyers believed that its modifying reply would be accepted. It is highly speculative on the basis of its subjective nature — and, thus, remains disputed.

Practising this, as the acceptance is not in complete conformity with the offer, PetroleumSales is not bound by OilBuyers' acceptance, and no contract exists cf. RNCL §2-6(1).

[37] BAR. *op cit.* p.327.

b) DCFR

The question is whether the contract has come into existence in spite of the non-conforming acceptance. The legal basis for this is found in the DCFR § 4:408, which contain an exemption rule in the second paragraph.

From the wording of the exemption, it is apparent that strictly non-material terms are to be accepted as a part of the contract, and not discarded as so-called *omitted terms*.[38] This follows from the general principle accepted in many countries within the EU, namely that if the new non-material terms are unacceptable, the offeror must actively object to such terms.[39] This is in contrast to the *mirror image rule* found in other systems, and the question of importance is, therefore, what constitutes a non-material and a material term.

The DCFR gives some guidance in its commentary to the provision, where the authors write that whether an alteration is material or not, is a question that is to be decided on a case-by-case basis.[40] The main consideration behind this question is whether the alteration would be likely to influence the offeror in terms of the intention to establish a contract[41].

A non-exhausting list of examples of material terms are found in the CISG, which lists price, quality, payment, time and place of delivery, and quantity, among others.[42] The commentary to the DCFR supports this rationale — but stresses that such a list can only be illustrative and that every case may be different in relation to what can identified as material and non-material terms.[43]

As the acceptance in the fictional case gives a definite assent to the original offer, the question is, therefore, if the specific request of hiring a tanker under the flag state of Bermuda is to be considered non-material or not.

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38 *Ibid.* p.324.

39 *Ibid.* p.325-326.

40 *Ibid.* p.351.

41 *Ibid.*

42 GOMARD, B. (2014). CISG Art. 19(3).

43 BAR. *op. cit.* p.351.

It is apparent that with regard to the term, PetroleumSales can still exercise their right to choose the tanker — but that there has been introduced certain limitations to their range of options. This term was however brought up late in the proceedings of the negotiations, which may indicate that the term was of lesser importance to both parties. From the case facts, all material terms were agreed on in advance of exchanging the written confirmation. Only at a late stage the new term was introduced, and this timing may additionally advocate for the term being more non-material than material.

Although limiting PetroleumSales' options in terms of choosing a tanker, PetroleumSales does not react when receiving the new term. There are, thus, multiple aspects of this case that may advocate for the flag state term being *non-material*.

In addition to this, it is apparent that the reason for PetroleumSales termination is not linked to the term, but rather to the price fluctuations in the market. It is, therefore, highly probable that they would have considered the contract as concluded, if the prices would be favourable to their business. With regard to the trading of commodities, the most important terms of contracts are mainly the time of delivery and price — due to the highly volatile markets. Thus, the term regulating the flag state of the tanker transporting the goods cannot be considered material.

For this reason, the flag-state specifying term introduced in the acceptance must be considered to constitute a part of the contract, as PetroleumSales did not object without undue delay.

The contract has therefore come into existence cf. DCFR 4:408(2).

5 CONCLUSION

The case analysis above illustrated the accentuated nuances separating the DCFR and the NLC. The main difference relevant for the research conducted in this thesis, is identified to be the regulation of correspondence of offer and acceptance.

5.1 Irrevocable Offer

In both systems, the result of the fictional case was the same. This, however, does not imply that the two systems use the same legal mechanisms regulating the prosess of revocation.

In the NLC it is the principle of *pacta sunt servanda* that hinders the offeror in revoking his or her offer. The law is in other words concerned with regulating the *promise*, in addition to the contract, and thus, render an offer with a promise of not revoking it, irrevocable.

The DCFR enjoys another and more direct mechanism, by containing a special section regulating irrevocable offers. This rule is simple and clear, and states that if an offer indicates that it is irrevocable — the offeror will not be able to withdraw, unless it is provided by agreement.

From this it is apparent that even though the result is the same in both systems — the DCFR has a simpler approach to regulate the revocation of an offer. Perhaps is this due to it being a more *modern* framework, mirroring the *present-day* way of forming contracts.

What can be observed from this, is that the DCFR is more accessible for those without legal expertise. While the NLC requires knowledge of case law and other non-statutory provisions in order to extract legal rules applicable to a certain situation, the DCFR is much more clear in its wording — and, thus, is more available for non-experts involved in legal queries.

In terms of the regulation of irrevocable offers in a future European Civil Code, however, the Nordic state of law will not likely experience substantive changes in terms of practical outcomes.

5.2 Modified Acceptance

With regard to the case concerning modified acceptance, the result vary in the two systems. The different legal mechanisms regulating the situation of a modified acceptance also expose a fundamental difference in the categorisation of material and non-material terms.

In the NLC, the mirror image rule is considered the general rule in such situations, and as the courts have had a high threshold in applying its exemption clause, the result is that what is considered non-material terms under the DCFR, may be considered material in the Nordic systems.

The DCFR is considerably more flexible in its approach — and is on a case-by-case basis lenient toward allowing non-confirming acceptances to form a contract, as long as the new terms or alterations are non-material in respect of the relevant terms of the contract. Again, this is likely due to the DCFR being a more modern framework designed to accommodate the flexibility needed and expected in present date contractual dealings and negotiations.

Compared to the DCFR, the NLC is much more formal in this regard, and one may argue that it is more outdated in its current application of the mirror image rule. This, however, may be explained by looking to the general ideology behind the laws. While the DCFR emphasises a more *social* protection of reliance[44], aiming at ensuring good faith and fair dealings, the NLC originates from a more liberal *Laissez-faire* society, and thus, requires more explicit formal requirements to be met in order for a contract to be considered as concluded, emphasising foreseeability and formality.

What is clear however, is that in the case of a European Civil Code, the state of law in the Nordic countries would experience a shift from *formality* towards *flexibility*. The current rigidity of the NLC would be altered, and accommodate the enforcement of non-material modifications in non-corresponding acceptances.

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In the final analysis, and as I have argued in the analysis above, the NLC does not regulate the formation of contract similar to the DCFR.

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44 ANTONIOLLI. *op. cit.* p.335-339.

5.3 Final Considerations

Although I have discovered that there are certain differences between the DCFR and the NLC, further research is required to properly research the many aspects of both formation of contracts and contractual law at large. These additional categories of contractual law should be researched with the same methodical framework as presented here — and might disclose additional differences between the NLC and the DCFR.

From the analysis and comparison, it is apparent that the Nordic legal dimension is more liberal than the DCFR, in light of its modern rules, availability and accessibility. As argued, its flexibility and perhaps more *social angle* bear many similarities to the NLC, but a schism is evident in situations where one party relies on the conduct of the other — at which time the DCFR tends to protect the weaker contracting party. In this way, the DCFR clearly stands out as an instrument of the future.

However, despite numerous attempts of implementing certain DCFR provisions, Europe's long-promised Civil Code remains an aspiration, and not yet a reality.[45] This failure is not surprising, as the EU is still a collection of nation states more than a fully integrated community.[46] The result is that the legal sphere in Europe is still dependent on national constitutionalised contractual legal frameworks — or alternatively, optional *avant la lettre* international legal instruments.

As Nordic integration slowly but steadily is replaced with more and more European integration, I expect that the future Nordic contractual law will be more prone to adopt a *European* dimension, rather than a Nordic. One thing is however certain, a European Civil Code is not imminently around the corner, and in terms of contract law, EU still finds itself in the paradoxical situation of the "dog that didn't bark".

[45] See CESL/COM-2015/0634.

[46] WALT, S. (2017).

6 BIBLIOGRAPHY

Andenas, Mads, Andenas, M., Fairgrieve, Duncan, & Fairgrieve, D. (2015). *Courts and Comparative Law*. Oxford University Press.

Antoniolli, L., & Fiorentini, F. (2011). *A Factual assessment of the draft common frame of reference*. Munich: Sellier.

Bar, C., Clive, E., Schulte-Nölke, H., Beale, H., & Research Group on EC_2 Private Law Acquis Group. (2009). *Principles, definitions and model rules of European private law : Draft Common Frame of Reference (DCFR)* (Outline ed.). Munich: Sellier.

Bar, C., *et al*. (2011). *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*. Volume I. Brussels: European Commission.

Bussani, M., & Mattei, U. (2012). *The Cambridge companion to comparative law*. Cambridge: Cambridge University Press.

Collins, H. (2008). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition, prepared by the Study Group on a European Civil Code and the Research group on EC Private Law (Acquis group) by Christian von Bar, Eric Clive, Hans Schulte−Nöcke.* Modern Law Review, 71(5), 840-844.

Cordero-Moss, G., & Fondet til fremme av forskning på privatrettens område. (2004). *Lectures on comparative law of contracts* (Vol. Nr 166 - 2004, Stensilserie (Universitetet i Oslo. Institutt for privatrett : trykt utg.)). Oslo: Fondet til fremme av forskning på privatrettens område.

Dannemann, Gerhard, Dannemann, G., Vogenauer, Stefan, & Vogenauer, S. (2013). *The Common European Sales Law in Context: Interactions with English and German Law*. Oxford University Press.

Deibel, K. N. (2011). Understanding and Supporting the Adoption of Assistive Technologies by Adults with Reading Disabilities. *University of Washington.* Retrieved from http://staff.washington.edu/deibel/papers/dissertation/acknowledgments.pdf

Doyle, A. C. (1893). *The Silver Blaze* (originally in the Strand Magazine, then collected in The Memoirs of Sherlock Holmes). London: G Newnes Ltd.

Freedland, M. and Lehmann, M. (2013). *Non- Discrimination and the 'Constitutionalization of Contract Law*. Oxford UP.

Gomard, B., Henschel, R., & Danmark. (2014). *International købelov (CISG) med kommentarer.* København: Jurist- og Økonomforbundets Forlag.

Goulbourne, Selina. (2006). *Compairing commonwealth laws: The role of the Commonwealth Legal Education Association in meeting some of the challenges and opportunities*.(Forty Years of the Law Teacher). Law Teacher, 40(3), 299-312.

Hellner, J. (1990). *Speciell avtalsrätt : 2 : Kontraktsrätt Supplement till Speciell avtalsrätt II, Kontraktsrätt : Fel i såld fastighet m m (Vol. 2)*. Stockholm: Stiftelsen Juristförlaget vid Stockholms universitet.

Lando, O., Konow, B., Jacobsen, K., Elvebakk, E., & Krüger, K. (2016). *Restatement of Nordic contract law*. Copenhagen: DJØF Publ.

Lando, O. (2007). The Structure and the Legal Values of the Common Frame of Reference (CFR). *European Review of Contract Law, 3*(3), 245-256.

Ot.prp.nr.63. (1914-1917). *Om utfærdigelse av en lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer*. Kristiania.

Sacco, Rodolfo. (1991). *Legal formants: A dynamic approach to comparative law. (part 1 and 2)*. American Journal of Comparative Law, 39(1), 1-34, 343-401.

Sagaert, V., Storme, M., & Terryn, E. (2012). *The Draft Common Frame of Reference : National and comparative perspectives*. Cambridge: Intersentia.

Research group on the existing EC private law. (2007). *Principles of the existing EC contract law (Acquis principles) : 1 : Contract I : Pre-contractual obligations, conclusion of contract, unfair terms* (Vol. 1). München: Sellier.

Richardson, L. (2014). The DCFR, anyone?. *University of Edinburgh Law School.* Retrieved from http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx

Ruud, M., & Ulfstein, G. (2011). *Innføring i folkerett (4. utg. ed.)*. Oslo: Universitetsforlaget.

Tørum, A. (2007). Nordisk obligasjonsrett og dens betydning for norsk kontraktsrett. *Tidsskrift for Rettsvitenskap, 120*(4), 563-578.

Walt, Stephen. M. (2017). It's Time for Europe's Militaries to Grow Up. *Foreign Policy.* Retrieved from http://foreignpolicy.com/2017/02/23/its-time-for-europes-militaries-to-grow-up-trump-nato/

Woxholth, G. (2014). *Avtalerett* (9. utg. ed.). Oslo: Gyldendal akademisk.

7 ABBREVIATIONS AND LEGAL TERMS

EAA	European Economic Area (EØS)
CESL	Common European Sales Law (2014)
CFR	Common Frame of Reference
CISG	Vienna Convention on Contracts for the International Sales of Goods
DCFR	Draft Common Frame of Reference
EC	European Commission
EC_2	European Community
EU	European Union
KKO	Suomen Korkein Oikeus (Finnish Supreme Court)
NCA	Nordic Contracts Acts
NCL	Nordic Contract Law
NDC	Norwegian and Danish Code (17th century)
NJA	Nytt Juridiskt Arkiv (Sweden)
NOU	Norsk Offentlig Utredning (Norway)
PECL	Principles of European Contract Law
RNCL	Restatement of Nordic Contract Law (2016)
Rt	Rettstidende (Norway)
SOU	Statens Offentliga Utredningar (Sweden)
UfR	Ugeskrift for Retsvæsen (Denmark)

Offeree	One that makes an offer to another[47]
Offeror	One to whom an offer is made[48]

[47] Definition by *Oxford English Dictionary*

[48] Definition by *Oxford English Dictionary*

8 APPENDIXES

8.1 Appendix I: Relevant RNCL Provisions

§ 2-1: Contracts are binding

A valid contract is binding upon the parties. It can be modified or ended only in accordance with its terms or by agreement or as otherwise provided by law.

§ 2-1: Binding effect

Pursuant to the following articles of this chapter [RNCL chapter 2], an offer to enter into a contract and a reply to such an offer are binding on the party that makes the offer or gives the reply, unless otherwise inferred from the offer or the reply or from commercial practice or other custom.

§ 2-6: The effects of a non-corresponding reply

(1) A reply which contains an acceptance of an offer, but which on account of an addition, a restriction or a condition, does not correspond to the terms of the offer is deemed to be a rejection combined with a new offer.

(2) This provision does not apply where the acceptor assumes that the reply corresponds to the offer and the offeror cannot be unaware of this. In such a case the offeror must reject the reply without undue delay, if it does not want to accept the reply; if the offeror fails to do so, a contract is considered to have been concluded in accordance with the terms of the reply.

8.2 Appendix II: Relevant DCFR Provisions

Vol. I, Book II – 4:202: Revocation of offer

(1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

(2) An offer made to the public can be revoked by the same means as were used to make the offer.

(3) However, a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable;

(b) the offer states a fixed time for its acceptance; or

(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

(4) Paragraph (3) does not apply to an offer if the offeror would have a right under any rule in Books II to IV to withdraw from a contract resulting from its acceptance. The parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects.

Vol. I, Book II – 4:208: Modified acceptance

(1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(3) However, such a reply is treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) the offeror objects to the additional or different terms without undue delay; or

(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

8.3 Appendix III: Relevant NDC, NCA and CISG Articles

Danish Code of 1683 § 5.1.2

"...everyone is obliged to fulfil a promise he has given by mouth, hand or seal."

Norwegian Code of 1687 § 5.1.1

"...everyone is obliged to fulfil a promise he has given by mouth, hand or seal."

Nordic Contract Acts § 1

Reglerne i dette kapitel kommer til anvendelse, hvis ikke andet følger av retshandelen eller av handelsbruk eller anden sedvane.

Nordic Contract Acts § 6

Fremtræder svaret som akcept, men stemmer det ikke med tilbudet, ansees det for avslag i forening med nyt tilbud.

Dette gjælder dog ikke, hvis avsenderen av akcepten gaar ut fra, at den stemmer med tilbudet, og tilbyderen maa forstaa dette. I saa fald skal han, hvis han ikke vil godta akcepten, uten ugrundet ophold gi den anden part meddelelse2 om det. Ellers ansees avtale for sluttet med det indhold, akcepten har.

CISG Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.