# Choice of law versus scope of application – the Rome I Regulation and the Hague-Visby Rules contrasted[1]

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# 1. Introduction

Rome I[3] is a choice of law instrument, providing for designation of the applicable law[4] in contractual relations which are potentially affected by more than one national law system, and with a primary rule allowing the contracting parties to choose such applicable law (party autonomy).

The Hague-Visby Rules[5] is an international convention providing for mandatory substantive rules in respect of certain liability questions arising under international contracts of carriage of goods by sea. Choice of law questions are not explicitly regulated in the Convention, but restrictions on freedom of choice of law follow implicitly as it would defeat the very purpose of the Convention if contracting parties were to be allowed to contract out of the mandatory rules of the Convention by choosing the laws of a state not giving effect to the rules of the Convention.

There is, therefore, a potential conflict between Rome I and the Hague-Visby Rules, in that contracts of carriage of goods falling within the scope of application of the Hague-Visby Rules are also *prima facie* covered by Rome I and its primary rule of party autonomy.

This potential conflict between the two sets of rules is from a Nordic perspective exacerbated by the fact that the Nordic states – which are parties to the Hague-Visby Convention – have, in their Maritime Codes (in a revision made in 1994), expanded on the scope of the mandatory

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3 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I). Rome I is within the EU coordinated with the Brussels I Regulation (No 1215/2012) on choice of jurisdiction, and in that respect constitutes a combined 'package' of choice of law and choice of jurisdiction. Moreover, Nordic states which are not bound by Brussels (e.g. Norway as non-EU member) are similarly bound on questions of choice of jurisdiction through the Lugano Convention ('Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', between the EEA and EU countries, originally from 1988, renegotiated in 2007). This article will deal solely with choice of law questions, on the footing that the relationship between Rome I and the Hague-Visby Rules has wider implications than those of European law: the Hague-Visby Rules have worldwide application.

4 'Applicable law' and 'governing law' is in this article used interchangeably.

5 Hague Rules from 1924 as amended by the 1968 and 1979 Protocols. The terms Hague-Visby Rules, the Rules, and the Convention are used interchangeably in this article.

substantive rules of the Convention, thus creating further questions as to how to delineate the scope provision of the Maritime Codes with the choice of law provisions contained in Rome I.

This dilemma has come to light in recent times in connection with choice of law legislation in Sweden and Norway.

Sweden – which is bound by Rome I as an EU-member – amended its Maritime Code in 2013 according to the legislator's perception of the extent to which the Maritime Code's scope provision contained choice of law elements in violation of Rome I.

Norway – which is not bound by Rome I as a non-EU-member – produced draft choice of law legislation in 2018, modelled on Rome I.[6] In this draft, the Norwegian choice of law expert departed from the opinion of the Swedish choice of law legislator on important aspects relevant to the Maritime Code. This difference of opinion concerned, first, the legal status of the Maritime Code scope provision (whether to categorize it as a scope or choice of law provision); second, the construction of important provisions of Rome I (whether Rome I by its own provisions yielded to substantive law conventions like the Hague-Visby Rules); and third, methodological aspects relating to choice of law versus substantive law (whether the one set of rules 'overrides' the other).

That divergence of opinion is the background for this article, in the sense that the article aims at understanding the complexity of what could be called meeting points between substantive law and choice of law relating to the Maritime Code – as seen from a substantive law (maritime lawyer's) perspective. The topic is important since the Maritime Codes, being common to the Nordic states, are the product of long lasting cooperation between Nordic maritime lawyers, and it would, as a matter of unified Nordic maritime law, be undesirable if whatever impact was

[6] The draft legislation was produced as part of a report, entitled *Utredning om formuerettslige lovvalgsregler* ('Report on choice of law rules in private law relations' – hereinafter: the Report) by professor Giuditta Cordero-Moss, appointed by the Ministry of Justice. The Report, dated 2 June 2018, has been the subject of public hearing and currently sits with the Ministry of Justice. The author is unfamiliar with whether or not the Report will lead to legislation. It is available at the Ministry of Justice's homepage - https://www.regjeringen.no/contentassets/aa11d98c5c144dac8361c7af7677f303/enpersonutredningen-om-formuerettslige-lovvalgsregler.pdf.

made by Rome I on the Maritime Codes, were to differ by reason of divergent views taken by choice of law experts involved in choice of law legislation in the different Nordic states.[7]

One main premise of the article is what is called 'clashing' of perspectives, which, somewhat simplified, denotes that it makes a dramatic difference if one starts from the end of the Hague-Visby Rules and its *purpose* of providing harmonized substantive rules, and pursues that *purpose* also into the expanded version of the Rules in the Maritime Codes – or if one starts from the end of Rome I and its primary rule of party autonomy. We shall call these two opposing perspectives 'clashing', in the sense that it is difficult to see how they can be reconciled in a principled manner.

This in turn means that the question of determining what impact Rome I has on the scope of the Maritime Codes, becomes a question of construing the relevant legal sources involved; those pertaining to the substantive law aspects (the Hague-Visby Rules and national legislation implementing and expanding on the Rules) and those pertaining to the choice of law aspects (Rome I and national choice of law legislation).

In that respect, the article will use the term 'substantive law scope perspective' (or sometimes merely 'scope perspective' or 'substantive law perspective') to denote that one starts from the end of looking at, and construing, the scope of application provision of the relevant substantive law instrument (the Hague-Visby Rules or the relevant provision of the Maritime Codes). The opposing term 'choice of law perspective' denotes that one starts from the end of the choice of law instrument (Rome I). The article will advocate the prevalence of such 'substantive law scope perspective' in the discussion of whatever impact Rome I has, or should have, on the scope provisions of the Nordic Maritime Codes. In this respect the article will argue that the contents of the perspectives of choice of law legislators in Sweden and Norway are too narrow, in that they seem

[7] Denmark, although a EU-member, is exempted from Rome I by reason of the 1997 Treaty of Amsterdam Protocol and has, to the author's knowledge, as of yet not entertained similar choice of law legislation as Norway. Finland, being by Rome I an EU-member on a par with Sweden, has, to the author's knowledge, commenced but not completed choice of law legislation relating to its Maritime Code.

not to give sufficient account of, and to some extent lack control over, the substantive law aspects as propagated in this article. In this respect the term 'holistic perspective' will occasionally be used, signifying a suggested need for choice of law experts to better integrate substantive law aspects into their perspective.

With this overriding aim of lending a critical eye to what we call choice of law perspectives, the article starts out by giving an account of the scope provisions of the Hague-Visby Rules and the corresponding provisions of the Maritime Codes, while bringing into discussion some aspects of choice of law and how these are countered by the purpose of such scope provisions – Section 2.

The article proceeds by then taking the opposite perspective, by giving an account of the relevant provisions of Rome I, while at the same time pointing to problematic aspects of those provisions in light of the opposing substantive law perspective – Section 3.

Thereafter, the article reviews the said Swedish and Norwegian choice of law legislation,[8] with particular emphasis on and analysis of the reasoning and methodology advanced in the preparatory works of the Norwegian draft legislation – Section 4.

Finally, some concluding observations are made, with a view to suggesting some principled topics intrinsic to the sources and perspectives presented, suited to being elevated to a more overarching level of analyses and theories of norms – Section 5.

[8] Which for Norway's part is currently mere draft legislation, see above.

# 2. The Hague-Visby Rules and their national implementation

## 2.1 The scope of the Hague-Visby Rules[9]

The Hague-Visby Rules contain, in Article 10, the following provision relating to their scope of application:

"The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if: (a) the bill of lading is issued in a contracting State, or (b) the carriage is from a port in a contracting State, or (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person."

This reflects the obvious aim of the Rules, namely to create uniform substantive rules to be applied by the contracting states to what is the subject matter of the Rules; bills of lading relating to international carriage of goods by sea – and with the further delineation that the Rules apply if such bills are issued in a contracting state (litra (a)), or if the export port is located within a contracting state (litra (b)).

The content of litra (c) may on its face appear to be a choice of law provision but must be seen within its overall context: For the purpose of creating uniform substantive rules, it makes sense to allow private parties to make a contractual choice of national legal systems which give effect to the Rules, even if the relevant state is not a state party to the Rules; the Rules may be implemented unilaterally by the respective state.

Neither of the alternatives in litras (a) to (c) can, in the author's view, be seen as choice of law provisions as this concept is traditionally understood. Rather, they form an intrinsic part of the substantive law scope of

[9] The terms Hague-Visby Rules, the Rules, and the Convention are in this article used interchangeably.

application provision. One could, theoretically, envisage an express choice of law provision as part of the Hague-Visby Rules, stating for example:

"To the extent bills of lading covered by these Rules contain choice of law provisions which refer to the laws of a state which is not party to these Rules and/or which has no legislation implementing the contents of these Rules, such choice of law provisions shall be deemed null and void."[10]

However, from the point of view of the draftsmen of the Rules, there would be no practical need for such a provision, and it would even appear illogical: State parties to the Rules undertake to implement and apply the Rules within their respective jurisdiction. The choice of governing law to be applied by the courts of the contracting states would therefore follow from the Rules themselves, i.e. their scope provision as implemented into national law.

The point so far has been to point out the essential and simple fact that there is a scope provision in the Hague-Visby Rules which makes them mandatorily applicable to a certain type of contracts (bills of lading relating to international sea carriage) and with connecting factors which establish their scope (the place of issuance of the bill and the port of loading). Moreover, we have seen that the concept of choice of law may, depending on the perspective, be intertwined with that of the scope of application: The Convention allows for contractual choice to the Rules themselves or to the laws of a state which has implemented the Rules without being party to the Convention. Such choice of law may be seen as 'quasi-choice', since it all the time operates within the boundaries of the substantive contents of the Rules – in other word, within their scope.

Therefore, by taking Article 10 litra (c) of the Rules as an example, we can see that a 'quasi-choice' of law provision is in effect a provision delineating the scope of application of the *substantive* part of the Rules, and that implicitly any contractual provisions referring to the laws of a state not giving effect to the Rules, must be considered invalid. In consequence, should a state party to the Rules accept such derogation from the Rules by acknowledging contractual choice of law leading to

[10] This is reflected in the provision stating that substantive contractual provisions derogating from the Rules are null and void, Article 3, 8.

the Rules not being given effect, this would mean that such state party violates its undertaking under the Convention.

## 2.2 The scope of national legislation implementing the Hague-Visby Rules

The Hague-Visby Rules have no force of law unless implemented into national law by the state parties to the convention,[11] and the above considerations concerning the nature of the scope provision of the Rules, would apply correspondingly to the scope provision in national legislation implementing the Rules.

In the Nordic Maritime Codes – prior to their revision in 1994 – the Hague-Visby Rules were essentially adopted with the scope of application of the Codes aligned to that of the Hague-Visby Rules Article 10. However, there was also a need to regulate the situation where a bill of lading referred to the laws of another Hague-Visby state than that in which a dispute arose (the law of the forum). Therefore, the Maritime Codes at the time contained a provision to the effect that if a bill of lading referred to the laws of another Hague-Visby state, then such law would apply.[12]

This latter provision could well be seen as a choice of law provision, but it is nevertheless of a 'quasi choice' nature, since it all the time operates within the mandatory substantive scope of the Hague-Visby, as implemented in national law.

[11] We do not here contemplate a mere contractual reference to the Rules themselves, through charterparty Paramount clauses, or similar.

[12] Norwegian Maritime Code 1893 Section 169 with identical provision in the other Nordic Codes.

## 2.3 National legislation extending the scope of substantive law beyond that of the Hague-Visby Rules

### 2.3.1 General considerations

So far we have proceeded on the assumption that the scope provision of national law implementing the Hague-Visby Rules, is essentially the same as the scope provision of the Rules themselves.[13] That is, however, not always the case. State parties to the Convention may choose to extend the substantive mandatory regulatory scheme of the Rules beyond the scope of the Rules themselves. Such an extended scheme will then form part of the scope provision of the national law, and the extension may include matters like the type of transport document to be covered by rules; the geographical scope connections of the transport to be covered by the rules; the rules being made applicable not only to international but also to domestic trade, etc.

This type of substantive law extension of the Hague-Visby Rules when implemented into national law, adds to the complexity of our topic. In these situations, national law will not, on the face of the national legislation, distinguish between what are the 'original' and what are the 'extended' Hague-Visby Rules as promulgated in national law. If, in retrospect, such a distinction has to be made, it will require scrutiny of the history of the relevant national law in order to 'decipher' what belongs to the one or the other. Such a task of 'deciphering' will in many ways be unfeasible as part of practical adjudication. Nevertheless, we shall see that the need for it comes to light, depending on the choice of law perspective taken by the legislator when implementing Rome I into national law (Section 4).

[13] This would be the case if the Hague-Visby Rules are implemented *verbatim*, which they often are, as in the English COGSA (Carriage of Goods by Sea Act) 1971.

### 2.3.2 The complexity of the Nordic Maritime Codes of 1994

We shall illustrate the above point about the 'original' and 'extended' implementation of the Hague-Visby Rules by looking at the Nordic Maritime Codes as they appeared after an important revision made in 1994. That revision aimed at modernizing the Rules and extending their substantive law protective scheme in favour of the cargo interest. The revision was modelled on the Hamburg Rules,[14] but without the Nordic states denouncing their status as parties to the Hague-Visby Rules.[15]

In short, the Nordic Codes – after the 1994 revision – comprised the following:

First, the scope of the mandatory rules was extended into the terminal stages, i.e. the port related storage and cargo handling logistics under the control of the carrier, in lieu of the development of containerization in the liner trade.[16] Second, the scope of application was extended from bills of lading to also cover other type of cargo documents, such as waybills, and also mere oral agreements for the carriage of cargo.[17] Third, provisions allowed for cargo claims to be brought against the performing carrier (sub-contractor of the carrier) when cargo damage occurred while the goods were in the custody of such performing carrier.[18] Fourth, the rules were also made applicable to domestic trade, with one particular inter-Nordic feature, in that Norway for its domestic trade disposed of

[14] United Nations International Convention on the Carriage of Goods by Sea, adopted in Hamburg in 1978.

[15] This meant the retaining of two important substantive provisions of the Hague-Visby: the nautical fault liability exception (the Norwegian Code Section 276) and its limitation rules (Sections 280–281).

[16] Sections 274 and 275 corresponding to Hamburg Rules Articles 4 and 5.

[17] Section 252 merely mentions "contracts of carriage by sea" (which fall within the otherwise scope of application of the provision), corresponding to Hamburg Rules Article 2.

[18] Section 286 corresponding to Hamburg Rules Article 10. Such provision was already introduced in the Nordic Codes as part of an earlier revision in 1973, thus serving as inspiration to the Hamburg Rules Article 10. It lies beyond the scope of this article to go into details on the interplay between the Nordic Codes and the Hamburg Rules, but this interplay goes to the root of the – in the author's view – impractical implications of certain choice of law perspectives, as will be later illustrated.

the navigational fault liability exception of the Hague-Visby Rules and raised the limitation amount of the Hague-Visby Rules,[19] which is not the case in the Codes of the other Nordic states.

This scheme of the Nordic Codes is therefore a type of hybrid solution, retaining the core of the Hague-Visby Rules while expanding the Codes with much of the substantive rules of the Hamburg Rules, and with some tailor-made inter-Nordic and domestic rules.[20] In the following we shall call this the 'Hague-Visby surplus system', in essence signifying the expansion of mandatory substantive protective rules beyond the scope of the Hague-Visby Rules.

Moreover, when implementing this 'Hague-Visby surplus system', the legislator saw the need to add jurisdiction provisions to the Nordic Maritime Codes as a means of securing that this 'surplus system' was applied to cases which had the appropriate geographical nexus to the Nordic states.[21] Such geographical nexus was therefore significantly extended compared to the corresponding connecting factors of the scope of application provision of the Hague-Visby Rules themselves, in Article 10.[22]

Furthermore, and as part of the same thinking, a need arose to disallow the type of inter-Hague-Visby choice of law which was allowed under the previous Codes, since the laws of other Hague-Visby states would generally not have in place an increased protective scheme similar to that of the 'Hague-Visby surplus system'. Therefore, what we above called a

[19] As motivated by the multimodal transport situation, which for practical-logistical reasons (car-ferry-car across fjords) may result in a greater need to align the liability rules of the various unimodal regimes in Norway than in the other Nordic states.

[20] States like Canada and Australia have done the same, but of particular interest is the regional harmonizing scheme of the Nordic states and its role in choice of law matters, as we shall later see.

[21] Norwegian Maritime Code Section 310 corresponding to Hamburg Rules Article 21. The effect of Section 310 soon became aborted by Norway (and the other Nordic states) becoming party to the Lugano Convention, which essentially provided for freedom of contract with respect to choice of forum – see footnote above. This is in practice an important aspect. However, for the purpose of analyses of choice of law perspectives versus substantive law perspectives, the position on selection of forum is in the principled sense immaterial.

[22] The previous Maritime Code Section 169 also had some degree of such inter-Nordic extended connecting factors, but this system was expanded as part of the 1994-Codes, see NOU 1993:36, p. 21.

'quasi-choice' of the laws of other Hague-Visby states under the pre-1994 Nordic Codes, was now replaced by the law of the forum.[23] In other words, the geographical nexus constituting the scope of application of the Codes was aligned with the geographical nexus constituting jurisdiction for application of the Codes.[24]

### 2.3.3 The 'quasi choice' of law provisions of the Nordic Maritime Codes – an account of Section 252

The above system of the Nordic Maritime Codes, which includes what we have called the 'Hague-Visby surplus system' and 'quasi choice' of law provisions, is generally speaking complex. It lies at the core of what we shall later see has created a fair amount of confusion in connection with choice of law legislation in Sweden and Norway and those countries' efforts to align the Maritime Code provisions with Rome I (Section 4). In anticipation of that discussion we here give an account of the Norwegian Maritime Code Section 252, to provide an illustration of the various components which are of relevance to our main theme of analyzing a choice of law perspective versus a (substantive law) scope perspective.

Section 252 is entitled 'Scope of application'. Its first paragraph reads:

"The provisions of this Chapter[25] apply to contracts of carriage by sea in domestic trade in Norway and in trade between Norway, Denmark, Finland and Sweden. In respect of contracts of carriage by sea in domestic

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23 Section 252 second paragraph. The fact that the Lugano Convention and (for the EU states) the Brussels I Regulation lead to the jurisdiction of the Maritime Code Section 310 being partly undermined, does not alter the fact that when a Nordic court is seized with jurisdiction over a matter falling within the scope provision of the Code (Section 252), the substantive provisions of the Code apply mandatorily.

24 For the sake of completeness it may be mentioned that the idea of inserting a provision for jurisdiction was considered during preparation of the Hague Rules of 1924, but the idea was rejected, see Salmerón Henríquez, *Freedom of Contract, Bargaining Power and Forum Selection in Bills of Lading*, (Phd Thesis:Doctoral Series 22), Groningen 2016, p. 215.

25 I.e. the rules contained in the chapter regulating carriage of general cargo (Chapter 13 of the Norwegian Code), not the chapter regulating chartering of ships (Chapter 14), which generally provides for freedom of contract.

trade in Denmark, Finland and Sweden, the law of the State where the carriage is performed, applies."

The first sentence is a typical scope provision. In that regard it should be recalled what was stated in Section 2.3.2 above: the Code (i.e. Chapter 13 of the Code) is, as a matter of substantive law, a 'Hague-Visby surplus system' and that system is made applicable also to domestic trade (which forms no part of the international trade under the Hague-Visby). Moreover, it should be recalled that although inter-Nordic trade is here regulated on a par with domestic trade, inter-Nordic trade is international trade within the meaning of the Hague-Visby Rules, so that – with the Nordic states being parties to those Rules – what is here covered is Hague-Visby trade.

The second sentence clearly contains a choice of law provision, albeit of a 'quasi choice' nature, as explained earlier. Its background is that for domestic trade there are (minor) differences between the contents of the Nordic Codes,[26] so that if a case involving domestic trade in one Nordic state were to be brought before the courts of a different Nordic state, then the law of the state where the domestic trade occurred, shall apply. This restricted choice is therefore of a 'quasi-nature'; it operates all the time within the confines of the scope provision of the Nordic Codes. Moreover, it makes sense with such an 'allocation of choice' to the respective domestic law, in view of the mandatory nature of the Nordic Codes: disputes which are mandatorily regulated should be regulated by the 'correct' mandatory scheme, i.e. the mandatory scheme of the respective domestic law of the relevant Nordic state. It would, practically and policy-wise, not make sense to allow for contractual choice to the laws of e.g. a non-Hague-Visby state in a Norwegian domestic law dispute appearing before e.g. a Swedish court.

Section 252 second paragraph reads:

"In other trades the provisions apply to contracts of carriage by sea between different States, if:

[26] The Norwegian Code having forfeited the navigational fault exception and raised the limitation amounts of the Hague-Visby Rules, see Section 2.3.2.

1. the agreed port of loading is in a Convention State,
2. the agreed port of discharge is in Norway, Denmark, Finland or Sweden,
3. several ports of discharge have been agreed and the actual port of discharge is one of these and is situated in Norway, Denmark, Finland or Sweden,
4. the transport document is issued in a Convention State,
5. the transport document states that the Convention or the law of a Convention State based thereon shall apply."

By 'other trade' is intended trade other than inter-Nordic and domestic trade, and essentially refers to trade between Hague-Visby states, but it is again important to note that inter-Nordic trade is also Hague-Visby trade, so that as for the inter-Nordic trade, the second paragraph is, content-wise, an overlap with the first paragraph.

Moreover, this second paragraph implements the scope provision of the Hague-Visby Rules Article 10 through numbers 1), 4) and 5). Numbers 2) and 3) are 'add-on's' to cater for the 'Hague-Visby surplus system' applicable to cases with the appropriate Nordic connecting factors.[27] It is important to note that with the somewhat remote or arbitrary connecting factors to the Nordic states, as in numbers 4) and 5), it is nevertheless the extended 'Hague-Visby surplus system' of the Code that applies, not that of the (original) Hague-Visby Rules, which – as a matter of legislative technique – would be impractical to achieve.

Section 252 third paragraph reads:

[27] NOU 1993:36 p. 20: "The mentioned first four factors have such a Nordic connection that the provisions in the chapter concerning carriage of general cargo ought to become applicable irrespective of the parties having agreed otherwise […]" (author's translation). This is a clear statement to the effect that the legislator's intent is that what we call the scope perspective overrides whatever choice of law perspective, which we shall later come back to. Such connecting factors were also partly inserted in the earlier version of the Maritime Code, Section 169, which was at that time already extended compared to the scope provision of the Hague-Visby Rules, but such connecting factors became further expanded in the 1994 Code, see NOU 1993:36 p. 21. It is worth noting that number 3 is taken from Hamburg Rules Article 2 litra c).

"If neither the agreed place of loading nor the agreed or actual place of delivery is in Norway, Denmark, Finland or Sweden, the parties may nevertheless agree that the contract of carriage by sea shall be subject to the law of a Convention State."

This is, again, an example of what we have called 'quasi choice' of law. If a given case does not have the geographical connecting factors to the Nordic states, which in practice would mean numbers 4) and 5) of the second paragraph, then there is room for party autonomy within the confines of the Hague-Visby Convention.

Moreover, it should be mentioned that Section 252 seems not to be exhaustive as a scope provision, since it is conceivable that the contracting parties have chosen Norwegian law to apply in a case involving carriage of goods, but without the case having the connecting factors stipulated in Section 252 second paragraph. In that case it is unresolved whether the provisions of the Code are to be applied mandatorily or non-mandatorily. Probably the latter would be the case, on the rationale that there is no statutory basis for applying the rules mandatorily in such a situation.

## 2.4 Summary

The essence so far has been to show the complexity of the interrelation between what may be called scope of application provisions and choice of law provisions in legal instruments.

First, we have seen that Hague-Visby Rules Article 10 may properly be called a scope provision; it sets out the subject matter of the Convention and the connecting factors which make the Convention applicable. At the same time, Article 10 has the *effect* of being a choice of law provision; in matters falling within its scope, it restricts the application of substantive law to the mandatory protective scheme of the Convention.

These considerations apply correspondingly to state parties implementing the Convention; the state parties undertake to apply the mandatory protective rules of the Convention, which means that courts within their jurisdiction are disallowed from recognising contractual choice to legal systems which do not give effect to the protective scheme

of the Convention. In that sense, also the relevant scope provisions of national law implementing the Convention entail restriction on the choice of law, and such national law scope provisions may be combined with what we have called 'quasi choice' of law provisions; there may be a need to allocate the contractual choice to the law of those states which give effect to the rules of the Convention.

Moreover, we have seen that this complexity is enhanced when national law expands on the substantive protective scheme of the Hague-Visby Convention, as illustrated by the Nordic Maritime Codes and what we have called the 'Hague-Visby surplus system'. Such national substantive law expansion means, on the one hand, that the basic structure of the scope provision (as derived from the Convention) is retained, including that of restricting contractual freedom of choice of law and providing for 'quasi choice' of law within their scope. On the other hand, such expanded scope provisions, partly detached from the Nordic states' obligations under the Hague-Visby Rules, create added complexity when confronted with the choice of law system of Rome I, as we shall see in the following sections.

# 3 Rome I – its main rule of party autonomy and exceptions to it

## 3.1 Opening remarks

We now turn to Rome I and the plain choice of law perspective underlying it, including its primary rule of party autonomy with respect to choice of law. We have seen that within our topic of substantive law under the Hague-Visby rules and corresponding national legislation, such a rule of party autonomy is not feasible. Therefore, our interest concerns the exceptions to the main rule of party autonomy in Rome I and whether those exceptions are appropriately phrased to cover the situation at

hand. This includes both the question of whether the scope of substantive law harmonizing rules such as those embedded in the Hague-Visby Convention are duly exempted, and it includes whether national (or regional) law systems expanding on such harmonizing substantive rules – such as the 'Hague-Visby surplus system' of the Nordic Maritime Codes – are catered for.

We shall see that neither of the exceptions in Rome I appears to be suited to cover the situation at hand, which is surprising, considering the fact that most of the European states involved in shipping and sea carriage are parties to the Hague-Visby Rules.

## 3.2 Article 3

Article 3.1 sets out the main rule of recognition of party autonomy relating to choice of law.

Article 3.3 then provides an exception to this main rule: if a contractual relation has its connecting factors to one state only – state A – but the parties have nevertheless agreed for the law of state B to apply, then Article 3.3 allows for the application of mandatory provisions of the state of the forum (state A) despite the contractual choice to the laws of state B. This situation is referred to by some as 'non-genuine choice of law',[28] since the contractual relation has no international aspect occasioning conflict of laws other than the choice of law provision of the contract.

The exception in Article 3.3 therefore makes good sense; the parties should not be allowed to circumvent such national mandatory rules being applicable to all contractual relations falling within their scope.[29]

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[28] In Norwegian: 'uekte lovvalg', see Report p. 29.

[29] It should be noted that Article 3.3 does not make the contractual choice of law to state B invalid. The choice is upheld as such, however, so that the choice shall not 'prejudice the application of' the mandatory provisions of state A. This is an impractical approach if applied to our context involving the mandatory scope of the Nordic Maritime Codes. Rather than comparing how the substantive laws of state B would venture compared to the mandatory provisions of the Codes, the more practical approach would be to simply apply the mandatory rules of the Code – a view which would accord with how the Nordic legislators intended the scope provisions of the Code to apply, as described in the previous Section. This, therefore, illustrates the incompatibility between what

We shall later see that the Swedish choice of law legislator invokes Article 3.3 by upholding the mandatory rules of the Swedish Maritime Code to domestic trade in Sweden.[30]

Article 3.4 should also be mentioned. It is not directly applicable to our situation but is still of interest, since the spirit of it is the same as that of Article 3.3. The point in Article 3.4 is that if the contract has a connection to several EU member states and the contractual relation involves mandatory EU law, and the dispute is brought before the courts of a EU state, then a contractual choice to the laws of a non-EU state shall not 'prejudice the application of' the relevant mandatory EU law, as implemented in the law of the forum.

Looking at the Nordic Maritime Codes, the idea has been to make uniform mandatory rules for contractual relations with connecting factors to the Nordic states, so that there is a 'region' (the Nordic states) with uniform mandatory rules, in the same way as Article 3.4 gives effect to a 'region' (the EU states) with uniform mandatory rules. There would therefore be strong policy grounds for the Nordic states to give effect to the mandatory rules of the Nordic Codes, at least for those states – Norway and Denmark[31] – which are not bound by Rome I.

## 3.3 Article 9

The next provision of relevance is Article 9 which states: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."

Such overriding mandatory provisions are defined as "provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within

we have called the (substantive law) scope perspective and the (formalistic) choice of law perspective.

30 See Section 4.2. The Norwegian draft legislator seems not to take a stance, see Section 4.3 below.

31 Denmark is not bound by Rome I, as explained in earlier footnote.

their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

In other words, such provisions of the law of the forum have the effect of setting aside deviating rules of the law contractually chosen by the parties, in the same way as we have seen under Article 3.3.

It may then be asked whether mandatory substantive rules of states parties to the Hague-Visby Rules constitute such 'overriding mandatory provisions'. As a matter of first impression, that seems in the author's view not to be the case. The somewhat obsolete Hague-Visby system of liability exceptions for navigational fault, combined with the fairly low limitation amounts, hardly deserves such a characterization. From a Nordic perspective this is underscored by the fact that the 'Hague-Visby surplus system' was adopted essentially to improve on what was perceived as shortcomings of the Hague-Visby Rules.[32] The point is also underscored by the fact that both the Hamburg Rules and the Rotterdam Rules[33] have considered the navigational fault exception of the Hague-Visby Rules to be obsolete.

However, the prevalence and harmonizing effect of the Hague-Visby Rules may perhaps in and of itself, irrespective of the Rules' obsolete substantive nature, be seen as meeting the criteria of 'safeguarding public interest'. We shall see that the Swedish choice of law legislator takes that view in respect of the Swedish Maritime Code being based on the Hague-Visby Rules, and the same view seems to be held under English law in respect of the UK COGSA 1971.[34]

To this should be added that the mentioned substantive law harmonizing effect of the Hague-Visby Rules is, naturally, restricted to the scope of the Rules themselves. In the UK the Hague-Visby Rules are implemented virtually *verbatim* into the COGSA 1971, thereby rendering the impact of Article 5 and its 'overriding mandatory provisions', unproblematic.

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[32] As explained in Section 2.3. It seems therefore clear that if one were to derive an intention from the Nordic legislators at the time (in 1994), it would be the 'Hague-Visby surplus system', not the (original) Hague-Visby Rules that deserve this characterization.

[33] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, enacted in Rotterdam 2009. The Convention has not entered into force.

[34] Yvonne Baatz, in Yvonne Baatz et al, Maritime Law, Sweet & Maxwell, 2011, p. 60.

With respect to the Nordic states this becomes more complex due to the 'Hague-Visby surplus system' of the Nordic Maritime Codes, as previously discussed. This substantive law 'surplus' of the Nordic Codes is, clearly, not of the same international prevalence as the Hague-Visby Rules themselves.[35] We shall, however, see that this has caused little concern to the Swedish choice of law legislator, who has managed to retain this 'surplus system' of the Swedish Maritime Code on the rather formalistic grounds that this 'surplus system' is of a substantive law nature, thus falling outside the mandate of choice of law legislation.[36]

## 3.4 Article 25

Another important provision is Article 25 which gives priority to pre-Rome I choice of law conventions to which EU member states are parties. The idea is that Rome I shall not have the effect of placing EU states in violation of their obligations under existing conventions, nor of forcing those states to repeal such conventions.

According to Article 25, the conventions in question are those "… which lay down conflict-of-law rules relating to contractual obligations".[37] The question then becomes: Do the Hague-Visby Rules 'lay down conflict-of-law rules' within the meaning of Article 25?

As we have seen, the topic of delineating the concept of choice of law rules is complex. The Hague-Visby is not like e.g. the Hague Convention

[35] We have seen that this 'surplus system' is essentially taken from the Hamburg Rules but this Convention does not enjoy the same prevalence as the Hague-Visby Rules, which means that the Hamburg Rules might be treated differently under Rome I Article 9 than the Hague-Visby Rules.

[36] Section 4.2 below. The Swedish scholar Jonas Rosengren takes a different view. In *Lagval, jurisdiktion og skiljedom vid sjötransportavtal* ('Choice of law, jurisdiction and arbitration in contracts for sea carriage'), JT, 2013-14 No. 1 pp. 66 *et seq* (p. 72), he submits that only the original Hague-Visby Rules should be granted the status of 'overriding mandatory provisions', also under Swedish law. That view would, however, require the impractical task of 'deciphering' the Maritime Code to trace its historic roots.

[37] For the purpose of this article the term choice of law is used, rather than conflicts of law. In some contexts the terms may denote different meanings but for present purposes the terms are used interchangeably.

of 1955 laying down genuine conflict of law rules in international sale of goods matters.[38] However, as we already have seen, the scope provision of the Hague-Visby has the *effect* of restricting contractual choice to those legal systems which give effect to the Rules. It is therefore to a large extent a question of what perspective to adopt when considering Article 25 in the light of the Hague-Visby Rules. A diversity of perspectives is reflected in scholarly works on this topic,[39] and we shall later see that differing views are taken by the Swedish and Norwegian choice of law legislatures.

It is worth adding that if one takes the view that the scope provision of Hague-Visby Rules is rendered unaffected by Rome I by reason of Article 25, this does not resolve our problem, namely that the scope provision of the Hague-Visby Rules was substantially extended in the scope implementation provision of the Nordic Codes in 1994, and with the question: shall the scope of the Hague-Visby or that of the Nordic implementing rules, govern under Article 25?

Moreover, we have seen that extension of the scope of application of the Nordic Codes was made in tandem with an expansion of the Codes' substantive law system; what we have called the 'Hague-Visby surplus system'. The question therefore also arises here: if Article 25 is taken to allow for application of the scope provision of the Hague-Visby Rules (construed as a choice of law provision), shall then, as a matter of substantive law, only the contents of the Hague-Visby Convention be exempted from Rome I, or shall the entire 'Hague-Visby surplus system' of the Nordic Codes be exempted from Rome I?[40] We shall later see that

[38] Convention on the Law Applicable to International Sales of Goods, enacted at The Hague 1955.

[39] Views among international scholars differ, see e.g. Marion Hoeks, *Multimodal Transport: Law Applicable to Multimodal Contracts*, Kluwer, 2010, pp. 128 et seq. Yvonne Baatz (above) takes the view that the Hague-Visby contains a scope provision, not a choice of law provision.

[40] An example: if only bills of lading were to be 'acknowledged' as contracts of carriage exempt from party autonomy under Rome I (and due to bills of lading only being covered by the scope provision of Hague-Visby Article 10), how would this be dealt with if a case falling within the scope of the Nordic Codes involved a sea waybill which referred to the laws of state B not containing provisions for sea waybills (in line with the Hague-Visby rules)? Clearly, the only practical solution would be to apply the mandatory rules of the Nordic Codes. Similarly: if a claim is made against a performing

differing approaches are taken and different techniques adopted by the Swedish and Norwegian choice of law experts in this respect.

## 3.5 Article 5

Article 5 is also worth discussing. This provision regulates the choice of law in contracts of carriage which do not contain express choice of law provisions. This is at the periphery of our interest, since primarily we look at situations where contracts do contain choice of law provisions, and how such choice fares within the ambit of the Hague-Visby Rules and corresponding national legislation.

It should, however, be clear that to the extent national regulation implementing the scope of the Hague-Visby Rules, sets aside contractual choice which deviates from it, then the same must apply to contracts which do not contain choice of law provisions. In other words, contracting parties cannot be granted a greater 'liberty' (by invoking Rome I Article 5) by not agreeing upon choice of law than by agreeing upon it. In this respect Article 5 must be seen in conjunction with Article 25: if the latter gives room for exempting the Hague-Visby Rules from the application of Rome I,[41] then this means that Article 5 is also rendered inapplicable.

One could perhaps ask whether Article 5, through its connecting factors, could retain its role of determining the choice of law *within* the scope of the Hague-Visby Rules. But that would generally not work, since such connecting factors are already contained in national legislation implementing the Hague-Visby Rules; they constitute what we have called 'quasi choice' of law.[42] These 'quasi choice' provisions of national legislation implementing the Hague-Visby Rules, would 'clash' with

carrier under the Nordic Codes, and the contract refers to the law of a state not having similar rules, how should this be resolved? If the contract referred to English law, should here the English rules of tort of bailment (on terms) be applied? Obviously this alternative is not attractive; it involves fundamental structural differences in legal systems.

41 As is the position taken by the Swedish legislator, Section 4.2.

42 See Section 2.3.3

the choice of law connecting factors of Article 5.[43] In other words, the connecting factors of a system for harmonizing choice of law (Rome I), and the factors delineating the scope of application of a mandatory substantive regulatory regime (Hague-Visby), are not the same. They serve different purposes within their respective regimes.

A general observation is that given the prevalence of the Hague-Visby Rules among several EU states, it is surprising that this 'clash' between regulatory systems is not addressed within the context of Rome I Article 5,[44] in the same way as it seems not to be addressed within the context of other provisions, such as Article 25. This adds to our general point that important perspectives seem to have been ignored or lost in the drafting of Rome I, the ramification of which is further illustrated below.

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[43] Article 5 states that the applicable law shall be that of the habitual residence of the carrier "provided that the place of receipt [load port] or place of delivery [discharge port] or the habitual residence of the consignor [cargo owner] is also situated in that country". Already here we see that these criteria are not aligned with those of the Hague-Visby Article 10, where there are other (additional) connecting factors which bring the substantive mandatory rules of the Convention into play, for example the place of issuing of the transport contract (bill of lading). If we look at the corresponding implementation provision of the Nordic Maritime Codes, there are further, and alternative, connecting factors which are not aligned with those of Rome I Article 5. Article 5 goes on to state: "If those requirements are not met, the law of the country where the place of delivery [discharge port] as agreed by the parties, shall apply." Also this is out of line with the Hague-Visby Rules, and constitutes only one out of several factors in the Maritime Codes, see Norwegian Maritime Code Section 252 as discussed in Section 2.3.3 above.

[44] Another observation is that such important shipping contracts as time charterparties seem not be covered by what appears to be intended as an exhaustive provision for choice of law in contracts of carriage in Article 5. Time charterparties do not have any discernable and/or singular "place of receipt or place of delivery" (of cargo). Those places alter, for example during a five year charter for worldwide trading. It may be that only the relationship between cargo owners and carriers is intended to be regulated by Article 5, and that time charterparties are envisaged to be falling within the category of service for hire, or similar. This does, however, not detract from the general observation that Rome I seems to be taking a piecemeal approach to contracts of carriage.

# 4. Different views taken on Rome I by Sweden and Norway

## 4.1 Opening remarks

In the previous section we reviewed those exceptions to the main rule of party autonomy in Rome I which might be of relevance to resolving our dilemma, namely that substantive law harmonizing rules emanating from the Hague-Visby Rules are essentially incompatible with the choice of law perspective underlying Rome I.

We now turn to how this dilemma is resolved in Swedish choice of law legislation and in the corresponding Norwegian draft legislation (the Report). Sweden is bound by Rome I, so its efforts have been directed towards amending the Maritime Code in order to align it with the content of Rome I. Norway is not bound by Rome I but here the aim has been to introduce new legislation by way of a separate choice of law Act, essentially modelled on Rome I, for purposes of conformity to EU law.

We shall see that there is a striking divergence of approach taken by the respective legislators. This divergence does not only exist in differences of opinion as to how to go about the task of aligning the system of Maritime Codes with Rome I. Differences of opinion also concern basic conceptual points as to what constitutes choice of law rules and what constitutes substantive law scope provisions. The paradox ensues that Sweden, being bound by Rome I, ends up with a solution seemingly closer to the current system[45] of the Maritime Code than does Norway, not being bound by Rome I. Or perhaps more precisely: the Norwegian draft legislator states that the current system of the Code will be fully retained while there are explanatory remarks in the Report which, as far as the author can see, points in the opposite direction, leaving the topic in considerable confusion.

[45] In Norwegian terminology it is the current system, since the Norwegian draft legislation has not yet taken effect. In Swedish terminology it would rather be the previous system of the Code, since the choice of law amendments were enacted in 2013.

## 4.2 Sweden

### 4.2.1 International trade

The above stated dilemma is openly addressed by the Swedish legislator. After having pointed out that Rome I Articles 3 and 5.1 are at odds with the Hague-Visby Rules to which Sweden is committed as a state party, the preparatory works state:

"The Regulation [Rome I] therefore gives the parties the opportunity to contract out of the Hague-Visby Rules, even in the type of trade falling within the scope of application of the Rules, for example by choosing the laws of a state which is not party to the Rules. In order for Sweden to be able to fulfill its international obligations, provisions must therefore be found which give the Convention or laws implementing the Convention application to cases being covered by the Convention. Such rules are based on the Hague-Visby Rules and are therefore allowed according to Rome I (article 25.1)."[46]

In other words, the Swedish legislator resorts to Rome I Article 25 to achieve the result of retaining Sweden's Hague-Visby obligations. As we have seen, this may be questioned since Article 25, according to its wording, deals with conventions which 'lay down conflict-of-law rules', while the Hague-Visby Rules provides for substantive harmonizing law, not choice of law rules in the traditional sense. However, in the author's view, the Swedish position is tenable, since the *effect* of the scope provision of the Hague-Visby (and the corresponding national law regulation) is that of restricting contractual choice of law to the confines of the relevant scope.[47] Moreover, the Swedish position is tenable in the sense that what we have called clashing of perspectives – the choice of law perspective and the substantive law scope perspective – must find its solution, and this expansive construction of Article 25 is one way of resolving it.

However, this retaining of the application of the Hague-Visby substantive rules through an expansive construction of Rome I Article 25, does

46 Prop. 2013/14:243 p. 33 (author's translation).

47 Section 2.3.3 above.

not resolve our further dilemma of the 'Hague-Visby surplus system' of the Nordic Maritime Codes. As we have seen, the mandatory substantive scope of the Nordic Codes is far wider than that of the Hague-Visby Rules.[48] By limiting the restriction on party autonomy under Rome I merely to the substantive provisions of the Hague-Visby Rules themselves, one would end up in awkward practical situations of having to 'decipher' the contents of the Maritime Code in order to discern which parts of it correspond to the (original) Hague-Visby Rules.

This dilemma is also resolved by the Swedish legislator, through retention of the content of the Maritime Code, including its 'Hague-Visby surplus system'. The technique deployed to achieve this is in the author's view inventive. The legislator takes the view that the 'Hague-Visby surplus system' of the Maritime Code concerns the mandatory nature of the Code's substantive rules, and that such questions of substantive law lie outside the legislator's mandate, which is restricted to (formal) questions concerning choice of law.[49] However, despite this technique perhaps deserving the characterization of being inventive, it again illustrates our point that a clashing of perspectives needs to be resolved, and the pathway chosen by the Swedish legislator leads to pragmatically sensible solutions, in effect illustrating a choice of law perspective yielding to a substantive law perspective.

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48 Section 2.3 above.

49 Prop. 2013/14:243 p. 34–35. This approach is in the author's view 'inventive', since such questions relating to the extent of the Code's substantive mandatory rules, clearly form part of the wider topic of choice of law. This can be illustrated by an example: In a dispute before a Swedish court, a contractual choice is made to English law (England being a Hague-Visby state). The dispute concerns a claim against the performing carrier. Such a claim is part of the substantive mandatory rules of the Swedish Code (the Nordic 'surplus system') but not of the English COGSA. There is obviously then a need to decide, as a matter of choice of law, whether the Swedish Maritime Code's system is applicable to the claim, or whether one shall have to look to English law – with its system of tort of bailment on terms as applicable against performing carriers. Clearly, the only practical solution here would be to apply the Swedish Maritime Code, but to state that such questions, which would have to be addressed and resolved, do not involve choice of law, seems artificial or, as stated: 'inventive'.

### 4.2.2 Domestic trade

Also with respect to domestic trade, the mandatory system of the Maritime Code is retained by the Swedish legislator. Its justification for doing so is twofold.

First, in situations where domestic trade has no connecting factors to foreign law other than a contractual choice of law provision referring to foreign law,[50] the mandatory system of the Code is retained as a matter of national mandatory law pursuant to Rome I Article 3.3.[51]

Second, in domestic trade where there is an additional foreign law factor by means of one of the parties (in practice: the carrier) being non-Swedish, the mandatory system of the Code is retained by reason of the system of the Code – as originating from the Hague-Visby Rules – enjoying the status of 'overriding mandatory provisions' within the meaning of Rome I Article 9. It is worth quoting the legislator's reasoning in this respect:

"The mandatory rules for the carriage of general cargo are based on the internationally recognized Hague-Visby Rules which were created amongst other reasons to protect the interest of the weaker party in the contract relation, the cargo owner, in its demand for safe carriage of the goods. The rules must be deemed to be of fundamental importance to this type of protection and for the economic structure of maritime trade in Sweden. The mandatory rules for the carriage of general cargo should therefore be applied also to domestic trade when the laws of another state otherwise apply to the contract. This means that the current position of the law on domestic trade is in principle retained."[52]

The quote is of interest since the mandatory rules of the Swedish Maritime Code are essentially *not* reflecting the protective rules of Hague-Visby Rules, but rather those of the Hamburg Rules.[53] The paradox therefore ensues that the legislator at the time – in 1994 – did not consider the Hague-Visby Rules to be sufficiently protective of the cargo side, hence

50 What we earlier have called 'non-genuine' choice of law.

51 Ibid. p. 35.

52 Ibid. p. 36 (author's translation).

53 Section 2.3.

the Code was expanded with the substantive system of the Hamburg Rules. The Hague-Visby Convention was retained at the time essentially on formal grounds, due to its international prevalence – not because of, but rather despite, its substantive rules.[54]

The current choice of law legislator, on the other hand, invokes the substantive rules of the Hague-Visby Rules as being of paramount importance to the cargo owners and their 'demand for a safe carriage of the goods'. This fairly superficial view of the history and substantive law parts of the Hague-Visby Rules and the Swedish Maritime Code is, in itself, illustrative of the type of clashing of perspectives which is the underlying theme of this article.

It is worth summarizing how the Swedish legislator shifts its perspective when confronted by the dilemmas involved in reconciling Rome I with the Hague-Visby Rules and the Swedish Code, involving international and domestic trade combined:

First, the legislator construes Rome I Article 25 expansively, by stating that the Hague-Visby Rules is a choice of law convention. Second, it considers the Hague-Visby Rules to be of an 'overriding mandatory nature' as a means of retaining what, in effect, is not the Hague-Visby Rules but an extended Swedish (Nordic) version of the Rules, i.e. the 'Hague-Visby surplus system'. Third, it retains this 'surplus system' of the Code by considering it to involve questions of substantive law, thus falling outside the ambit of Rome I and the choice of law questions to be addressed by the legislator.

### 4.2.3 Scope versus choice of law provisions – an illustration of consequences

Some further remarks shall be made concerning our interest in differing views on what is to be considered legislative scope of application and choice of law provisions.

[54] Particularly because of their fairly obsolete system of the carrier being exempt from liability through navigational fault, and their fairly low limitation amounts. These provisions were, however, retained in the Code as a consequence of Sweden remaining a state party to the Rules, Section 2.3 above.

In Section 2.2 we reviewed the history of the Nordic Maritime Codes and how the scope provision of Article 10 of the Hague-Visby Rules was implemented into the Codes, while at the same time being expanded with added geographical connecting factors, constituting the overall scope of application of the Codes, including that of the 'Hague-Visby surplus system'. As part of that review we discussed 'quasi choice' provisions within this overall mandatory scope of application, including the fact that for domestic trade in one of the Nordic states, the law of the relevant state was to apply, in order for the 'correct' national domestic law to become applicable.[55]

Moreover, we saw in Section 4.2.1 how the Swedish perspective on what constitutes scope of application and what constitutes choice of law, was instrumental in retaining the system of the Code, by viewing the Hague-Visby as a choice of law convention for the purposes of Rome I Article 25. That perspective on the delineation between choice of law and scope of application has, however, had some further effects.

One such effect is of a formal nature, in that the naming of the respective Maritime Code provisions has been altered. What was before called a provision for 'Scope of application' while now being considered a choice of law provision (in line with the understanding of Rome I Article 25), is re-named 'Contract terms'.[56] Moreover, a new provision is introduced, named 'Scope of application', which merely states that the provisions of the Code apply to 'carriage of general cargo'.[57] In other words, the Swedish current legislator's view on what constitutes choice of law provisions has led to renaming of what the earlier legislator considered to be scope of application provisions.

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55 Section 2.3.3.

56 Swedish: 'Avtalsbestämmelser'.

57 Section 2: "This chapter applies to sea carriage of general cargo" (author's translation). The reference to "this chapter" is stated as a demarcation against the chapter on chartering of ships, which essentially contains non-mandatory rules. The interrelation between the two chapters lies beyond the scope of this article. But it should be recalled that the earlier Swedish version, as that of the current Norwegian Code Section 252, contained a scope of application provision which entailed the entirety of topics, both of substantive law and 'quasi choice' of law, as discussed in Section 2.3.3.

Those changes are basically non-material. However, one important material change is made in that the previous 'quasi choice' of law of the domestic rules in the respective other Nordic Codes is abolished, apparently because it, in the legislator's view, entailed a choice of law provision in violation of Rome I. That change is potentially dramatic, in view of the history of the Code and the Nordic 'package' of joint legislation, essentially for the protection of the cargo side.

To take an example: If a Norwegian domestic trade dispute were to be brought before a Swedish court, and the contract referred to the laws of state not being party to the Hague-Visby or its protective scheme, then the Swedish court would seemingly have to give effect to that choice; domestic trade is not Hague-Visby trade, and there would seem to be no other exception to the primary rule of party autonomy in Rome I.[58] That would be a striking result in view of the Nordic cooperation and what it aimed at achieving. It would also be striking in view of the fact that Sweden retains full effect to the mandatory rules for its own domestic trade, and that the scope provision (including the 'Hague-Visby surplus system') is retained, hence being applicable to inter-Nordic trade.[59]

This is, therefore, an example of how perspectives on the nature of scope versus choice provisions may play a significant role. In view of the inventive techniques by which Sweden otherwise manages to retain the Swedish Maritime Code unaffected by Rome I, it is surprising that no efforts were made also to retain this intrinsic part of the inter-Nordic system of the Code. If taking a (substantive law) scope of application perspective, it could for example be argued that this type of choice is of a 'quasi choice' nature; it form parts of the regulatory scheme within the mandatory substantive law scope of the Code.

In the next section we shall see a further dramatic twist in the same direction.

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[58] The Swedish legislator takes the view that 'overriding mandatory provisions' within the meaning of Rome I Article 9 would apply to a Swedish domestic dispute involving a non-Swedish party, Section 4.2.2 above. However, that approach seems not to apply to our present example of a Norwegian domestic case being brought before a Swedish court.

[59] The way the provision is amended is by a simple add-on to the effect that it cannot be derogated from in either domestic or Hague-Visby trade.

## 4.3 Norway

### 4.3.1 Overview

The Norwegian expert report on draft legislation (the Report)[60] takes a dramatically differing view from that of the Swedish legislator, concerning both central aspects of Rome I as well as the nature of the relevant provisions of the Maritime Code.

The Report takes the view that the Hague-Visby is not a convention containing choice of law rules within the ambit of Rome I Article 25. The Report simply states this as a fact, despite the obvious complexity of the question, and despite the Swedish legislator having taken the opposite view.[61] This means – according to the Report – that the Norwegian Maritime Code, with its implementation of the Hague-Visby Rules, would as a starting point not be exempted from the general rule of party autonomy of Rome I.[62]

The Report suggests, however, on overall policy grounds and due to the fact that Norway is not bound by Rome I, that the current maritime law system should not be disturbed. To achieve this, the Report suggests certain amendments to the Norwegian version of Rome I (the Norwegian draft choice of law Act), first, by explicitly retaining parts of the current scope provision of Section 252 of the Maritime Code as an exception to the otherwise applicable rule of giving effect to party autonomy, and second, by adding a provision to the Norwegian equivalent to Rome I Article 25, stating that the exception for existing conventions shall apply

60 See footnote 6.

61 The Swedish views are merely referred to in footnotes, with no principled discussion as to the differences of views, see Report pp. 61 and 138.

62 The Report also seems to take the view that the substantive mandatory rules of the Hague-Visby (as implemented in the Maritime Code) would not qualify as 'overriding mandatory provisions' within the meaning of Rome I Article 9, again, contrary to the view taken by the Swedish legislator. Consequently, the rules of the Maritime Code would also on that basis have to yield to the general rule of party autonomy of Rome I. The question is not discussed explicitly but there are remarks to that effect, see pp. 33 and 97. See also p. 153 where doubt is expressed as to whether the passenger liability rules of the Maritime Code Section 430 deserve the characterization of 'overriding mandatory provisions'.

not only to conventions laying down conflict-of-law rules, but also to conventions harmonizing substantive law rules, thus intended to cover the Hague-Visby Rules. We shall revert to these provisions in more detail.

The approach taken by the Report is in the author's view in many ways puzzling, since what it states it aims to achieve seems generally not to accord with the reasoning given for achieving it. This, in turn, pertains to our main interest in this article; to explore differences in perspectives relating to choice of law and substantive law questions. At the same time it touches upon an important policy matter, namely the Nordic tradition of substantive maritime law cooperation and how this may be under threat from choice of law legislators – a threat which, in the author's view, seems more real from the Norwegian choice of law legislator than from the Swedish, which is paradoxical in view of the fact that while Sweden is bound by Rome I, Norway is not.

### 4.3.2 Perspectives taken on choice of law versus scope of application – a critical review

We recall the main point as set out in Section 2 above: the Maritime Code Section 252 has as its function to implement the scope provision of the Hague-Visby Rules.[63] At the same time it serves the function of establishing the scope of application of the modernized, expanded substantive law scheme of the Code: the 'Hague-Visby surplus system'.[64] For present purposes we start out by holding onto the simple point: Section 252 as the means of implementing the Hague-Visby Rules. In this sense Section 252 is a scope provision while at the same time excluding choice of law in the traditional sense; allowance for contractual choice to laws which do not implement the Hague-Visby Rules would render the harmonized rules covered by the scope provision redundant – while also violating Norway's international obligation under the Hague-Visby Rules.

[63] This follows from Section 252 second paragraph, implementing Hague-Visby Rules, Article 10, see Section 2.3.3.

[64] As this follows from Section 252 first paragraph, combined with the geographical connecting factors in the second paragraph, see Section 2.3.3 above.

With this starting point in mind, it is surprising to see the approach taken in the Report.

The Report takes the view that rules like Maritime Code Section 252 are scope provisions that "become applicable only after choice of law rules have designated[65] Norwegian law as the governing law".[66]

The same point is formulated elsewhere: "These are rules that presuppose that Norwegian law has been designated as the governing law. If the choice of law rules have designated Norwegian law as the governing law, these rules will determine whether [Maritime Code Chapter 13] becomes applicable. These rules are therefore no choice of law rules which compete with the choice of law rules [of Rome I as implemented in the draft legislation]."[67]

This is a surprising stance. It gives overall priority, and supremacy, to choice of law rules. According to the Report this supremacy follows from "the ordinary methodology of private international law".[68] However, one could ask, in general terms: why should such a 'methodology' take precedence over a competing result which follows from a plain reading of a legislative provision, such as the Maritime Code Section 252? Rather, it would seem that ordinary legal methodology of adjudication will need to start by looking at a relevant legal provision, such as the Maritime

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65 Norwegian: 'utpekt' which literally means 'pointed out' – but here we use the term 'designated'.

66 Report p. 15 (author's translation). In Norwegian the term 'bakgrunnsrett' which translates 'background law' is used, which in the author's view is an unfortunate term. The term is ordinarily used in contract law, signifying that contract law legislation may serve as a complementary source of construction of contracts. In choice of law matters, the designated law is not merely 'in the background'.

67 Report p. 137 (author's translation). Similar statements are given several places, e.g. at pp. 141 and 180.

68 Report p. 15 and p. 139 – in Norwegian: 'den alminnelige internasjonalprivatrettslige metode'. As far as the author can see, no analytical or other justification is given in the Report for this proposition, other than examples from provisions of conventions, or legislation implementing conventions, which make use of the term, but such use forms part of the directions to adjudicators given in the relevant provisions, thus not giving justification for any a-priori application of such principle unrelated to the application of the relevant provision itself, see e.g. the example given in the Report on p. 103 concerning CISG Article 1 first paragraph litra a) (probably erroneous for litra b)).

Code Section 252. If such a provision gives unreserved directions as to when it becomes applicable, there is no room for a 'presupposition' that a legal norm of a different or 'higher' order (i.e. the norm of choice of law) has first been consulted. We have seen that Section 252 contains such unreserved directions, as bolstered by the history and purpose of the provision.[69]

We are therefore now at the core of the main topic of this article, namely the fundamental 'clash' between a choice of law perspective and a (substantive law) scope perspective.

The Report briefly discusses this contrary (substantive law) scope perspective, which would exclude any a-priori application of choice of law rules, but dismisses it by finding that Section 252 is not sufficiently clearly drafted to yield such a result, with the following reasoning:

"As a starting point the parties can avoid application of this scope provision [Section 252] by choosing the law of a different state. To what extent it can be argued that this scope provision is based on an implicit choice of law rule, is uncertain. Such an extensive[70] rule excluding party autonomy as the primary choice of law rule in contract law, ought to be explicit. […][71] It must be concluded that the provision does not replace choice of law rules but comes in addition to them. It is, therefore, as a starting point possible for the parties to avoid its application by making a choice of law."[72]

From the perspective of a maritime lawyer, these statements are indeed puzzling.

First, it seems obvious from a plain reading of Section 252, in view of its history and purpose, that there is indeed such an 'implicit' restriction

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69 Section 2.3 above.

70 Norwegian: 'inngripende'.

71 The omitted part reads: «Furthermore, such an implicit choice of law rule would not have a connecting factor which designates the governing law in those cases which are not covered by the rule.» That is, however, a circular argument in the sense that the answer to it follows from a reading of the provision itself, seen in light of its expansive scope and the history of it, see Section 2 above. The statement seems therefore to reflect an insufficient understanding of the substantive law involved.

72 Report p. 103.

on party autonomy.[73] It could be asked rhetorically: would an adjudicator, such as a Norwegian judge, when applying Section 252, entertain such an idea of allowing for party autonomy to set aside the mandatory substantive rules of the Code? It seems clear to the author that he or she would not. Why then should a choice of law expert as part of choice of law legislation introduce such a novel construction of the Code?

Second, the statements are puzzling because one could ask: Why introduce the notion of 'sanctity' of party autonomy into this equation at all – that is, why does such an argument belong here at all? To start from the other end: clearly the draftsmen of the Hague-Visby Rules took a stance on this policy question, which later became adopted into national law by the state parties to the Convention. That is a plain legal fact, belonging to the constituents of the relevant provision. One may like or dislike that policy decision, but it does not belong to the task of a choice of law legislator to 'censor' or 'second guess' it by introducing (retrospectively) an overriding principle of party autonomy, together with requirements of 'clear wording' to rebut it.

Third, the statements are puzzling on the following premise: If the wording had been sufficiently clearly drafted in exclusion of party autonomy so as to satisfy the choice of law expert's need for clarity, where would that take us in terms of methodology? Would that not confirm the point that a plain construction of a (substantive law) scope provision eliminates any (prior) choice of law inquiry? The answer seems to be in the confirmative. In other words, a plain legal method of application and adjudication – which could be called 'the ordinary methodology of construction of legal provisions' – would override what the Report calls 'methodology of international private law'.

Fourth, the statements are puzzling in view of the fact that Section 252 does implement the Hague-Visby Rules and that this Convention does not allow for party autonomy to circumvent its substantive liability rules, which means that allowing for party autonomy to set aside the application of Section 252, would render Norway in violation of its obligation under

[73] It would seem more appropriate to call such restriction 'patent' or 'explicit', since it is apparent from a mere reading of the provision.

the Convention – a phenomenon that forms an important part of the Swedish legislator's position but which is left unaddressed in the Report.[74]

### 4.3.3 Perspectives taken on substantive harmonizing law Conventions

When the Report takes the position that Maritime Code Section 252, which incorporates the Hague-Visby Rules, has to yield to some kind of a-priori choice of law perspective, it is not surprising that the Report also takes the same starting point with respect to substantive harmonizing rules as contained in the Hague-Visby Rules themselves. The Report states:

"There are quite a few conventions which harmonize the substantive law in certain areas, so called 'uniform law'. Examples of such Conventions are the 1980 Wien Convention on international sale of goods (CISG) and the 1924 Convention on bills of lading as amended by Protocols in 1968 and 1979 (Hague-Visby Rules). According to the traditional approach[75] these Conventions become applicable if choice of law rules designate the law of a state which has ratified the Convention as the governing law. This means that the parties can avoid the application of these harmonizing rules by choosing the law of a state where the Convention is not in force."[76]

Then there is a sudden and dramatic twist:

"This is not a result wished for, since it must be assumed that the intention behind a convention which harmonizes the substantive law is that the unified regulation becomes applicable. According to recent case law in a number of countries[77] it should therefore first be investigated

[74] According to the Report this is 'resolved' indirectly by adding a draft section 40 but this is also problematic, see below.

[75] Norwegian: 'den tradisjonelle tilnærming' – which is the very methodological question at stake.

[76] Report p. 35 (author's translation).

[77] The following cases dealing with CISG are referred to: In Austria: OLG Wien, 27.2.2017 (http://www.globalsaleslaw.org/content/api/cisg/urteile/2814.pdf); in France: CA Bordeaux, 12.9. 2013 (http://www.globalsaleslaw.org/content/api/cisg/urteile/2552.pdf); CA Rouen, 26.9. 2013 (http://www.globalsaleslaw.org/content/api/cisg/urteile/2551.

whether these unified rules become applicable, *before a choice of law is made*. If there is such a unifying instrument,[78] and if the case falls within its scope of application according to the instrument's own delimitation rules,[79] there is *no need to make a choice of law*. This means that a possible choice of law made by the parties will have effect only within the framework of the mandatory[80] rules of the unified source."[81] (emphases added)

This twist is dramatic, for several reasons.

First, it is obvious that the European case law referred to in the quoted passage takes the very approach we have advocated above: The adjudicator starts with the scope provision of the relevant substantive law harmonizing instrument, which overrides – or renders inapplicable – any (otherwise) applicable choice of law rules, such as those contained in Rome I.

Second, it is surprising that the Report does not address this point as a matter of legal analysis. It is in that respect not appropriate to state that there is 'no need' to make a choice of law in these situations. Such a mere explanatory phrase of 'no-need' is no term of legal analysis. Rather, it would be appropriate to state that it is not 'right' as a matter of legal analysis to consider any (prior) choice of law when the relevant scope provisions provide otherwise.[82] This follows from 'an ordinary methodology of construction of legal provisions', as explained above.

Third, the European case law referred to concerns the CISG but its rationale is clearly just as applicable to the Hague-Visby Rules, and perhaps even more so, since the latter provides for mandatory substantive

pdf); in Germany: OLG Naumburg, 18.7.2013 (http://www.globalsaleslaw.org/content/api/cisg/urteile/2717.pdf); in Italy:Trib. Foggia, 21.6.2013, (http://www.uncitral.org/docs/clout/ITA/ITA_210613_FT.pdf#); Trib. Padova, 25.2.2004 (http://cisgw3.law.pace.edu/cases/040225i3.html).

78 Norwegian: 'den ensartede kilden'.

79 Norwegian: 'avgrensingsregler'.

80 'Mandatory' must be a mistake for 'substantive', since CISG contains no mandatory rules.

81 Report p. 35 (author's translation).

82 This does not exclude a contractual choice being made applicable as a 'quasi choice' within the ambit of a scope provision but that is a fact beyond the principled point made here.

harmonizing rules, the former for mere non-mandatory harmonizing rules.

Fourth, as a matter of legal analysis, the reference to European case law concerning the CISG has an aspect directly pertaining to Maritime Code Section 252. This provision is a national law provision which implements the Hague-Visby Rules, just as the national law provisions being applied by the European courts referred to above, implement the CISG. Therefore, there is no room, by parity, for making any choice of law inquiry *before* applying Section 252, any more than there is before applying the corresponding provisions in the European case law referred to above. But this fact also escapes any principled analyses in the Report.

Furthermore, Section 252 is a complex provision, in that it incorporates the scope provision of the Hague-Visby Rules, while also containing the scope for the expanded Nordic 'Hague-Visby surplus system'.[83] This is in itself a phenomenon which invites legal analysis: Clearly the intention of the Nordic Maritime Code legislators has been that the entire scope of (the Norwegian) Section 252 should apply as a scope provision, not only that part of Section 252 which originates from, and implements, the Hague-Visby Rules.[84]

Therefore, by applying the rationale of the European courts referred to above, there is no principled reason why the entire Section 252 should not be exempted from any (prior) choice of law perspective as a matter of acknowledging the intent of the legislator – in the same way as the intent of those drafting the scope provision of the CISG and the intent of the national legislators implementing that Convention, has been acknowledged in the European court cases referred to above. This perspective is, however, entirely left out of the Report. Rather, the Report carries on the – in the author's view untenable – perspective that application of Section 252 'presupposes' that choice of law rules already have designated Norwegian law as the governing law.

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[83] Section 2.3.3.

[84] Which pertains to Section 252 second paragraph, No's. 1), 4) and 5), as compared to Hague-Visby Article 10 – see Section 2.3.3.

We now turn to the more concrete consequences of this perspective, as reflected in the draft choice of law legislation itself.

### 4.3.4 The draft Act and 'rectification' of Rome I Article 25

The Report takes the view that Conventions providing for international substantive law harmonized rules, such as the Hague-Visby Rules, are not exempted from the application of Rome I, since such Conventions do not fall within the ambit of Rome I Article 25, which provides an exemption for 'conflict-of-law rules relating to contractual obligations' while, according to the Report, the Hague-Visby Rules provide substantive rules, not choice of law (conflict of law) rules. Since the draft legislation in the Report is modelled on Rome I, the Report finds it necessary to 'rectify' Rome I in this respect, by introducing an added part to the draft Act Section 40, which otherwise corresponds to Rome I Article 25.[85]

A second limb to this provision – draft Act Section 40 – is introduced, stating:

"This Act does not affect the application of provisions which follow from Norway's international law obligations and which harmonize the substantive law in given legal areas."[86]

But also this raises the type of questions we have discussed above.

First, since European case law, in states being bound by Rome I, applies such international substantive law harmonizing instruments *irrespective* of Rome I, and the Report (elsewhere) seems to acknowledge the correctness of such an approach, it could be asked why the Report does not take the consequences of this stance, or at least discuss whether there really is a need under Rome I (or equivalent legislation) to insert such an exemption.

This goes to the fundamental question of what belongs to choice of law rules and what does not – as discussed in the previous section. In furtherance of that discussion, one could ask: If Norway were bound by

[85] Report p. 180.

[86] Report p. 202 (author's translation).

Rome I (like Sweden), then there would clearly be no room for such a 'rectifying' provision to Rome I Article 25, and where would that take us as a matter of legal analyses?

Would Norway then be unable to apply the Hague-Visby Rules in situations where party autonomy provides otherwise (by the contract designating the laws of a non-Hague-Visby state)? That would clearly be untenable, amongst other reasons as a matter of Norway's international law obligation under the Hague-Visby Convention. This means that such a solution (recognition of the Hague-Visby Rules) would have to be upheld in any event, either through the approach taken by Sweden (that the Hague-Visby is a conflict-of-laws Convention within the meaning of Rome I Article 25), or through the approach taken by the European courts relating to application of the CISG (that such international harmonizing instruments are applied beyond the scope and irrespective of Rome I).

The attempt by the Report to 'rectify' perceived shortcomings of Rome I Article 25 therefore has the paradoxical effect of destabilizing the uniformity of the law in this area, while at the same time not addressing fundamental questions concerning what belongs, and does not belong, to the ambit of choice of law legislation, as evidenced by the European jurisprudence relating to the application of the CISG, and as evidenced by the opposing view taken by the Swedish choice of law legislator.

Moreover, this approach by the Report of suggesting an addition to Rome I Article 25, brings up a further dilemma, namely that of the Nordic Maritime Code's substantive law expansion of the Hague-Visby Rules into the realm of the Hamburg Rules; what we have called the 'Hague-Visby surplus system'.[87] As a consequence of its novelty of introducing such an addition to Rome I Article 25, the Report finds that this suggested provision has the effect of retaining only Norway's obligations under the Hague-Visby Rules, and thus abolishing (as yielding to party autonomy) those parts of the Maritime Code which are modelled on the Hamburg Rules, since these do not 'follow from Norway's international obligations', according to the draft Act Section 40.

The Report states in this respect:

[87] Section 2.3.2.

"Some of the provisions of the Maritime Code Chapter 13 […][88] are modeled on such a Convention (the Hamburg Rules) without Norway having ratified the Convention. If it should be considered desirable that such rules are also given primacy, draft Section 40 may be formulated so as to achieve this. […] However, such an alternative would be fairly complicated, since it would be necessary in respect of each and every provision to determine whether it is written on an independent basis or whether it is inspired by a convention."[89]

This statement is also paradoxical from a substantive law viewpoint. First, it ignores the fundamental point that substantive rules taken from the Hamburg Rules form an integrated part of the 'Hague-Visby surplus system' of the Maritime Codes. Second, it ignores the point that the solution recommended by the Report (to only give primacy to provisions stemming from the Hague-Visby Rules), would lead to the practical need of 'deciphering' each and every provision of the Maritime Code to determine whether or not it is rooted in the Hague-Visby Rules or not – the very complication which the Report recommends should be avoided.

Moreover, in furtherance of this suggestion to, effectively, abolish the majority of the substantive parts of the current Maritime Code as yielding to party autonomy, the Report suggests that Norway enter into discussions with Denmark on whether (also) the remainder of the substantive rules of the Code resulting from Nordic maritime law cooperation should be abandoned, based on the reasoning that Sweden, being bound by Rome I, has already had to depart from the results of such Nordic cooperation in its Maritime Code.[90] But that premise is imprecise and leads to another

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88 Chapter 14 is also mentioned, which involves a discussion lying beyond the scope of this article.

89 Report p. 15 (author's translation). See also Report p. 153 where the same point is discussed.

90 Report p. 153 and pp. 15–16 where it is stated that to retain such an inter-Nordic substantive law system would entail departing from the main rule of party autonomy under Rome I and that such restriction of party autonomy must be stated 'expressly' in the draft Act – and that such restriction "would mean that Norway has a separate regime for these contracts for carriage of goods, which departs from the regime of Rome I and therefore also from the regimes of Sweden and Finland. This does not promote harmonization of the law." (author's translation).

paradox: Sweden has managed to retain these parts of the Swedish Code (the 'Hague-Visby surplus system') by considering them matters of *substantive law*, lying outside the mandate (and thus the scope) of choice of law legislation.[91]

### 4.3.5 The draft Act and retention of Maritime Code Section 252

We make a halt to recapitulate the position at this point, from the polarized positions of a choice of law and a (substantive law) scope perspective:

From a scope perspective it would follow from a plain construction of Maritime Code Section 252 that it does not yield to party autonomy with respect to choice of law (other than such 'quasi choice' which follows from the provision itself).[92] Therefore, since this scope provision of Section 252 simply applies as a matter of plain construction, the complicated factors of the draft choice of law Act and its provision for allowing for exception from party autonomy provisions derived from international substantive law harmonizing rules (draft Act Section 40, second paragraph), would simply not come into play, as being irrelevant to the construction of Section 252 – in the same way as Rome I is deemed irrelevant by the European case law giving effect to the CISG, through its scope provision as implemented into national law.

The Report takes the opposite view. It leaves Maritime Code Section 252 itself unaffected by the choice of law legislation,[93] by considering Section 252 to be a scope provision *not* affected by choice of law rules but which 'presupposes' that choice of law rules – and the rule of party autonomy – have already led to it becoming applicable. By this primacy given to choice of law rules, the Report then sees a need to provide express exemption from such primacy of choice of law rules – and the rule of party autonomy – by allowing rules which originate from international

91 Section 4.2.

92 Section 2.3.3.

93 Unlike the Swedish legislator who amended it, viewing it as a choice of law provision, Section 4.2.

substantive harmonizing law Conventions, to override the otherwise primacy of choice of law rules – as provided for in draft Act Section 40 second paragraph.[94]

If we, once more, stick to a (substantive law) scope perspective, the point at this stage is that draft Act Section 40 would not lead any complication; a plain construction of Maritime Code Section 252 would simply mean that draft Act Section 40 is rendered moot or inapplicable. In other words, a substantive law scope perspective takes primacy over a choice of law perspective – and over a choice of law instrument, such as the draft Act.

However, matters become more complicated, since the Report suggests another provision in the draft Act, expressly referring to and retaining (parts of) Maritime Code Section 252. This leads to possible complications also from a scope perspective, since the draft Act aims (as it were) at expanding choice of law legislation into substantive law, by purporting to incorporate substantive law scope provisions (Maritime Code Section 252) into the choice of law instrument.

There is, therefore, a need to look into the relevant part of the draft Act, even if one were to disagree with the perspective taken in the Report.

Draft Section 40 (as discussed above) is contained in a general provision of the draft Act, not particularly directed at contracts of carriage. However, draft Act Section 5 is directed at contracts of carriage and allocation of choice of law in that respect.

Draft Act Section 5 is entitled "Contracts of carriage". It starts out by providing for party autonomy with respect to choice of law. It then provides choice of law rules for situations where the parties have not

[94] To further complement, or confuse, the picture, we have seen that the Swedish choice of law legislator takes yet another perspective. Here, Section 252 is seen as a choice of law provision – not a scope provision as is the view of the Norwegian choice of law legislator – which, as such, was found to require (slight) amendments to be aligned with the choice of law instrument; Rome I. Moreover, according to the Swedish choice of law perspective, such a novel provision as introduced by the Norwegian draft Act Section 40 in 'rectifying' Rome I Article 25, would be superfluous, since the Swedish choice of law legislator sees Rome I Article 25 as covering substantive law Conventions such as the Hague-Visby Rules, a view not shared by the Norwegian Report.

so chosen. This part of the provision is modelled on Rome I Article 5.[95] Thereafter, the part follows which relates to the Maritime Code. A final (fourth) paragraph is proposed, which reads:

"In domestic trade, or trade between Norway, Denmark, Sweden and Finland, the Maritime Code […] Section 252 […][96] shall apply."

From a mere reading of this draft provision the following questions may spring to mind:

First, it may not be obvious, from a plain reading of draft Section 5 as a whole, that this last provision overrides the main rule of party autonomy at the opening of the provision. Rather, it may be read in such a way that only the connecting factors provided elsewhere,[97] where the parties have not decided on the governing law, are set aside by the reference to the Maritime Code.[98]

Second, and to the same point: if the methodology of choice of law, as set out elsewhere in the Report,[99] is to be followed, then reference in a choice of law instrument to a Maritime Code scope provision would entail a kind of circuity of logic: if it is right (i.e. a justifiable legal methodology) to consider the scope provision in Maritime Code Section 252 only applicable if choice of law rules designate Norwegian law as the governing law, then it would not 'help' to make reference in a choice of law instrument to Section 252: it would simply beg the same question: is Norwegian law made applicable according to choice of law rules? And if the parties have chosen a different legal system, the rule on party autonomy would seem

95 See Section 3.5 above.

96 Maritime Code Section 321 is also mentioned which concerns chartering of ship and which lies beyond the scope of this article.

97 That is, the second and third paragraph of the provision which corresponds to Rome I Article 9, see Section 3.3 above.

98 Such an understanding would make sense in itself, since the connecting factors in the second and third paragraphs depart from those of the Hague-Visby Rules (as implemented into national law), see the similar discussion relating to Rome I Article 9 – see Section 3.3.

99 Section 4.3.2 above.

to prevail. In other words, the reference in the draft Act to the Maritime Code lacks in clarity.[100]

However, reading the comments on draft Act Section 5 in the Report, it seems the answer to these questions is intended to be that the reference to Maritime Code Section 252 should have the effect of setting aside the otherwise applicable rule of party autonomy:

"These provisions [Section 252] delimit the scope of application of the Maritime Code, but say nothing about when Norwegian law (and thus the Maritime Code) is the governing law [ref.]. These provisions become applicable only after the choice of law rules first have designated Norwegian law as the governing law. Norwegian law is the governing law if the draft Act Sections 3 [providing for party autonomy] or 5 designate Norwegian law. This means that the parties, if having made a choice pursuant to Section 3, can achieve the provisions delimiting the scope of application of the Maritime Code not becoming applicable. To ensure that these provisions do become applicable, there is a need to make express exemption for them in the draft Act. Therefore, a sentence is suggested in Section 5 fourth paragraph to achieve this."[101]

Apart from the indicated methodology of construction of Section 252, which in the author's view is misconceived (see Section 2.3), the statement makes it clear that the intention is to have this reference to Section 252 prevail.

However, a further question arises: Why does draft Act Section 5 only refer to the first paragraph of Section 252 (dealing with domestic and inter-Nordic trade), not to the remainder of Section 252, which gives the connection factors for application of the Maritime Code (Chapter 13 of the Code) and which contains the factors which implement the Hague-Visby Rules into Norwegian/Nordic law? As we have seen, inter-Nordic trade is Hague-Visby trade, and what is mentioned about inter-Nordic trade in Section 252 is in reality superfluous, since the same would follow from the connecting factors of Section 252 second paragraph. Is then Hague-Visby

[100] In the same way as the Report considers the current Maritime Code Section 252 to be lacking in clarity, Section 4.3.2 above.

[101] Report p. 153.

trade (or the expanded version of it in the Nordic Codes) not intended to be retained as part of the draft choice of law Act?

The purported answer as given in the Report is obscure. The approach to it seems to be:

First, the view seems to be that the need to retain the substantive law parts of the Hague-Visby Rules is sufficiently achieved through the draft Act Section 40 second paragraph. However, this is without realizing that such retention of the Hague-Visby Rules would need to retain the Norwegian law incorporation of the Hague-Visby Rules, and thus Maritime Code Section 252 second and third paragraph.[102]

Second, the view seems to be that Maritime Code Section 252 first paragraph (being expressly retained), reflects some kind of obscure Nordic substantive law cooperation which, from a choice of law perspective, should, ideally, be abolished. The report states:

"It is, however, recommended [ref.] to consider whether there is today sufficient grounds for retaining these provisions [Maritime Code Section 252 first paragraph[103]], particularly in light of the fact that Sweden and Finland are no longer in a position to retain them. If such consideration leads to these provisions [Maritime Code Section 252 first paragraph] being abolished, then the draft Act Section 5 fourth paragraph can be omitted."[104]

This creates a further mixture of unfounded premises:

First, Sweden does not take the same view on Section 252 and Rome I as does the Norwegian Report, thus Sweden does not abolish the relevant provision. Second, it seems to ignore the relationship between Section 252's first and second paragraphs (as explained above). Third, if the legislator were to go along with this recommendation in the Report, then the domestic law part of Section 252 first paragraph would also disappear, seemingly with the effect that domestic trade would also be subject to the rule of party autonomy pursuant to draft Act Sections 3

[102] Section 2.3.3.

[103] Also Section 321 concerning chartering of ships is here mentioned, which falls outside the scope of this article.

[104] Report p. 153.

and 5. This alternative is not discussed in the Report, despite its dramatic consequences, and despite the Swedish choice of law legislator having expressly avoided it by making domestic trade subject to the exceptions in Rome I Articles 3 and 9,[105] something which is not commented on in the Norwegian Report, and with no corresponding provisions (to Rome I Article 9) in the draft Act itself.[106]

Moreover, going back to our recurring theme of conflicting perspectives, the following paradox ensues: If the legislator were to go along with the recommendation in the Report to omit the reference to Maritime Code Section 252 from the draft Act Section 5, this would strengthen, rather than weaken, the position submitted in this article, namely that it follows from a plain construction of Section 252 that there is no room for any (prior) consultation on choice of law rules, including that of party autonomy. This position would, if the said omission is made in the draft Act Section 5, live (as it were) undisturbed by any competing provision of the draft choice of law Act, albeit contrary to the intention of the Report, which is – in principle – to have Maritime Code 252 yield to choice of law rules, including that of party autonomy.

### 4.3.6 Summary – a test case on practical effects of the draft Act

It will have transpired that in the author's view the draft choice of law Act and its underlying premises suffer from significant shortcomings of both a methodological and a practical nature. This can best be illustrated by posing a hypothetical case, capturing the main points made in the previous sections.

We assume that a cargo claim dispute is seized by a Norwegian court. Discharge of the goods has taken place in Norway. The cargo document[107]

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[105] Section 4.2.2.

[106] The view is generally taken that one should take a restrictive approach as to what substantive law should qualify as being of 'international mandatory nature', unlike views expressed by the Swedish choice of law legislator, Report p. 153.

[107] We simplify by saying 'cargo document', not 'bill of lading', 'sea waybill', etc. which would complicate the example.

refers to Panamanian law. By plain application of the Maritime Code Section 252 second paragraph No. 2,[108] the liability provisions of the Code apply. But Section 252 second paragraph is not retained as being exempted from party autonomy in the draft choice of law Act (only the first paragraph involving domestic and inter-Nordic trade is), so what does this mean?

Shall then Section 252 second paragraph be allowed to be derogated from, by reference to Panamanian law? But that second paragraph incorporates the (scope provision of the) Hague-Visby Rules,[109] and it follows from the draft Act Section 40 second paragraph that substantive law harmonizing Conventions to which Norway is a state party, such as the Hague-Visby Rules, are to be retained. But to 'retain' such provisions cannot be made in the abstract. An adjudicator would need to know how and where such a Convention is implemented into Norwegian law, and then apply the relevant Norwegian law provision. An adjudicator would not apply a Convention 'in the abstract'. That Norwegian law implementing provision is contained in Maritime Code Section 252 *second paragraph* which, again, the choice of law legislator seemingly has directed shall yield to party autonomy, which in turn is in violation of Norway's Hague-Visby obligation (and of the draft Act Section 40, second paragraph) – and so on, in endless retrogression.

In addition: If an adjudicator were to follow the draft legislator's suggestion that Maritime Code section 252 second paragraph shall yield to party autonomy, he or she would then have to check whether Panama is a Hague-Visby state, for the purpose of deciding whether Norway is internationally bound to apply the Convention, as directed in draft Act Second 40 second paragraph. Assuming Panama is, the adjudicator would then have to do the balancing act of accepting the derogation from the Maritime Code (by reason of the choice made to Panamanian law) but nevertheless retain the Hague-Visby, as implemented into the Maritime Code. But that is an entirely impractical exercise, since no indication of

[108] See Section 2.3.3.

[109] As per Section 252 second paragraph No's. 1), 4) and 5) although that cannot be discerned from the provision itself, see the discussion in Section 2.3.3.

such 'origin' of the respective provisions is given in the Maritime Code itself. One would have to do a theoretical-historical extensive research of 'deciphering' the respective parts of the Code's law provisions to find this out.[110] And even if this were to be achieved, it would not resolve the question of application of provisions not (directly) originating from the Hague-Visby Rules.[111]

The above discussion was made on the assumption that Panama is a Hague-Visby state, but that was an incorrect assumption (for the purpose of our example), since Panama is not. And what would that mean? According to the draft choice of law Act it would seem to mean that despite the subject matter at hand clearly being covered by scope of the Maritime Code,[112] an adjudicator should instead look to choice of law legislation and its directive of letting party autonomy override the scope of the Code, and instead apply Panamanian law *in toto* to the dispute.

As a matter of straightforward adjudication of a dispute falling within the plain wording of the Maritime Code through its scope provision, an adjudicator would – it is submitted – not reach such a conclusion, which – it is submitted – would be legally wrong, as a matter of ordinary legal methodology of 'applying the Code'.[113] Thus, the draft choice of law Act would not only have the effect of muddling this area of substantive law, but also of bringing genuine confusion into the fundamental methodology of application of law and adjudication.

The example illustrates that the draft legislation is simply not tenable as an instrument for practical adjudication. Moreover, it is in the author's view conceptually untenable due to the methodological shortcomings discussed earlier. The legislator starts in the abstract by taking as a premise that Section 252 must be categorized as a 'scope provision' not embedding elements of choice of law, and derives formalistic conclusions from such an a-priori, conceptually based, premise.

110 Section 2.3.2

111 See the examples given in footnotes 40 and 49.

112 Discharge having taken place in Norway, Section 252 second paragraph.

113 See Section 4.3.2 above and the stated contrast between 'the ordinary methodology of construction of legal provisions' as opposed to the Report's suggestion of 'the ordinary methodology of international private law'.

Rather than starting out from such a conceptually based premise, it seems clear that a holistic approach is required, where the choice of law legislator possesses sufficient insight also into the substantive law areas impacted by choice of law legislation, and what the interrelations are between substantive law and choice of law. Only through such an holistic approach does it seem possible to avoid undue simplification whereby some statutory provisions are categorized as 'scope' provisions, not containing choice of law elements, and others as 'choice of law' provisions, not containing substantive law elements.

This topic is complex but we have seen that, paradoxically, the Swedish choice of law legislator, being bound by Rome I, has – through a balancing act of weighing substantive law and choice of law elements – ended up with a much more pragmatic and workable legislative product than that of the Norwegian choice of law legislator, with Norway not being bound by Rome I.

# 5 Concluding observations

## 5.1 International instruments and 'clash' of perspectives

Going back to the opening of this article, we started out with the simple statement: Rome I takes as a starting point that legal subject matters (contractual relations) may be affected by more than one national law system, with a perceived need to harmonize the relevant choice of law and providing as the main rule freedom of contract (party autonomy). Such a legal instrument, sorting out factors pertaining to more than one legal system and harmonizing the designation of the governing law, takes – in our terminology – a choice of law perspective.

We have then seen a different perspective. Succinctly put: long before the idea of creating legal instruments to harmonize conflict of laws – such

as Rome I – came the idea of harmonizing legal rules in areas which had a potential for conflicts of laws, but where conflicts of law was consumed into, and thus resolved through, the substantive law harmonizing scheme – such as the Hague-Visby Rules. Such substantive law harmonizing instruments require a scope of application provision to allocate the legal subject matter – e.g. contracts for international carriage by sea – to the relevant rules of harmonized substantive law. Generally, such substantive law harmonizing instruments take – in our terminology – a (substantive law) scope perspective.

Moreover, legal subject matters falling within such scope of substantive law harmonizing instruments may at the same time fall within the (otherwise) applicable choice of law rules. In our example of the Hague-Visby Rules, the legal subject matter (international contracts of carriage) is *prima facie* also covered by Rome I. But, as we have seen, it would be close to meaningless if Rome I and its primary rule of party autonomy were here to govern. The very purpose of substantive law regulation would then potentially be rendered inoperative, while at the same time – and for the same reason – state parties to the Hague-Visby Rules would potentially be rendered in violation of their obligations under that Convention.

Clearly, such a solution is not tenable, which means that somehow the substantive law rules of the Hague-Visby must be given primacy over the main rule of party autonomy of Rome I, which in turn means that – in our terminology – the scope perspective must prevail over the choice of law perspective.

## 5.2 National law and a 'second order' clash of perspectives

From this simplified illustration of potential conflicts between international instruments – the Rome I and the Hague-Visby Rules – we take the matter one step further.

The relevant scope provisions of international conventions, such as the Hague-Visby Rules, are, naturally, incorporated into national law,

and it is no anomaly that they may become amended or extended as part of national law implementation, as we have seen with the Nordic Maritime Codes. Such amendment or extension is made in furtherance of, and cannot be separated from, the scope perspective: scope provisions of international instruments do not exist in a legal void.

This renders us into a 'second order' clash of perspectives where traditional choice of law perspectives seem to miss out on important points. This potential 'clash' between choice of law instruments (Rome I) and national law also needs to be resolved, and clearly the starting point must be to acknowledge the intent of the national legislator when he/she expands on the substantive law as part of, or in connection with, implementation of international law instruments, as we have seen with respect to the Nordic legislators' promulgation of the 'Hague-Visby surplus system' as part of the Maritime Codes.

Such an acknowledgment of the legislator's intent is a matter of fostering, in a principled way, the stated scope perspective. But it is *also* a matter of practical adjudication. A different result would simply lead to unworkable substantive law solutions, such as having to 'decipher' the content of substantive law rules (the Maritime Codes), as part of a piecemeal effect of a choice of law perspective – as we have seen illustrated in the Norwegian draft choice of law Report, aiming at treating differently those parts of substantive law (the Norwegian Maritime Code) which originate, or do not originate, from an international instrument, such as the Hague-Visby Rules.

This brings us to an important part of this article: to cast a critical eye over choice of law perspectives, by using as illustration the approaches taken by the Swedish and Norwegian choice of law legislators. This comparison has demonstrated, first, a striking difference of opinion as to the very nature of choice of law rules versus substantive law rules, second, a striking difference of opinion of how to try to reconcile these sets of rules.

In the author's view, this disparity between opinions and perspectives is a diagnosis of the choice of law perspective in itself – being of a formalistic and non-holistic nature (Sections 5.4 and 5.7 below). That

could in itself perhaps be harmless, but it has the further implication of trespassing into the realm of substantive law, and it has, in the Nordic context, a potentially stunning negative effect on the efforts made over the years by substantive (maritime) law experts, who established what they viewed as sensible regulation of uniform Nordic substantive law, in furtherance of the more simplistic ideas embedded in the Hague-Visby Rules. Put succinctly: by a whim of formalistically oriented choice of law experts, this uniform substantive law system risks being undermined.

## 5.3 Legal sources determining choice of law – their influence on terminology

A further observation is that what we have called clashing of perspectives between choice of law and substantive law, will also have the potential to result in the clashing, or at least confusion of, terminology. The phenomenon of 'choice of law' does not belong solely to the approach of harmonizing choice to national legal systems in the Rome I sense. Choice of law (or restriction of it) may also be contained in and governed by substantive law systems – through application of the relevant scope provisions.

Therefore, substantive law scope provisions may well be a legal source of determining choice of law questions. In that sense, within the realm of contract law, the legal sources which determine choice of law questions could, generally speaking, consist of: a) contractual provisions, b) choice of law instruments (Rome I), and c) substantive law regulations. As we have seen in this article, alternative c) may override b) and a).

This in turn means that categorization of legal concepts may have floating transitions. One example: When choice of law is contained in the implementing provision of the Hague-Visby Rules in the Maritime Code Section 252, that is a choice of law regulation of a different order from that of the traditional choice regulation, as in Rome 1. We have called this different-order type of choice regulation 'quasi choice', since it operates within the confines of the substantive law system to be exempt from regular choice of law rules, as in Rome I. Put differently, when

substantive law harmonizing systems, such as the Hague-Visby Rules or legislation originating from it, must be considered exempted from (otherwise) choice of law regulation, such an exemption pertains just as much to the 'quasi choice' regulation contained within the ambit of such a substantive law harmonizing scheme. An opposite approach – to give the term 'choice of law' a formalistic and homogenous meaning, and let such meaning govern as part of a legislative programme – would, as we have seen, lead to untenable solutions as a matter of substantive law and practical adjudication.[114]

One cannot, therefore, operate with concepts or categories that are pre-defined, or made a-priori, such as saying that a given legal provision is a 'scope provision' and thus must yield to a 'choice of law provision' as if the latter belongs to some kind of higher legal order – or that 'scope provisions' generally 'presuppose' that choice of law rules have already been consulted – as we have seen demonstrated in the review of the Norwegian draft choice of law Report. Mere categorization of legal phenomena does not have the effect of 'governing' the outcome of conflicts between opposing sets of legal rules, nor does it 'govern' the outcome of concrete adjudication.

Rather, one must take a holistic perspective, realizing the intricate interplay between the two sets of rules (choice of law instruments versus substantive law instruments), which – as we have submitted – is resolved by ordinary legal methodology of construction of legal provisions,[115] which may well lead to primacy of a substantive law scope perspective, as illustrated in the area of law inquired into in this article.

## 5.4 Incompleteness of choice of law regimes and effect on 'legal efficacy'

It will have transpired from the above that a choice of law perspective may not sufficiently take into account a (substantive law) scope perspective, whereas, as we have seen, a scope perspective may very well impact

[114] See e.g. Section 4.3.6.

[115] Section 4.3.2.

on the substantive consequences of a choice of law perspective – as a matter of ordinary legal methodology of construction of legal provisions. The fact that a choice of law perspective is not in this way holistic, is, in the author's view, a consequence of the subject matter being regulated by a choice perspective; the task of sorting out connecting factors of a given type of case potentially affected by different legal systems, and that of designating the governing law according to such connecting factors, which is, generally speaking, a legal-formalistic exercise.

When this non-holistic choice of law perspective endeavours to be all-embracing, as the ambition of Rome I appears to be,[116] it may lead to fallacies or voids when seen from an holistic perspective.

We have, first of all, seen this illustrated in respect of Rome I Article 25, which fails to take into account choice of law regulations embedded in substantive law Conventions, which do not carry the label of regulating 'conflicts of law', and are thus seemingly not exempted from Rome I and its primary rule of party autonomy.[117]

Second, it is illustrated in respect of the regulation of 'non-genuine' choice of law[118] concerning domestic mandatory rules. Here Rome I Article 3.3 gives overriding effect to domestic mandatory rules as an exception from the otherwise primacy of party autonomy. This, in the author's view, is a fallacy, in that it is unrealistic for the domestic courts to make a comparison between the foreign law chosen and what parts of it 'collide' with, and thus have to yield to, domestic mandatory rules. This has been illustrated by the Swedish choice of law legislator's approach to the rules of domestic trade under the Swedish Maritime Code: the scope provision of the Maritime Code is simply retained[119] and with no direction to the adjudicator that this scope provision, with its resultant

116 E.g. Rome I Preamble (6) and (11).

117 Section 3.4. – but conversely the Swedish position, Section 4.2.

118 The subject matter having no connection to a state other than the forum, except for a contractual choice thereto, Report p. 19.

119 Section 4.2.1.

substantive rules, shall be compared with or measured against whatever foreign law is chosen by the contracting parties.[120]

Third, it is illustrated in respect of similar questions relating to Rome I Article 9 concerning priority given to 'international mandatory rules'. Here again it may be unrealistic to 'decipher' what specific provisions are of such nature and compare them with whatever the competing rules are of the foreign laws chosen by the parties. This is again illustrated by the Swedish choice of law legislator when it avoids this problem of comparing individual substantive law provisions, but instead considers the part of the Maritime Code we have called the 'Hague-Visby surplus system' as substantive rules *en bloc*, thus falling outside the ambit of choice of law regulation altogether.[121]

Fourth, the all-embracing ambition of Rome I is also exemplified in its provision of such adjudicatory details as the fact that principles of interpretation of contractual provisions are to be taken from the law designated by the choice of law rules, not that of the forum.[122] Anyone having had practical experience with e.g. an English law contract dispute being tried before a Norwegian court or arbitral tribunal, will know that principles of interpretation are not capable of simply being adopted from one legal system to another, and such an attempt to 'import' principles

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120 As far as the author can see, this approach is strictly speaking non-compliant to Rome I Article 3.3 which retains "the application of provisions of the law of that other country [Sweden] which cannot be derogated from by agreement." The phrase 'provisions of the law' seems to envisage that one looks to each and every provision to check whether it can be derogated from. Not all provisions falling within the scope of the mandatory Chapter of the Maritime Code applicable to domestic trade bear such a status.

121 We have seen it also in the Norwegian Report, which admits the impracticality of adopting such an approach of 'deciphering' the nature and background of substantive rules, see Section 4.3.3. Generally, such a split-up system may perhaps work reasonably well within comparable legal systems, but becomes impractical when the system with which to compare it belongs to a different legal tradition. It should be recalled that Rome I and its primary rule of party autonomy apply irrespective of which legal system is designated by such party autonomy, see Article 2. On the other hand, problematic aspects of such comparison may also appear within European legal systems, see footnotes 40 and 49.

122 Rome I Article 12, 1 a).

of construction may even lead to questionable outcomes as a matter of substantive law.[123]

What we have pointed to here also has an aspect that is part of the overriding harmonizing aim of choice of law instruments, such as Rome I, namely to foster certainty and foreseeability in contractual relations, and thus promotion of what can be labelled 'legal efficacy'.[124] It seems that this goal is to a large extent undermined by the very complexity and thus non-foreseeability created by the choice of law instrument itself. This has been amply illustrated by examples above, and by the strikingly different approaches taken by the Norwegian and Swedish choice of law legislators, both in respect of the understanding of central provisions of Rome I, and in respect of the implications this may have on the understanding of national law.[125]

In summary: Rome I purports to be an all-embracing choice of law system, which as a matter of practical adjudication it is not. In that respect it is worth reiterating how several European courts in the area of substantive law harmonization of sale of goods under CISG have simply omitted the application of Rome I altogether, considering that such disputes, governed by scope provisions of international instruments, fall outside

[123] The Norwegian arbitration, *Hindanger*, ND 1968.68 (Professor Brækhus as sole arbitrator) is a good illustration: English law was agreed but Norwegian principles of construction were applied. See also Solvang, Forsinkelse i havn – risikofordeling ved reisebefraktning, 2009, pp. 122 et seq., illustrating the English system of 'implied terms' as part of the methodology of construction under English law but without any direct parallel under Norwegian law – also illustrating how 'contract law principles' as a complementary source of construction may simply be incompatible under the two systems. See similarly, Solvang, *The English doctrine of indemnity for compliance with time charterers' orders – does it exist under Norwegian law?* SIMPLY/MarIus nr 419, 2013, pp. 11–28; Solvang, *Charterparty law – some ideas for future research projects*, MarIus nr 418, 2013, particularly pp. 35–43; Solvang, *On foreseeability in construction of contracts in laytime matters – a comparison between English and Scandinavian law*, MarIus nr 424, 2014, pp. 201–214.

[124] Rome I Preamble (16) states: "To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict of law rules should be highly foreseeable. […]."

[125] See e.g. the almost impenetrable notion in the Norwegian choice of law Report concerning the methodology to the effect that the scope provision of the Maritime Code 'presupposes' prior consultation of choice of law rules, Section 4.3.2.

the ambit of Rome I.[126] To the author it is an open question why the Swedish and Norwegian choice of law legislators did not even consider such a solution in the parallel questions raised by the relevant scope provisions of the Maritime Codes; that these provide a self-contained scope provision for international substantive law harmonization purposes, falling outside the ambit of Rome I.[127]

## 5.5 Do choice of law instruments contain elements of substantive law?

As part of our attempt to circle in aspects of relevance to our recurring theme of clashing perspectives, it could be asked whether Rome I, as a choice of law instrument, must, by virtue of its own provisions, be said to contain directions on, as it were, a substantive law meta-level which must, or should, lead to choice of law rules being given priority, contrary to what has been argued in this article – for example along the following lines:

Rome I sets out the main rule of party autonomy and, by its own terms, provides the relevant exceptions to such main rule, by allowing for mandatory laws of the forum to prevail, and in certain situations 'international mandatory rules' as well, as this term is understood by the law of the forum.[128] In that way it may be said that since the instrument itself sets the premise for what part of substantive rules shall be allowed to prevail, then by the very design and status of the instrument, other

[126] Section 4.3.3 above.

[127] One could for example construe Rome I Article 1 to such effect. The provision states: "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations […]." It could well be argued that matters falling within the scope of the Maritime Codes do not 'involve a conflict of laws', since such 'conflicts' are fully resolved through the relevant scope provisions, in the same manner as disputes falling within the ambit of CISG (and relevant national law scope-implementation provisions) do not 'involve a conflict of laws'. See also the discussion in Section 4.3.5 above, to the effect that it would as a matter of adjudication be simpler if the Norwegian draft choice of law Act omitted any reference to the Maritime Code scope provision altogether – in the same way as Rome I Article 5 is unrelated to matters falling within the ambit of the Hague-Visby Rules, Section 3.5.

[128] Sections 3.2 and 3.3.

substantive law rules, including those which (indirectly) regulate choice of law as part of international harmonizing rules, are disallowed; they are set aside as a result of Rome I being considered 'a complete code'.

Such a notion seems to underlie much of the thinking behind both the Swedish choice of law legislation and the Norwegian draft legislation. However, we have taken an opposite view: There is no reason to believe that the intention of Rome I is to set aside substantive law regulation which contains scope provision which (indirectly) governs the choice of law for the purpose of harmonizing substantive law, since such a solution (primacy given to Rome I), would have the effect of undermining the substantive law harmonizing rules. This is what has been illustrated by the European court cases relating to the application of CISG; priority is given to harmonizing substantive rules over harmonizing choice of law rules.

The better approach must therefore be to construe Rome I in light of its purpose, namely to designate the governing law, and as part of it party autonomy, in situations in need of being so regulated. If a subject matter is already regulated by a different scheme of harmonizing rules, then there is no need for the purpose underlying Rome I – or on more formal grounds: there are no 'conflicts of laws' within the scope provision of Rome I itself, in Article 1.

This has therefore the effect of recognizing substantive law scope provisions (which may contain restrictions on choice of law and also that of 'quasi choice' provisions)[129] in existing legislation, and thus accord with our general argument that choice of law provisions yield to substantive law scope provisions, as a matter of ordinary legal methodology of construction of such scope provisions.

This has some further implications. It mean, first, that international harmonizing instruments, such as the Hague-Visby Rules, and national implementation provisions based thereon, are fully recognized by Rome I – or they fall outside the ambit of Rome I (again as held by the European courts relating to CISG). But it also means that the same reasoning should apply to international harmonizing instruments not being rooted in (formalized) international instruments, such as the Nordic Maritime

[129] Section 2.3.

Codes. This is so because here as well there is no need for provision for harmonizing choice of law (Rome I), and there is, here again, the question of recognizing the legislators' intent when promulgating such harmonizing rules.

This perspective also has a further twist of methodology of construction of interest to the views taken by the Nordic choice of law legislators when construing Rome I Article 25. This provision makes an exemption for prior 'conflict of law conventions' and not (at least not expressly) for prior substantive law harmonizing conventions. The Swedish legislator here took the view that Article 25, through an expansive construction, did also contemplate substantive law conventions, so as to effectively retain the prior Maritime Code under Rome I. The Norwegian draft legislator took the opposite view and, as part of the draft Act modelled on Rome I, found reason to make a 'rectifying' additional provision to Rome I Article 25, in order to ensure that the Maritime Code as based on the Hague-Visby Rules would be retained.

But neither of these views and solutions are in the author's view tenable. The better view seems to be that those international substantive law harmonizing rules, which do resolve questions of choice of law, are outside the ambit of Rome I altogether, and not in conflict with it. According to this view it makes perfect sense that Rome I Article 25 is formulated in the way it is. It means that Sweden was wrong in viewing the Hague-Visby Rules as a choice of law convention within the meaning of Rome I, and would not have needed to make its amendments in purported compliance with Rome I. It also means that the expansive choice of law perspective taken by the Norwegian draft legislator was misplaced: there would be no need for a 'rectifying' provision to Article 25, since such 'rectification' is outside the ambit of Rome I, and thus also outside the ambit of the Norwegian draft choice of law Act.

## 5.6 Does the primacy of party autonomy of Rome I constitute 'substantive' law?

Similar to the above notion that Rome I, with its selection of substantive law areas allowed to interrupt the main rule of party autonomy, could be seen as a norm of higher order, another proposition could perhaps be made by proponents of a choice of law perspective, along the following lines:

Rome I is not merely a system of formalistic nature by allocating connecting factors in order to establish a unified system for designating the governing law in contractual relations, it is also a 'substantive law' system in the sense that it provides policy grounds for promoting the value of freedom of contract, as reflected in its main rule of party autonomy in the choice of law.[130] One could therefore argue that this overriding aim should also be given effect in relation to our topic: the conflict between choice of law rules (Rome I) and restrictions on choice of law (indirectly) following from substantive harmonizing schemes.

We have seen such arguments raised by the Norwegian draft choice of law legislator, submitting that the paramount value of freedom of choice should form a principle of presumption when construing (other) statutory provisions which may lead to restriction of party autonomy, such as the scope provision of Maritime Code Section 252. In other words, Rome I and its (substantive law) part in promoting party autonomy, is generally used as a substantive law argument of construction: if the relevant provision (Section 252) is not clearly enough drafted so as to exclude it from being made subject to prior consultation of choice of law rules, it will be construed to the contrary: that it yields to party autonomy and choice of law rules.

We have argued that this is a highly artificial way of construing a substantive law scope provision: if it is clear from its wording, together

[130] Rome I Preamble (11) reads: "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations." See also the opening words of the Preamble (1): "The Community has set itself the objective of maintaining and developing an area of freedom, security and justice."

with its history and purpose, that it applies (and restricts choice of law), then it is not viable to introduce freedom of choice as an argument on its own account, unrelated to the sources otherwise relevant to construing the scope provision. Put differently: A principle of party autonomy does not extend beyond the purpose of Rome I as a choice of law instrument. First, Rome I does in itself provide restrictions on party autonomy[131] and, second, those policy statements cannot be detached from the scope of application of Rome I itself.

We are then back to the same point discussed in the previous Section: The purpose of applying Rome I does not extend to situations where choice of law questions are regulated by a harmonizing scheme of a different nature from Rome I, namely that of providing harmonized substantive law rules. Moreover, if it follows from ordinary methodology of construction applied to such other rules (scope provisions of substantive law harmonizing rules) that these govern irrespective of Rome I, there is no room for introducing arguments of construction derived from Rome I.[132]

## 5.7 Theories of norm and collision between norms

We have given an account of the complexity between substantive law and choice of law rules and, in consequence, illustrated what we have called a 'clash' between legal perspectives. We have tried to analyze this 'clash' and reconcile the respective positions as a matter of pragmatic law application and adjudication. Despite this attempt, the fact remains that there are striking differences of opinion as to how to approach this interplay between opposing sets of rules, as illustrated particularly by

[131] A digression is that Rome I contains a policy statement to the effect that protection of the weaker party should prevail over party autonomy, in Preamble (23): "As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules." This is the very thinking behind the Hague-Visby Rules and behind the modernization of these rules in the 'Hague-Visby surplus system' of the Nordic Maritime Codes. However, Rome I has no specific provision within the area of transportation contracts which are aligned with this policy statement.

[132] See the more detailed account of the methodological aspects in Section 4.3.2

the Norwegian draft choice of law Report, as contrasted with the corresponding Swedish position. In other words, there are different positions as to what constitutes choice of law within what we have categorized as the choice of law perspective – in addition to the opposing position of what we have called a (substantive law) scope perspective.

Collision between legal norms is nothing new. In the realm of substantive law the phenomenon is well known. In simplified terms: If there is potential conflict, there are two alternative approaches to resolve it. The one is to avoid the conflict by aligning the (seemingly) conflicting rules to one another through techniques of construction; to adopt restrictive construction to the one (or both) norm in light of the other.

If such alignment through techniques of construction is not feasible, the other alternative is to adopt principles developed to give primacy to the one norm (or set of norms) over the other. Such principles may involve the hierarchical origin of the conflicting norms (*lex superior*), or the temporal origin of the conflicting norms (*lex posterior*), or the specificity or generalized nature of the conflicting norms (*lex specialis*).

What signifies these approaches – the alignment of norms to avoid conflicts, or principles applied to resolve conflicts – is that holistic approaches are required and adopted. A holistic approach is required in the said process of aligning norms to avoid conflicts, and it is required in, and forms the basis for, the said principles for resolving the outcome of colliding norms.

Our topic is marked by this very phenomenon of potentially conflicting norms and there is, in the author's view, a conspicuous lack of reflection among choice of law lawyers to elevate the topic to a more principled level.

We have made some tentative suggestions in that respect. We have suggested that such potential conflict can be avoided by construing Rome I restrictively, to the effect that it is not intended to cover situations where choice of law questions are already resolved through legal instruments which incorporate choice of law as part of substantive law harmonizing schemes. Or the same result could perhaps be achieved through established principles for resolving conflicts between norms, for example by

viewing choice of law questions incorporated into, and thus resolved through, harmonizing substantive law scope provisions, as *lex specialis* to the otherwise application of choice of law instruments (Rome I). It is worth recalling that European courts in practical adjudications in the area of international sale of goods and the CISG, have reached the solution of giving primacy to our advocated (substantive law) scope perspective[133] – a result which fits well within the more theoretical justifications for it, as suggested here.

The diversity of views between various lawyers does, nevertheless, point in the direction of a need for further research and academic exploration in this field. This, in turn, involves a need to go below the surface of superficial analyses[134] and undertake more fundamental inquiries into theories of legal norms. The Norwegian legal theorist Nils Kristian Sundby (1942–1978) laid the groundwork for such endeavours. His work[135] was marked by an ambition to expand on the traditional understanding and analyses of norms which, in Sundby's view, had too narrowly dealt with only two categories of norms: deontic norms (duties or directives in their various forms) and norms of competence (norms facilitating the creation of new norms), as well as the interplay between the two.[136] In Sundby's view, such a narrow approach failed to take into account what he considered to be an overarching type of norms which he chose to call qualification norms;[137] norms giving the criteria for – thus 'qualifying' – what will 'count as' something in a given normative context.

[133] Section 4.3.3.

[134] Of which, in the author's view, the Norwegian Report is an example, see Section 4.3.

[135] Sundby *Om normer* (on norms), 1973. I will here be using the second edition from 1978.

[136] See Sundby (1978) e.g. pp. 3, 9, 50–63, 110–117, 393–396. The interplay mentioned here is marked by the idea that all norms of competence can indirectly be derived from (conditional) deontic norms, as was the view taken by the Danish scholar Alf Ross, Ibid p. 393–396.

[137] In Norwegian: 'kvalifikasjonsnormer', which could also translated as 'eligibility norms' – see, generally, Sundby (1978) p. 3 and pp. 77 et seq. The term seems to have been introduced originally by the Swedish scholar Tore Strömberg in his article *Lathund för lagläsare* (simplified guidance for readers of legislative acts) published in *Logik, Rätt och moral* (logic, law and morals), 1969, pp. 191–205, and adopted by the Swedish scholar Karl Olivecrona in *Rättsordningen* (the system of law), 1966.

Choice of law rules would, in Sundby's categorization and terminology, be good examples of such qualification norms. The same applies to (statutory) scope provisions directing the application of substantive law rules – and to the interplay between the two.

Sundby's works on this point were of a rather rudimentary nature, although having the strength of taking an holistic approach, penetrating and dissecting the function of various norms within the legal realm seen as a dynamic, holistic system.[138] Since his endeavours, surprisingly little has been done in legal philosophy to test out and develop these endeavours.[139] Perhaps the time has come to restart such endeavours. The partly chaotic divergence between different legal scholars in the field of choice of law versus substantive law and scope provisions, certainly points in that direction.

[138] As further developed in the book *Rettssystemer* (legal systems), 1975, co-authored by Torstein Eckhoff (1916–1993).

[139] Svein Eng, *Rettsfilosofi* (legal philosophy), 2007, adopts Sundby's categories of norms, including that of qualification norms, but Eng takes the topic in the direction of linguistics, which in the author's view is of limited value in bringing renewed insight into the more pragmatic complexity of legal norms, as has been illustrated in this article. Moreover, it is in the author's view questionable whether Eng gives a fair representation of Sundby's original idea behind the term, see *Rettsfilosofi* p. 108–109 and footnote 38 on p. 109, describing Sundby's thinking on the origin of the concept as "lacking in clarity" ('dunkel'). As further illustration of Sundby's perspectives, see Solvang, *From the role of classification societies, to theories of norms and autonomous ships – some cross-disciplinary reflections*, SIMPLY 2018=MarIus 518, 2019 pp. 241 et seq.