CISG – a Uniform Law within the Sphere of Conflict of Laws

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1. Introduction

This paper will explore the actual effects of the Scandinavian reservation[1] against Part II – Formation of the Contract of the 1980 United Nations Convention on Contracts for the Sale of Goods (the CISG).[2] Since such an exploration involves the interplay with choice-of-law rules, this paper will also lay out the map of the legal surroundings of the CISG, *i.e.* the sphere of conflict of laws. As will be shown, it is doubtful whether the Scandinavian reservation in conjunction with the choice-of-law rules actually result in an appropriate and foreseeable regulation of the issue.

The purpose of the CISG is to harmonise private commercial law of international trade through the unification of substantive sales law. The legislative technique used was to create a new sales regime specifically aimed at international transactions, rather than collecting rules from existing sales laws. Thus the CISG constitutes an anational uniform sales law and provides a truly neutral alternative to national sales laws. Clearly the CISG has become a world-wide success. As of 1 February 2009, the CISG is in force in 72 countries and covers more than two-thirds of world trade.

However, it is important to recognise that the CISG does not provide a comprehensive uniform sales law for all international sales transactions, nor

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[1] The Art. 92 reservation will be referred to as the '*Scandinavian* Reservation', as this expression both illustrates that the Nordic countries *but Iceland* have made the reservation, and it is settled in the scholarly writings on the subject.

[2] The CISG entered into force on 1 January 1988, and in Sweden and in Finland, on 1 January 1989, in Norway on 1 August 1989, in Denmark on 1 March 1990, and in Iceland on 1 June 2002.
All the Nordic States have also made a reservation under Art. 94, under which regional uniform law (closely-related legal systems) will apply instead of the CISG. This reservation will not be further dealt with in this article.

does it regulate all legal aspects of international trade.[3] First, the scope of the CISG itself sets the primary limitation. For instance, the CISG concept of 'international transaction' is a narrow one, and the validity of contract is explicitly excluded from its scope. Secondly, it is still common practice amongst traders to either contract out of the CISG, or abstain from its pleading in court proceedings.[4] Thirdly, the CISG allows for reservations, which also means variations to the scope of the CISG. Moreover, conflict of laws must be relied upon to determine what variation will apply *in concretu*. Fourthly, import and export involve more than just the sales contract. The goods must be transported and insured. Such contracts fall outside the scope of the CISG, albeit that their non-compliance may give rise to damages under the sales contract and as such fall under the CISG. Accordingly, the conflict of laws still has a vital role to play in international trade, and the importance of further unification of the choice-of-law rules in contract should not be underestimated.

International co-operation through uniform and universally applicable choice-of-law rules will of course further promote legal certainty, as well as prevent forum shopping between courts of the participating states, since the same national law will be identified as the governing law of the contract. Where the choice-of-law rules allows for party autonomy, the parties are also able to choose a commercially sound law to govern their contract. It should be noted that the *universal character* of the choice-of-law rules enhances foreseeability in itself, since there is no requirement of reciprocity. Instead, it is enough that the proceedings are brought before a court of a participating State in order for the uniform choice-of-law regime to apply. Consequently, there is no need for the parties to have their places of business in different participating States; nor that the choice-of-law rules identify the law of a participating State as the governing law.[5]

[3] Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG*, 25 International Review of Law and Economics 314–341 (*cit.* Ferrari), pp. 314–315.

[4] De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary,* in *Quo Vadis CISG?*, Ferrari, (ed), 2005.; Ziegel, *The Scope of the Convention: Reaching Out to Article One and Beyond*, 25 Journal of Law and Commerce (2005-06) 59–73 (*cit.* Ziegel).

[5] This is a general principle of private international law. See Arts 2–3 *e contrario* of the 1955 Hague Convention, and explicitly codified in Arts 2 of the Rome Convention and the Rome I Regulation, respectively.

The 1955 Hague Convention on the Law Applicable to International Sale of Goods (the 1955 Hague Convention)[6] and the Rome Convention[7] and the Rome I Regulation[8] on the Law Applicable to Contractual Obligations (the Rome Regimes) are the result of such international co-operation. The first instrument is the result of the work of the Hague Conference on Private International Law and is open to both members and non-members,[9] whereas the Rome Convention and its new incarnation the Rome I both emanate from the European Union and are open only to its Member States.[10] All three regimes are in force in Sweden and in Finland, whereas Denmark is a Contracting State only to the Hague and the Rome Conventions, and Norway only to the Hague Convention. Iceland has not ratified any of the instruments and thus applies its own autonomous choice-of-law rules in contract.

Accordingly, in a Scandinavian – as well as a European – context, there are three choice-of-law instruments that constitute the sphere of conflict of laws, within which the CISG will be applied. This necessitates a detailed map of the three regimes and their relation *inter se*, as well as fitting the CISG into this conflict structure.

2. Conflict of Laws – European Style

In Europe the traditional private international law method is still followed. The traditional choice-of-law rules consist of juridical concepts or categories together with connecting factors (localising elements), *e.g.* 'a contract of sale shall be governed by the law of the country in which the seller has her habit-

[6] The 1955 Hague Convention on the Law Applicable to International Sale of Goods, 510 U.N.T.S. 149, No. 7411 (1964). It entered into force on 3 May 1964.

[7] The 1980 Rome Convention on the Law Applicable to Contractual Obligations (consolidated version) [1998] O.J. C27/34. All Member States are Contracting States to the Rome Convention. Since this is an obligation under the Treaty of the European Union, the Rome Convention also forms part of the *communitaire acquis*. It entered into force on 1 April 1999.

[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),[2008] O.J. L 177/6. It will apply to international contracts concluded after 17 December 2009.

[9] Contracting States to the 1955 Hague Convention are Denmark, Finland, France, Italy, Norway, Sweden, Switzerland, and Niger.

[10] All Member States are Contracting States to the Rome Convention (see also Art. 28 of the Rome Convention), whereas the Rome I is in force in all Member States but Denmark, see Recital 46 and the Protocol on the position of Denmark annexed to the Treaty of Amsterdam, [1997] O.J. C 340.

ual residence'. The juridical concept in the example is 'sales contract', whereas the connecting factor is 'the seller's habitual residence'. The traditional method requires that a legal issue is characterised in order to determine into which juridical category it falls. Once the legal category is identified, its connecting factor(s) will determine the applicable law. Accordingly, the process – and problem – of characterisation is fundamental to European conflict of laws. In principle, characterisation will follow the substantive rules of the *lex fori*, although it is quite possible that the conflict rule itself may contain its own basis. International instruments may also provide further guidelines, such as a definition or even an autonomous concept, in order to ensure their uniform application.[11] The 1955 Hague Convention and the Rome Regimes are perfect examples of the European conflicts style.

The main advantage of the traditional method is that it is foreseeable – at least where the characterisation is settled – and thus promoting legal certainty, as well as being more cost-effective than elaborate *in casu* analyses. Arguably, it is also less exposed to the homeward trend.[12] The main criticism is that the traditional method is too strict and rigid and therefore may not do justice.[13] In Europe, however, any rigidity in the default rules for commercial contracts is cured by providing full party autonomy, *i.e.* the parties may choose whatever law they like as the *lex contractus*, regardless of whether there is any real or substantial connection to it.[14] In this case, the connecting factor consists of the parties' will alone.[15] It should also be noted that only the 1955 Hague Convention contains strict default rules, whereas the Rome Regimes' default rules consist of presumptions.

11 Bogdan, *Svensk internationell privat- och processrätt*, 7th ed. 2008, p. 66; Dicey/Morris/Collins, *The Conflict of Laws*, 14th ed. 2006, incl. *2nd Cum. Suppl. 2008* (*cit*. Dicey), pp. 37 *et seq.*; Kropholler, *Internationales Privatrecht*, 6th ed. 2006, pp. 121 *et seq.*

12 See *e.g.* Kozyris, *Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity"*, (2008) 56 Am.J.Comp.L. 471, p. 479.

13 See *e.g.* Richman/Reynolds, *Understanding the Conflict of Laws*, 3rd ed 2002, Ch. 4 Choice of Law.

14 Although note that the Rome I may limit the effect of party autonomy if the contract only has connections to the Member States.

15 Kropholler, p. 295; Saf, *A Study of the Interplay between the Conventions Governing International Contracts of Sale*, www.cisg.law.pace.edu/cisg/biblio/saf.html 1999 (cit. Saf 1999), section 5.1 incl. f.ns. See also Dicey, p. 1560.

2.1 Scope of the Conflict Instruments

In order to come into play, rules of private international law require the presence of an *international element*, *i.e.* that there is a connection to more than one country – or legal system.

In the 1955 Hague Convention this is expressed as 'international character'[16], whereas the two Rome Regimes refer to 'any situation involving a choice between the laws of different countries', and 'situations involving a conflict of laws', respectively.[17] Clearly, this is the case when the parties have their places of business in different States, but it is not so limited. Also when the parties are situated in the same State and the conclusion, or performance, of the contract is to take place abroad, the international element is fulfilled. Furthermore, even if the contract itself lacks such concrete international criteria of a constant nature, its connection to an international contract, *e.g.* where the performance of the former is dependent of the latter, will bring it within the scope of the European conflict regimes.[18]

However, a choice-of-law clause, an arbitration agreement, or an agreement on the choice of court will not suffice on its own to create the international element where all other elements are located in one state.[19] Albeit that the Rome Regimes give a limited effect to such a choice of law in a purely domestic situation: The non-mandatory rules of the domestic law will be replaced by the chosen law and, most importantly, the mandatory rules of the chosen law will be given full mandatory effect, rather than being treated as incorporated contractual terms. Thus, there will be a cumulative application of two sets of – potentially conflicting – mandatory rules.[20]

In conclusion, the international element is quite easily fulfilled under the three instruments. In fact, it is safe to say that whenever there is any doubt

[16] Art. 1 of the 1955 Hague Convention (HC).

[17] Arts 1 of the Rome Convention (RC) and the Rome I (RI), respectively. No substantive change is intended through the different wording, see the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Explanatory Memorandum, COM (2005) 650 final (*cit.* Explanatory Memorandum), p. 4. Furthermore, the latter wording is the same as in the Report on the Convention on the law applicable to contractual obligations, [1980] O.J. C282/20 (*cit.* Guiliano/Lagarde Report), p. 10.

[18] See *e.g.* Guiliano/Lagarde Report (note 17), p.10; Philip, *Dansk international privat- og procesret*, 3rd ed. 1976 (*cit.* Philip)(re. the 1955 Hague Convention), p. 325.

[19] Art. 1(4) HC; and Arts 3(3) *e contrario* of the Rome Regimes.

[20] Arts 3(3) of the Rome Regimes.

as to which law shold govern the contract, there is an international element present.

Both the 1955 Hague Convention and the Rome Regimes are of *universal character*, *i.e.* their application is not limited as between Contracting States, or Member States. They are also *mandatory* in the sense that they must be applied *ex officio* and the parties cannot contract out of their application.[21]

The 1955 Hague Convention applies only to one specific kind of contract – international sales of movable goods. Thus, international sales of immovables; intangible movables, such as debts, companies, patents, copyright, goodwill, stocks and shares; and electricity fall outside its scope (*e contrario*).

Negotiable instruments, registered ships, vessels and aircrafts, as well as sales on executions and otherwise by authority of law are explicitly excluded. It should be noted that documentary sales are not excluded, since such documents are only the means of the transaction and not its object. Arguably, a subsequent sale by the first buyer of such documents would also fall within the scope.[22]

Other issues explicitly excluded are the capacity of the parties; formal validity, transfer of title in the goods as between the parties and other proprietary aspects of the contract, as well as consumer sales.[23]

The Rome Regimes apply to international contractual obligations, which means that they are not concerned with property rights and intellectual property.[24] Matters explicitly excluded from their scope are status and legal capacity; matters of family law; negotiable instruments; arbitration agreements and agreements on the choice of court; company law; agency, *i.e.* whether an agent is able to bind a principal in relation to a third party; trusts;

[21] NJA 1999 p. 660 (re. the Lugano Convention); and 2007 p. 787 (re. the Brussels Convention). See also Bogdan (note 11), pp. 46 *et seq.*; Dicey (note 11) § 32-044; Jänterä-Jareborg, *Foreign Law in National Courts A Comparative Perspective, Recueil des cours* 2003, p. 257; North, *Essays in Private International Law*, pp. 186–7; Saf, *The Validity of a Collective Labour Agreement Resulting from a Swedish Blacking – The Rickmers Tianjin AD 2007 Nr. 2*, (2007) 9 Yb.P.I.L. 481. A different matter is that by virtue of the principle of procedural autonomy, a Swedish court cannot on its own accord investigate facts not pleaded by the parties. See the Swedish Code of Judicial Procedure, Ch. 17 s. 3.

[22] Art. 1 HC. See also Philip (note 18), p. 326; and Saf 1999 (note 15), section 4.3.1.

[23] Art. 5 HC; and *La Déclaration et la Recommendation suivantes relatives au domaine de la Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels conclue le 15 juin 1955* permitting the Contracting States to adopt specific choice-of-law rules for consumer sales without violating their Convention obligations. This means that the Rome Regimes apply to all consumer contracts.

[24] Guiliano/Lagarde Report (note 17), p. 10.

and evidence and procedure, with the exception of the burden of proof and the admissability of modes of proof. Insurance contracts that cover risks situated within the Community are excluded from the Rome Convention, whereas most such contracts are included in Rome I.[25]

The Rome I explicitly excludes 'obligations arising out of dealings prior to the conclusion of a contract' – *culpa in contrahendo*. It would seem that the same applies as regards the Rome Convention.[26] Instead this matter is governed by the Rome II Regulation on the law applicable to non-contractual obligations.[27] The consequences of nullity of the contract, on the other hand, falls within the scope of the Rome Regimes, although under the Rome Convention it is possible for a Contracting State to make a reservation against the provision.[28]

The Rome I is the new incarnation of the Rome Convention and shall replace the latter in all Member States but Denmark, and except as regards the non-European territories of the Member States.[29] Unlike its predecessor, the Rome I is Community law proper, although both Rome Regimes aim to ensure the proper functioning of the internal market and the free movement of judgments under the Brussels I Regulation.[30]

2.2 Relation *Inter Se* of the Conflict Instruments

It is clear from the above that the scope *materiae* of the 1955 Hague Convention and the Rome Regimes overlap: first, all three instruments are universal choice-of-law-rules, and secondly, a contract of international sales of movable goods is clearly an international contract.

[25] Arts 1 of the Rome Regimes.

[26] Explanatory Memorandum (note 17), p. 5.

[27] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] O.J. L 199/40.

[28] Arts 10(1)(e) and 22 RC; and Art. 12(1)(e) RI.

[29] Art. 24 RI, incl. reference to Art. 299 of the EC Treaty. Re.Denmark, see Recital 46 RI.

[30] Arts 61(c) (legal basis) and 65 (scope *materiae*) of the EC Treaty.
Although part of the *communitaire acquis*, the Rome Convention is an inter-*state* co-operation under the auspices of the original Treaty of Rome. In 1999, the Amsterdam Treaty gave the European Union competence to legislate in the area of private international law – at least insofar as it is necessary for the proper functioning of the internal market, which arguably covers the entire area. As Community law proper, the Rome I will enter into force at the same time in all Member States and the ECJ will have competence to give preliminary rulings on its interpretation by virtue of the Treaty itself, rather than a separate Protocol of Interpretation.

Art. 21 of the Rome Convention and Art. 25 of the Rome I, respectively, give precedence to existing conventions on the same subject-matter.[31] Accordingly, a Member State that is also a Contracting State to the 1955 Hague Convention, will always apply the 1955 Hague Convention to determine the applicable law to an international sale of movable goods.

Naturally, the general principle of *lex specialis derogat lex generalis* also has the effect that where a particular issue of an international sale of movable falls *outside* the scope *materiae* of the 1955 Hague Convention, *e.g.* formal validity, this issue will be governed by the Rome Regimes instead as *lex generalis*. Thus, the Rome Regimes will not only give precedence to the 1955 Hague Convention, but they will also complete it.

The relation *inter se* of the Rome Regimes is foremost a question of temporal and territorial scope. The Rome I will apply to contracts concluded after 17 December 2009, whereas the Rome Convention applies to contracts concluded after its respective entry into force in each of the Contracting [Member] States. The Rome Convention came into force on 1 April 1991 after the United Kingdom ratification, and in Sweden on 1 July 1998.[32] Accordingly, the date of concluding the contract will determine which one to apply; and the two Rome Regimes will run parallel for a period of time. This is an important fact to bear in mind, as there are some differences between the two.

As regards the territorial scope, the Rome Convention will still apply in Denmark, as well as in those non-European member-state territories that are outside the scope of the EC Treaty. Accordingly, the location of the court seized, *i.e.* whether it is a Danish court or placed in a non-European member-state territory, will be the determinating factor.[33]

[31] See also Art. 307 of the EC Treaty, which encompasses the general international law principles of *pacta sunt servanda* and *res inter alios acta*. Since several of the Contracting States to the 1955 Hague Convention are Third States, the exception in Art. 25(2) of the Rome I, requiring the Member States to apply the Rome I instead of an existing Convention exclusively between Member States, does not apply. Due to the *universal character* of the conflicts instruments, it is impossible to identify any reciprocal obligations that could be modified under the law of treaties as between the Member States only. Thus, *e.g.* the Rome I cannot be given precedence as a modification to an existing convention between both Member States and Third States in accordance with Art. 41 (*per* analogy) of the 1969 Vienna Convention on the law of treaties. See further Saf, *[The Community Regime on Free Movement of Judgments and Cross-border Service – Denmark included]*, ERT 2007 p. 632, pp. 635 *et seq.* incl. f.ns.

[32] *Lagen (1998:167) om tillämplig lag för avtalsförpliktelser* / Act (1998:167) on applicable law to contractual obligations.

[33] Art. 24 of the Rome I and Art. 299 of the Treaty.

2.3 Determining the *Lex Contractus*

As indicated, both the 1955 Hague Convention and the two Rome Regimes fully recognise the principle of party autonomy. It is in fact the main choice-of-law rule for commercial contracts in all three legal instruments.[34]

A valid choice must be either 'express' or 'clearly demonstrated by the terms of the contract or the circumstances of the case' (implied choice). That is to say, there is no recognition of the principle of hypothetical party intention. Under the Rome Regimes, but not the 1955 Hague Convention, it is also possible to alter the chosen law from the law of country A to that of country B; or have part of the contract governed by the law of country C and the remainder governed by the law of country D – so called *depeçage*.

Only where the parties have made no valid choice, the contract will be governed by the law of the country with which it has the closest connection, *i.e.* the law of the seller.[35] Art. 3(1) of the *1955 Hague Convention* contains a strict rule to this effect. There is one exception to this rule: If the seller receives the buyer's order in the latter's country, the *buyer's law* will apply instead, under Art. 3(2). In this way, a buyer who is unaware of the seller's location abroad will not suffer from any surprise application of foreign law due to the (unknown) international character of the sales contract. Thus, it serves the same purpose as Art. 1(2) of the CISG.

The *Rome Convention* does not have specific rules on sales contracts. Instead the *lex contractus* is 'the law with which the contract is most closely connected.' This is determined according to the general three-stage process found in Art. 4(2) and (5): First, the characteristic performance of the contract must be identified. In a sales contract this is the delivery of the goods. Secondly, it must be established in which country the characteristic performer has her habitual residence, *i.e.* where the seller's (relevant) place of business is situated. The law of this country is presumed to be the *lex contractus*. Thirdly, it must be ascertained whether there are any factors that may

[34] See Art. 2 1955 HC, Art. 3(1) RC and Art. 3(1) RI, respectively. Although Art. 3(4) of the Rome I limits the choice to laws of the Member States where the contract is only connected to the internal market.

[35] The principal default connecting factor for international sales contracts is in short the seller's place of business, although this is differently expressed in the three instruments. Art. 3(1) HC refers to 'business establishment'; and the Rome Regimes to 'the place of central administration' (companies *etc.*) or 'the principal place of business' (natural persons), see Art. 4(2) RC, and Art. 4(1)(a) in conjunction with Art. 19 RI, respectively.

rebut the presumption, *i.e.* whether the contract is more closely connected with another country. For instance where the contract belongs to a group of contracts. If this is the case, the law of that country will govern the contract instead.

Also the *Rome I* uses rebuttable presumptions, but with two major differences compared to the Rome Convention: First, there are specified presumptions for the most common types of contracts, such as the sale of goods. Art. 4(1)(a) states that 'a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence', *i.e.* where the seller's (relevant) place of business is situated. Secondly, in order to rebut any of the presumptions, a stronger connection to another country is required. That is to say, the contract must be '*manifestly more closely connected* with another country', otherwise the presumption rule will prevail.[36]

Since both the Rome Regimes use rebuttable presumptions, there is no need for an exemption rule such as the one in Art. 3(2) of the 1955 Hague Convention, or Art. 1(2) of the CISG (*infra* section 3.1). The fact that a seller has kept the buyer unaware of the international element, would mean that such a contract is manifestly more closely connected to the buyer's law. There is also additional protection in that a party may rely on her own law to show that she did not actually consent, thus releasing her from the contract.[37]

If the seller has more than one place of business, the 1955 Hague Convention refers only to the business establishment that received the order, whereas the Rome Regimes have a solution similar to that of Art. 10 of the CISG. The seller's relevant place of business (branch, agency or other establishment) is the one through which the contract was conluded, or the one responsible for its performance.[38]

Another interesting question is whether it is possible for the parties to choose an anational law such as the CISG without having recourse to national law. The traditionalists' view that choice-of-law rules only can identify the law of a *country* is still going strong, although one of the proposal versions to the Rome I contained a provision allowing the parties to 'choose

[36] Art. 4(3) RI. This change is due to the differing interpretations of the member-state courts, as regards the actual strength of the presumption in relation to the weight attached to any rebuttal factors. In some Member States the presumption has been regarded as virtually unrebuttable, whereas others have looked upon it more as a starting point.

[37] Art. 8(2) RC and Art. 10(2) RI. Guiliano/Lagarde Report (note 17), p. 28.

[38] Art. 3(1) HC, Art. 4(2) RC and Art. 19(2) RI.

as the applicable law principles and rules of the substantive law of contract recognised internationally or in the Community.'[39]

Unfortunately, the differences in contents of all three conflicts instruments mean that forum shopping is quite possible, although the uniform rules on jurisdiction in the Brussels I Regulation and the Lugano Convention will prevent unilateral forum shopping to a certain extent.

3. The Uniform Sales Law – the CISG

3.1 Scope of the CISG

The general scope of the CISG is stated in Art. 1, *i.e.* 'international contracts of sale of goods'. The international element is objectively determined: the parties must have their places of business in different states. There is no definition of 'place of business', although it is to be understood as the place of a permanent and stable business organisation including any subsidiaries. Where a party has more than one place of business, the relevant one is that which has the closest relationship with the contract and its performance, see Art. 10. In order to protect a party not realising that her contracting party's place of business is abroad, Art. 1(2) requires actual knowledge of the international element for the CISG to apply.

The reference to 'different States' will sometimes have the effect of bringing the CISG into play where the entire transaction takes place within one state, simply because the parties' places of business are in different states. Or reversly, excluding its application to a truly cross-border transaction where the parties' places of business are in the same state. Accordingly, the international element in the CISG is more narrowly construed than that of the traditional choice-of-law rules, such as the 1955 Hague Convention, the 1980 Rome Convention and the Rome I Regulation.

The CISG does not provide any exact definition of the concept 'sale of goods', although the exclusions in Art. s. 2–3, as well as the reciprocal obligations of buyer and seller under Arts. 30 and 53, will provide some guidelines. This would mean that its substantive scope covers international sales of tangible goods, computer standard software, water, and gas, respectively. Immovable property, on the other hand, is excluded *e contrario*.

[39] See Art. 3(2) of the original Rome I Proposal, COM (2005) 650 final; and Explanatory Memorandum (note 17), p. 5.

Pursuant to Art. s. 2 and 3 certain contracts are explicitly excluded: consumer sales, goods sold at auctions or on execution, sales of commercial papers and money, ships, vessels, hovercraft, aircraft, electricity, and so called mixed contracts where the seller also provides services. There are different opinions on whether hire-purchase contracts and leasing contracts fall within the scope.

Furthermore, the validity of the contract – with the exception of its formation – and property in the goods are explicitly excluded under Art. 4. As a result, these matters will be governed by their respective applicable law, as determined by the choice-of-law rules of the forum state. It should be noted, though, that validity is not entirely excluded: (i) Art. 11 contains the principle of consensualism and thus governs formal validity – or the *lack* of such requirements rather; and (ii) Art. 29(1) "A contract may be modified or terminated by the mere agreement of the parties." complements Part II on Formation of the Contract in that the provision deals with the common law doctrine of consideration in the situation of modifiation or termination of a pre-existing contract.[40]

Even within the scope of the CISG, it is possible that recourse must be had to private international law and the *lex contractus*. Art. 7(2) explicitly refers to the *lex contractus* in situations where so called gap-filling is necessary and the general principles of the CISG cannot provide any guidance. Naturally, the more developed the CISG becomes through case law, the need for reference to the *lex contractus* will diminish.

3.2 Application of the CISG

The general requirements of applicability of the CISG are found in Art. 1. Once it is determined that the contract is one for the sale of goods, there are two ways through which the CISG may apply. First, under Art. 1(1)(a), the CISG will apply where the parties to the contract have their places of business in different CISG States. This is usually referred to as *the direct application of the CISG*, since Art. 1(1)(a) has the effect of disregarding – or replacing – the traditional way of determining the *lex contractus* through choice-of-law rules.

[40] This problem does not exist in civil law jurisdictions and thus the effect of Art. 29(1) CISG is harmonisation of this matter. Date-Bah, in Bianca-Bonell, *Commentary on the International Sales Law*, The 1980 Vienna Sales Convention, 1987 (*cit.* in Bianca-Bonell) pp. 241–242.

Secondly, under Art. 1(1)(b), the CISG will apply when the choice-of-law rules of the forum state identify the law of a CISG State as the applicable law, *and* the parties' places of business are in different states. This is usually referred to as *the indirect application of the CISG*, as the route goes *via* private international law.

Clearly, Art. 1(1)(b) expands the scope of application of the CISG, since it is no longer necessary that the parties have their places of business in different *CISG* States. In fact, the connection between the contracting parties and the CISG as part of the *lex contractus* may be very weak and the application of the CISG, rather than the domestic law in question, may come as a surprise. This expansion was considered a very controversial matter at the time of drafting the CISG, and thus the CISG also allows for a reservation against the application of Art. 1(1)(b) pursuant to Art. 95.[41]

The application of the CISG is ultimately dependent on the parties themselves. According to Art. 6, the parties may exclude the application of the CISG in its entirety – so called 'opting out', or derogate from or vary any of its provisions. That is to say, the provision enables full party autonomy in both the international and the domestic meaning of the principle.[42]

The legal effect of the parties' choice of law under private international law with regard to Art. 6 and the possible opting out of the CISG, as well as the effect of a reservation against the indirect application under Art. 1(1)(b), will be discussed in section 4 *infra*.

Finally, the CISG allows for five different reservations, which are found in Arts 92–96.[43] It is of course possible for a Contracting State to make more than one reservation, which means that there are several different versions of the CISG in force and that it is not a truly autonomous body of uniform law. Under the law of treaties, a reservation will exclude or modify the legal effect of a treaty provision in relation to the reserving state, thus affecting the scope of application of the convention. The CISG reservations consist of exclusions, which means that a *reserving state* will be regarded *as a non-contracting state within the scope of its reservation*. The excluded issue will instead be governed by the underlying conflict rules and the domestic *lex contractus* so determined. A different matter is that the substantive

[41] Reserving States as regards Art. 95 are: Armenia, China, the Czech Republic, Singapore, Slovakia, St. Vincent and the Grenadines, and the United States.

[42] *E.g.* Bonell, in Bianca-Bonell (note 40), pp. 53–54.

[43] Art. 97 of the CISG.

rules of the CISG may still apply as part of the applicable law by virtue of Art. 1(1)(b). A complication that may not have been entirely foreseen by the drafters nor the Reserving States.

4. Fitting the CISG Into the Conflicts Structure

The CISG and the 1955 Hague Convention and the Rome Regimes all govern international sales of goods. *Prima facie* this would seem to indicate that their scope *materiae* overlap. There is one important difference, though: the CISG primarily consists of uniform *substantive* rules, whereas the three conflicts instruments contain *choice-of-law* rules. Accordingly, there is no true overlap of the scope *materiae*, and the reservation in Art. 90 of the CISG, giving precedence to other conventions on the *same* subject-matter, will not come into play.[44]

A different matter is that the CISG also contains its own rules governing its application, instead of relying only on the choice-of-law rules of the forum, *i.e.* Art. 1(1)(a)–(b) on direct and indirect application of the CISG, respectively. The role of these two provisions, how they fit into the conflicts structure, as well as their proper characterisation, have been widely debated. Even more so regarding Art. 1(1)(b), due to the possibility of making a reservation against its application under Art. 95. Accordingly, the effect of such a reservation is also under debate.[45]

The underlying purpose of Art. 1(1)(a) is to render any recourse to choice-of-law rules unnecessary. Instead, the substantive rules of the CISG are directly applicable whenever the parties' places of business are in different CISG States *and* provided that the forum State is a CISG State. Unless Art. 1(1)(a) forms part of the *lex fori*, there is no treaty obligation to apply the provision.[46]

[44] Bridge, in Fawcett/Harris/Bridge, *International Sale of Goods in the Conflict of Laws*, 2005 (*cit.* Bridge), pp. 968 *et seq.*; Ferrari, in Schlechtriem/Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*, 5th ed. 2008 (*cit.* in Schlechtriem/Schwenzer), Art. 90, para. 4; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999) (*cit.* Honnold), pp. 534–535; Ramberg/Herre, *Internationella köplagen (CISG) – en kommentar*, 2nd ed. 2004, pp. 634 *et seq*. (tentatively).

[45] See *inter alia* Bell, *Why Singapore Should Withdraw Its [Article 95] Reservation to the United Nations Convention on Contracts for the Sale of Goods (CISG)*, (2005) 9 Singapore YBIL 55–73; Ramberg/Herre (note 44), pp. 652 *et seq.*; Ziegel (note 4), p. 63 *et seq.*

[46] Bridge (note 44), p. 917; Ferrari (note 3), pp. 319–321; Honnold (note 44), p. 34. See also Schlechtriem, *Internationales UN-Kaufrecht*, 4th ed. 2007 (*cit.* Schlechtriem), p. 10.

Under Art. 6, the parties have a right to contract out of the CISG. This can be achieved in three ways. First, they may choose the law of a non-CISG State as their governing law, through a valid choice of law under *e.g.* Art. 2 of the 1955 Hague Convention, or Art. 3 of the Rome Regimes.[47] Secondly, the parties may contract out of the CISG and choose the domestic rules of a CISG State as their *lex contractus*. Thirdly, the parties may only contract out of the CISG and then rely on the objective choice-of-law rules of the relevant conflicts regime, *e.g.* Art. 3 of the 1955 Hague Convention, or Art. 4 of the Rome Regimes, to determine which national domestic sales law that will apply.

In any case, the effect of Art. 6 is two-fold: first the provision necessitates recourse to the choice-of-law rules, thus indicating that Art. 1(1)(a) may not be of such pure substantive character after all. Secondly, it would seem to render Art. 1(1)(a) into a default rule.

Arguably, a functional analysis of Art. 1(1)(a) would lead to the following conclusion. Art. 1(1)(a) is a rule of the *lex fori* and its function is to determine when a particular body of substantive rules is applicable to an international sales contract. Thus, the provision at least serves *the same function as a choice-of-law rule* and not that of a rule of substantive law.[48] The close interrelation with the conflicts regimes is further shown by Art. 6, since that provision means that Art. 1(1)(a) does not always prevail over the choice-of-law rules.

For practical purposes, however, it is of course not necessary to properly characterise Art. 1(1)(a) in order to apply the rule correctly. It is enough to know that the provision prevails over the conflicts regimes, as long as the

[47] The question whether the parties' *invalid* choice of law should still be treated as an intention to contracting out of the CISG is probably better left to an *in casu* interpretation of the contract and the situation at hand. Particularly so, if the choice-of-law rules allow for an alteration of the governing law. It does not necessarily follow from the parties' invalid choice of the law of a non-CISG State, that the parties will prefer the probably unexpected application of the seller's domestic sales law to the CISG by virtue of the default choice-of-law rules.

[48] More precisely, it arguably serves the same function as a *unilateral* choice-of-law rule, since it only applies to one specific situation. This unilateral character renders Art. 1(1)(a) into *lex specialis* in relation to the universal conflicts instruments, thus prevailing over them. See *inter alia* Kropholler, *Internationales Einheitsrecht – Allgemeine Lehren*, 1975, pp. 190 *et seq.*; Ramberg/Herre (note 44), p. 80; Saf 1999 (note 15), section 2.1; Schlechtriem, in Schlectriem / Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. 2005, Intro to Arts 1–6, para 4. *Cf* Bridge (note 46), p. 918.

parties have not contracted out of the CISG under Art. 6, and provided that the forum State is a CISG State.

Art. 1(1)(b) of the CISG, on the other hand, is not a rule of private international law, even though it extends the scope of application of the CISG in relation to non-CISG and Reserving States, respectively. In this regard, the provision merely expresses the general principle of private international law that the substantive rules of a particular legal system will be applied when identified as the governing law. Instead, its main function is to distribute legal issues as between different bodies of law *within* a legal system, *i.e.* as between the domestic sales law and the uniform international sales law in the CISG. Consequently, Art. 1(1)(b) is an *internal* choice-of-law rule (*Verteilungsnorm*).[49] Other examples of such internal legal demarcation rules are *inter alia* section 4 of the Swedish Sale of Goods Act, which in effect refers consumer sales to the Consumer Sales Act; or section 5 that, in principle, refers international sales of goods where the parties have their relevant places of business in different states to the CISG-regime.

The effect of Art. 1(1)(b) is thus a presumption for the application of the CISG as part of the applicable law – rather than the domestic sales law, where the choice-of-law rules identify the law of a CISG State as the *lex contractus*. Naturally with the possible exception that the parties have explicitly contracted out of the CISG pursuant to Art. 6.

Art. 95 allows for a reservation against Art. 1(1)(b), in order to protect the contracting parties from a surprise application of the CISG, instead of the expected domestic rules of the *lex contractus*. As already mentioned, the effect of such a reservation is also debated. In short, there are two possible interpretations: First, it could be that a *court in a Reserving State* can never apply the CISG rules in this context;[50] or secondly, that the reservation simply refers to cases where the law of a Reserving State is identified as the *applicable law* of the contract.[51]

[49] Schlechtriem (note 46), p. 13. See also Bridge (note 44), pp. 921 *et seq.* (similarly)

[50] Ferrari, in Schlechtriem/Schwenzer, Art. 1, para. 77 *et seq.*; Lookofsky, *Understanding the CISG*, 3rd ed. 2008, §§ 2.4 and 8.7. See also Bridge (note 44), pp. 978–979.

[51] The German Declaration re. Art. 95 of the CISG, (BGBL 1989 II S. 588). The Attorney-General's Chambers, Government of Singapore, *CISG – Review of Article 95 Reservation (Consultation Paper) Executive Summary*, January 2007, www.agc.gov.sg/publications/docs/CISG_Article_95_Report.pdf (2009-03-17) (cit. AGC Consultation Paper), p. 9. Evans, in Bianca-Bonell (note 40), pp. 656–657; Honnold (note 44), pp. 40 *et seq.* though only dealing with examples where the *lex contractus* coincides with the location of one party's place of

From a conflicts perspective, only the latter interpretation is appropriate, since Art. 1(1)(b) is simply intended to permit a wider application of the CISG, not to change generally accepted principles of private international law. Accordingly, the *lex contractus* will be determined under the choice-of-law rules of the *lex fori*, without any recourse to the CISG or its Art. 1(1)(b). In accordance with the principle of exclusion of *renvoi*,[52] the concept of 'law' within the field of private international law means *the law in force in a State other than its choice-of-law rules*, *i.e.* its substantive law including any bodies of uniform substantive law such as the CISG. Consequently, *any reservation under the CISG will only affect the contents of the substantive law of the Reserving State*; and thus the reservation is only of any practical relevance where the law of the Reserving State is the *lex contractus*. This is also in line with the legitimate interest of a Reserving State in having a uniform application of its law also before foreign courts (comity of nations).

The former interpretation, on the other hand, would mean that the same choice of law, *e.g.* Singapore law, might lead to application of either the CISG or Singapore domestic sales law, depending on the forum chosen. Clearly, this leads to uncertainty and will also encourage forum shopping, which is very unsatisfactory not only from a conflicts perspective.[53]

Another important aspect of the extended scope of application of the CISG under Art. 1(1)(b) is that not only courts of Reserving States, but also courts of non-Contracting States may apply the CISG to an international sales contract as part of the *lex contractus*. Again, the rationale is the legitimate interest of any sovereign state in having a uniform application of its law also before foreign courts. Naturally, this is not the same as a treaty obligation under the CISG itself.

5. The Scandinavian Opting Out of Part II

Art. 92 of the CISG enables States to opt out of either Part II on Formation of Contract or Part III on Sale of Goods and still become party to the Convention. Only the Scandinavian countries have made a reservation against Part II, since they prefer the principle of irrevocable offer, embodied

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business, rather than the lex contractus itself.; Schlechtriem (note 46), p. 18. *Cf* Bridge (note 44), p. 981.

[52] See Art. 2(1) HC, Art. 15 RC, and Art. 20 RI.

[53] AGC Consultation Paper (note 51), pp. 7–8.

in the uniform Scandinavian Contracts Acts, to the principle of contract in the CISG. Another reason is that the Scandinavian Contract Acts cover *all* contracts, not just sale of goods.

Since a Reservation State is to be regarded as a non-Contracting State, the practical effect of the Scandinavian reservation is that Part II of the CISG cannot apply by virtue of Art. 1(1)(a). However, this does not mean that Part II will never apply when one of the parties has her place of business in a Reservation State. The CISG rules on formation will nevertheless apply pursuant to Art. 1(1)(b), *i.e.* where the law of a Contracting State, which has not made any reservations under either Art. 92 or Art. 95, is identified as the governing law of the contract under the choice-of-law rules of the forum. Accordingly, also a Scandinavian court may apply Part II as part of the foreign *lex contractus*.[54]

There is no reservation as regards Part III on Sale of Goods.[55] Accordingly, Part III will be directly applicable under Art. 1(1)(a) also in relation to the Scandinavian States, provided that the parties' places of business are in different CISG States.

To illustrate how the Art. 92 reservation works, two different scenarios will be presented. *Illustration I* concerns the *export* of gadgets from Sweden to Germany, *i.e.* it involves a Swedish seller and a German buyer. *Illustration II* concerns the *import* of gadgets from Germany to Sweden, *i.e.* it involves a German seller and a Swedish buyer. Admittedly, from the perspective of international trade, these two scenarios are not really that different: one party's export is the other party's import. The same applies for the conflict analysis: both scenarios are concerned with an international sale of goods. Therefore, the results produced by the Art. 92 reservation in conjunction with Art. 1(1)(b) are quite interesting.

[54] Østre Landsret, 23 April 1998 www.cisg.dk/olk23041998danskversion.htm, commented by Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 Journal of Law and Commerce (1990) 289–299. Evans, in Bianca-Bonell (note 40), p. 643; Honnold (note 44), pp. 536–537; Ramberg/Herre (note 44), pp. 640 *et seq*.

[55] Originally, the CISG was drafted as two separate conventions following the pattern of the two earlier 1964 Hague Conventions (ULF and ULIS). When those two drafts were merged, Art. 92 was added in order to ensure the same effect. See Honnold (note 44), pp. 536–537.

Illustration I – Swedish Export

A Swedish company sends a letter regarding the sale of 50 widgets for a price of 500 euros a piece to a German company. The German company sends a letter of acceptance, to which the Swedish company responds that the letter was an invitation to treat and that the widgets have already been sold to another company. The German company decides to sue the Swedish company for breach of contract. There is no choice-of-law clause in the offer/alleged contract.

Variation A – German proceedings

The German company brings proceedings before a German court, *e.g.* under Art. 5(1)(b) of the Brussels I Regulation (place of delivery of the goods): (i) Pursuant to CISG Art. 1(1)(a) in conjunction with Art. 92, Part II on Formation of Contract cannot be directly applicable, as Sweden is to be regarded as a non-CISG States. (ii) Under Art. 4 of the Rome Convention, the German court will, in the absence of choice, apply the law to which the contract is most closely connected. With regard to sales contracts, this is presumed to be the law of the seller, *i.e.* Swedish law. The same will follow from Art. 4(1)(a) of the Rome I, since the seller's place of business is situated in Sweden. (iii) Pursuant to Art. 92, the Swedish Contracts Act will govern the question of formation. If there is a valid contract, Part III of the CISG will apply pursuant to Art. 1(1)(a).

Variation B – Swedish proceedings

The German company brings proceedings before a Swedish court, *e.g.* under Art. 2 of the Brussels I Regulation (defendant's domicile): (i) The same as in Variation A. (ii) Under Art. Art. 3(1) of the 1955 Hague Convention[56], the Swedish court will, in the absence of choice, apply the law of the country where the seller has her place of business at the time of receipt of the buyer's order, *i.e.* Swedish law. (iii) The same as in Variation A, *i.e.* the Swedish Contracts Act together with Part III of the CISG.

Variation C – Swedish proceedings and the exemption rule

Swedish proceedings as in Variation B. This time, however, the Swedish company sent a representative to the German company demonstrating the widgets. A week later, but still *during the Swedish representative's stay in Ger-*

[56] As *lex specialis* in relation to the Rome Regimes, see Art. 21 RC and Art. 25 RI.

many, the German company sent its order (acceptance) to the representative's hotel. (i) The same as in Variation A. (ii) Under the exemption rule in Art. 3(2) of the 1955 Hague Convention, the Swedish court will, in the absence of choice, apply the law of the country where the buyer has her place of business if the seller received the buyer's order in that country, *i.e.* German law. (iii) German law consists *inter alia* of the CISG – *including* Part II. Pursuant to Art. 1(1)(b), Part II of the CISG will apply despite the Scandinavian reservation. Accordingly, *the Swedish court will apply the CISG in its entirety* (*i.e.* Part II and III) to the contract and in particular to the question of formation.

Illustration II – Swedish Import

A German company offers in a letter to sell 100 gadgets for a price of 400 euros a piece to a Swedish company. When the Swedish company accepts a week later ("within reasonable time"[57]), the German company informs that the gadgets have already been sold. The Swedish company decides to sue the German company for breach of contract. There is no choice-of-law clause in the offer/alleged contract.

Variation A – German proceedings

The Swedish company brings proceedings before a German court, *e.g.* under Art. 2 of the Brussels I Regulation (defendant's domicile): (i) Pursuant to CISG Art. 1(1)(a) in conjunction with Art. 92, Part II on Formation of Contract cannot be directly applicable, as Sweden is to be regarded as a non-CISG State. (ii) Under Art. 4 of the Rome Convention, the German court will, in the absence of choice, apply the law of the seller, *i.e.* German law, and the same will follow from Art. 4(1)(a) of the Rome I. (iii) German law consists *inter alia* of the CISG – *including* Part II. Pursuant to Art. 1(1 (b), Part II of the CISG will apply despite the Scandinavian reservation. Accordingly, the *entire* CISG will apply to the contract and in particular to the question of formation.

[57] *I.e.* the legal time period during which the offer is binding under Swedish law, see s. 3 of the Contracts Act.

Variation B – Swedish proceedings

The Swedish company brings proceedings before a Swedish court, *e.g.* under Art. 5(1)(b) of the Brussels I Regulation (place of delivery of the goods): (i) The same as in Variation A. (ii) Under Art. Art. 3(1) of the 1955 Hague Convention, the Swedish court will, in the absence of choice, apply the law of the seller, *i.e.* German law. (iii) Pursuant to Art. 1(1)(b), Part II of the CISG will apply despite the Scandinavian reservation. Accordingly, *also the Swedish court will apply the CISG in its entirety* to the contract and in particular to the question of formation.

Variation C – Swedish proceedings and the exemption rule

Swedish proceedings as in Variation B. This time, however, the German company sent a representative to the Swedish company offering to sell gadgets. A week later, but still *during the German representative's stay in Sweden*, the Swedish company sent its acceptance to the representative's hotel. (i) The same as in Variation A. (ii) Under the exemption rule in Art. 3(2) of the 1955 Hague Convention, the Swedish court will, in the absence of choice, apply the law of the buyer, *i.e.* Swedish law. (iii) Pursuant to Art. 92, the Swedish Contracts Act will govern the question of formation. If there is a valid contract, Part III will apply pursuant to Art. 1(1)(a).

It is clear from both *Illustrations*, that the reservation under Art. 92 does neither prevent the application of CISG Part II with regard to a Swedish party, nor does it prevent the application of CISG in its entirety by a court of a Reserving State. Instead, the actual effect of the reservation in any given case will depend on the connecting factor(s) in the choice-of-law rules of the *lex fori*; and naturally forum shopping is possible whenever the choice-of-law rules lack in uniformity, see *Variations C*.

Moreover, even where there are uniform choice-of-law rules, the reservation will only apply one-way. As has been shown by *Illustrations I* and *II*, even if the only connecting factor used is the seller's place of business, the reservation will only apply to Swedish exports, but not to Swedish imports from *e.g.* Germany. That is to say, the cross-border trade between *e.g.* Germany and Sweden is not uniformly regulated. It is not a satisfactory solution from the parties‘ perspective, that the direction of transport of the goods, rather than the parties' places of business, will determine whether Part II of the CISG or the Swedish Contracts Act will govern the formation of their contract.

6. Conclusions

It is clear from the above, that the Scandinavian reservation, in conjunction with the choice-of-law rules, does not guarantee Scandinavian parties the application of the uniform Scandinavian Contracts Acts to issues of formation of their international contracts. Instead this issue falls under the conflicts regimes, which identify the seller's law – a neutral and appropriate connecting factor in itself, but naturally it cannot create a uniform substantive regulation of the trade, only a uniform solution for determining the governing law. The result is that Swedish *exports* will be governed by the Swedish Contracts Act, whereas Swedish *imports* will be governed by the CISG Part II.

Given the facts that such a uniform substantive sales law already exists – the CISG; that its scope is limited to international commercial trade objectively defined; that its contents – although different – also in regard of the formation of contract is reasonable; that it is possible to derogate from or vary any of its provisions under Article 6; and that the common practice of the Swedish domestic trade already is to avoid the principle of irrevocable offer, there would not seem to be any valid argument against withdrawing the Swedish Reservation under Article 92. In cross-border trade with other CISG States, it is a far better solution to let the parties' places of business determine the application of Part II of the CISG, rather than the direction of transport of the goods.

It is equally clear, that the CISG does not regulate all legal issues of a sales contract, which means that the *lex contractus* as determined under the conflicts rules still has a vital role to play. Accordingly, any opportunity to further uniformity in this field ought to be taken. It is strongly suggested that Sweden should follow the example of Belgium[58] and denounce the 1955 Hague Convention, in order to prevent random and inappropriate results created by the exemption rule as shown above in *Variations C*, as well as prevent forum shopping between courts of different Member States. Furthermore, as *lex generalis* the Rome Regimes must anyway be used for issues falling outside the scope of the 1955 Hague Convention, such as formal validity. There is also the misconception that contractual issues of international sales of goods

[58] Belgium denounced the 1955 Hague Convention on 19 February 1999 (effective from 1 September 1999).

such as formation and substantive validity would fall outside the scope of the latter too – this is not so.[59]

Accordingly, it is time to upgrade the Swedish choice-of-law rules in sales of goods with a more comprehensive and modern conflicts instrument such as the Rome I. Having only *one* such instrument in the area of international contract law, will also bring greater clarity in practice as well as reduce any unnecessary misconceptions regarding the interplay with an old and incomplete regime.

[59] See Ramberg/Herre (note 44), p. 82. This follows from Art. 2(3) in conjunction with Art. 5(3) *e contrario* of the 1955 Hague Convention, see further Saf 1999 (note 15), section 6.2.1 incl. f.n. 320.