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Editor's preface

As in earlier years, also this issue of SIMPLY contains a diverse list of contributions, reflecting the breadth of the Institute's activities.

There is a core maritime contract law article, by Thor Falkanger, discussing a Supreme Court case involving multimodal carriage of goods. Then follows an article on maritime labour law, by Hanna Vik Furuseth, dealing with jurisdictional questions concerning national rights to implement wage and working conditions on foreign-flagged ships. This is followed by an article on maritime environmental and labour law, by Alla Pozdnakova, giving an account of the international regulatory scheme of ship recycling. There is then an article, bordering to the law of the seas, by Birgit Feldtmann, Kim Østergaard and Hanna Barbara Rasmussen, pointing out serious challenges of practical nature in carrying out cruise shipping in desolate Arctic waters. Then follows a slightly revised master thesis, covering important aspect of marine insurance law, that is, H&M insurance and the concepts of faulty material and error in design under the Nordic Plan, by Julie Karin Værnø. Finally, there is an article by the undersigned, analyzing concepts of substantive versus choice of law rules, involving the Hague-Visby rules and the Nordic Maritime Codes.

We wish you all happy reading!

Trond Solvang

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Cargo damage – road or vessel liability rules?

– Supreme Court decision on damage during sea passage to cargo on a trailer – HR-2019-912

Thor Falkanger[1]

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I. Introduction

The party undertaking a transport obligation regarding general cargo is often not the owner or operator of the mode of transport required for fulfilling the obligation. Furthermore, in many instances he is free to choose both the mode of transport as well as the person or entity who shall actually perform the transport. Thus, the contracting carrier may decide to use a number of subcontractors, e,g. a shipping line and/or a truck company. With the possibility of the subcontractor using subcontractors, the cargo side – which, for the sake of simplicity, we call the cargo owner – may be faced with a very complicated system of sub- and sub-sub-contractors, of which he will have no prior knowledge. Such a complex relationship may give rise to a vast number of questions when the cargo owner complains that the cargo is lost, damaged or delayed. We have the issue of the liability of the contracting carrier. as well as of one or more of the subcontractors, and in addition the possibility of recourse questions, as well as issues concerning affected insurance companies.

The decision of 14th May 2019 by the Norwegian Supreme Court in the Nexans-case – HR-2019-912-A – is a good example of these complexities.[2] But first of all, the unanimous Court ruling provides guidelines for the determination of a number of issues, and these are the topic of this article.

[2] On the home page of the Supreme Court – https://www.domstol.no/hoyesterett – there is an English translation of the judgment, which is used in this article; however, with some reservations on my side which will appear from some of the notes.

II. The Nexans-case – an outline of the factual background

The facts of the case are, in short:

Nexans had undertaken to transport a cable from its production plant in Northern Norway to North England. The first leg of transport, from Northern Norway to the Stavanger area by truck, was arranged by Nexans. For the remaining distance, Nexans engaged Kuehne + Nagel (KN). The cable, for the remote control of subsea vessels, was more than 3,3 km long and rolled up on a drum, with a total weight of about 20 tons

The truck delivered the drum to KN's terminal in Risavika (close to Stavanger). KN engaged Pentagon to carry out the transport from there to the final destination, and Pentagon in turn engaged three subcontractors:

(i) *Lode* to bring the cargo on an open trailer from KN's terminal to the terminal of Sea-Cargo – a distance of a little more than 2 km, most of it on public roadway,

(ii) *Sea-Cargo* to carry the trailer by ship to Immingham in England – a distance of about 380 nautical miles, normally covered in about 20 hours, and

(iii) *an English truck company* to take the trailer about 260 km from Immingham to the final destination.

Lode placed and secured the drum on the trailer, and on arrival at the terminal of Sea-Cargo, the trailer was drawn on board the vessel M/V Norrland by Sea-Cargo's servants. The trailer was secured to the deck.

Shortly after departure from the terminal, the vessel encountered heavy wind and waves which caused heeling up to 35 degrees, and eventually the drum loosened from the trailer and fell onto other cargo. It was agreed that the cable was a total loss.

III. The claims resulting from the casualty

The casualty resulted in two claims:

(i) Nexans and its cargo insurerer Axa claimed damages for the loss of the cable from KN, and

(ii) KN presented a recourse claim against Pentagon in the event that KN were held liable towards Nexans.

The basic issue in Nesdan's claim was whether the incident was subject to the Maritime Code or the Road Carriage Act. Before discussing the reasoning of the Supreme Court, I mention the contractual ties between Nexans and KN, and give a short summary of the possibly relevant stipulations in both the Code and the Act.

IV. The contractual relationship between Nexans and KN

Nexans and KN had cooperated since 2004 and their relationship had been formalised in a framework agreement of 2014, which referred to NSAB 2000.[3] The actual contract was initiated by a short e-mail sent on 10th November 2014 from Nexans ordering the transport; this was 3 days before the cargo arrived at KN's terminal. On 14th November, KN issued a waybill, stating that the total transport was subject to the CMR-convention and the Norwegian Road Carriage Act.

[3] NSAB = General Conditions of the Nordic Association of Freight Forwarders

V. The relevant enactments

The damage occurred on a sea voyage, and a sea voyage from Norway to England is subject to the mandatory rules in the Maritime Code of 1994 – which in this respect is in conformity with the Hague-Visby Rules.[4] The carrier is liable for cargo damage, unless he can show that the loss was not due to his personal fault or that of anyone for whom he is responsible (Section 275). The liability is, however, subject to two important exceptions regarding loss due to nautical error or fire (Section 276). In addition, there are provisions on limits of liability (Section 280), but this protection is lost if it shown that the carrier "personally caused the loss wilfully or through gross negligence and with knowledge that such loss would probably arise" (Section 283).

The Road Carriage Act of 1974, which is in conformity with CMR,[5] also has mandatory liability rules applicable to the case under review. The liability regime is, however, close to strict liability (Sections 27 to 29). In addition, liability is here subject to limitation, but with higher amounts than in sea carriage (Section 32); and, furthermore, the right to limitation is lost when the damage is caused wilfully or with gross negligence, not only by the carrier himself, but also by *anyone* for whom he is responsible (Section 38).

In principle, there are two separate regimes, and problems would appear to arise only when there is uncertainty as to whether damage occurred during the sea or during the road carriage. However, according to the Road Carriage Act, Section 4 damage may be subject to the Road Carriage Act even if the damage occurs on a vessel:

> *"If a vehicle with cargo is carried for part of the transport distance by vessel, train or aeroplane and the cargo is not unloaded from the*

[4] Hague-Visby Rules = Convention for the unification of certain rules of law relating to Bills of Lading, 1924, and Protocol to amend the International Convention for the unification of certain rules of law relating to Bills of Lading, 1968.

[5] CMR = Convention on the contract for the international carriage of goods by road of 1956. However, with some notes where – in my opinion – the translation is unfortunate.

> *vehicle, except for the reasons listed in Section 22, this Act is nevertheless applicable for the total transport.*
>
> *However, if it is proven that loss, damage or delay occurred under the transport during other means of transport which is not caused by the road carrier, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the road carrier is determined by the rules applicable to carriage of cargo with the other means of transport … " (my translation).*

Summing up: A road carriage contract may cover a sea leg, but difficult liability questions may arise when the cargo is damaged on board a vessel.

VI. One or several transport agreements?

When a transport is dependent upon the use of different means of transport, the result may be that the cargo owner is party to several separate contracts – one with A for the road leg, one with B for the sea leg etc. In principle, he may have all the contracts with the same person, i.e. separate contracts subject to different liability regimes. As stated by the Court:

> *"Which Act or Code is to apply must depend on which means of transport the parties have agreed upon. If they have entered into a contract of carriage by sea, the Maritime Code is applicable, and if they have entered into a road carriage contract, the Road Transport Act*[6] *is applicable" (section 43).*

Whether there is one or separate documents is not decisive, but one document will imply that there is one contract. In our case, there were additional factors indicating one contract:

[6] In conformity with CMR, I prefer Road Carriage Act.

> *"I take as a starting point that Nexans ordered one*[7] *carriage by a short e-mail to KN on 10 November 2014, providing information about the goods and place of delivery. Under the framework agreement between the parties, which is a natural reference in this regard, KN had a right to use sub-carriers and any "reasonable" means of transport, method and route. It was therefore KN or its sub-carrier Pentagon – not Nexans – that decided that parts of the carriage were to be performed by ship, although this decision was undoubtedly an obvious one to make" (section 49).*

However, the framework agreement might indicate that KN's liability depended upon the Maritime Code for the sea leg:

> *"In my opinion, this liability rule cannot in any case be decisive. As mentioned, the Road Transport Act and the Maritime Code contain invariable rules on liability, and liability is thus determined by the Act or Code I am about to choose" (section 51).*[8]

VII. Does the Road Carriage Act imply that there is actual road carriage in Norway?

The Road Carriage Act Section 1 (1) reads:

> *"This Act concerns agreements on carriage of goods by vehicle on road when the carriage is against compensation and according to the agreement shall take place between places in the Kingdom (inland carriage) or to or from the Kingdom or between foreign states whereof at least one has adhered to the Geneva Convention of 19 May 1956 on international carriage on road (international carriage)" (my translation).*

---

7 The word "one" is emphasized by the Court.

8 The translation is here, in my opinion, unfortunate: «in any case» is too definite, "nevertheless" is better; "invariable" should have been "mandatory", and "the Act or Code I am about to choose" should have been "the choice of law I am now discussing".

The Court found this

> *"to mean that in order for the Act to be applicable, the goods must have been carried by road in Norway before they leave the country" (section 38).*

In support of this conclusion, the Court refers to Wilhelmsen, Rett i havn [Transport law in the harbour], 2006 page 38 where, without further arguments, it is stated that a prerequisite is that the transport "comprises an element of road transport in Norway".

The focus on Norway is a little surprising, given that Section 1 has reference to transport "between foreign states".[9]

Having concluded in this way, the next question was whether the contract comprised the necessary element of road transport in Norway. The Court concluded positively since

> *"the location of KN's terminal in Risavika where the transport started, required that the goods were carried by road – at least until reaching a dock. This part of KN's assignment was performed by a sub-carrier – Kåre K. Lode AS – which, in return for payment, pulled the trailer with the goods over a distance of around two kilometres" (section 38).*

As mentioned above, the greater part of the distance was along public roads.

The question of whether a required road transport had taken place had appeared before the Court of Appeal many years earlier, cf. ND 1984 p. 292 containing this essential passage:

> *"The cargo is stowed in the semi-trailer at Heitmann's terminal … Oslo harbour. Thereafter the semi-trailer is connected to a tugmaster and drawn about 300 meters along the quay and on board the vessel 'Grey Master', and then the semi-trailer is disconnected from the tugmaster which is driven ashore again. Having regard to the start-*

[9] Nor is there any mention of this part of Section 1 in ND 1984 p. 292 Court of Appeal (referred to below).

> *ing point within the quay terminal, the distance covered and the purpose of the transport, this has to be characterised as a loading operation. It is added that the driving distance along the quay could easily have been somewhat longer depending on at which berth the vessel was moored, without a different conclusion. In all events it would have been a very modest driving distance" (p. 297, my translation).*

This decision was referred to by the Supreme Court, and it was said that the situation before the Supreme Court differs

> *"from that described in Eidsivating Court of Appeal's judgment in ND-1984-292, the aluminium band judgment, which has been emphasised in legal literature. There, the goods were acquired*[10] *at a dock terminal and loaded onto a semi-trailer, which was then pulled some 300 meters along the dock and onboard the ship. This operation as a whole was considered a loading operation without the characteristics of carriage of goods by road" (section 39).*

VIII. The crucial question: Road or sea transport rules?

Initially the Court states that the question which

> *"Act or Code to apply must depend on which means of transport the parties have agreed on. If they have entered into a contract of carriage by sea, the Maritime Code is applicable, and if they have entered into a road carriage contract, the Road Transport Act is applicable" (section 43).*

Here there is, however, no freedom to choose because of the mandatory legislation, but the stipulations in the framework agreement are not de-

[10] "Acquired" is a somewhat questionable translation of "overtatt"; I would have preferred "taken over" or "taken into possession" or "received".

cisive, but instead "suggests a division of the assignment depending on the means of transport" (section 51). However, we are dealing

> *"with circumstances implying that this is not essential after all. After KN received the order from Nexans, KN issued a bill of lading*[11] *on 14 November 2014, clearly expressing that the entire carriage is 'subject to' the CMR Convention and the Norwegian Road Transport Act. The same was stated on the bill of lading issued by the sub-carrier Pentagon to KN three days earlier. The carriers therefore did not make arrangements for any division or special regulation of the carriage by sea as the frame agreement allowed" (section 52).*

However, KN had argued that the consignment note was issued for customs purposes and that it contained errors, was not signed and was not sent to Nexans until after the damage occurred. The Court did not accept this:

> *"A bill of lading*[12] *functions as evidence even if it is inadequate, see sections 7 and 13 of the Road Transport Act. And in the overall assessment that I am now to make,*[13] *the bills of lading will clearly indicate what KN and Pentagon – that planned, organised and completed the carriage – considered the dominant element of the assignment when the contract was entered into" (section 53).*

Regarding the total assessment, the Court mentioned that the carriage by sea was the longest part of the transport in terms of distance:

> *"But the carriage by road was also significant, and divided into two stages. Against this background, and bearing in mind that the load was to be fastened to the same trailer during the entire journey, the fact that one means of transport was used for a longer distance than the other cannot be given much weight in the overall assessment" (section 54).*

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11 «Bills of lading» is misleading; the Norwegian text uses «fraktbrev», which corresponds to the CMR art. 4 term: "consignment note".

12 See preceding note.

13 Norwegian text: «den helhetsvurdering som her skal skje»; a better translation – in my view – is: «the overall assessment which here has to be made".

The conclusion was that the Road Carriage Act was "applicable as a starting point" (section 55).

My summing up is that the important elements in the Court's assessment are:

(i) a reasonable discretionary evaluation of distances on land and at sea,

(ii) what KN and Pentagon considered as dominant – sea or road carriage – at the time the contract was concluded (section 53), and

(iii) "that the load was to be fastened to the same trailer during the entire journey" (section 54).

Element (ii) has to be used with reservations: KN and Pentagon are not totally free to regulate their relationship, with consequences for the cargo owner. One cannot define as sea voyage what in the eyes of the law is road transport, with the consequence that the cargo owner is afforded less protection than under the Road Carriage Act.

IX. In principle road transport – but was the exception in the Road Carriage Act Section 4 subsection 2 applicable?

1. General principles

Before dealing with the Court's attitude to Section 4 subsection 2, a few remarks are required on what the more general contract law principles appear to entail.

The subcontractor Lode fastened the drum to the trailer, no doubt with knowledge that the trailer should be moved to Sea-Cargo's terminal and then on board a vessel. Whether the drum was securely fastened for road carriage may –based on the facts given in the judgment – be questioned. It is beyond doubt that it was not secured for a sea voyage at that time of the year – bad weather in the North Sea mid-November

should come as no surprise. It may be argued, given the fact that the trailer was due to undertake a sea voyage, that securing for the first road carriage was not sufficient to fulfil the safety obligation, or if this should be considered differently, that there was at least an obligation to inform the vessel that the drum was secured for road transport only. The errors of a subcontractor are attributed to the contractor – here Pentagon, and Pentagon in turn is the subcontractor of KN. I add, if one should find that Lode was not to be blamed, that this is not decisive as then the focus is turned against Pentagon, who had instructed Lode and should have given the relevant information to the ship, and Pentagon was the "servant" of KN.

There were also, undoubtedly, errors committed on board the vessel: Simply securing the trailer was not enough to meet the obligations set down in the Maritime Code Section 262. Then we have the difficult question:

(i) was the error on board the vessel sufficient to cause the damage?, or

(ii) was it a true case of "contributory damage" – was the damage dependent upon the combined effect of Lode's error and the vessel's error?

As for (ii), there is a regulation in the Maritime Code Section 275 subsection 3:

> *"If damage is caused partly by negligence of the carrier (or his servants or agents) and partly by something else (e.g. intervention by a third party, it is necessary to determine the extent to which the damage or loss can be traced to the carrier. There is an important rule on evidence in this connection. It is for the carrier to prove the extent to which the damage was not caused by his fault or neglect" (Falkanger, Bull & Brautaset, Scandinavian Maritime Law (4th ed. 2017) pp. 361–362).*

Summing up:

These considerations are clearly of relevance when we have recourse claims between the contractors on the transport side, but what do they lead to regarding the cargo owner's claim against KN, given the Court's conclusion that the Road Carriage Act is applicable in this respect? Under

this Act KN is obviously responsible. It is sufficient to point to the errors committed by the subcontractors. The crucial question is whether these errors can be characterised as "gross negligence", with the consequence that the right of loss limitation cannot be invoked, cf. the Maritime Code Section 283.

2. The Court's reasoning

The Court's point of departure is

> *"that the liability rules in the Maritime Code applies if the damage is 'not caused by the road carrier, but by some event that could only have occurred in the course of and by reason of' the carriage by sea" (section 60).*

"Caused by the road carrier" clearly must relate not only to the road carrier himself, but also to his subcontractors. However, the Court says that when applying subsection 2, the sea carrier is not included:

> *"Sea-Cargo, that was engaged to carry the goods by sea, is not relevant here, see Bull, Innføring i veifraktrett [introduction to road carriage law] 2000 page 138. Moreover, the wording of the CMR Convention*[14] *– 'caused by act or omission of the carrier by road' – clarifies that the question is whether the road carrier's acts or omissions caused [the word 'caused' emphasised by the Court] the damage. Liability is not to be assessed" (section 62).*[15]

The Court, after having referred to the finding of facts by the Court of Appeal, then concludes that it is clear that the road carrier's failure to secure the goods for the carriage by road[16] "created a risk of damage also

[14] The Court had previously remarked that subsection 2 incorporates Article 2 no. 1 second and third sentence of the CMR Convention and that the subsection must as a starting point be interpreted in the same manner (section 58).

[15] The last quoted sentence might have been translated as: «A negligence assessment is not required".

[16] A careful reading of the judgment does not make it obvious that the securing for road transport was substandard (contrary to the road carrier's obligations) (section 69).

during the journey by sea". However, the mere existence of *such risk* is not considered sufficient to establish that the damage was *caused*[17] by the road carrier (section 68).

The reasoning creates some difficulties. When the Court uses the expression "caused by act or omission", is it then possible to disregard completely "what ought to have been done"? – e.g, to give information on the status of the cargo, cf. MC Section 258 first sentence:

> *"If the goods need to be handled with special care, the sender shall in due time give notice thereof, and state the measures which may be required".*

The Court counters such line of reasoning:

> *"I cannot see the relevance of the road carrier's omission to inform the crew about the inadequate securing of the goods upon delivery. The cable drum, poorly fastened, was placed on an open trailer. I therefore take it that the sea carrier could easily observe the need of securing" (section 72).*

However, the Court continues to state that in any circumstances, it is decisive

> *"that the damage cannot be deemed to have occurred because the risk created by the road carrier materialised. As I see it, it was the sea carrier's subsequent omission that triggered*[18] *the damage" (section 70).*

The Court's view is that only the sea carrier could evaluate the necessity of securing measures and take the required actions. Thus, it was the risk created by the sea carrier that materialised and caused the damage (section 71). In other words: The damage was not caused by the road carrier (section 73).

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17 The Norwegian word used is «forårsaket».

18 The word triggered (Norwegian "utløste") emphasised by the Court.

This conclusion brings us to the final question: Was the loss due to an event that could only have occurred in the course of and due to the sea carriage? The Court's answer is:

> *"In my view, section 4 subsection 2 of the Road Transport Act must also be interpreted to mean that the damage must have occurred as a result of a particular risk related to this means of transport. I refer to Bundesgerichtshof's (BGH's) judgment 15 December 2011 in case I ZR 12/11, which in paragraph 32 shows a similar interpretation of this condition in Article 2 of the CMR Convention" (section 75).*

In the German case it is said that typical examples of such events are loss of the vessel, stranding, heavy sea, and salt water contamination. The case concerned fire, and the German Court stated that whether fire on board a vessel falls within this category cannot be answered in general: the particular circumstances are decisive.[19]

The Supreme Court held that the heeling of the ship because of the rough sea, which in turn made the load slide off the trailer, was an event under subsection 2. It could only have occurred during carriage by sea, since the risk that materialised can exist only on a ship. And this risk is of such a nature that it demands safety measures beyond those required for carriage by road. Although a loaded trailer may also be exposed to damaging sideways impact on the road, the circumstances causing the impact and the risk in general are completely different. On the road, the risk often arises when the vehicle is exposed to strong and direct wind, to changes of direction at high speed or to irregularities in the road surface. During carriage by sea, the goods are placed on a parked vehicle with a risk of moving or sliding off during the journey. Such events may ultimately also affect the stability of the ship (sections 76 and 77).

The final conclusion was – contrary to the view held by the Court of Appeal – that KN's liability had to be decided in accordance with the

[19] «Die Frage, ob es sich bei einem Feuer an Bord eines Seeschiffes um ein für dieses Transportmittel typisches Schadensrisiko handelt, lässt sich nicht generell beantworten. Es müssen vielmehr die bekannten Umstände des Schadenshergangs berücksichtigt werden" (section 34).

rules of the Maritime Code. The way the case had been presented to the Supreme Court, did not give the Supreme Court sufficient information to determine KN's liability under the rules of the Maritime Code. Therefore, the judgment of the Court of Appeal was set aside. The decision in the case concerning the recourse claim was also set aside because of the connection between the two cases.

Jurisdiction to impose national wage and working conditions on board foreign-flagged ships

– a practical approach

Hanna Vik Furuseth[1]

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1. Introduction

The regulation of wage and working conditions on board foreign-flagged ships is feasible. That is the main finding in two reports written in parallel during the spring of 2019; one by the Norwegian law firm Wikborg Rein and the other by researchers at the Scandinavian Institute of Maritime Law at the University of Oslo.

Wikborg Rein's report was commissioned by the Norwegian Ministry of Trade, Industry and Fisheries.[2] The Scandinavian Institute of Maritime Law's report was commissioned by the Norwegian Confederation of Trade Unions, the Norwegian Seafarers' Union and the Norwegian Maritime Officers' Association.[3] Their mandates were, however, identical: To investigate the opportunities and challenges associated with requiring Norwegian wage and working conditions on board foreign-flagged ships in Norwegian waters and on the Norwegian continental shelf.

Several studies have been undertaken in recent years, both at the University of Oslo and elsewhere, to investigate the legal challenges associated with requiring national wage and working conditions on board foreign-flagged ships.[4] The aspect that separates this latest project from the

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2 Wikborg Rein and Oslo Economics, *Vurdering av muligheten til å kreve norske lønns- og arbeidsvilkår i norsk farvann og på norsk kontinentalsokkel*, 2019.

3 Finn Arnesen, Hanna Furuseth, Alla Pozdnakova and Henrik Ringbom, *Norske lønns- og arbeidsvilkår i norske farvann og på norsk kontinentalsokkel*, 2019.

4 Henrik Ringbom, "National Employment Conditions and Foreign Ships – International Law Considerations" in *Scandinavian Institute of Maritime Law Yearbook* 2014, Sjørettsfondet, 2015, pp. 109–151; Henrik Ringbom and Erik Røsæg. *Norwegian employment conditions for foreign flagged off-shore service ships – International and EU law considerations*, Oslo: Scandinavian Institute of Maritime Law, University of Oslo, 2014 [unpublished]; Finn Arnesen and Tarjei Bekkedal, *EØS til sjøs*, Oslo: Scandinavian Institute of Maritime Law, Centre for European Law, University of Oslo, 2017; Finn Arnesen and Tarjei Bekkedal, *Fair wage and working conditions within the European Maritime Space*, Oslo: Scandinavian Institute of Maritime Law, Centre for European Law, University of Oslo, 2017, 2019; Erik J. Molenaar, Alex Oude Elferink and Denise Prevost, *Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags: Aspects of International Law*, Utrecht: Netherlands Institute for the Law of the Sea, Universiteit Utrecht, 2008.

rest, is that it resulted in a legislative proposal, applying the insights from both the institute's report and Wikborg Rein's report to show one way in which Norwegian wage and working conditions may be imposed on board foreign-flagged ships in Norwegian waters and on the Norwegian continental shelf.[5]

This article is based both on the report written at the Scandinavian Institute of Maritime Law, as well as on the legislative proposal. The article thus represents a practical approach to coastal State regulation of wage and working conditions on board foreign-flagged ships.

The two reports and the legislative proposal were all focused on finding ways of securing Norwegian wage and working conditions in Norwegian waters and on the Norwegian continental shelf. However, the questions addressed in so doing will also be relevant outside the Norwegian context. This article extracts some of the most important findings from this mainly Norwegian project, to present them to a wider audience.[6]

The potential regulation of wage and working conditions on board foreign-flagged ships in Norwegian waters and on the Norwegian continental shelf will be subject to the rules and principles of general international law, the law of the sea, international trade law, bilateral trade and shipping agreements, as well as the rules under the European Economic Area (EEA law), which extend EU internal market law to the EFTA Member States Norway, Iceland and Liechtenstein.[7] Rather than

5 Finn Arnesen and Hanna Furuseth, *Forslag til lov, lovendringer og forskriftsendringer for å gjennomføre norske lønns- og arbeidsvilkår i norske farvann og på norsk sokkel – forslag utarbeidet for LO, Norsk Sjømannsforbund og Norsk Sjøoffisersforbund*, 2020. The legislative proposal was, like the report, commissioned by the Norwegian Confederation of Trade Unions, the Norwegian Seafarers' Union and the Norwegian Maritime Officers' Association.

6 The article is an abbreviated and modified version of the author's contributions in Arnesen et al. (2019) and Arnesen and Furuseth (2020). These contributions were in turn based on the author's master's thesis, Hanna Furuseth, "Regulering av lønns- og arbeidsvilkår i kabotasjefart – folkerettslige og EØS-rettslige begrensninger, in *MarIus* no. 517, Sjørettsfondet, 2019. The output of the research has benefitted greatly from fruitful discussions with, and feedback from, Finn Arnesen, Hans Jacob Bull, Alla Pozdnakova and Henrik Ringbom.

7 For a more thorough discussion of these challenges to coastal State regulation of wage and working conditions on board foreign-flagged ships, see Arnesen et al. (2019); Arnesen and Furuseth (2020); and Furuseth (2019).

discuss all of these challenges to coastal State regulation, the focus of this article will instead be on the one challenge that is common to all coastal States seeking to regulate wage and working conditions on board foreign-flagged ships: The question of jurisdiction.

Section 2 of this article addresses how the law of the sea and the rules and principles of general international law affect the coastal State's jurisdiction to impose national wage and working conditions on board foreign-flagged ships. The discussion shows how the imposition of such conditions can be based on the coastal State's sovereignty in ports, internal waters and the territorial sea, and on its sovereign rights in the exclusive economic zone and on the continental shelf. Section 3 is devoted to the main features of the legislative proposal, suggesting how the insights from the previous section can be applied to secure Norwegian wage and working conditions on board foreign-flagged ships in Norwegian waters and on the Norwegian continental shelf.

2. Jurisdiction to impose national wage and working conditions on board foreign-flagged ships

2.1 Introduction

One of the main challenges for coastal States seeking to impose national wage and working conditions on board foreign-flagged ships, is the question of jurisdiction. Jurisdiction is the State's competence under international law to regulate the conduct of physical and legal persons.[8] Prescriptive jurisdiction is the State's competence to make laws, decisions or rules.[9] Enforcement jurisdiction is the State's competence to

[8] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford: Oxford University Press, 2019, p. 440.

[9] Crawford (2019) p. 440.

enforce such rules through executive or judicial measures.[10] The coastal State cannot impose national wage and working conditions on board foreign-flagged ships if it does not have jurisdiction to do so.

Jurisdiction is normally derived from territory or nationality.[11] The coastal State's potential jurisdiction over foreign-flagged ships is based on its territorial jurisdiction, while the flag State's jurisdiction is based on the United Nations' Convention on the Law of the Sea (UNCLOS) art. 91, on the nationality of ships.

UNCLOS regulates the balance between coastal State and flag State jurisdiction by dividing the sea into different maritime zones, where coastal State jurisdiction over foreign-flagged ships will vary depending on the position and actions of the ship. Wherever coastal State jurisdiction is limited, the ship will be left to the jurisdiction of the flag State. The provisions of UNCLOS regulating flag state jurisdiction are included in the Convention's part VII on the high seas. However, it is presumed, both in legal literature and in State practice, that the ship is subject to the flag State's jurisdiction, even when it finds itself in other maritime zones.[12]

The main rule under the Convention is that the coastal State has full jurisdiction, based on its territorial sovereignty, over its land territory, in its internal waters and in its territorial sea.[13] Beyond the limits of the territorial sea, the ship is subject to the exclusive jurisdiction of the flag State.[14] These main principles are nuanced by the provisions of UNCLOS, as well as by the rules and principles of general international law.[15]

The following subsections investigate these nuances of maritime jurisdiction from a coastal State perspective, focusing on how the coastal State's jurisdiction in different maritime zones may be applied to impose national wage and working conditions on board foreign-flagged ships.

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10 Dolliver Nelson, "Maritime Jurisdiction" in *Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum (ed.), Oxford Public International Law, 2010, para. 1; compare Crawford (2019) p. 440.

11 Crawford (2019) pp. 440–447.

12 Ringbom (2015) p. 115.

13 UNCLOS art. 2.

14 UNCLOS art. 92.

15 See also UNCLOS, preamble, at para. 8.

2.2 Internal waters and ports

2.2.1 Overview

Within its internal waters, the coastal State has full jurisdiction. The internal waters are the waters on the landward side of the coastal State's baseline, which is drawn along the low-water line or between appropriate points along the coast.[16] The coastal State's internal waters are, like its land territory, subject to the coastal State's sovereignty.[17] This also applies to ports.[18] Thus, in its internal waters and ports, the coastal State does, as a main rule, have full prescriptive and enforcement jurisdiction over foreign-flagged ships. This entails that the coastal State may choose to make ships present in its ports or internal waters subject to domestic regulation, for instance in relation to wage and working conditions on board the ship, and to enforce such regulations. The coastal State can also regulate these ships by regulating access to its ports.[19]

UNCLOS lays down few restrictions on the coastal State's jurisdiction in its internal waters and ports.[20] However, possible restrictions following from the rules and principles of general international law do apply.[21] Rules and principles of general international law limit the coastal State's jurisdiction over ships present in its ports or internal waters due to distress or force majeure.[22] Furthermore, there is a need for a "sufficiently close

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16 UNCLOS art. 8 cf. art. 14. cf. arts. 5, 6, 7, 9, 10, 11 and 13.

17 UNCLOS art. 2.

18 UNCLOS arts. 8 cf. 5 cf. 11; Erik J. Molenaar, "Port State Jurisdiction" in *Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum (ed.), Oxford Public International Law, 2014, para. 7.

19 See discussion in section 2.2.3.

20 Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 2nd ed., Oxford: Hart Publishing, 2016, pp. 56–57; Ringbom (2015) pp. 116–117. One restriction worth mentioning, is art. 8 (2), upholding the right of innocent passage in some internal waters which had not previously been considered as such. The right of innocent passage will be discussed in section 2.3.

21 UNCLOS, preamble, at para. 8.

22 R. R. Churchill and A. V. Lowe, *The law of the sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 68; Philip C. Jessup. *The law of territorial waters and maritime jurisdiction*, New York: G. A. Jennings Co., Inc., 1927, pp. 194–208.

or substantial connection with the person, fact, or event and the State exercising jurisdiction".[23] The obligations in UNCLOS art. 300 to "fulfil in good faith the obligations assumed under [the] Convention" and to "exercise the rights, jurisdiction and freedoms recognized [therein] in a manner which would not constitute an abuse of right" do also place some restraints on the potential use of the coastal State's jurisdiction in its internal waters and ports. In addition to this, matters internal to the ship are often mentioned as a possible limit on the coastal State's jurisdiction over ships present in its internal waters and ports.[24]

2.2.2 Internal matters

The term "internal matters" refers to matters that are internal to the ship and which do not affect the interests of the port State.[25] Port States often refrain from exercising jurisdiction over internal matters.[26] Whether or not this practice reflects a rule under customary international law, is a matter of some debate.[27] A distinction can be made between the French

[23] Erik J. Molenaar, "Port and Coastal States" in *The Oxford handbook of the Law of the Sea*, Donald Rothwell, Alex Oude Elferink, Karen Scott, Tim Stephens (eds.), Oxford University Press, 2016, para. 16. See also F. A. Mann, «The Doctrine of Jurisdiction in International Law» in *Collected Courses of the Hague Academy of International Law*, No. 3, Leiden: Brill Nijhoff, 1964, p. 49. See discussion in section 2.5.

[24] Bevan Marten, "Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation", in *Jurisdiction over Ships Post-Unclos Developments in the Law of the Sea*, Henrik Ringbom (ed.), Leiden: Brill Nijhoff, 2015, pp. 105–139, on pp. 115–117; Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Hamburg: Springer, 2014, pp. 28–31; Churchill and Lowe (1999) pp. 65–69; Molenaar (2014) para. 12; Ringbom (2015) pp. 123–127.

[25] Molenaar (2014) para. 12.

[26] Molenaar (2014) para. 12.

[27] In an unpublished legal opinion from 2009, commissioned by the Norwegian Shipowners' Association, concerning regulation of wage and working conditions on board foreign-registered supply ships on the Norwegian continental shelf, Alexander Proelss writes on page 8, that "under customary law all matters relevant to the 'peace of the ship' (such as, e.g., employment standards) continue to be governed by the legislation of the flag State even while the vessel is in the internal waters of another State". See also Alan E. Boyles unpublished legal opinion from 1998 on a proposed EU directive on manning conditions for regular ferry services between EU Member States, cited in Marten (2014) p. 193 at footnote 187 and in Molenaar et al. (2008) pp. 102–104. Of a different opinion are, inter alia, A. H. Charteris, "The Legal Position of Merchantmen

approach and the Anglo-American approach. According to the French approach, the port State's jurisdiction over ships in port does not extend to matters that are internal to the ship, unless the port State is asked to intervene or events on board disturb the peace of the port, at which point they cease to be regarded as internal matters.[28] According to the Anglo-American approach, the port State has full jurisdiction over foreign-flagged ships in port, but it may choose not to exercise it.[29]

The question of whether the coastal State has jurisdiction to regulate internal matters on board foreign-flagged ships in port depends on whether a rule reflecting the French approach exists in customary international law. The conditions for the existence of a customary rule of international law are the existence of consistent State practice and the belief among these states that they are conforming to what amounts to a legal obligation (opinio juris sive necessitatis).[30]

The practice of port States refraining from regulating internal matters on board foreign-flagged ships is relatively widespread and uniform.[31] However, this is a consequence of the fact that States adhering to the

in Foreign Ports and National Waters" in *British Year Book of International Law 1 (1920- 1921)* pp. 45–96, p. 46; Malcolm N. Shaw, *International Law*, 8th ed., Cambridge: Cambridge University Press, 2017, p. 413; Jessup (1927) pp. 1 91–194 and 236; Rothwell and Stephens (2016) pp. 58–59; Molenaar et al. (2008) pp. 104–105; Ringbom (2015) pp. 125–126; Marten (2014) pp. 31 and 193–195; and Marten (2015) p. 116.

28 Churchill and Lowe (1999) p. 66–67; Marten (2014) p. 29. See *Avis du Conseil d'État sur la Compétence en matière de Délits commis, à bord des Vaisseaux neutres, dans les Ports et Rades de France* (1806), paras. 4–7. Conseil d'État's position in this case has since formed the basis for French practice, even though the port State's jurisdiction was somewhat expanded in serious crimes, such as murder, later in the 19th century (see Cour de Cassation's ruling *Jally/Tempest* (1859), discussed in Charteris (1920–1921) p. 53).

29 Churchill and Lowe (1999) p. 66. See e.g. *Cunard Steamship Co., Ltd. v. Mellon*, 262 U.S. 100 (1923), which concerned application of the American prohibition laws to ships at port. See also *Lauritzen v. Larsen* 345 U.S. 571 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 U.S. 10 (1963); and *Incres Steamship Co. Ltd. v. International Maritime Workers' Union* 372 U.S. 24 (1963), which all concerned application of American labour laws to foreign seafarers (mentioned in Ringbom (2015) p. 125, footnote 34).

30 These conditions are described, inter alia, by the International Court of Justice in the 1969 *North Sea Continental Shelf Cases*, paras. 73–74 and 77.

31 Churchill and Lowe (1999) pp. 66–68; Marten (2014) p. 30 with further references.

Anglo-American approach have been hesitant to exercise the jurisdiction they believe that they have, while States adhering to the French approach have had an increasingly wide understanding of what disturbs the peace of the port.[32] This makes it difficult to establish that the second criterion for the establishment of a rule of customary international law is satisfied, being the belief among these States that they are conforming to what amounts to a legal obligation. This is also the dominant view in legal literature: Any restraints on the port State's jurisdiction over foreign-flagged ships in port do not follow from customary international law, but rather from internal political assessments, national laws and/or considerations of comity.[33]

The absence of a rule of customary international law reflecting the French approach, does not change the fact that port States often refrain from regulating so-called internal matters on board foreign-flagged ships. It is therefore of interest to assess whether wage and working conditions on board ships would be regarded as internal matters if such a rule existed.

The reasoning behind the concept of "internal matters" is that matters that are internal to the ship, and which do not affect the interests of the port State, should be left to the flag State's jurisdiction.[34] It is important to note that what constitutes "internal matters" and "the interests of the port State", in the eyes of the international community, is constantly evolving.[35] What constituted "internal matters" yesterday, may therefore not do so tomorrow.

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32 Churchull and Lowe (1999) p. 66; Jessup (1927) pp. 191–194; Marten (2014) p. 30; Ringbom (2015) p. 124.

33 See, inter alia, Charteris (1920–1921) p. 46, p. 46; Jessup (1927) p. 191–194 and 236; Marten (2014) pp. 31 and 193–195; and Marten (2015) p. 116; Molenaar et al. (2008) pp. 104–105; Ringbom (2015) pp. 125–126; Rothwell and Stephens (2016) pp. 58–59; and Shaw (2017) p. 413.

34 Ringbom (2015) p. 123.

35 Molenaar (2014) para. 12. Molenaar uses "working and living conditions – including hours and wages – of crew on board foreign vessels that regularly call on ports in States where significantly different conditions apply", as an example of these "evolving dominant views in the international community".

If a rule of customary international law reflecting the French approach were to exist, both Ringbom and Marten assume that employment conditions would be regarded as "internal matters".[36] According to Ringbom, this assumption does not apply to "requirements on working hours and other standards that have a direct bearing on the safe operations of the ship".[37] Marten argues that "even if the internal affairs approach did represent a rule of international law, it has been confined to matters of internal discipline and minor crimes of a kind that would have almost no impact on the kind of safety and environmental measures that make up the bulk of contemporary shipping regulations".[38]

Applying the French approach, Marten's and Ringbom's assumptions, which are supported by widespread practice of port States enforcing security and environmental standards on board foreign-flagged ships, can be explained by the fact that such standards in fact do affect "the interests of the port State".[39] Security and environmental standards on board foreign-flagged ships affect the port State's interests, both by affecting security at sea and by affecting the environment along the coast, and because the port State may often be obliged by international instruments to enforce such standards.[40] This same logic can be applied to wage and working conditions, including both hours and wages, at least for ships that are operating in the port State's territorial waters and exclusive economic zone and on its continental shelf.

Wage and working conditions on board foreign-flagged ships present in port do affect the port State's interest. This is because such conditions on board may affect safety at sea along the coast, and because these ships are affecting wage and working conditions in the port State, inter alia by competing with other ships and seafarers working and living in the port State. Furthermore, port States are often to some degree obliged to exercise jurisdiction over such matters, under provisions concerning

36 Marten (2015) pp. 115–116; Ringbom (2015) pp. 123–124.

37 Ringbom (2015) p. 124, note 29.

38 Marten (2015) p. 116.

39 Compare Churchill and Lowe (1999) p. 67.

40 See discussion in WTO Council for Trade in Services, Maritime Transport Services Background Note by the Secretariat (S/C/W/315), 2010, para. 106.

port State control established by international conventions on seafarers' wage and working conditions.[41]

Some port States do already impose requirements related to wage and working conditions on board foreign-flagged ships. When Australia in 2008 introduced regulation of wage and working conditions on board foreign-flagged ships in Australian ports, there were few international objections.[42] This may be indicative of considerable international acceptance for such use of port State jurisdiction.[43] Even if a ban were to exist in customary international law against regulating internal matters on board ships, there would therefore be good reason to believe that it would still be possible to regulate wage and working conditions on board foreign-flagged ships operating in the port State's waters or on the port State's continental shelf.

2.2.3 Port entry conditions

In addition to applying its domestic laws to foreign-flagged ships present in port, the coastal State can regulate wage and working conditions on board foreign-flagged ships by regulating access to its ports. With the possible exception of ships in distress and situations of force majeure, foreign ships have no general right of access to port.[44] The right of the coastal State to regulate access to its ports is clearly expressed in the *Nicaragua* case, where the International Court of Justice stated that "[i]t is

41 WTO S/C/W/315 (2010) para. 106. See e.g. the Maritime Labour Convention art. V (1), (4) and (6) and regulation 5.2; and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) art. 8 (4). For examples from EU law, see Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports art. 1; and Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control.

42 Marten (2014) p. 195.

43 Ringbom (2015) p. 126.

44 Molenaar (2014) paras. 7–9; Marten (2014) pp. 31–33; Marten (2015) pp. 114–115; Molenaar (2016) pp. 283–285.

[...] by virtue of its sovereignty that the coastal State may regulate access to its ports".[45]

The right to regulate access to port also entails the right to make both access to and presence in port subject to certain conditions.[46] This aspect of port State jurisdiction does not follow explicitly from any treaty, but it is assumed in, and follows implicitly from, several international instruments.[47] One example is UNCLOS art. 25 (2), from which it follows implicitly that the coastal State may impose conditions for access to both its internal waters and ports outside its internal waters.

The right to impose conditions for access to port has in practice been used by port States to regulate matters beyond the ports and internal waters of the port State, and even far beyond its territorial waters. One example is the Court of Justice of the European Union's (CJEU) ruling in the *Air Transport Association of America* case, where the CJEU accepted port State jurisdiction as a basis for making the EU's scheme for greenhouse gas emission allowance trading apply to flights between EU Member States and third countries.[48] Such use of port State jurisdiction is, however, not uncontroversial.[49] One reason for this is that the port State's jurisdiction will always be competing with the flag State's jurisdiction

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45 *Case concerning military and paramilitary activities in and against Nicaragua*, International Court of Justice, Judgment, 27 June 1986, ICJ Reports 1986 p. 14., para. 213.

46 Marten (2014) p. 201; Ringbom (2015) p. 119. See for instance the US Supreme Court's ruling in *Patterson v. Bark Eudora* 190 U.S. 169 (1903), on p. 178: "the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose".

47 See discussion in WTO S/C/W/315 (2010) para. 106. See e.g. MLC art. V (1), (4) and (6) and regulation 5.2; MARPOL Convention art. 5 (4); and STCW Convention art. 8 (4). See also UNCLOS arts. 25 (2), 221 (3) and 255.

48 Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864. See also case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, ECLI:EU:C:1992:453, where the CJEU found that a European prohibition on transporting and storing salmon caught in the North Atlantic could be enforced against a vessel registered in Panama. The justification was that where any ship is in a port of a Member State, it is "generally subject to the unlimited jurisdiction of that State" (para. 29).

49 Marten (2014) p. 211.

and the interests of the flag State, in particular when the ship is outside the territorial waters of the port State.[50]

2.2.4 Cabotage

For ships transporting goods or passengers between domestic ports, port State jurisdiction may be applied in combination with the coastal State's right to regulate maritime cabotage. The term "cabotage" refers to the transport of goods or passengers between domestic ports.[51] The coastal State's right to regulate maritime cabotage is based on its long-recognised right to reserve domestic shipping for national ships, which in turn is based on its territorial sovereignty.[52] A report published by Seafarers' Rights International in 2018 documents that 91 United Nations Member States restricted foreign-flagged ships' access to their domestic cabotage markets, which implies that 80% of the world's coastlines were subject to such regulations.[53]

While port State jurisdiction is based on the ship's presence in, or potential access to, port, the right to regulate cabotage covers the ship's entire voyage from one domestic port to the other, even if this involves moving outside the internal, or even territorial, waters of the coastal State.[54] The right to regulate cabotage may therefore justify a more extensive use of port State jurisdiction when regulating ships performing cabotage.[55]

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50 UNCLOS art. 92.

51 Robert C. Lane, "Cabotage", in *Encyclopedia of Public Inernational Law* (vol. 8), Rudolf Bernhardt (ed.), Amsterdam: North-Holland, 1985, pp. 60–62, p. 61.

52 Marten (2014) pp. 199–201; Ringbom (2015) pp. 147–148. See also Institut de Droit international, *Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers,* Session de La Haye – 1898, art. 5 (1) and (3): "L'Etat comme souverain a le droit […] [d]e réserver pour ses nationaux certaines branches de commerce, d'industrie ou de navigation".

53 Deidre Fitzpatrick et al. (eds.), *Cabotage laws of the world*, Seafarers' Rights International, 2018, p. 10.

54 Lane (1985) p. 61 writes that this right to regulate cabotage also covers cabotage between colonial powers and their overseas territories.

55 Marten (2014) p. 201, Ringbom (2015) pp. 147–148.

2.3 Territorial sea

2.3.1 Overview

The coastal State's sovereignty extends, beyond its land territory and internal waters, to an "adjacent belt of sea, described as the territorial sea".[56] As the internal waters and ports, the territorial sea is thus subject to the sovereignty and full jurisdiction of the coastal State.[57] The coastal State's sovereignty in the territorial sea is exercised subject to UNCLOS and other rules and principles of general international law.[58] The most important limitation in this regard is the right of innocent passage.[59]

2.3.2 Innocent passage

UNCLOS art. 17 grants ships of all States "the right to innocent passage through the territorial sea". Innocent passage is defined in UNCLOS arts. 18 and 19, excluding passage that is "prejudicial to the peace, good order or security" of the coastal State.[60] The term "passage" is explained in art. 18 as being

> navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
>
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.

Accordingly, ships proceeding to or from internal waters or ports will have a right to innocent passage through the territorial sea.[61]

For ships present in the territorial sea that are not engaged in innocent passage, the coastal State's jurisdiction is unlimited by the provisions of

56 UNCLOS art. 2 (1).
57 UNCLOS art. 2 (1).
58 UNCLOS art. 2 (3) and preamble, at para. 8. See e.g. arts. 24 and 300.
59 UNCLOS art. 17.
60 UNCLOS art. 19.
61 UNCLOS art. 17, cf. art. 18 (1) b).

the Convention, save for the requirement of good faith and prohibition of abuse of rights in UNCLOS art. 300. Accordingly, these ships can be subject to coastal State regulation of wage and working conditions in the same manner as ships present in the coastal State's internal waters and ports. It follows from UNCLOS art. 25 (1) that the coastal State "may take the necessary steps in its territorial sea to prevent passage which is not innocent".

For ships engaged in innocent passage, coastal State jurisdiction is limited. It follows from UNCLOS art. 21 (1) that the coastal State may adopt laws and regulations relating to innocent passage in the territorial sea in respect of, inter alia, navigation, resource preservation and exploitation, environmental protection, and the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State. However, such regulations may "not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards".[62]

Based on the wording of article 21 (1), which only states what the coastal State "may" do, the coastal State's jurisdiction to adopt rules not covered by the list in art. 21 (1) is somewhat unclear. Churchill and Lowe argue that the coastal State, by virtue of its sovereignty, has full jurisdiction to apply legislation regarding matters not listed in art. 21 (1) to foreign-flagged ships engaged in innocent passage.[63] Barnes, on the other hand, argues that the list in art. 21 (1) of what the coastal State "may" do, is exhaustive.[64]

For the purposes of the potential regulation of wage and working conditions on board ships in the coastal State's waters and on its continental shelf, this discussion is of limited interest. The reason is that the limitations on the coastal State's prescriptive jurisdiction over ships

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62 UNCLOS art. 21 (2).

63 Churchill and Lowe (1999) p. 95.

64 Richard A. Barnes, "Article 21" in *United Nations Convention on the Law of the Sea A Commentary*, Alexander Proelss (ed.), München: Verlag C. H. Beck oHG, 2017, pp. 199–208, p. 201.

engaged in innocent passage do not affect the coastal State's right to impose conditions for access to port.

UNCLOS art. 25 (2) states that "[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject". Thus, the coastal State even has the same enforcement jurisdiction over ships engaged in innocent passage, but breaching the coastal State's port entry conditions, as it does over ships engaged in passage which is not innocent.[65]

2.4 Exclusive economic zone and continental shelf

2.4.1 Overview

Beyond the limits of the territorial sea, the ship is subject to the exclusive jurisdiction of the flag State.[66] UNCLOS art. 92 states that ships shall be subject to the flag State's exclusive jurisdiction on the "high seas".[67] The high seas include "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".[68]

The exclusive economic zone is an "area beyond and adjacent to the territorial sea", extending up to 200 nautical miles "from the baselines from which the territorial sea is measured".[69] The continental shelf is the "seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend

65 Compare UNCLOS art. 25 (1).
66 UNCLOS art. 92.
67 UNCLOS art. 92.
68 UNCLOS art. 86 (1).
69 UNCLOS arts. 55 and 57.

up to that distance".[70] This means that the waters above the continental shelf may be part of either the exclusive economic zone or the high seas.

According to UNCLOS art. 58 (2), "[a]rticles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with [the Convention's part V]", which contains specific provisions relating to the exclusive economic zone. Accordingly, the main principle of exclusive flag State jurisdiction applies, both on the high seas above the continental shelf and in the exclusive economic zone.

Meanwhile, the coastal State does have sovereign rights for the purpose of exploring and exploiting natural resources in the exclusive economic zone and on the continental shelf.[71] These sovereign rights can form the basis of regulations that can enable the imposition of national wage and working conditions on board foreign-flagged ships in the exclusive economic zone and on the continental shelf, without exercising jurisdiction over these ships.

2.4.2 Exclusive flag State jurisdiction

There is some discussion in legal literature as to whether the exclusivity of flag State jurisdiction according to art. 92 applies to both legislative and enforcement jurisdiction, or only to enforcement jurisdiction.[72] The provision's context in the Convention may lend support to the interpretation that it is limited to enforcement jurisdiction only, as all the exceptions to art. 92 contained in the Convention concern enforcement jurisdiction.[73] The background for and considerations behind the provision also support such an interpretation, as the freedom of navigation

[70] UNCLOS art. 76 (1).

[71] UNCLOS arts. 56 and 77.

[72] See e.g. Hoffmann, Albert J. "Navigation, Freedom of" in *Max Planck Encyclopedia of Public International Law,* Rüdiger Wolfrum (ed.), Oxford Public International Law, 2011, para. 22, arguing the former; and Douglas Guilfoyle, «Article 92», in *United Nations Convention on the Law of the Sea A Commentary*, Alexander Proelss (ed.), München: Verlag C. H. Beck oHG, 2017, pp. 700–704, p. 700–702, arguing the latter.

[73] See e.g. UNCLOS art. 110 on the right of visit of warships and art. 111 on the right of hot pursuit.

of the high seas is not threatened by several States having concurrent legislative jurisdiction over the same ship.[74] This discussion is, however, by no means settled.[75]

2.4.3 Sovereign rights of the coastal State

In the exclusive economic zone, UNCLOS art. 56 (1) a) provides that the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".[76] The list of purposes is not exhaustive, and the reference to "other activities" is so worded as to give the coastal State jurisdiction over other economically relevant uses of the exclusive economic zone as well, when made possible through technological developments.[77]

On the continental shelf, UNCLOS art. 77 (1) provides that the coastal State "exercises […] sovereign rights for the purpose of exploring it and exploiting its natural resources".[78] Maggio points out that the coastal State's "sovereign rights" under art. 77 are limited to the purpose of exploring and exploiting the continental shelf's natural resources.[79]

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74 Guilfoyle (2017) p. 702.

75 See the International Tribunal for the Law of the Sea's (ITLOS) judgment in the *M/V "Norstar" Case (Panama v. Italy)*, 10 April 2019, No. 25, para. 225, where the ITLOS states that the principle of exclusive flag State jurisdiction "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas".

76 UNCLOS art. 56 (1) a).

77 Alexander Proelss «Article 56» in *United Nations Convention on the Law of the Sea A Commentary*, Alexander Proelss (ed.), München: Verlag C. H. Beck oHG, 2017, pp. 418–437, p. 428; Churchill and Lowe (1999) p. 167; Rothwell and Stephens (2016) p. 93.

78 UNCLOS art. 77 (1).

79 Amber Rose Maggio, «Article 77» in *United Nations Convention on the Law of the Sea A Commentary*, Alexander Proelss (ed.), München: Verlag C. H. Beck oHG, 2017, pp. 604–614, p. 606, with further references.

A similar understanding is expressed in the preparatory works of the Norwegian Seabed Minerals Act.[80] Here, it is stated that "[t]he law of the sea gives the coastal State access to exercise jurisdiction on the continental shelf limited by what is necessary for the purposes for which the coastal State has sovereign rights or which has a special connection to the exercise of these rights".[81] One can therefore probably conclude that coastal State jurisdiction pursuant to Article 77 is limited to activities that are necessary for or have a special connection to the exploration or exploitation of natural resources on the continental shelf.[82]

The coastal State's sovereign rights in the exclusive economic zone and on the continental shelf entail that the coastal State, in principle, is free to impose as a condition for the activities mentioned above that licensees provide their employees with wage and working conditions in accordance with certain standards, and that they require the same of their subcontractors. Still, the coastal State must exercise its rights with due regard to the rights and freedoms of other States.[83] This includes, inter alia, the exclusive flag State jurisdiction under art. 92 and the freedom of navigation under art. 87.[84]

By regulating licensees involved in resource exploration and exploitation in the exclusive economic zone and on the continental shelf, the coastal State will be able to secure national wage and working conditions on board foreign-flagged ships in the exclusive economic zone and on the continental shelf, without exercising jurisdiction over these ships. Such regulation may therefore be used to impose national wage and working conditions on board foreign-flagged ships, while still being compatible with the rights and freedoms of other States, such as the principle of

80 Act of 22 March 2019 no. 7 relating to mineral activities on the Norwegian continental shelf (Seabed Minerals Act).

81 Prop.106 L (2017–2018) p. 18 [translated by the author].

82 An example of legislation taking such a limitation into account is Canada's Coasting Trade Act (S.C. 1992, c. 31) section 2 (1), which stipulates that in order for activity over or transport to and from the continental shelf to be subject to the Act, it must be related to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada.

83 UNCLOS arts. 56 (2) and 78. See also art. 300.

84 Cf. UNCLOS art. 58 (1) and (2).

exclusive flag State jurisdiction, in any of its interpretations, and the freedom of navigation on the high seas.

2.5 Substantial connection

As mentioned above, the coastal State's jurisdiction is limited by customary international law prescribing the need for a "sufficiently close or substantial connection with the person, fact, or event and the State exercising jurisdiction".[85] Crawford describes a principle of "genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question".[86] This limitation to coastal State jurisdiction applies even if regulation of wage and working conditions can be designed so as to not interfere with any of the provisions of UNCLOS.[87] It can also serve to inform the coastal State's obligations under UNCLOS art. 300, as well as other provisions relating to good faith, reasonableness and the prohibition of abuse of rights.

Paraphrasing Molenaar and Crawford, the principle of substantial connection prescribes the need for a sufficiently close or substantial connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the State exercising jurisdiction.[88] The sufficiency of grounds will often be considered relative to the rights of other States.[89] When assessing whether such a connection exists, one must therefore weigh the jurisdictional base and reasonable interests of the coastal State against the rights and reasonable interests of other States.[90]

When regulating ships in ports and territorial waters, the coastal State's jurisdiction can be based on the principle of territorial sovereignty.[91] As pointed out by Molenaar, "[t]he sufficiency of the territorial principle as a basis for jurisdiction can be presumed unless international

85 Molenaar (2016) p. 287. See also Mann (1964) p. 49.
86 Crawford (2019) p. 441.
87 UNCLOS, preamble, at para. 8.
88 Crawford (2019) p. 441; Molenaar (2016) p. 287.
89 Crawford (2019) p. 441, Molenaar et al. (2008) p. 101.
90 Crawford (2019) p. 441, Ringbom (2015) pp. 132–133.
91 UNCLOS art. 2.

law stipulates otherwise".[92] For ships involved in cabotage between the coastal State's ports and between these ports and installations on the continental shelf, jurisdiction can also be based on the coastal State's right under customary international law to regulate cabotage.[93]

Regulation of wage and working conditions on board foreign-flagged ships may also be linked to the coastal State's reasonable interests in securing both safety and decent working conditions at sea. For ships performing cabotage or work in the coastal State's ports or waters for longer periods of time, this is even more relevant, as such ships and their crews are competing against other ships present in and seafarers living in the coastal State. For ships visiting only one port, the connection will be weaker.

As regards the rights and reasonable interests of other States, the degree of "genuine connection" between flag State and ship will vary. This is because it is up to each individual State to "fix the conditions for the grant of its nationality to ships", and there are no provisions, either in UNCLOS or in similar conventions, regulating the consequences of a lack of the "genuine link" required in UNCLOS art. 91. The rights of the flag State under the Convention, however, such as the freedom of navigation and the right of innocent passage, must of course be respected.[94]

When regulating licensees in the exclusive economic zone and on the continental shelf, State jurisdiction can be based on the coastal State's sovereign rights for the purpose of exploring and exploiting natural resources.[95] Here too, regulation of wage and working conditions on board foreign-flagged ships, in this case indirectly through the licensee, may be linked to the coastal State's reasonable interests in securing both safety and decent working conditions at sea.

The reasonableness of coastal State regulation of wage and working conditions on board foreign-flagged ships in territorial waters and ships

92 Molenaar (2016) p. 287.

93 Marten (2014) pp. 199–201; Ringbom (2015) pp. 147–148. See discussion in section 2.2.4.

94 UNCLOS arts. 87 and 17.

95 UNCLOS arts. 56 and 77.

engaged in cabotage is supported by State practice. As described above, coastal State regulation of cabotage is more the norm than the exception world-wide, and sources referring to the right of coastal States to regulate cabotage date back as far as the late 1800s.[96] As concerns regulation of ships engaged in resource exploration and exploitation in the exclusive economic zone and on the continental shelf, Australia and Canada are clear examples of such practice.[97]

Coastal State regulation of wage and working conditions may be designed as minimum requirements, so as not to interfere with concurrent flag State jurisdiction imposing higher standards. International conventions on safety, environmental standards and working conditions at sea are based on the development of minimum standards and do not, for all intents and purposes relevant to this discussion, prevent individual States from imposing more stringent conditions.[98] By imposing the same requirements on all ships, both foreign-flagged and national, coastal State regulation of wage and working conditions can be designed so as not to breach requirements of non-discrimination and market access in international trade law and EU/EEA law.[99]

In summary, there is strong indication that, even under the "substantial connection test", the coastal State regulation of wage and working conditions on board foreign-flagged ships, when based on its territorial sovereignty in ports, internal waters and the territorial sea, and on its sovereign rights in the exclusive economic zone and on the continental shelf, will be justified.

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96 Fitzpatrick et al. (2018) pp. 10–11; Institut de Droit international (1898) art. 5 (1) and (3).

97 Fair Work Act 2009 (No. 28, 2009, Compilation No. 36) section 33 (1) c) and d) [Australia]; Coasting Trade Act (S.C. 1992, c. 31) section 2 (1) [Canada].

98 See e.g. MLC, preamble, at para. 11, citing the ILO Constitution's art. 19 (8), which "provides that in no case shall the adoption of any Convention or Recommendation by the Conference or the ratification of any Convention by any Member be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation".

99 This is discussed in Arnesen et al. (2019) and Arnesen and Furuseth (2020).

3 A practical approach

3.1 Introduction

As mentioned above, this article is partly based on a legislative proposal applying the insights from the Scandinavian Institute of Maritime Law's report and Wikborg Rein's report, to show how Norwegian wage and working conditions may be imposed on board foreign-flagged ships in Norwegian waters and on the Norwegian continental shelf.[100] The most important feature of the legislative proposal is a proposed Act relating to Norwegian wage and working conditions in Norwegian waters and on the Norwegian continental shelf. This section presents some of the Act's solutions for securing national wage and working conditions on board foreign-flagged ships in Norwegian ports and territorial waters, in the Norwegian exclusive economic zone and on the Norwegian continental shelf. Although the future application of the propositions presented here is uncertain, they may serve as an example of how such legislation can be devised.

3.2 National wage and working conditions

The proposed Act relating to Norwegian wage and working conditions in Norwegian waters and on the Norwegian continental shelf defines "Norwegian wage and working conditions" as "provisions on work and rest periods, wages, including overtime, shift and rotation allowances and inconvenience allowances, and coverage of travel, board and lodging expenses, as laid down in legislation and collective agreements for NOR vessels engaged in the same type of activity".[101] The exact definition is motivated by considerations of EU/EEA law, which will not be discussed here. More important is the provision stating that the proposed

[100] Arnesen and Furuseth (2020); Arnesen m.fl. (2019); Wikborg Rein (2019).

[101] The quotes from the proposed Act are based on an unofficial translation of the legislative proposal, Arnesen and Furuseth (2020).

Act does not prevent employees "from having more favourable wage and working conditions than what is provided for in this Act". The proposed Act thus imposes only minimum requirements, allowing for concurrent flag State jurisdiction securing more favourable wage and working conditions on board.

3.3 Regulation of ships

Subject to limitations following from international law, the proposed Act stipulates that employees working on board ships shall have Norwegian wage and working conditions whenever the ship is in Norwegian ports or internal waters or in the Norwegian territorial sea. The requirement for Norwegian wage and working conditions also applies whenever the ship is in the Norwegian exclusive economic zone or in the waters above the Norwegian continental shelf, provided it is then transporting cargo or passengers between Norwegian ports, or between Norwegian ports and installations on the Norwegian continental shelf.

The regulation of ships is based on Norwegian territorial sovereignty and on the coastal State's right under customary international law to regulate cabotage. The requirement for Norwegian wage and working conditions applies to all ships, both Norwegian and foreign, thus securing consistent regulation and equal treatment.

The requirement for Norwegian wage and working conditions will not apply on board ships that traverse the Norwegian territorial sea without calling on a Norwegian port or entering Norwegian internal waters, call on a Norwegian port or enter Norwegian territorial waters due to force majeure or distress, or are on their way to or from a foreign port. Nor shall it apply to ships that are in a Norwegian port, if they are coming directly from and sailing directly to a foreign port.

These exemptions from the requirement for Norwegian wage and working conditions take into account limitations in customary international law and in UNCLOS art. 18 (2) on coastal States' jurisdiction over ships in situations of distress or force majeure, and the right of innocent

passage through the territorial sea under UNCLOS art. 17, as well as considerations of international trade.

3.4 Regulation of licensees

Subject to limitations following from international law, the proposed Act stipulates that licensees under the Norwegian Petroleum Act,[102] Seabed Minerals Act,[103] Aquaculture Act[104] and Offshore Energy Act[105] are required to ensure that their own employees on board ships, and employees on board ships of their contractors and any subcontractors directly contributing to the performance of the contract, are guaranteed Norwegian wage and working conditions when the ship is in Norwegian ports, internal waters, the Norwegian territorial sea, the Norwegian exclusive economic zone, or in the waters above the Norwegian continental shelf.

The regulation of licensees is based on the coastal State's sovereign rights for the purpose of exploring and exploiting natural resources in the exclusive economic zone and on the continental shelf, as well as on its territorial sovereignty when regulating licensees on its territory.[106] The proposed regulation of licensees is devised to avoid exercising any form of jurisdiction over foreign-flagged ships that are outside Norwegian territory and not performing cabotage, while still securing Norwegian wage and working conditions in the exclusive economic zone and on the continental shelf.

The proposed Act is thus different from e.g. Australian or Canadian legislation regulating ships in the exclusive economic zone and on the continental shelf.[107] In the proposed Act, wage and working conditions on board the ships are only regulated *indirectly*, through the licensee. Consequently, limitations on coastal State jurisdiction over ships, such

[102] Act of 29 November 1996 no. 72.

[103] Act of 22 March 2019 no. 7.

[104] Act of 17 June 2005 no. 79.

[105] Act of 04 June 2010 no. 21.

[106] UNCLOS arts. 56, 77 and 2.

[107] Fair Work Act 2009 (No. 28, 2009, Compilation No. 36) section 33 (1) c) and d) [Australia]; Coasting Trade Act (S.C. 1992, c. 31) section 2 (1) [Canada].

as the right of innocent passage or the exclusive flag State jurisdiction outside territorial waters, need not be taken into account.

3.5 Enforcement

The proposed Act stipulates that supervision of the requirements applying to ships shall be carried out only when the ships are in Norwegian ports. Administrative measures and violation fines may be directed at the employer or the ship owner.[108] This means that enforcement jurisdiction over ships may only be exercised in port, where they are subject to Norwegian territorial sovereignty.

Supervision of the requirements applying to licensees shall be carried out by licensees themselves, by documenting to the supervisory authority that they are complying with the relevant requirements. Non-compliance will be met by administrative measures or violation fines directed at the licensee. Under no circumstance will the supervision or the enforcement of the requirements applying to licensees involve exercising enforcement jurisdiction over foreign-flagged ships.

4 Conclusion

This article started by stating that the regulation of wage and working conditions on board foreign-flagged ships is feasible. And it is. The discussion has shown that coastal State regulation of wage and working conditions on board foreign-flagged ships can be based on the coastal State's territorial sovereignty in its ports, internal waters and territorial sea, and on its sovereign rights in the exclusive economic zone and on the continental shelf. The legislative proposal presented at the end of this article represents but one way in which the coastal State can regu-

[108] Or, more accurately, the ISM company. See the International Safety Management Code (ISM) para. 1.1.2.

late wage and working conditions on board foreign-flagged ships, while interfering as little as possible with the interests of other States. Other ways of imposing national wage and working conditions on board foreign-flagged ships already exist, for instance in Australian and Canadian legislation, and yet others may come to exist in other coastal States in the years to come. Still, the legislative proposal presented in this article, as well as the discussion preceding it, serve to illustrate that it is feasible, within the boundaries set by the law of the sea and the rules and principles of general international law, to secure national wage and working conditions on board foreign-flagged ships.

Ship recycling regulation under international and EU law

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1. Introduction

This article examines the international and EU regulation of ship recycling. The demand for recycling of the European fleet exceeds by far the supply available in European ship recycling markets. Therefore, most European-owned commercial vessels are sent to the recycling facilities of third countries, the majority of which are located in South East Asia.[2] The economic feasibility of using the services of ship scrapping yards located in third countries is also an important consideration for shipowners.

The levels of health, safety and environmental standards on many of these sites are, however, unacceptably low.[3] Ships may contain hazardous, toxic and explosive cargo residues and dangerous built-in substances, such as asbestos and sometimes even radioactive materials. The so-called "beaching" of ships is an extremely dangerous and environmentally harmful shipbreaking, conducted directly onto beaches, where the ship is washed up with the tidal waters. Beaching is practiced in countries such as Pakistan, Bangladesh and India.[4] At the same time, European-flagged or European-owned ships are estimated to represent a major share of the customers at these sites.[5]

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2 See generally Frank Stuer-Lauridsen, Nikolai Kristensen and Jesper Skaarup, *Shipbreaking in OECD*, Working Report No. 18, 2003 (Arbejdsrapport fra Miljøstyrelsen), available at: <https://www2.mst.dk/udgiv/Publications/2003/87-7972-588-0/pdf/87-7972-589-9.pdf> (last accessed 13 April 2020).

3 See Report by the Parliament of Norway on environmental crime (in Norwegian): Meld.St. 19 (2019–2020) Miljøkriminalitet [Environmental Crime], p118–119, available at: <https://www.regjeringen.no/no/dokumenter/meld.-st.-19-20192020/id2698506/> (last visited 26 April 2020). See also reports by IndustriALL Global Union on unsafe accidents in the Bangladesh shipbreaking industry (29.05.2019), *Safety crisis in Bangladesh shipbreaking yards continues*. Available at: <http://www.industriall-union.org/safety-crisis-in-bangladesh-shipbreaking-yards-continues-0> (last accessed 13 April 2020).

4 See ILO, *Ship-breaking: a hazardous work*, 23 March 2015: https://www.ilo.org/safework/areasofwork/hazardous-work/WCMS_356543/lang--en/index.htm.

5 European owned ships are reported to amount to one third of end-of-life ships scrapped in South East Asia: see, e.g., Opinion of the European Economic and Social Committee on 'Shipbreaking and the recycling society' (own-initiative opinion) (2017/C 034/06)

Recently, the problem of beaching and other unsafe shipbreaking practices have come into focus due to both the initiatives by NGOs and media attention.[6] To begin with, the competence to adopt and enforce environmental, social and labour conditions at the ship scrapping facilities lies with the State, in whose territory the yard is located. This State – and private owners of the yard – may or may not respect the applicable minimal international standards. In addition, as explained later, there are no sufficiently rigorous international requirements in force which would regulate the ship recycling industry. The concept of sustainable, safe and environmentally sound ship recycling is vague and leaves a significant margin of discretion to States involved in the shipbreaking business.

Shipowners are also required to choose the recycling facilities for their end-of-life ships according to certain rules and procedures. In some countries, proceedings have been initiated against shipowners, as well as so-called 'cash buyers' of end-of-life ships, which buy up such ships and deliver them to scrapping yards, as well as against other actors involved, such as insurance companies.[7] These cases highlight the legal and practical difficulties faced by the authorities in trying to combat what they view as illegal shipbreaking. These cases also highlight legal uncertainty issues for shipowners, which may – unexpectedly perhaps – end up with a violation of environmental law.

Furthermore, the ability of flag States to address the problem of beaching and other unsound ship scrapping is limited. By imposing certain requirements on the owners or operators of ships (for example, by requiring them only to use sufficiently responsible ship yards and imposing sanctions for non-compliance with such requirements), flag States may prompt shipowners to re-flag the ship to a State with less strict regulations. Indeed, studies report significant discrepancies between flag

and the information published by NGO Shipbreaking Platform at <https://www.shipbreakingplatform.org/> (last accessed 13 April 2020).

6 See, e.g., NGO Shipbreaking Platform (above), www.danwatch.dk and IndustriALL Global Union (n. 3 above).

7 See text accompanying n. 68 below.

States, citing the discrepancy between the 25 largest flag states and the 25 largest flag states for end-of-life ships.[8] In all cases, flag States will probably be unwilling to take more stringent unilateral measures in the absence of global rules.

In practice, once the ship has sailed away from the State where it is registered or where the shipowner has its place of residence, it may be difficult for the authorities of the home State to trace what happens to that ship at a later stage, and prove a possible infringement of applicable rules. In practice, ships are often sold to the yards through middlemen (so-called 'cash buyers'), and ownership of a ship may be transferred to other entities a number of times before the actual scrapping occurs. These operations – even if environmentally and socially ignorant – might be viewed as lawful under applicable national rules.

The further discussion will focus on the international regulation and corresponding EU regulation of ship recycling. At both the international and the EU level, regulatory attempts have been made to tackle the problem of unsafe and environmentally unsound scrapping of ships. Section 2 gives an overview of international instruments. Section 3 examines EU law provisions giving effect to and strengthening the international obligations with regard to safe and sound ship recycling. Section 4 contains some final remarks.

[8] COWI (for European Commission), Support to the impact assessment of a new legislative proposal on ship dismantling, Final report, December 2009, available at: <https://ec.europa.eu/environment/waste/ships/pdf/final_report080310.pdf> (last accessed 13 April 2020) and Urs Daniels Engels, *European Ship Recycling Regulation: Entry-Into-Force Implications of the Hong Kong Convention*, Springer, Heidelberg, New York Dordrecht London (2013), p. 174.

2. International conventions governing ship recycling

2.1 Overview

No specific internationally binding standards currently in force govern ship recycling as such. However, this sector does not operate in an entirely lawless environment. Firstly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter – Basel Convention) lays down a regime for the transporting of waste from State to State, subject to certain environmental and safety standards. Secondly, the IMO Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (not yet in force) sets out provisions on the safe and environmentally sound ship recycling. International non-binding instruments, such as the IMO guidelines,[9] as well as general international environmental law also provide for criteria and standards for the ship recycling industry.

2.2 Basel Convention

2.2.1 The scope of the Convention

Today, the Basel convention is the central international (global) instrument for combatting environmentally unsound ship scrapping.[10] This Convention generally seeks to minimise the generation and transboundary movement of hazardous and other wastes and aims to ensure the environmentally sound management of such wastes.[11] From the outset, the Basel Convention does not entirely outlaw the export of waste but

[9] See n. 32 below.

[10] Adopted on 22nd March 1989. Its ratification status by far exceeds the ratification status of the Hong Kong Convention.

[11] Article 4. On Basel Convention in the ship recycling context see Engels (n. 8 above), p. 124 et seq.

instead requires that export and import states meet a number of obligations with respect to hazardous and other wastes.

Does the Basel Convention apply (and if so, on what conditions) to ships which are to be recycled? The conditions for the application of Basel regime are (1) that ships are covered by the 'waste' definition of the Basel Convention; (2) that they are subject to transboundary movement; and (3) that both the State of export and the State of import are parties to the Basel Convention.[12]

Objections have been raised by some States and industry stakeholders against application of the Basel Convention to ship breaking. It may indeed be questioned whether ships taken out of service to be sent to scrapping are included at all in the definition of «waste». The Basel Convention makes an express exception for wastes which "derive from the normal operations of a ship, the discharge of which is covered by another international instrument."[13] Ships as such and their parts are not excluded from the Basel Convention.

Article 2 of the Basel Convention defines "wastes" as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law."[14] Obviously, the Convention was not designed to deal with ship decommissioning as such, and a ship as a unit is not mentioned in the Basel Convention and its Annex III (List of hazardous characteristics). However, a ship contains materials which are regulated by the Convention in its hull, equipment, cargo and fuel. The operations at ship scrapping yards are included in the examples of operations defined as 'disposal' by the Convention.

In addition, it has also been argued that a ship continues its existence as such until the dismantling operations commence at a yard.[15] In such a case, the element of transboundary movement on which the application of the Convention is contingent, is arguably not present.

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12 Article 4.5 and Engels (n. 8 above), pp 124–125.

13 Article 1(4).

14 Article 2.1. Disposal operations are defined in Annex IV.

15 See Engels (n. 8 above), p. 127, summarizing the debate.

In this author's view, the real problem of the Basel regime is rather of evidentiary character than of substantive legal character: how to prove that there was 'intention to dispose' of the ship before it has left the waters under jurisdiction of the export State.

Although the disagreement as to the application of the Basel regime to ship scrapping persists, national practice and scholarly opinion seem to support the view that the ships may generally be considered as 'waste' within the meaning of the Basel Convention.[16]

2.2.2 Obligations with regard to prevention of export of ships as hazardous waste

It is outside the scope of this article to give a detailed presentation of general obligations envisaged for States parties under the Basel Convention. For the purposes of this article, it is relevant to mention that the Basel Convention requires the export States to prohibit export of hazardous waste in cases where the import State does not provide a written consent to the specific import ("prior informed consent") or has prohibited import of such wastes.[17]

Furthermore, the export State is required to prohibit all persons "under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations".[18] The Convention also does not allow the generator or exporter of wastes to commence the transboundary movement in the absence of a proper written confirmation that requirements concerning the consent of the import State have been fulfilled and a contract exists with the disposer (scrapping yard) on environmentally sound management of waste in question.[19] These obligations prevent (at least in law, if not in fact) owners of ships from moving the

16 See, e.g., Engels (n. 8 above).
17 Article 4(1).
18 Article 4(7)(a).
19 Article 6.

ship destined for scrapping to another State without the notification and proper authorization by the authorities of the export State.

In 1995, a so-called "Basel Ban Amendment" was adopted (in force as of 5 December 2019). This instrument introduced a *total ban* on all exports of hazardous wastes from OECD-countries to non-OECD countries. In the context of ship recycling, this means (if the ban were in force) that only one existing non-Western shipbreaking market – Turkey – can import ships for recycling.

The Basel Convention defines all transboundary movement of wastes without notification and consent or in contravention of the documentation, as well as movement resulting in dumping of hazardous wastes, as being *illegal traffic*.[20] In addition to the requirement to criminalize the illegal traffic of hazardous wastes,[21] the Basel Convention requires that the export States ensure the taking back of the wastes in question or provide for the proper (i.e. environmentally sound) disposal of the wastes.[22] Thus, the ship sent illegally for breaking in another State must, as a general rule, be returned to the export State. This obligation lies primarily with the exporter or generator of the waste.[23]

The Basel Convention requires States to adopt adequate legal, administrative or other measures to implement and enforce the Convention's provisions, including measures to prevent and punish conduct amounting to violation of the Convention's obligations.[24]

2.2.3 Is the Basel Convention adequate to address environmentally unsound ship breaking?

As noted above, the Basel Convention does not contain provisions setting out requirements addressed specifically to owners and operators of ships and shipbreaking yards or recycling facilities. The waste export

[20] Article 9.1.

[21] Article 4.3.

[22] Article 9.2. Article 8 contains a corresponding requirement to re-import waste where the consent has been given but the contract may not be completed.

[23] Article 9.2. (i.e. owner of the ship, cash buyer or another agent).

[24] Article 4.4.

rules are not tailored to address unsound ship scrapping as such. The Basel regime is also weakened by more or less lawful ways of circumventing its requirements, as well as by evidentiary issues and enforcement difficulties faced by the national authorities.

However, the broad scope of the Basel Convention, and the general formulation of the obligations it imposes on export and import States, has also certain advantages. The broad definition of 'exporter', 'carrier' and 'generator'[25] is capable of including a broad range of natural and legal persons involved in initiating, organising, facilitating or performing activities aimed at shipping the vessel to scrapping yards abroad. The notion of a 'shipowner' or a 'shipping company' under the Hong Kong Convention discussed further below is arguably more limited.

However, as the State of export is defined as a State party "from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated",[26] it is unlikely that this definition applies to the flag State in cases where the ship is not located in its territory at the given time. In such a case, the flag State's responsibilities vis-à-vis the sending of its ship to scrapping are unclear. This uncertainty accordingly applies to exporters of waste who are defined as "any person under the jurisdiction of the State of export who arranges for the export of hazardous wastes or other wastes."[27]

The Basel Convention requires both categories of States – export and import – to ensure that the disposal of end-of-life ships is conducted in an environmentally acceptable manner. This general obligation is given effect in a number of specific contexts. For example, the export of waste may not be permitted if the export State has reason to believe that the waste will not be managed in an environmentally sound manner.[28] The "environmentally sound management of hazardous wastes or other wastes" requires actors to take "all practicable steps to ensure that hazardous or other wastes are managed in a manner that will protect human health and

25 Article 2(15), 2(17) and 2(18).
26 Article 2(10).
27 Article 2(15).
28 Article 4(2)(e).

the environment against the adverse effects which may result from such wastes."[29] In this author's view, many reported ship scrapping practices in third States, especially those involving "beaching", are obviously not compatible with this criterion.

Importantly, the Basel Convention also precludes States within which wastes are generated from transferring their obligation to manage these wastes in an environmentally sound manner to import States.[30] The responsibilities thus clearly and unavoidably rest not only on the recycling State but also remain with the State from where the ship is exported.

Although the Basel Convention is far from offering perfect solutions to tackle irresponsible practices in the shipbreaking industry, it has established an important cooperation framework for further developing the international regulation of ship recycling conditions. For example, *Technical Guidelines for decommissioning of ships* (2013) aims to provide some guidance for ship scrapping sites on the "sound treatment of waste". The Guidelines do not rule out the use of beaches if this is combined with measures to prevent discharges. The Guidelines should obviously be understood as encouraging beaching sites to become more environmentally friendly and to only use beaches where absolutely unavoidable, and not as a general acceptance of beaching.

2.3 Hong Kong Convention

2.3.1 Generally

At the IMO diplomatic conference in 2009 held in Hong Kong, IMO member States adopted the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (hereinafter 'Hong Kong Convention').[31] Norway has been a driving force for the

[29] Article 2(8).

[30] Article 4(10).

[31] The Convention is commonly known as «Hong Kong Convention» or «Ship Recycling Convention».

elaboration and adoption of the Hong Kong Convention, and the first State to ratify it (in June 2013).

The adoption of the Convention was preceded by work under the framework of the Basel Convention and under the auspices of the IMO. In particular, the IMO Resolution on Guidelines on Ship Recycling was adopted in 2003.[32] The International Labour Organisation (ILO) has been involved in work to protect the occupational safety and health of workers in the ship recycling industry.[33] The mentioned IMO Guidelines place the ultimate responsibility for ship scrapping conditions on the State where the yard or facility is located, while the shipowners are required, "as far as practicable", to reduce potential problems caused by ship scrapping.

The overarching objective of the Hong Kong Convention is to "effectively address, in a legally-binding instrument, the environmental, occupational health and safety risks related to ship recycling, taking into account the particular characteristics of maritime transport and the need to secure the smooth withdrawal of ships that have reached the end of their operating lives."[34] The Convention is designed to cover a ship's life cycle "from cradle to grave". Importantly for this article, the Hong Kong Convention poses a number of requirements for end-of-life ships.

The main text of the Hong Kong Convention contains 21 Articles with relatively generally substantive and procedural obligations for States parties and the Annex "Regulations for Safe and Environmentally Sound Recycling of Ships" which sets out the detailed provisions of the Convention.

Ship recycling is defined as "the activity of complete or partial dismantling of a ship at a Ship Recycling Facility in order to recover components and materials for reprocessing and re-use, whilst taking care of hazardous

[32] Resolution A.962(23). See also <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_117943.pdf> (last accessed 13 April 2020); Secretariat of the Basel Convention, Guidance for compliant ship recycling facilities in consideration of the requirements of the Basel and Hong Kong Conventions (RWECLTD 4/7/2013).

[33] 2003 tripartite meeting: Safety and health in shipbreaking: Guidelines for Asian countries and Turkey Bangkok, 7–14 October 2003, at: <https://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/meshs-1.pdf> (last accessed 13 April 2020).

[34] The Preamble.

and other materials, and includes associated operations such as storage and treatment of components and materials on site, but not their further processing or disposal in separate facilities."[35]

"Ship Recycling Facility" means a defined area that is a site, yard or facility used for the recycling of ships.[36] Obviously, these definitions are broad enough to include all methods of ship recycling and shipbreaking, including the most unsustainable ones such as beaching.

The Hong Kong Convention applies to all ships sailing under flag of a State party, with the usual exception for warships, naval auxiliary, or other ships owned by or operated only on government non-commercial service, as well as ships under 500 GT and ships operating only in waters under national jurisdiction of a State party.[37] Ships are broadly defined as a "vessel of any type whatsoever operating or having operated in the marine environment and includes submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units (FSUs), and Floating Production Storage and Offloading Units (FPSOs), including a vessel stripped of equipment or being towed."[38] Thus decommissioned oil rigs are also included in the Convention.

2.3.2 Hong Kong Convention obligations for ships (flag States) and Recycling States

The Convention contains provisions setting out obligations relevant for two categories of 'actors': firstly, for ships and shipowners (flag States) and, secondly, for ship recycling facilities (States under whose jurisdiction these facilities operate). In addition, port States, which are parties to the Convention, undertake to conduct inspections of ships flying the flag of a State party when in their ports.[39] The Hong Kong Convention

35 Article 2(10).

36 Article 2(11).

37 Article 3.

38 Article 2(7).

39 Article 8. In addition, No More Favourable Treatment clause in Article 3(4) with respect to ships flying the flag of a non-Party State.

contains minimum requirements for States, which may adopt stricter provisions than those laid down in the Convention.[40]

Requirements applicable to *ships* include restrictions on the use of certain hazardous materials and an obligation for each new ship to have on board an inventory of such materials.[41] Existing ships are required to comply with this requirement "as far as practicable" and within 5 years or earlier if going to recycling before that deadline. In addition to the requirement to have an updated inventory of hazardous materials on board ships, some other provisions ensure further the safety of the ship's recycling processes.

Further, the Hong Kong Convention contains requirements applicable to ships taken out of service ("destined to be recycled") in preparation for recycling. Such ships may only be recycled at an authorized recycling facility subject to a specifically adopted Recycling Plan.[42] Ships are subject to surveys throughout their life time which, among other checks, verify compliance with the provisions on the inventory of hazardous materials. For ships which are to be taken out of service, they must undergo a final survey before being sent for recycling.[43] The inspection shall, among other things, verify that the ship is to be sent to a ship recycling facility that has valid approval.

The Convention also sets out requirements for the *Recycling States* parties to the Convention related to the standards of the recycling facilities, authorization of such facilities as well as inspections, monitoring and enforcement with regard to the facilities.

Importantly, States must ensure that the recycling yards under their jurisdiction accepting ships to which this Convention applies, are authorized in accordance with the regulations in the Annex.[44] Such authorization must be conducted in light of IMO guidelines[45] and must

40 Article 8.

41 Annex Chapter 2 contains Requirements for Ships.

42 Reg. 9 of Annex of the Convention.

43 The Annex also specifies requirements for the International Certificate on Inventory of Hazardous Materials to be issued to ships.

44 Article 6 of the Convention and Regulation 16 of the Annex.

45 See n. 32 above.

include certain elements and criteria applicable to the facilities deserving to be authorized. Such authorization may logically be granted only to the facilities which meet some minimum safety and environmental standards.

Recycling States must adopt national laws and regulations ensuring that the facilities under their jurisdiction are designed, constructed, and operated in a safe and environmentally sound manner in accordance with the regulations of the Hong Kong Convention. The relevant standards must, among other things, include workers' safety and emergency response, environmental rules and internal allocation of responsibilities.[46]

The Annex also requires that the competent national authorities of the recycling State monitor the facility as required by the Hong Kong Convention and investigate infringements and breaches of the recycling rules. If it turns out that the facility no longer meets the requirements for approval, competent national authorities may require the facility to take corrective action, or decide to suspend or withdraw the permit for the facility.

Corresponding obligations apply to flag States with regard to their ships. Flag States and Recycling States shall require that the requirements of the Hong Kong Convention are complied with, and take effective measures to ensure such compliance.[47] Such measures include detection and investigation of violations, as well as adoption of national sanctions for violations. The Convention also requires States parties to impose sufficient sanctions for violations of the Convention's provisions.

2.3.3 What is the future of the Convention?

As noted earlier, ship recycling facilities regulated by the Hong Kong Convention must meet certain requirements for sound environmental and health standards. The standards are quite general and are set out in the Annex to the Convention. The IMO guidelines for the Convention somewhat detail out the requirements of the Convention. However, all in all, neither the Hong Kong Convention nor other international

[46] Chapter 3 of the Annex.

[47] Article 4.

instruments impose either sufficiently explicit environmental requirements or else an outright ban on certain unacceptable ship scrapping approaches (e.g. beaching). In this respect, the national authorities of Recycling States have a wide margin of discretion when granting authorization to the facilities under their jurisdiction.

At the same time, the Hong Kong Convention does not penalize shipowners for using facilities which may be authorized by the national authorities of the recycling State but which are, in practice, incompatible with the Convention's requirements for safe and sound ship recycling.[48] Further, by contrast to the Basel Convention imposing a duty to take the illegally shipped waste back to the export State,[49] there is no obligation to take back the ship sent to a third State for recycling in violation of the provisions of the Hong Kong Convention. The Hong Kong Convention also does not require criminalization of particularly illicit infringements.[50]

The Hong Kong Convention has been criticized by environmental organizations, who argue that, among other limitations/defects, this Convention does not combat but rather tolerates beaching and other unsafe scrapping of ships in developing countries.[51] The Convention arguably permits the export of end-of-life ships without first cleansing them of toxic materials, thereby failing to uphold Basel principles. Per today, only a handful of States have become parties to the Hong Kong Convention; States with the largest ship-breaking markets have not ratified it. A recent ratification by one of the largest shipbreaking States, India (2019), may be a significant step forward in the Convention's entering

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48 However, one source reports that several ship recycling yards in China, India and Turkey have developed appropriate infrastructure and obtained Statement of Compliance Certificates from IACS- member societies: Kanu Priys Jain, Ship Recycling: The Relevance of the Basel Convention, The Maritime Executive, 20th February 2018. Accessible at: <https://www.maritime-executive.com/editorials/ship-recycling-the-relevance-of-the-basel-convention> (last accessed on 13 April 2020).

49 See text accompanying n. 22 above.

50 Article 10.

51 New "Ship Recycling" Convention Legalizes Scrapping Toxic Ships on Beaches of Poor Countries – "A major step backwards", *Toxic Trade News*, 15 May 2009, available at: <://www.fidh.org/en/issues/globalisation-human-rights/economic-social-and-cultural-rights/New-ship-recycling-convention> (last accessed on 13 April 2020).

into force.[52] However, the sufficient acceptance rate is yet to be achieved for the Convention to enter into force.[53] It is not certain when or whether its entry into force will take place in the near future.

3. Ship recycling in the European Union law

3.1 Overview

The European Union is an important actor in the global environmental sector, and has been party to the Basel Convention since 1993.[54] By its competence to adopt secondary legislative measures binding for Member States, the EU not only harmonizes the international law provisions on environmentally sound ship recycling in the EU but may also contribute to the development and enforcement of more stringent standards than States may manage to achieve through international agreements. In addition, the conduct of shipowners and other private actors in the shipbreaking business may be directly regulated by Regulations. Importantly, by adopting high standards for EU actors, the EU is also capable of influencing to a certain extent the safety and environmental standards at the scrapping yards located in *third* (non-EU) States.

The framework based on the Basel Convention is implemented in the Waste Shipment Regulation and is examined further below. This regime has been more recently supplemented by the Ship Recycling Regulation based on the Hong Kong Convention. The latter Regulation applies to

[52] Belgium, Congo, Denmark, Estonia, Norway, Netherlands, France, Germany, Ghana, Malta, Serbia, Turkey, Panama, India and Japan (as of 14 April 2020).

[53] Entry into force provisions are laid down in Article 17, which lays down a number of cumulative conditions to be met. It is required that no less than 15 States have acceded to the Convention, of which the combined merchant fleet is no less than 40% of the world merchant shipping gross tonnage and the combined maximum annual ship recycling volume during the preceding 10 years is at least 3 % of the gross tonnage of the combined merchant shipping of the same States.

[54] Council Decision of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention) (93/98/EEC).

ships flying the flag of an EU/EEA State and excludes such ships from the scope of the Waste Shipment Regulation.

As shipowners may always choose a flag for their ships, they may accordingly choose which Regulation will govern their situation. One of the factors relates to estimated costs associated with complying with the requirements of one or the other Regulation. Arguably, the Ship Recycling Regulation may lead to increased costs for shipowners, because it introduces new documentation and inspection requirements and the duty to scrap end-of-life ships only at the yards approved according to the procedure laid down by that Regulation.

The Waste Shipment Regulation has, in any case, not lost its significance because a significant number of European-owned ships fly the flag of a third State. This Regulation is also incorporated into the EEA Agreement and is thus relevant for shipment of waste to or from the EFTA States Norway, Iceland and Liechtenstein. The following section examines the application of the Waste Shipment Regulation to ships to be sent to recycling.

3.2 Waste Shipment Regulation

The Regulation 1013/2006 on shipments of waste is based on the Basel Convention provisions. The EU fully transposes and implements not only the Convention, but also the 'Basel Ban Amendment' in this Regulation.[55] Thus, the Regulation bans shipments of waste falling within its scope to non-OECD States. Ships are expressly included in the Regulation, which states that it is "necessary to ensure the safe and environmentally sound management of ship dismantling in order to protect human health and the environment. Furthermore, it should be noted that a ship may become waste as defined in Article 2 of the Basel Con-

[55] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190/1 2006. The predecessor is Regulation 259/93. The EU has also incorporated the OECD Decision of the Council C(2001)107/Final Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations (as amended by (2004)20).

vention and that at the same time it may be defined as a ship under other international rules".[56]

Apart from the clarification in the recital that ships may be considered as 'waste', the EU law definition of 'waste' generally follows the Basel provisions, and is spelled out in the provisions of the EU Directive on waste.[57] The concept of waste includes substances or objects, which are disposed of or are being recovered; or are *intended to be disposed* of or recovered.[58]

The Regulation applies to shipment of waste within the EU/EEA Area, to the import of waste to the EU from the third States, and to shipments of waste from the EU to third countries (including non-OECD countries).[59] The latter situation is governed by Title IV of the Regulation, and is the most relevant for this article.

Firstly, all export of waste from the EU to third States destined for *disposal* is prohibited.[60] The operations amounting to disposal are, among other, deposit into or on to land, and land treatment such as sludgy discards in soils or release into seas or oceans.[61] This clearly applies to practices such as beaching of end-of-life ships.

Secondly, the export of waste destined for *recovery* in non-OECD States[62] is prohibited if it involves wastes listed in Article 36(1) of the Regulation, as specified in the related Annexes (which include hazardous wastes). At the same time, shipment of waste on the Green list (Annex II)

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56 Recital 35. The Waste Shipment Regulation preserves the exceptions of the Basel Convention, including the exception for waste generated by the normal operation of the ship within the meaning of MARPOL 73/78 or other relevant instruments. The EU law definition of 'waste' also follows generally the Basel regime and is laid down in the two Directives on, respectively, waste and hazardous waste.

57 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 2008, p. 3.

58 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 2008, p. 3, Annex I.

59 Article 1(1).

60 Article 34.1. EFTA States are subject to further provisions but are not a significant destination for end-of-life ships.

61 Annex II A of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ L 114/9, 2006.

62 www.oecd.org.

for recovery is generally excluded from the regulatory requirements.[63] This list also includes "vessels and other floating structures" to be shipped for breaking, if they are properly *emptied* of dangerous substances. However, older ships are in all cases unlikely to benefit from the Green list because they normally contain built-in hazardous materials. If an end-of-life ship contains a sufficient amount of such materials in its hull, it will not classify as 'green waste' which may be sent to a third State for recovery.[64]

The Waste Shipment Regulation contains provisions envisaging certain legal *implications* of the infringements of its requirements. Importantly, and in line with the Basel Convention, the Regulation contains *take-back* obligations applicable in cases where a shipment of waste cannot be completed as intended or if it was illegal.[65]

Article 50(1) of the Waste Shipment Regulation requires Member States to adopt provisions on effective, proportionate and dissuasive penalties for infringement of the provisions of the Regulation and to take all measures necessary to ensure that they are implemented. Furthermore, the Environmental Crime Directive[66] requires Member States to criminalize seriously negligent or intentional illegal shipment of waste.[67] In the Netherlands, the shipowners and other involved entities were prosecuted for environmental violations after they sent their ships to beaching in India.[68]

Of course, it is possible for shipowners to escape the application of the Waste Shipment Regulation. It may be difficult to prove the intention

63 Article 1(3)(a). See also Engels (n. 8 above), p 44.

64 See Tony George Puthucherril, *From Shipbreaking to Sustainable Ship Recycling*, Martinus Nijhoff (Leiden/Boston), 2010, p. 84 for discussion of French case Sandrein where this was one of the issues raised.

65 Arts 22–24 and 34(4).

66 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (The Environmental Crime Directive), OJ L 328, 2008, p. 28.

67 Article 3(1)(c).

68 The cases are reported here: <https://www.reuters.com/article/us-netherlands-shipping-court/dutch-shippers-sentenced-for-having-ships-demolished-on-indian-beach-idUSKCN1GR2NC> (SeaTrade) and here: <https://www.maritime-executive.com/article/another-dutch-shipowner-fined-for-beaching-a-vessel> (*HMS Laurence*) (last accessed 13 April 2020).

to dispose of a ship – a subjective matter – before that ship is re-flagged and sent abroad with other purposes, such as continued operations or repair. The question is whether it is possible to deduce the intention to scrap the ship from some objective factors, including the age of the ship, the route it takes, the manner in which the transfer is organized (e.g., to cash buyers and similar actors known to be involved with purchasing vessels for shipbreaking etc). In EU case law, the concept of 'waste' is interpreted broadly, so as to ensure the effectiveness of the EU environmental law and the Directives.[69] Even if the substance – or a ship – still has commercial value, it may be considered as 'waste',[70] if the holder has an actual intention to discard it at the time of shipment (for example, because it is only perceived as a burden).[71]

In addition, the ship sold to ship scrapping may leave undetected from a port in an EU/EEA State, thereby escaping the reach of the EU waste shipment rules. In *Tide Carrier/Harrier* case (Norway), the ship did not manage to leave the Norwegian waters because it suffered engine stoppage a short time after having departed from the port. As the national authorities had suspicions that the ship was in reality destined for scrapping at the infamous Alang beach (India), they had the chance to start the investigation against the shipowner, the cash buyer and the insurance company.[72]

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69 C-263/05 Commission v. Italy, para. 33.

70 C-263/05 Commission v. Italy, para. 36.

71 Joined Cases C-241/12 and C-242/12 Shell.

72 For a description of the case, see: <https://www.shipbreakingplatform.org/spotlight-harrier-case/> (last accessed on 13 April 2020). At the time of writing, the cash buyer Wirana accepted a settlement of 7 million Norwegian krone for charges of several environmental violations in relation to Harrier-case.

3.3 EU Ship Recycling Regulation

3.3.1 Overview

Ship Recycling Regulation 1257/2013 was adopted by the European Parliament and Council in 2013[73] with a view of improving the ship recycling conditions and speeding up ratification of the Hong Kong Convention. The Regulation is based on the provisions of the Hong Kong Convention and follows broadly the same logic as this Convention. The overall allocation of the responsibilities between the flag State and the Recycling State is, therefore, preserved by the Regulation. However, the Regulation has also introduced some elements which strengthen the latter's provisions.

The Ship Recycling Regulation applies to ships flying the flag of an EU Member State or the flag of an EFTA State party to the EEA Agreement (i.e. Norway, Iceland and Liechtenstein). Following the Regulation's entry in force, the EU- or EEA-flagged ships are no longer subject to the EU law on export of waste.[74] The Waste Shipment Regulation continues to govern recycling ships under the flag of a third State, even if the ship has European owners. However, the Waste Shipment Regulation still keeps some relevance for ships covered by the Ship Recycling Regulation: e.g. definition of "waste" in the Ship Recycling Regulation is connected to the definitions in the Waste Shipment Regulation.[75]

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73 Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC, OJ L 330/1, 2013.

74 The Regulation was incorporated in the EEA Agreement by the decision of the joint EEA committee nr. 257/2018 of 5 December 2018. In Norway, the Regulation is implemented by a corresponding Regulation nr 1813 (2018), in force as of 6 December 2018.

75 Article 3(2).

3.3.2 Allocation of responsibilities for ship recycling under the Regulation

The Ship Recycling Regulation provides for a number of rules and restrictions concerning materials used for building and equipping the vessels covered by the Regulation. For the purposes of this article, the focus is on the final stage of a ship's life: recycling.[76]

Shipowners' obligations and responsibilities during the final stage of the ship's life are determined in Article 6 of the Regulation. "Ship owner" is broadly defined as "the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship".[77] The definition includes cash buyers and similar intermediaries which take over ownership of the vessel in order to organise or facilitate its moving to a ship recycling yard.

Article 6 requires that the operator of the ship recycling facility is provided by the shipowner with all ship-relevant information which is necessary for the development of the ship Recycling Plan. The intention to recycle the ship in a specified ship recycling facility must also be notified to the flag State administration.

The Regulation also requires that ship operations prior to entering the ship recycling facility are conducted in such a way as to minimise the amount of cargo residues, remaining fuel oil, and ship generated waste remaining on board. Ship owners must ensure that tankers arrive at the ship recycling facility with cargo tanks and pump rooms in a condition ready for certification as safe-for-hot work.[78] It is unclear whether these

[76] For a more detailed discussion of the Regulation, see Puthucherril (n. 64 above) or Engels (n. 8 above).

[77] Article 3(1)(14).

[78] Article 6(3).

provisions are clear enough to ensure that the ship is delivered to the yard entirely free of (toxic and explosive) cargo residues.

3.3.3 EU approval system for ship recycling facilities

A central requirement for shipowners introduced by the Regulation is to send their end-of-life ships to yards which are approved according to the procedure established in the Regulation.[79] In line with the Hong Kong Convention, the recycling yard must be authorized by the national authorities of the State where the yard is located. In addition, the Regulation requires that the yard is approved by the EU Commission, whether the yard is located in an EU Member State or in a third country. The Regulation requires all eligible yards to be registered on the so-called European list made by the EU Commission according to the requirements laid down in the Regulation.[80]

The Regulation sets out more detailed requirements to be met by the recycling yards which qualify for the European list.[81] The Regulation requires, among others, that a ship recycling facility "operates from built structures" and controls all leakages, "in particular in interidal zones" (not mentioned in the Hong Kong Convention).[82] Furthermore, with regard to ship recycling facilities located in third countries, waste management, human health and environmental protection standards must be "broadly equivalent to relevant international and Union standards".[83] In this author's view, the Regulation clearly outlaws typical beaching and similar unsound and hazardous ship scrapping practices.

The additional requirements for the European approval of the ship recycling facilities located in third States are laid down in Article 15. This provision sets out requirements for the applicant facility regarding the documentation of compliance with the standards of the Regula-

79 Article 6(2).
80 Articles 13 and 15.
81 Article 15.
82 Article 13(1)(c) and (f).
83 Article 13(5).

tion. Furthermore, Article 15 stipulates that the yard located in a third country must be inspected by an independent verifier with appropriate qualifications (a classification society). In addition, by applying for the European list, the yard accepts the possibility of a site inspection by the representatives of the Commission, both prior to and after its inclusion on the list. Thus, in practice, the Commission has the final word on the question of what acceptable ship recycling standards are for EU-flagged ships within and outside the EU.

At present, the EU Commission has put into effect the Regulation's approval mechanism by adopting the European list for ship recycling yards in the EU Member States and Turkey.[84]

3.3.4 Consequences of non-compliance with the Ship Recycling Regulation

Like the Hong Kong Convention, the Ship Recycling Regulation requires Member States to adopt effective, proportionate and dissuasive penalties for infringements of the Regulation and to take all the necessary measures to ensure that they are applied.[85] Member States are also required to cooperate in order to facilitate the prevention and detection of potential circumvention and breach of this Regulation.[86]

By contrast to the sanctions regime applicable to ships covered by the Waste Shipment Regulation, infringements of the Ship Recycling Regulation are not covered by the Environmental Crime Directive.[87] It means that individual Member States may determine whether or not

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84 Commission Implementing Decision (EU) 2020/95 of 22 January 2020 amending Implementing Decision (EU) 2016/2323 establishing the European List of ship recycling facilities pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council (Text with EEA relevance), C/2020/200, OJ L 18, 2020, p. 6. Applications from facilities located in third countries (non-OECD) are reportedly under review: <https://ec.europa.eu/environment/waste/ships/list.htm> (last accessed 12 April 2020).

85 Article 22(1).

86 Article 22(2).

87 The Environmental Crime Directive (n. 66 above). Article 30 of the Ship Recycling Regulation envisages a procedure to follow when deciding whether infringements of the Regulation should be covered by the Environmental Crime Directive.

administrative and similar non-criminal law penalties are sufficient and adequate for the purposes of the Regulation.[88]

The Regulation envisages the possibility of taking measures against approved recycling yards in EU Member States, which no longer comply with the applicable requirements: the Member State where that yard is located shall suspend or withdraw the authorisation given to it or require corrective actions by the yard, as well as immediately inform the Commission.[89] The Regulation does not provide for equivalent consequences of non-compliance for recycling yards located in third States, but the yard must keep the Commission updated on changes in the information provided previously on the meeting of standards.[90]

A significant difference from the Basel regime and the corresponding EU Waste Shipment Regulation, is the absence of a take-back obligation for shipowners in the Ship Recycling Regulation. The latter envisages a similar, but not equivalent provision: a *right* for the recycling facility to decline to accept the ship for recycling if the conditions of the ship do not correspond substantially with the particulars of the inventory certificate.[91] In such a case, the shipowner retains the responsibility for the ship and is obliged to inform the flag State administration accordingly.[92]

4. Final remarks

To achieve sustainable, safe and environmentally sound ship recycling, it is necessary to clarify and detail the international law requirements governing this sector. International law has so far not been quite successful

88 Article 30 of the Ship Recycling Regulation envisages a procedure to follow when deciding whether infringements of the Regulation should be covered by the Environmental Crime Directive (n. 66 above).

89 Article 14(4)

90 Article 15(6). In addition, Article 23 provides environmental organisations with the right to request action, which might start a withdrawal process for the approval of a yard which does not comply with the requirements of the Ship Recycling Regulation.

91 Article 6(5).

92 Above.

in the accomplishment of this objective. The Basel regime is complex and not designed to regulate ship recycling, which is a factor compromising its national implementation and its legal certainty for the actors involved, including owners and operators of the end-of-life ships and ship recycling facilities. The Hong Kong Convention is yet to enter into force and has not been tested in practice. In all cases, these conventions obviously contain very broad 'grey areas' of acceptable shipbreaking methods, even if they do not tolerate "beaching" and similarly dangerous and environmentally catastrophic shipbreaking practices.

The legislative steps undertaken by the EU may have strengthened the implementation and enforcement of the Basel and Hong Kong frameworks respectively. Of course, it is not satisfactory that two different regimes apply to end-of-life ships depending on what flag they fly. In this author's view, the Ship Recycling Regulation provides for more legal certainty for shipowners, has a clearer allocation of obligations between shipowners and recycling facilities and is also less extreme than the Waste Shipment Regulation with regard to penalties for infringements. Due to the European approval system, it may also contribute to the improvement of the conditions of yards in the third States. The Ship Recycling Regulation has, however, been criticized by the shipping industry because it increases costs for EU-flagged ships and may thereby affect the competitiveness of the EU fleet.

The Hong Kong Convention and the corresponding EU Regulation is based on the flag State jurisdiction. A commonly known weakness of this approach is the opportunity to avoid these rules by re-flagging vessels under a flag of convenience prior to scrapping. However, rules on waste shipment also have loopholes which raise legal and practical enforcement difficulties for the national authorities. Developments in the national practice show that the authorities in EU and third States may be increasingly willing to combat environmentally unsound shipbreaking.

Cruise ships in Greenlandic waters

Legal prophylaxis and preparedness at the intersection of the law of the sea and real life

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1. Introduction

The navigation of Arctic waters has always been challenging and involved severe risks. This has been clearly illustrated by large-scale maritime disasters, such as the notorious sinking of the Titanic and the running aground of the Exxon Valdez. Both disasters have shown the enormous consequences in terms of loss of human life and environmental damage if things go wrong in the harsh conditions of the Arctic. In recent decades, climate change has improved conditions for maritime navigation and exploitation of natural resources in the Arctic and has consequently led to increased sea-based activity in the area.

The new opportunities for navigating the Arctic have also allowed passenger ships, especially cruise ships with a large number of passengers, to gain access and provide unique tourist experiences that were previously impossible. The Arctic coastal states may have a commercial interest in increased tourism activities, but the coastal states will also share certain responsibilities, such as the need to establish a system of preparedness to deal with situations if things go wrong. Due to the complex conditions in the Arctic, including low water temperatures and harsh weather conditions, there are a number of specific challenges connected to the management of potential disasters. Those challenges would include, for example, how to evacuate a large cruise ship that is carrying elderly passengers after it has collided with an iceberg by Greenland's partly uninhabited east coast.[4]

In March 2019, the cruise ship Viking Sky with about 1300 people aboard, suffered engine failure in harsh weather off the Norwegian coast. The Viking Sky lost power in rough waves and experienced a complete black-out and loss of propulsion. The master broadcast a mayday and instructed the crew to drop both anchors. The anchors did not hold, and the ship continued to drift towards the shore. The general alarm was activated and the passengers and crew began to muster. Although

[4] See The Barents Observer, *Arctic cruise ship boom*: https://thebarentsobserver.com/en/travel/2018/05/arctic-cruise-ship-boom.

the three operational DGs could finally be restarted, the engineers had to continuously balance the electrical load manually. The vessel was manoeuvred towards open waters, still with both anchors lowered.[5]

On receipt of the mayday, the Southern Norway Joint Rescue Co-ordination Centre (JRCC) launched a major rescue operation. It has been reported that the mission completed 30 loads in 18 hours, airlifting almost 500 people, making it the largest public-private helicopter rescue in Norwegian history.[6] Even if the incident resulted in no lost lives, it illustrated with sharp clarity some of the difficulties that can arise when a large cruise ship, carrying many passengers, experiences engine failure in complex conditions and has to be evacuated. A similar situation on Greenland's large and partly uninhabited east coast would most likely be even more complex to deal with. Compared to Norway, and the specific region where the Viking Sky incident happened, the distances involved in Greenland would be significantly greater, and the area's main capabilities and SAR resources are located on the west coast, with the capital Nuuk as the main centre and with the only full-scale hospital in Greenland.

One of the aims of the law of the sea in general is to ensure the safety of maritime navigation and the prevention of disasters, as well as the establishment of a system on land and at sea that is able to respond and save lives, and prevent damage to the marine environment, when things go wrong – this is what we call *legal prophylaxis and preparedness* in the context of this article. The legal framework for maritime navigation is regulated by a complex system of regulation and it can be argued that the United Nations Convention on the Law of the Sea (UNCLOS) is the framework regulation for the legal regime at sea.[7] However, UNCLOS

[5] Accident Investigation Board Norway, Interim report 12 November 2019 on the investigation into loss of propulsion and near grounding of the Viking Star, 23 March 2019, page 5 ff.

[6] See Danmarks Radio, *Et krydstogtskib er i vanskeligheder ud for Norges kyst*: https://www.dr.dk/nyheder/udland/et-krydstogtskib-er-i-vanskeligheder-ud-norges-kyst. See also High North News, *The Viking Sky incident: A warning about what to expect in the Arctic*: https://www.highnorthnews.com/en/viking-sky-incident-warning-about-what-expect-arctic.

[7] UNCLOS is also often perceived as a constitution of the oceans, however, it remains unclear, what this actually means, see on this and more generally on UNCLOS as a

does not contain an exhaustive regulation of all relevant aspects of the legal regime at sea and consequently not all provisions on navigation in Arctic waters and safety. UNCLOS is therefore supplemented by a number of more specific international laws and different forms of regulations, hereunder regulations under the IMO,[8] which, for example, set out specific requirements for ship design, safety procedures and equipment.[9] Furthermore, the law of the sea obligates coastal states to establish effective SAR- systems.[10] The legal framework for navigation in the Arctic waters is further supplemented by international regulations that apply specifically to navigation in polar waters.[11] In addition to these international regulations, there are some legal requirements when sailing passenger ships in Greenlandic waters, including in particular, a reporting and pilotage obligation. This means that the legal framework for navigation with cruise ships in Greenlandic waters is fragmented and that the legal regime, which aims at preventing maritime disaster and securing an effective SAR system, is created by a number of regulations on different levels.[12]

Therefore, the first aim of this article is to draw a picture of the complex regulatory framework which governs the navigation of cruise ships in Greenlandic waters and, more than anything, aiming at preventing disasters with the loss of lives. This means that the article's starting point is an analysis of the legal framework for the safe navigation of cruise ships in Greenlandic waters. The perspective here is a public law perspective, dealing with international public law regulations and regional public law regulations specifically for polar waters and Greenlandic waters.

system of regulation Siig/Feldtmann, UNCLOS as a system of regulation and connected methodology; some reflections on the issues at stake, 2018, MarIus., SIMPLY 502, p. 59 ff.

8 The IMO has adopted about 60 treaties, dealing with various issues related to shipping and navigation, see Henrik Ringbom, *Arctic Shipping from an EU Perspective*, 2018, MarIus., SIMPLY 502, p. 32.

9 See for example SOLAS.

10 See for example SAR-Convention, see further below 3.3.

11 See below 3.1. on the Polar Code.

12 See on the regulation of navigation in arctic waters Henrik Ringbom, *Arctic Shipping from an EU Perspective*, 2018, MarIus., SIMPLY 502, p. 31 ff.

The second aim of the article is to link the legal prophylaxis with the issue of preparedness. This means that the article's second part raises the question of how the *legal prophylaxis* is supported by the *preparedness* on land and at sea. If a cruise ship with over 2000 persons onboard gets into distress and needs to be evacuated in bad weather, can it be expected that the SAR system in and around Greenland would able to deal with the incident? This article will consider the organisation and capabilities of the Greenlandic SAR zone and examine some selected challenges involved in a large-scale SAR situation with a cruise ship in Greenlandic waters.

2. Some general reflections on navigating Greenlandic waters

Greenland covers an area of 2,127,600 km^2. The total Greenlandic marine area covers an area of approximately 2,000,000 km^2. Several significant challenges exist in relation to implementing safe navigation of ships through the region. Radio communications can be affected by atmospheric conditions and there are magnetic disturbances, which means that magnetic compasses can become useless. There are areas along the Greenlandic coastline where a systematic, continuous and comprehensive survey of the sea has not been carried out, which places limitations on the use of the digital sea charts, which currently are not yet complete.[13]

In addition, weather conditions in Greenland are very variable because of the ice, which lowers temperatures and causes dense mists. The ice itself also poses a challenge to safe navigation. Fast ice and pack ice are

[13] See Danish Maritime Authority, *Navigation in Greenland*: https://www.dma.dk/SikkerhedTilSoes/Arktis/SejladsGroenland/Sider/default.aspx with further information and EfS A, *General information regarding Danish, Greenlandic and Faroe waters*, 17.03.2017, version 2.

generally found in Greenlandic waters.[14] Fast ice can reach thicknesses of 60–200 cm. Pack ice is ice that calves from fast ice and moves through Greenlandic waters. The amount and type of pack ice varies from year to year and with the season.[15] There are also icebergs, which are formed by freshwater. Icebergs absorb a great deal of air, which means that the *structure* of an iceberg is different from that of ordinary ice. Icebergs present the greatest hazards to shipping. Only ca. 1/7 of the mass of an iceberg is visible above the waterline.

Weather conditions and ice make it currently impossible to navigate in the northern waters of Greenland during the winter. The sailing season in the northern waters of Greenland is obviously determined by the specific weather and ice conditions each year; usually ships can navigate from April to October. During the winter period, supply ships do not sail to the small northern settlements.[16]

3. The general law of the sea framework relating to navigating in Arctic waters

In 2008, the five Arctic Ocean coastal states signed the Ilulissat Declaration.[17] In this declaration the so-called *Arctic Five* coastal states emphasised, among other things, that the existing law of the sea is sufficient to

[14] Fast ice is defined as sea ice that forms and attaches to a coast, ice walls, ice fronts, banks or grounded icebergs. Pack ice is a term to describe any kind of ice that floats in the water and is not attached to land. On different forms of ice in Greenland see Danish Meteorological Institute (DMI): http://ocean.dmi.dk/arctic/index.uk.php.

[15] On ice conditions in Greenlandic waters see SAR Grønland, Eftersøgnings- og redningstjenesten i Grønland, vol. 2 chapter 8.

[16] Danish Maritime Authority, *Navigation in Greenland*: https://www.dma.dk/SikkerhedTilSoes/Arktis/SejladsGroenland/Sider/default.aspx with further information and EfS A, *General information regarding Danish, Greenlandic and Faroe waters*, 17.03.2017, version 2.

[17] *The Ilulissat Declaration*, Arctic Ocean Conference Ilulissat, Greenland, 27 – 29 May 2008, s. 1–2. The five Arctic Ocean coastal states are the United States, Russia, Canada, Norway and The Kingdom of Denmark (of which Greenland is a part).

regulate the governance of the Arctic Ocean. One of the core concepts of the law of the sea, and UNCLOS in particular, is the *freedom of navigation*.[18] This means that anyone may peacefully navigate all parts of the oceans and the principle of the *freedom of navigation* covers also parts of the oceans that can be hazardous to navigate because of ice and/or weather conditions. States, including coastal states, cannot arbitrarily hinder or completely prohibit the navigation of ships in specific areas. On the other hand, safety is a central concept and consideration in the regime of the law of the sea. Therefore, there might be a completely legitimate basis for supplementary regulation to minimize risks. Such regulation can, for example, be aimed at regulating behaviour or stipulating specific technical requirements.[19]

In general, regulation of behaviour and technical regulation of commercial shipping is achieved through two different regulatory models: either through binding international regulations or through international guidelines and standards, which are developed by the shipping industry itself and by other parties.[20] As legal instruments, the aforementioned international guidelines and standards do not have a binding effect *per se*, and therefore cannot be used directly as tools for enforcement or legal sanctioning where there is a breach of the regulation at hand. This does not necessarily present a problem if they are obeyed, since these types of norms can be appropriate if agreement on a binding rule of law cannot be achieved within the international law regime.

The International Maritime Organization (IMO) is a central regulator when it comes to standards for regulating behaviour of a formal and informal nature. The IMO published two guidelines: *'Guidelines for Ships*

[18] On the concept of freedom of navigation see Rüdiger Wolfrum, *The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective*, in del Castillo (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, 2015, p. 89 ff.

[19] Yoshifumi Tanaka, *Navigational rights and freedoms*, in Rothwell et al. (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 536 ff.

[20] Janusz Symonides, *Problems and Controversies Concerning Freedom of navigation in the Arctic*, in del Castillo (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, 2015, p.230 f.

Operating in Arctic Ice-covered Waters"[21] from 2002 and *'Guidelines for Ships Operating in Polar Waters*"[22] from 2010. They are both non-binding guidelines and thus in legal terms must be characterised as informal sources of law (*soft law)*.[23] In regard to the need for mandatory rules for commercial activities in the Arctic, the IMO has subsequently issued the International Code for Ships Operating in Polar Waters.

3.1. The International Code for Ships Operating in Polar Waters (Polar Code)

The Polar Code's overall aim is to increase maritime safety for ships and passengers and to minimise the risk of pollution in polar waters where this is not sufficiently met by the existing regulations, see in particular article 1 of the Polar Code. The Polar Code is a legal supplement to the existing legal regime, rather than a replacement/termination of existing rules. The Polar Code's application is much more comprehensive and stringent compared to the mentioned guidelines from 2002 and 2010. The difference between the recommendations in the guidelines and regulations in the Polar Code is not just a question of the mandatory nature of the regulations. The recommendations in the guidelines from 2002 are not comprehensive and deal with subjects like waste plants, communication and guidelines relating to navigation and environmental risk.[24] To a large degree, the 2010 guidelines are a repeat of the recommendations given in the 2002 guidelines. In contrast, the Polar Code is much more comprehensive in its requirements. The Polar Code covers two kinds of regulation: mandatory regulations and recommendations which are of a non-binding character.[25]

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21 MSC/Circ. 1056(2002) & MEPC/Circ. 399 (2002).

22 A 26/Res.1024 (2010).

23 On the concept of *soft law* see for example, Harhoff (ed.) et al, *Folkeret*, 2017, p. 122 f.

24 MSC/Circ. 1056, MEPC/Circ. 399 (2002), section 16.1.

25 Such recommendations can over time be regarded as standard practice.

The Polar Code is devised by the IMO's specialist committees for safety (MSC)[26] and pollution MEPC).[27] To ensure international adherence, the Polar Code is implemented through two existing sets of regulations, the SOLAS convention[28] in relation to the part that deals with safety, and the MARPOL Convention[29] in relation to the part that deals with pollution emissions. The Polar Code was adopted in relation to implicit adoption procedure[30] and came into effect at the beginning of 2017 for ships built after this date. Ships that were built before this date have to meet the requirements on their first service. In legal terms, the Polar Code has the status of *lex specialis* in relation to the general law of the sea, since the Polar Code's geographical area of application is limited to Polar waters, meaning the waters of the Arctic and Antarctica. Furthermore, the Polar Code is solely taking into consideration questions relating to the environment and safety. Other questions of the law of the sea, as for example the division of jurisdiction of the law of the sea between flag states, port states and coastal states, continue to be derived from UNCLOS and are not affected by the Polar Code.

In pursuance of the Polar Code, the shipping industry is subjected to obligations and expenses in the form of regulations that relate to ship design, ship construction and equipment and requirements relating to the crew's training and qualifications. The Polar Code's methodology consists of two separate chapters that deal with maritime safety and measures for the prevention of pollution, respectively. Each chapter is divided into two separate sections. The first section contains mandatory requirements and the second section contains recommendations. In particular, it is the Polar Code's mandatory regulations that differentiate it from earlier guidelines in this area.

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26 Maritime Safety Committee, cf. IMO convention Part VII.

27 Marine Environment Protection Committee, cf. IMO convention Part IX.

28 SOLAS: 1974 International Convention for the Safety and Life at Sea.

29 MARPOL: 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto as amended by the 1997 Protocol.

30 See further information by IMO http://www.imo.org/en/About/Conventions/Pages/Home.aspx.

To ensure that ships are approved to navigate in the special conditions of Polar waters, they must be classified. The two parameters that confer value in the establishment of the classification, are the scope of the expected activity, compared to the risk factor. Therefore, ships are assigned to three different categories – A, B and C. Category A ships are designed for operation in polar waters at least in medium first-year ice, which may include old ice inclusions. Category B ships, which are not included in category A, are designed for operation in polar waters in at least thin first-year ice, which may include old ice inclusions. Category C ships are designed to operate in open water or in ice conditions less severe than those included in Categories A and B.[31] All ships covered by the Polar Code's classification must have a Polar Ship Certificate, which is issued after an inspection. In the shipping industry, certification is usually carried out by private classification societies.[32] In other words, a task that is normally carried out by a public sector regulatory authority has been delegated to a private entity.

An example of the implementation of the Polar Code's provisions is the Executive Order no 169/2009 on the use of ice searchlights, which ships must comply with when navigating in darkness.[33] The executive order applies to Greenlandic, Danish and foreign cargo and passenger ships navigating in Greenlandic waters.[34] The public law requirements on the use of ice searchlights applies to both types of ships if the ships have a gross tonnage of 150 or greater. Conversely, if a ship has a gross tonnage of under 150 or is another type of ship, for example a fishing vessel, it is not subject to the requirement that ice searchlights must be used in Greenlandic waters. The decision not to use ice searchlights may be seen as an acceptance of the risk involved, but this might be acceptable

31 For a more detailed explanation of the technical terminology and types of ice, see the Polar Code, Introduction, Section 2 Definitions. See also further information by IMO http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx.

32 See Kristina Maria Siig, Private classification societies acting on behalf of the regulatory authorities within the shipping industry, SIMPLY vol. 482 (2016).

33 Executive Order no. 169/2009 on technical regulations relating to the use of ice searchlights in Greenlandic water (bekendtgørelse nr 169/2009 om teknisk forskrift om anvendelse af isprojektører ved sejlads i grønlandsk farvand).

34 Executive Order no 169/2009, Section 2, paragraph 2 and paragraph 3.

with smaller local vessels where the master and crew generally have an extensive understanding of local conditions. Any breach of the Executive Order will result in a fine or imprisonment.[35]

3.2. Securing of a Search and Rescue System (SAR)

A central element in the law of the sea system with respect to increased safety at sea is the regulation of an effective Search and Rescue System (SAR). UNCLOS only regulates the SAR system to a limited degree, among other things by imposing a duty to render assistance to ships in distress.[36] Similar regulations of the duty to render assistance are also found in other international regulations, for example in SOLAS V, rule 33.[37] The specific regulation of the SAR-system as such is found in the *International Convention on Maritime Search and Rescue* (SAR Convention). The SAR Convention also emphasises the general duty to render assistance. In addition, the SAR Convention imposes an obligation on coastal states to establish an effective SAR system. The central element of the SAR Convention is the coastal states' obligation to establish SAR zones and rescue co-ordination centres and subcentres (SAR Centres). The coastal states are also subject to a number of obligations in relation to emergency services and the handling of emergency situations.

In 2011, the Arctic states under the Arctic council – USA, Canada, Denmark, Iceland, Norway, Sweden, Finland and Russia (also known as "the Arctic 8") – signed the "Arctic Search and Rescue Agreement (Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic)", which established SAR zones for each of the eight Arctic states:[38]

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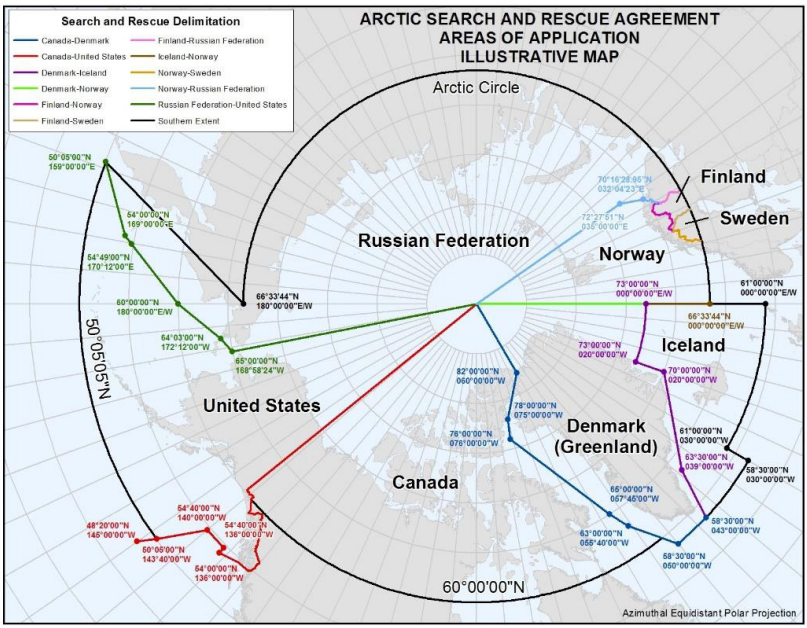
35 Executive Order no 169/2009, Section 6.

36 See UNCLOS art. 98. See also Douglas Guilfoyle, *Article 98*, in Alexander Proeless (ed.), United Nations Convention on the Law of the Sea; A Commentary, 2017, p. 725 ff.

37 See Birgit Feldtmann & Kristina Siig, *Bådflygtninge i Middelhavet – gamle problemer uden nye løsninger?*, in: Hans Viggo Godsk Pedersen (ed.), Juridiske emner ved Syddansk Universitet 2015, 2016, p. 261 ff.

38 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, 2011: https://oaarchive.arctic-council.org/handle/11374/531. On the agreement



As the above illustration shows, the Greenlandic SAR zone, like the other Arctic SAR zones, covers a large geographical area. It is controlled by the Joint Rescue Coordination Centre (JRCC), a unit under the auspices of the Arctic Command in Nuuk.

4. Specific legal prophylaxis in waters next to Greenland

In addition to the afore mentioned international legal regulations, navigating in Greenlandic waters is specifically regulated by a number of

see also Shih-Ming Kao, Nathaniel S. Pearre & Jeremy Firestone, *Adoption of the arctic search and rescue agreement: A shift of the arctic regime toward a hard law basis?*, Marine Policy Vol 36, Issue 3, p. 832 ff.

regulations which have been adopted by the IMO and devised as national regulation. In relation to Greenlandic waters, the Executive Orders' on reporting and piloting obligations are most central. These two Executive Orders cover, what in this article is termed as *legal prophylaxis*, i.e. provisions whose overall aim is to improve maritime safety for passenger ships (and also for commercial shipping) navigating in Greenlandic waters. Section 4.1 begins with a presentation of the executive order on the duty to report and then section 4.2 follows with an analysis of requirements on the use of people with local knowledge or an actual piloting obligation.

4.1. Duty to report when navigating in Greenlandic waters (GREENPOS)

A central element in increasing maritime safety for ships navigating in Greenlandic waters is a requirement to report the position of the ship. The aim of the duty of reporting is to ensure that the authorities have an overview at all times of who is navigating where and are able to be aware of any deviations from planned sailing routes which can indicate an emergency situation.

The duty to report was implemented in 2003 and is regulated by an IMO Circular and the corresponding Danish Executive Order 170/2003.[39] In general, there are two mandatory reporting systems for ships established for Greenlandic waters; however, the GREENPOS system is the one that is of interest to cruise ships.[40] The GREENPOS system is obligatory for all ships navigating in or out of Greenlandic waters, including the Greenlandic EEZ and continental shelf. Ships are obligated to report their position every six hours, the planned route, speed and weather conditions. When a ship navigates into the GREENPOS area, it must send a route plan, which contains the following information: The ship's name and call

[39] IMO circular on the GREENPOS/COASTAL CONTROL, IMO SN/Circ. 221 of 29 May 2002, and Executive Order 170/2003 on ship reporting systems in waters next to Greenland (Bekendtgørelse nr. 170/2003 om skibsrapporteringssystemer i farvandene ved Grønland).

[40] The two reporting systems are GREENPOS and COASTAL CONTROL, see Executive Order no. 170, 2003, section 1, 2.

sign, date and time, position, true course, speed, destination and ETA, intended voyage, defects and deficiencies, weather and ice conditions, and the total number of persons on board and other relevant information.[41]

The GREENPOS reporting system is aimed at ensuring that JRCC Greenland, based in Nuuk, has a clear picture of the movement of ships in Greenlandic waters at all times. The system thus ensures that JRCC Greenland is made aware of ships deviating from the intended voyage or for example which do not report into the system during the six-hour period.

The duty to report is a public law obligation, which can be enforced by criminal law: if the duty is neglected, it will result in criminal sanctions under the Greenlandic criminal law system.[42]

4.2. Specific safety requirements relating to navigation in Greenlandic waters

Another element in the system of legal prophylaxis for Greenlandic waters is the *Executive Order for Greenland on the Safe Navigation of Ships (Executive Order 1697/2015)*, which entered into force on 1 January 2016.[43] The executive order applies to cargo ships with a gross tonnage of at least 150 tonnes and to ships carrying more than 12 passengers. For passenger ships carrying more than 250 passengers, specific strict rules apply. Warships and other state vessels which are not used for commercial service are not covered by the provisions in chapter 3 of the executive order concerning safety requirements.[44]

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41 The specific obligations are defined under Executive Order no. 170, 2003, Grønlands positions rapporteringssystem (GREENPOS) *Bestemmelser for udfærdigelse af meldinger*, see also IMO Resolution MSC.126(75) (adopted on 20 May 2002) Mandatory ship reporting System.

42 Executive Order no. 170/2003, section 5.

43 Executive Order no. 1697/2015 for Greenland on the safe navigation of ships, etc. (Bekendtgørelse for Grønland om skibes sikre sejlads m.v., bek.nr 1697(2015). The provision on the obligation on pilot services entered into force 01.07.2016, see Section 19, paragraph 2.

44 Executive Order 1697/2015, Section 1.

Executive Order 1697/2015 provides some very specific regulation of navigation and thus supplements some of the regulations of the above-mentioned Polar Code and other relevant regulation, such as the Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas.[45] Executive Order 1697/2015 refers directly to UNCLOS' right to innocent passage and the connected limitations of the coastal states' right to regulate passage, however, its aim is to improve maritime safetety and thus give "*effect to generally accepted international rules or standards*", and it is consequently also binding for foreign vessels.[46] Any violation of the obligations of Executive Order 1697/2015 is punishable under Greenlandic or Danish law and can result in a prison sentence of up to two years. As a legal entity, the shipping company can also be punished for violating Executive Order 1697/2015 with a fine.[47]

Executive Order 1697/2015 divides Greenland into a northern and southern navigation zone. Passenger ships with over 250 passengers that navigate the northern navigation zone have to be at least "*Baltic Ice Class 1C*" or a similar ice class.[48] All ships navigating in Greenlandic waters must monitor the ice in an area where there is an ice presence. Vessel speed must be adjusted and an ice searchlight must be used in darkness. Ships must keep to a safe distance from icebergs.[49] When planning the ship's voyage, the shipmaster must take into account a number of factors and details: the safety procedures of the ship's safety management system related to navigation in Arctic waters; any limitations on the information contained in nautical charts and navigation aids; information about the extension and type of ice and icebergs in the vicinity of the planned

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45 Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas, A 25/Res.999 (03.01. 2008)

46 See Executive Order no. 1697/2015, Section 1, paragraph 4 with footnote 1 and UNCLOS art. 21, subsection 2.

47 Executive Order no. 1697/2015, Section 17 and 18. The maximum penalty of two years imprisonment is only applicable in situation where the violation of the Order 1697/2015 is dealt with under Danish criminal law. Executive Order no. 1697/2015, Section 18. The Greenlandic system of criminal justice does not operate with minimum/maximum penalties, see *Kriminalloven* (Criminal Code for Greenland) section 118 and 119.

48 Executive Order1697/2015, § 3 and 13, stk.2.

49 Executive Order 1697/2015, § 4.

voyage on an ongoing basis; statistical information about ice and temperatures from previous years; any possible places of refuge where the ship may be protected or receive assistance; any sea areas designated especially protected areas in the vicinity of the route; voyages in areas with limited search and rescue facilities.[50]

Navigation is prohibited in areas delimited in nautical charts by a dotted line with information about "numerous rock". Navigation in areas labelled in the chart as "foul" or "unsurveyed" is only allowed if the ships follow previously used routes that the shipmaster has assessed would have a sufficient safety margin in relation to the ship's greatest draught and width and the journey takes place in daylight and with "good visibility".[51] When navigating the Southern West Coast near the capital Nuuk, passenger ships with over 250 passengers on board must follow the recommended routes.[52] Those passengers ships are also obliged to have a sufficient ice class, when navigating in areas with ice.[53]

Furthermore, Executive Order no. 1697/2015 establishes some quite specific obligations concerning the training of the crew.[54] In regard to voyage planning, Executive Order no. 1697/2015 requires that shipmasters and shipping companies document the possibility of assistance by other ships or SAR facilities within a reasonable period of time and with sufficient rescue capacity.[55] This requirement is interesting for at least two reasons. First, the issue of "*pairing*", i.e. an obligation for cruise ships to navigate at a closer distance to another cruise ship, was one of the topics discussed under the negotiations of the Polar Code. However, such an obligation was not regulated in the Polar Code. Second, documenting that SAR facilities are within a reasonable period of time from the ship and have sufficient rescue capacity could be a complex issue. As illustrated below, the question of sufficient SAR facilities in and around Greenlandic

50 Executive Order 1697/2016, § 5.
51 Executive Order 1697/2016, § 6.
52 Executive Order 1697/2016, § 14.
53 Executive Order 1697/2016, § 13.
54 Executive Order 1697/2015, § 16.
55 Executive Order 1697/2015, § 15.

waters is not easy to answer, which means it may be quite difficult to meet the Executive Order's requirement.

According to Executive Order 1697/2015, Section 7, ships must have at least one person on board who possesses the necessary local knowledge of the water to be navigated. This individual must be qualified to navigate the ship concerned or have several years' experience in navigating ships of similar size.

For passenger vessels carrying more than 250 passengers in the inner and outer territorial waters of Greenland, specific regulations concerning the obligatory use of pilotage came into force on 1st July 2016.[56] This means that for larger passenger vessels navigating in and out of Greenlandic territorial waters it is mandatory to employ pilot services; in this context it may be noted that the Kingdom of Denmark currently only claims 3 nm as Greenlandic territorial waters and not 12 nm as permitted under UNCLOS art. 3, as claimed for the other parts of the Danish realm.[57] The pilot must be certificated to perform pilotage assignments in the area concerned. The vessel can get permission to navigate without a pilot, if the applicant documents the necessary qualifications and experience navigating in the Polar waters.[58]

In the case of passenger ships with more than 250 passengers, it is fair to assume that these ships are cruise ships whose sailing routes will include visits to destinations in Greenland and destinations outside Greenland.[59] With regard to the practice of meeting the Executive Order's requirements to have a pilot on board when navigating in Greenlandic waters, the pilot, or several if required, may sign on outside Greenland. This obviously depends on the individual ship's sailing route, but usually it takes place in Reykjavik in Iceland.

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56 Executive Order 1697/2015, § 11, § 19, stk.2.

57 See Udenrigsministeriet, Søterritoriet: https://um.dk/da/udenrigspolitik/folkeretten/folkeretten-a/havret/.

58 See Executive Order 1697/2015, § 11, stk.2.

59 There is only one major ferry service in Greenland operated by Arctic Umiaq Line with the ferry Sarfaq Ittuk which can accommodate 238 passengers and 23 crew, see Arctic Umiaq Linw: https://aul.gl/en/aboard/useful-information/.

The piloting company and its employees that carry out the piloting activities, must, in accordance with Greenlandic law, meet the formal requirements for qualifications that are a consequence of the Executive Order 1698/2015 on piloting.[60] Section 5 of the Executive Order 1698/2015 concerns the requirement for local knowledge[61] and states that applicants for piloting certificates must be able to document comprehensive knowledge of the piloting areas, including documentation of long-term navigation in Greenlandic waters. In addition, there must be sufficient knowledge of Greenland and Greenlandic waters. It is not further defined what is understood by knowledge of Greenland and Greenlandic conditions. For people who have not stayed or lived in Greenland for a long period of time, being able to meet the requirement for possessing local knowledge in accordance with Executive Order 1698/2015 and thus being able to carry out piloting in Greenlandic waters, must be considered difficult to achieve. With respect to being able to submit sufficient documentation to demonstrate the required local knowledge, the person in question must submit their discharge book, which must document in detail how their local knowledge has been acquired. This account must be included as an appendix with the employer's declaration for the employment's scope and nature.[62]

It is the Danish Maritime Authority in Denmark which carries individual assessments of whether the requirement for documentation and local knowledge has been met.[63] Currently there is only one provider of piloting services in Greenland.[64]

60 Executive Order 1698/2015 for Greenland on piloting (Bekendtgørelse nr. 1698/2015 for Grønland om lodsning,).

61 Executive Order 1698/2015, section 8, paragraph 1.

62 Executive Order 1698/2015, section 8, paragraph 2.

63 Executive Order 1698/2015, section 8, paragraph 3.

64 Greenland Pilot Service: https://gps.gl.

5. Preparedness

As stated previously, cruise ships that navigate in Greenlandic waters are subject to comprehensive regulations. This regulation can be considered fragmented in that it consists of number of different regulations at different levels, which together form the legal framework that shipping companies and shipmasters must act under when navigating cruise ships in Greenlandic waters. One of the central aims of this regulation as a whole is legal prophylaxis for the purpose of reducing the risk of disasters. Another aim of the regulation is to ensure that rescue operations can be carried out, should this be necessary, also if the vessel in question is a cruise ship that may have many passengers on board. With regard to this, it is crucial, on the one side, that the legal framework is supplemented with emergency response planning and associated training on board. On the other side, this needs to be supported by an efficient emergency response system on land and on sea, for example, a search and rescue system that can deal with the evacuation of passengers and crew in difficult conditions. The following provides a brief insight into the issue of preparedness and the search and rescue (SAR) system in Greenland. The aim is to present some of the central aspects that illustrate the interplay between legal prophylaxis and real-life circumstances when a cruise ship is in distress in Greenlandic waters.

5.1 Preparedness on board

According to chapter 8 of the Polar Code, every ship that navigates in Arctic waters must ensure that it has emergency response planning in the event that the ship is forced to carry out an evacuation. As mentioned previously, Executive Order 1697/2015 also contains a similar obligation. The Polar Code specifies that it must be ensured that there are escape routes and these must be made safe from icing. There must be rescue equipment for both the crew and passengers that is suitable for the weather conditions, including having sufficient insulation. The

rescue equipment must protect against the cold, wind, and sun and must also contain equipment to communicate with rescue assets. All lifeboats have to be closed or partially closed; open lifeboats are not permitted. This is due to the fact that the low temperatures of the Arctic make it necessary to keep warm inside the lifeboats to survive. However, as described below, the survival span of an individual, even in a closed lifeboat, is rather short in the harsh Arctic environment.

The Polar Code does not specifically require that there should be immersion suits for all passengers and crew on board the ship. The Polar Code only requires that there is thermal protective aid. The difference between these two things is crucial should a person fall into cold Arctic water. The likelihood of survival wearing only a thermal protective aid is far less than if an immersion suit is worn.

5.2 The SAR system and preparedness in Greenland

In addition to the ship's equipment and emergency response plan, as mentioned, there are some international law obligations for coastal states in relation to enforcing the regulations and to maintaining an effective SAR system. The implementation of the Polar Code means, for example, that there is a number of tasks that the coastal state must carry out in relation to inspection and enforcing the new rules at shipping companies, as well as in connection with port state inspections. In addition, Denmark/Greenland is obligated to collaborate with the other Arctic nations on the SAR function, including monitoring of the whole Arctic area. As mentioned above, since 2011 this cooperation has been regulated by the "The Arctic Search and Rescue Agreement (Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic)".[65]

In relation to rescue at sea and the agreement between Greenland and Denmark, it is the Danish Defence Forces who are responsible for recue at sea beyond 3 nm, while it is the responsibility of the police in

[65] See above 3.2.

Greenland within 3 nm. However, this does not include large search and rescue actions (defined as search and rescue actions of ships covered by the reporting systems GREENPOS) and rescue tasks in large areas of sheltered water areas and channels, e.g. the Disco Bay, and all search and rescue actions in North Greenland and Northeast Greenland, since there are not sufficient police forces in these areas. Rescue at sea is defined as an effort to assist a ship in distress (and its crew and passengers). The biggest challenges to the rescue operations are the large distances and difficult terrain involved, and the extremely limited infrastructure in Greenland, which presents serious logistical challenges. In Greenland there are no roads linking the towns or settlements. This means that the most important means of transport are by plane, helicopter or ship. Another important challenge in creating an overview of the situation in order to deploy and manage units, is that these may be several thousand kilometres from Arctic Command's headquarters in Nuuk. Establishing channels of communication over very long distances is also a challenge. There are a limited number of airports that can be used by the Danish Defence Forces' large transport planes and monitoring planes. Large civilian passenger aircraft and cargo planes are only able to land at Thule Air Base, Kangerlussuaq and Narsarsuaq. Apart from these three airports, there are very few other airports or landing strips available on the east coast of Greenland and no airports that can handle large civilian aircraft.[66]

The maritime search and rescue centre in Nuuk and the rescue centre in Kangerlussuaq, merged in 2014 to become the Joint Rescue Coordination Centre Greenland, located as an integrated part of Arctic Command's headquarters in Nuuk. JRCC Greenland manages and co-ordinates the Danish Defence Forces' overall search and rescue efforts. In 2011, the "*Den Operative Kontaktgruppe Arktis*" (Operative Contact Group Arctic) was created with the following permanent members: Arctic Command, Greenland Police, coastal radio service Aasiaat Radio and Air Greenland, with the operative operations of civilian SAR helicopters. The aim of the group's creation is to strengthen the inter-organisational

[66] Forsvarsministeriet, *Forsvarsministeriets fremtidige opgaveløsning i Arktis*, 2016, p. 89 ff.

collaboration between the permanent and voluntary players of air and sea rescue operations in the Arctic area.[67] "*Skibsfartens og Luftfartens Redningsråd*" (the Shipping and Aviation Rescue Committee) prepares, approves and publishes the results of the performance of SAR services in Greenland. The three overall requirements in the targets and performance requirements are:[68]

1. Rescue percentage of 94%. In other words, the aim is that the average rescue rate in the Greenlandic SAR-system's geographical area is at least 94% during a period of five years.
2. Emergency response – it is envisioned to maintain a sufficient SAR emergency response service in Greenland, which efficiently and proportionally responds to all emergency distress calls, including deploying a suitable number of relevant units.
3. Response time – There are specific requirements for response times, i.e. from the time an alarm is raised to 'mobilisation'.

The Danish Defence Forces concluded in 2016 that the most likely, but still not very likely, scenario for a large-scale SAR operation in the Greenlandic SAR-zone would be a passenger ship with up the 250 passengers. What is interesting in this context is that the reasoning behind this is that there are specific regulations for passenger ships with over 250 passengers.[69] In other words: the Danish Defence Forces have based

[67] The above information is based in interviews conducted during the period from February 2017 until August 2017. The interviews were mostly conducted as face-to-face expert interviews, with one conducted by telephone. The respondents of interviews were maritime/SAR stakeholders and shipping companies both in Denmark and Greenland. All interviews were recoded and analyzed with help of Nvivo 11. See also Hanna Rasmussen & Birgit Feldtmann, Safe Navigation of Cruise Ships in Greenlandic Waters – Legal Frame and Practical Challenges International Journal on Marine Navigation and Safety of Sea Transportation (TransNav) Vol. 14, nr.1 2020, page 208 f. See also Skibsfartens og Luftfartens Redningsråd; SAR Grønland, Eftersøgnings- og redningstjenesten i Grønland, chapter 8.

[68] Skibsfartens og Luftfartens Redningsråd; SAR Grønland, Eftersøgnings- og redningstjenesten i Grønland. See also Forsvarsministeriet, *Forsvarsministeriets fremtidige opgaveløsning i Arktis*, 2016, p. 83.

[69] Forsvarsministeriet, *Forsvarsministeriets fremtidige opgaveløsning i Arktis*, 2016, p. 107.

their SAR-scenario, and consequently their capacities, on the assumption that the above described legal prophylaxis for passenger ships with more than 250 passengers would be efficient.

This means that the capacities in Greenland are not based on a scenario where a large cruise ship with thousands of passengers and crew is in a state of distress. Consequently, Arctic Command has limited units at its disposal. The most relevant units are inspection ships (Thetis class; typically, two ships available at any one time), ship-based helicopters (on board a Thetis class ship; typically, one helicopter available at any time), inspection ships (Knud Rasmussen class; typically one or two ships available at any time), inspection cutter TULUGAQ8, Challenger and C-130 Hercules plane (only for periods of time). Arctic Command has also helicopter emergency services at its disposal, which are outsourced to Air Greenland. The helicopter emergency services consist of two rescue helicopters, stationed at Kangerlussuaq and in Qaqortoq or Narsarsuaq.[70] In the case of life-threatening situations, the agreement with Air Greenland provides access to all helicopters and planes of Air Greenland's Fleet, however these are not configured for or have training status for carrying out SAR operations. Greenland Police have four police cutters with a fixed crew of 5–6 persons. Some of the exercises that have been carried out in the Artic area have shown that Arctic Command lacks sufficient manpower in a number of areas in relation to carrying out a comprehensive rescue action over a longer period of time. The main challenges are:

- Supply and logistics elements in the airports etc., for example, evacuation capacity and access to fuel.
- Press, information and contact access
- Call Centre function, which can receive calls and enquiries from close family members, etc. in connection with major incidents.

Another challenge is a lack of access to comprehensive aerial views and a lack of accurate nautical charts. JRCC and the rescue units are not

[70] Forsvarsministeriet, *Forsvasministeriets fremtidige opgaveløsning i Arktis*, 2016, p. 89 ff.

connected digitally, which results in a lack of awareness of each other's positions, the situation, search patterns, etc. between JRCC and the rescue units.[71]

5.3. Practical challenges in connection with preparedness in Greenland

An additional challenge in Greenland is emergency preparedness. The only full-scale hospital is in Nuuk and it does not have the capacity to deal with large numbers of patients from, for example, a cruise ship with 2,000 passengers and crew. The nearest hospitals in the region are in Iceland and Canada and the nearest hospitals in the Danish realm are in Denmark, many hours away by plane. The emergency preparedness is limited to a small number of naval vessels of different sizes, helicopters and planes. In en emergency, the Air Greenland is obligated to support any rescue and evacuation operations with its aircrafts. In connection with the Viking Star incident from 2019, it was reported in the media that up to six helicopters were used to evacuate the vessel, each being able to transport 15–20 passengers at the same time. In total, the mission completed 30 loads in 18 hours.[72] It is questionable whether such capacity would be available at short notice if a similar situation was to occur in Greenland, for example next to the east coast of Greenland.

Even if the passengers and crew could be evacuated from the ship, transporting them elsewhere presents the next challenge: Air Greenland only has one large aircraft that can be used in an emergency and it has a capacity of about 280 people.[73] Furthermore, there is only one large

[71] The above information is based in interviews conducted during the period from February 2017 until August 2017, see fodnote 64.. See also Hanna Rasmussen & Birgit Feldtmann, Safe Navigation of Cruise Ships in Greenlandic Waters – Legal Frame and Practical Challenges International Journal on Marine Navigation and Safety of Sea Transportation (TransNav) Vol. 14, nr.1 2020, page 208 f. and Skibsfartens og Luftfartens Redningsråd; SAR Grønland, Eftersøgnings- og redningstjenesten i Grønland.

[72] See Danmarks Radio, Et krydstogtskib er i vanskeligheder ud for Norges kyst: https://www.dr.dk/nyheder/udland/et-krydstogtskib-er-i-vanskeligheder-ud-norges-kyst.

[73] See Air Greenland, Fleet: https://www.airgreenland.com/charter/fleet/airbus-330-200.

airport, located in Kangerlussuaq in West Greenland, where this kind of aircraft can land and take off. Other Greenlandic airports can only cater for smaller planes.[74]

5.3.1. Survival chances

The climate in Greenland is cold, changeable and complex due to ever-changing ice conditions. This is also true during the summer season in Greenland when cruise ships usually visit the region. The weather can change rapidly from clear skies and good conditions to poor visibility and challenging conditions. The waters around Greenland are cold all year around and survival in the water is basically impossible. According to the Polar Code, a passenger must be able to survive at least five days in a lifeboat. However, a number of search and rescue exercises conducted in Svalbard (so-called SARex exercises), a geographical area that is comparable to Greenland, showed that the lifeboats have limitations and passengers would most probably die within five days. Participants in the first exercise SARex had to abandon their lifeboats after 24 hours because it was too cold and there was insufficient insulation on the bottom of the boat.[75] More recent exercises, called SARex2 and SARex3, have demonstrated improved technology and better insulation at the bottom of the lifeboats, but another challenge was fresh air. It seems impossible to maintain safe levels of oxygen in a covered lifeboat without opening "the roof", which in turn affects temperatures inside the lifeboat.[76] These examples from the SARex exercises alone show quite clearly that surviving in a lifeboat in Arctic waters for five days using existing tech-

[74] Hanna Rasmussen & Birgit Feldtmann, Safe Navigation of Cruise Ships in Greenlandic Waters – Legal Frame and Practical Challenges International Journal on Marine Navigation and Safety of Sea Transportation (TransNav) Vol. 14, nr.1 2020, page 211.

[75] Knut Esben Solberg, Ove Tobias Gudmestad & Bjarte Odin Kvamme, *SARex Spitzbergen, Search and rescue exercise conducted off North Spitzbergen: Exercise report*. 2016, University of Stavanger.

[76] Knut Espen Solberg, Ove Tobias Gudmestad & Eivinn Skjærseth, *SARex 2: Surviving a maritime incident in cold climate conditions*, Report no. 69, 2017, University of Stavanger, and Knut Espen Solberg & Ove Tobias Gudmestad *SARex3, Evacuation to shore, survival and rescue*, Report no. 75, 2018, University of Stavanger.

nology is challenging to say the least. Furthermore, the SARex exercises were conducted in comparatively good weather and it is obvious that the chances of survival will be drastically reduced in poor weather and difficult conditions.

Another challenge relating to the survival of cruise ship passengers in an emergency is the physical condition and age of some of the passengers who need to be evacuated. The average age of passengers on cruise ships is rather high and it can be expected that some passengers will not be very mobile, making them much more difficult to evacuate.

A report from the Danish Maritime Accident Investigation Board (DMAIB) from 2016 illustrates another challenge arising from the growing cruise ship market: not only are there more large cruise ships navigating in Greenlandic waters, but there are also a growing number of smaller tourist boats who make a living from providing activities specifically aimed at the cruise ship's passengers. One of those smaller vessels, a boat carrying cruise ship passengers in Greenlandic waters actually sank and its 23 passengers had to be evacuated. However, there was no space on the deck of the boat where the 23 passengers could put on their survival gear. The accident report thus raises a general question of whether it is possible to evacuate the passengers from these kinds of vessels.[77]

Survival chances are also influenced by the fact that there is no obligation for the boats to have immersion suits for every passenger. In the SARex exercises, all test persons were dressed in immersion suits and it can be expected that the survival of passengers would be severely limited if the passengers were not wearing immersion suits. If a passenger fell into the water, their survival chances would be very low.

[77] Danish Maritime Accident Investigation Board (DMAIB, 2016). Marine Accident Report December 2016 INUK II Foundering on 14 August 2016.

7. Concluding remarks

Passengers booking a cruise in Arctic/Greenlandic waters obviously expect to enjoy exceptional nature and spectacular landscapes. But this unique experience comes at a price. The Arctic climate and environment are harsh, distances are long, and navigation is complex and difficult. The average cruise ship passenger might not really consider the risks involved and believe that any hazards are under control and that there is an effective SAR system able to assist if things go wrong.

The legal framework for navigation in the Arctic is trying to establish legal prophylaxis by providing regulations to limit risk and to create a system of preparedness if things go wrong. This legal framework is complex and fragmented, but it cumulatively increases safety at sea. On the other hand, legal regulation is always a result of negotiations and compromises, which does not always result in the most risk-reducing option. For example, a clear obligation for cruise ships to provide immersion suits for all passengers and crew would most probably increase their survival chances. However, this is not an obligation chosen to be included in the Polar Code. The reason for this might be connected to the fact that this would be costly for the shipping companies or that there is an expectation that some of the less mobile passengers would have difficulties getting into such survival suits.

Regardless of the fact that there is a legal framework that to a high degree is of a prophylactic nature, this must, if a maritime accident occurs, be supported by a well-functioning emergency response system and here the overall conclusion has to be that the emergency response system in Greenland is not geared towards a large cruise ship in distress with several thousand people on board. The Danish strategy for the SAR system and capacities around Greenland are based on the scenario of cruise ships carrying up to 250 passengers[78], when in fact far larger cruise ships navigate in Greenlandic waters every summer. The trust in the

[78] See Skibsfartens og Luftfartens Redningsråd; SAR Grønland, Eftersøgnings- og redningstjenesten i Grønland, chapter 8.

specific legal prophylaxis for large passenger ships comes with a risk. One way to limit risks and to ensure assistance if things go wrong would be a requirement that cruise ships must sail at a proper distance so that there is always a sister ship that can come to the rescue within a short period of time; however, such a requirement was not introduced in the Polar Code.

The Greenlandic SAR system has never been stress-tested in a real, large-scale SAR situation with a large cruise ship with thousands of passengers and crew onboard. In the aftermath of the Sky Viking Incident, the EPPR Chair, Peter Holst-Andersen, was cited for seeing the incident as a warning about what could be expected in the Arctic: "*The incident with Viking Sky was somehow a 'best case scenario'. It happened in a densely populated area with a lot of rescue capabilities relatively close to the ship. Had a similar disaster happened in most other places in the Arctic the result would most likely have been catastrophic*. (…) *No one would have had sufficient resources to react so effectively and promptly in the high North. This is why it is so extremely important that we work and cooperate cross-state on these issues. And there is still room for improvement*".[79]

This seems to be true for the Greenlandic preparedness. We can only hope that the legal prophylaxis will continue to be effective and that we will never have to stress-test the Greenlandic SAR system under extreme circumstances in a large-scale rescue operation in bad weather, far away from the main capabilities around Nuuk.

[79] High North News, *The Viking Sky incident: A warning about what to expect in the Arctic*: https://www.highnorthnews.com/en/viking-sky-incident-warning-about-what-expect-arctic.

Faulty Material & Error in Design

- An analysis of the Nordic Marine Insurance Plan

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1. Presentation of the Subject

The objective of this thesis is to elaborate on the Nordic Marine Insurance Plan's cover for losses caused by faulty material and error in design.

The maritime market is continuously faced with new technology and solutions. The extent of the technology can vary from minor changes in existing machinery or equipment, to more ground-braking technology encouraged by the green wave currently affecting the business. These new technologies may cause both faulty material and errors in design. Even though the Nordic Marine Insurance Plan is regularly revised and amended, it is impossible to take every new solution into account. Hence, it is important to get a broad understanding of how these perils are handled in the Nordic Marine Insurance Plan, as this will ensure that the contract can be used in a dynamic manner in relation to new technologies.

The thesis will focus on two perils: faulty material and error in design, and discuss how these perils are regulated in the Nordic Marine Insurance Plan. The primary focus of the thesis will be Cl. 12-4, which is the main provision relating to damage caused by faulty material or error in design under the hull insurance. The thesis will also discuss how a damage caused by faulty material or error in design will affect the insurance cover in the event of a total loss. Other types of insurance, such as war insurance and insurance for fishing vessels, mobile offshore units and builder's risk will not be discussed in the thesis.

There are two perspectives that will be central throughout the thesis. Firstly, the thesis will seek to analyze the cover for losses caused by faulty material or error in design in light of the underlying considerations and principles behind the rules in the Nordic Marine Insurance Plan.

Secondly, the thesis will use the internal structure and logic of the Nordic Marine Insurance Plan to get a better understanding of the insurance cover for losses caused by faulty material and error in design. The Nordic Marine Insurance Plan is constructed as a balanced and consolidated insurance contract, where the provisions are meant to

complement each other and provide a logical insurance cover. Hence, this perspective will be central in order to understand the full extent of cover for losses caused by faulty material and error in design.

In the following, the relevant legal sources for the thesis will be presented in Chapter 2, followed by an introduction to the Nordic Marine Insurance Plan, and its structure and the scope of cover in Chapter 3. Then, the thesis will follow the structure and logic of the Nordic Marine Insurance Plan and firstly discuss faulty material and error in design as perils in light of the contract in Chapter 4, followed by a discussion about the losses covered under the hull insurance in Chapter 5. Lastly, some finishing remarks will be made in Chapter 6.

2. Legal Sources

As a starting point, marine insurance contracts in Norway are regulated by the Insurance Contracts Act of 1989, which contains a set of mandatory provisions. Still, in accordance with § 1-3 letter c, the provisions are not mandatory for insurance of ships that are to be registered in the Norwegian Ship Register. Thus, the Insurance Contracts Act is used as background law for marine insurance contracts and the act will not be directly used in thesis.

In the Nordic marine insurance market, the Nordic Marine Insurance Plan is often used as an agreed standard contract. The contract dates back to 1871[2], but the most current version is based on the Norwegian Marine Insurance Plan of 1996, Version 2010. All references to the Nordic Marine Insurance Plan relate to the most recent version: The Nordic Marine Insurance Plan of 2013 – version 2019. The Nordic Marine Insurance Plan is developed and negotiated by representatives from various interested parties, such as members by the Nordic Association of Marine Insurers (Cefor) and Nordic Shipowners' Associations, as well as technical survey-

[2] H. Bull, *Insurance Law and Marine Insurance Law: The Unequal Twins,* 2004, p. 20

ors and members of the academic societies. By ensuring that all parties develop the contract together, the result is a balanced and fair contract.[3] Furthermore, the contract is revised every third year. This secures a dynamic document, where the parties may amend the contract if the risks in the business change.[4]

The Nordic Marine Insurance Plan is supplemented by the Commentary to The Nordic Marine Insurance Plan of 2013 – version 2019.[5] The Commentary is written by the parties responsible for the development of the Nordic Marine Insurance Plan and contains a substantial level of information about the different clauses and how they should be interpreted.

The Commentary shall have a higher degree of precedence than ordinary preparatory works.[6] The document has been thoroughly discussed and must be regarded as an integral component of the Nordic Marine Insurance Plan.[7] This structure allows for the clauses in the contract to be relatively precise, while the Commentary provides a broader interpretation where the considerations and background are included.[8]

Even though the Commentary holds a high interpretative value, the weight will vary depending on the relationship between the wording in the contract and the Commentary. As the Commentary compliments the clauses in the contract, the remarks in the Commentary will carry a high interpretative weight if they elaborate on matters that were difficult to incorporate in the clause.[9] The same applies if the Commentary resolves issues that are unsolved in the contract.[10] This is for example

3 T. Wilhelmsen, *Flexibility, foreseeability and reasonableness in relation to the Nordic Marine Insurance Plan 2013*, 2013, pp. 67–68

4 T. Wilhelmsen, *Planen som Nordisk Plan – forhold til konkurrerende produkter, særlig engelske vilkår*, 2019, p. 35. Reference is also made to T. Wilhelmsen, *Flexibility, foreseeability and reasonableness in relation to the Nordic Marine Insurance Plan 2013*, 2013

5 The Commentary is only available online. All references to page numbers in the Commentary are based on the available pdf version to be found online at http://www.nordicplan.org/Commentary/Pdf-download/ (23.02.2020)

6 Commentary to The Nordic Marine Insurance Plan of 2013 – *Version 2019,* p. 25

7 The Commentary p. 25. See also ND 1998.216 NSC *Ocean Blessing* and ND 2000.442 NA *Sitakathrine*

8 T. Wilhelmsen, *Planen som Nordisk Plan*, 2019, p. 18

9 See ND 1978.138 NA *Stolt Candor*

10 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p.27

demonstrated in ND 2000 p. 442 NA *Sitakathrine* where the scope of the hull insurance was extended in light of remarks in the Commentary.[11] However, if the remarks in the Commentary concern general reflections and interpretation, they should not be interpreted as literally.[12]

Case law from the supreme court will usually be an important legal source with considerable precedence.[13] However, there are few, if any, cases from the supreme court relating to the topic of this thesis. Case law from the lower courts does have some degree of interpretative value,[14] but also this case load is limited.

Arbitration is commonly used to solve disputes relating to marine insurance. A rough estimate indicates that about 25 % of disputes are solved through arbitration.[15] From a marine insurance perspective, there are several benefits from using arbitration compared to solving disputes in the ordinary court system. Brækhus lists expertise, time efficiency, confidentiality, costs efficiency and internationality as the five main benefits.[16] In Norway, where the courts are generalized, it cannot be expected that the judges have sufficient competence to solve issues related to complex matters of marine insurance.[17] Hence, an arbitrational tribunal of experts in the field secures expertise, which ensures time and cost efficiency.[18] An unpublished arbitration award may be beneficial for a company with regards to keeping valuable information confidential. However, in a business where lack of competence is an issue, it is important to limit the confidentiality in order to secure knowledge and development of the Nordic Marine Insurance Plan as a contract.[19]

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11 T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan. Regulation and practice*, 2019, pp. 81–83

12 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 28

13 T. Eckhoff, *Rettskildelære,* 2001, p. 160

14 T. Eckhoff, *Rettskildelære,* 2001, p. 162

15 T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan,* 2019, p. 74

16 S. Brækhus, *Voldgiftspraksis som rettskilde*, 1990, p. 451 ff., as cited in T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 74

17 This is further emphasized by the fact that neither ordinary nor marine insurance law are a part of the legal education program in Norway.

18 T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, pp. 74–77

19 T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 78

The arbitration awards will normally have a limited weight as legal precedence.[20] However, the significance increases for standard contracts that use arbitration clauses.[21] Where such clauses are commonly used, the number of ordinary court cases will naturally be low. Consequently, the arbitration awards will be the main source of information about the interpretation and the legal development of the contract. Furthermore, accessibility of the awards further increases the significance.[22] The general view in theory is that published arbitration awards should carry the same level of precedence as judgements from the lower court.[23] The most common way to publish arbitration awards of significance is to publish them in Nordiske Domme for Sjøfartsanliggende. In addition, some awards are specifically mentioned in the Commentary as examples of interpretation. These awards should have an even higher degree of precedence, as the award will be treated similarly to other remarks in the Commentary.[24]

There are a limited number of cases from both the ordinary courts and from arbitration that relate to faulty material and error in design. However, some cases will be used to demonstrate the general aspects related to the Nordic Marine Insurance Plan.

In addition to arbitration, minor disputes are may be solved by the use of Nordic average adjusters, currently Bjørn Slaatten in Norway, in accordance with Nordic Marine Insurance Plan Cl. 5-5. The average adjuster is an independent and objective party who can issue a legal evaluation of a dispute. The evaluation is non-binding and does not prevent the parties from taking the dispute to court or arbitration. These cases

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20 T. Eckhoff, *Rettskildelære,* 2001, p. 163, as cited in T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 79

21 T. Eckhoff, *Rettskildelære,* 2001, p. 163, as cited in T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 79. This is particularly the case for shipbuilding contracts, but such a clause was also included in the Nordic Marine Insurance Plan in the 2019 version, cf. Cl. 1-4A and 1-4B

22 T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 79

23 S. Brækhus, *Voldgiftspraksis som rettskilde*, 1990, p. 459 and T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 80

24 S. Brækhus, *Voldgiftspraksis som rettskilde*, 1990, p. 459 and T. Wilhelmsen, *Choice of forum in the Nordic marine insurance plan*, 2019, p. 80

will have low degree of precedence as the evaluation is only issued to the concerned parties; usually the assured, the broker and the underwriters. Still, the evaluations are useful to demonstrate how the theoretical issues in the Nordic Marine Insurance Plan occurs in practice, even if they are customarily adhered to by several leading Nordic insurers.

As mentioned above, the community for marine insurance law under the Nordic model is relatively limited. Consequently, the availability of literature concerning marine insurance under the Nordic Marine Insurance Plan is limited and there are no books concerning the latest version of the contract. However, the 2019 version did not result in any major amendments in relation to the topics discussed in this thesis. Hence, literature concerning the 2016 version is highly relevant.[25] Furthermore, the rules concerning faulty material and error in design have been relatively unchanged since 1964 and many of the governing principles of the Nordic Marine Insurance Plan have remained the same throughout the previous versions. Thus, literature concerning the earlier versions of the Nordic Marine Insurance Plan, such as Brækhus and Rein's *Håndbok i kaskoforsikring: på grunnlag av Norske Sjøforsikringsplan av 1964* will still be of interest when it comes to the broader lines in the Nordic Marine Insurance Plan, as well as the specific considerations that apply for losses caused by error in design and faulty material.

[25] There are still only a limited number of relevant books regarding the Nordic Marine Insurance Plan: T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017 and Stang Lund, *Handbook in Loss of Hire Insurance*, 2017. A very limited presentation is also available in T. Falkanger, H. Bull, & L. Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective,* 2017

3. The Nordic Marine Insurance Plan and some Starting Points

3.1 Introduction

In order to understand how losses caused by faulty material and error in design are regulated under the Nordic Marine Insurance Plan, it is important to introduce the structure of the insurance contract, as well as different terms and concepts that are applied throughout the contract concerning the general prerequisites for cover.

The purpose of this chapter is to clarify these terms in order to provide a clear structure and vocabulary throughout the thesis. Firstly, the general structure of the Nordic Marine Insurance Plan will be presented in Chapter 3.2, before the scope of cover will be discussed in Chapter 3.3.

3.2 The Structure of the Nordic Marine Insurance Plan

The Nordic Marine Insurance Plan operates with different parts and chapters to regulate the scope of cover in the event of a casualty. Part One consists of several general rules that apply to all types of insurance. For the purpose of this thesis, chapters 2 and 3 are of particular importance. Chapter 2 consists of rules concerning among other perils covered, cf. Cl. 2-8, and rules related to causation, cf. Cl. 2-11. Chapter 3 regulates the duties of the insured, including but not limited to the duty to comply with safety regulations and the duty of disclosure.

The remaining parts of the Nordic Marine Insurance Plan regulate the cover for the specific insurance types. Hull insurance is regulated in Part Two, which includes chapters 10 to 12. Chapter 10 applies for all losses under the hull insurance. Chapter 11 applies in the event that the damage is so extensive that the vessel must be considered a total loss, whereas Chapter 12 applies in the event that the "vessel has been damaged without the rules relating to total loss being applicable", cf. Cl. 12-1. Hence, chapters 11 and 12 cannot apply simultaneously for the same

casualty. This distinction results in different rules becoming applicable in the event of a loss caused by faulty material or error in design, depending on the extent of damage.

Loss of hire insurance is regulated in Chapter 16 in Part Three. The rules in Chapter 16 apply independently of Part Two as they apply to a different type of insurance. Still, the rules in Chapter 16 are closely intertwined with the rules relating to hull insurance, as a prerequisite for loss of hire cover is that the vessel has been deprived of income "as a consequence of damage to the vessel which is recoverable under the conditions of the Plan", cf. Cl. 16-1.

The rest of Part Three will not be relevant for the purpose of this thesis. The same applies to Part Four of the contract, which regulates insurance for fishing vessels, mobile offshore units and builder's risk.

3.3 The Scope of Cover under the Nordic Marine Insurance Plan

The scope of cover under The Nordic Marine Insurance Plan concerns four main aspects: the perils covered, the casualty, also known as the insured event, the losses covered and the rules concerning causation.

On a general note, a peril is defined as an internal or external risk that has the potential of causing a casualty.[26] This could for example be a fire or heavy weather. The Nordic Marine Insurance Plan is based on an all-risk principle which states that an insurance against marine perils covers "all perils to which the interest may be exposed", cf. Cl. 2-8. This means that a peril must be explicitly excluded for a loss arising from such a circumstance to be unrecoverable. Hence, the Nordic Marine Insurance Plan provides cover for both fortuitous events as well as inherent and latent defects in the insured object, unless specifically excluded.[27]

A prerequisite for cover under the Nordic Marine Insurance Plan is that the peril results in an insured event or a casualty, which again

[26] H. Stang Lund, *Handbook in Loss of Hire Insurance*, 2008, Chapter 3-1

[27] T. Wilhelmsen, *Hull Insurance of "Latent defects"*, 2004, p. 259

causes a loss for the assured.[28] The term "casualty" is indirectly defined in Cl. 2-11. It follows from the clause that the insurer is liable for losses incurred "when the interest insured is struck by an insured peril". The wording indicates that the peril must have changed from being dormant to some kind of activity or force,[29] and thus have changed from being a risk to the insured object on a general basis, to actually materializing in an adverse influence on the interest insured. This is further supported in the Commentary on page 66, where it is stated that "the general risk that a peril represents must have produced some concrete and specific result".

Cl. 2-11 separates between the "loss" incurred and the insured event. Thus, even though the casualty is a prerequisite for the insurer's liability, the assured is only entitled to compensation if the casualty also results in a loss.[30] As Cl. 2-11 is a general rule which applies to all types of insurances, the type of "loss" is not further defined.[31]

Under the hull policy, the casualty must result in a "damage", which represents a loss for the assured. The term "damage" is used throughout Chapter 11 and 12.

The term "damage" implies that there must be an identifiable physical change to the part in question. The term further indicates that the change must be for the worse, in the sense that the part does not function as it is supposed to. The magnitude of the change must also be taken into consideration when interpreting the term "damage". The term indicates that the change must be of some extent, as a "damage" must be understood to be more comprehensive than a mere flaw or imperfection. Still, as the term "damage" is closely related to the functionality of a part, it must be expected that, as a minimum, a "damage" includes all reductions in functionality, even if the reduction is minor. The Commentary states on page 293 that minor changes are sufficient, such as "development of tiny

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28 T. Falkanger, H. Bull, & L. Brautaset, *Scandinavian Maritime Law,* 2017, p. 628

29 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017p. 131

30 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p 131

31 The Nordic Marine Insurance Plan included a definition of the term "loss" up until the 2016 version. A "loss" was defined as a "financial loss of any kind, including total loss, damage, loss of income, costs and liability", cf. the Nordic Marine Insurance Plan of 2013 Cl. 1-1 letter d.

cracks or fractures only discoverable by the use of specialist techniques, such as fluoroscopy". This statement indicates that the term could be interpreted more widely, as the decisive question will be whether the qualities of the part has changed, not necessarily impacting the functionality. However, it could be argued that the qualities of the part are central to ensure the functionality. Hence, reduced qualities will in most cases result in a change in functionalities, as the part will be weaker than it is supposed to.

The last part of the scope of cover is related to the rules concerning causation. As a starting point, these rules are the link between the perils covered and the losses covered.[32] As a minimum, it must be required that there is a logical causation between the peril and the loss.[33] It is, however, not uncommon that several perils can be attributed to the loss. In these cases, the Nordic Marine Insurance Plan apportions the claim based on the rules in Cl. 2-13. The main rule is that the claim shall be apportioned "according to the influence each of them must be assumed to have had on the occurrence and extent of the loss" and that the insurer is only liable for "that part of the loss which is attributable to the perils covered by the insurance", cf. Cl. 2-13.

4. Faulty Material and Error in Design

4.1 Introduction

As the Nordic Marine Insurance Plan is based on an all-risk principle, the starting point is that faulty material and error in design are covered perils under the contract, unless specifically excluded.[34] Neither faulty

[32] T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p 116

[33] T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p 116

[34] T. Wilhelmsen, *The Norwegian Marine Insurance Plan and Substandard ships,* 2000, p. 212

material nor error in design are excluded perils in the general parts of the Nordic Marine Insurance Plan.[35] Hence, on a general note, the all-risk principle applies for losses caused by these two perils.

However, there are partial exclusions for losses caused by faulty material and error in design in Part Two of the Nordic Marine Insurance Plan. For hull insurance, the cover for losses caused by error in design or faulty material is regulated in Cl. 12-4.[36] The clause states that:

> *"If the damage is a result of error in design or faulty material, the insurer is not liable for the costs of renewing or repairing the part or parts of the hull, machinery or equipment which were not in proper condition, unless the part or parts in question had been approved by the classification society."*

The exclusion in Cl. 12-4 only applies to damage to the part which was not in proper condition. Hence, it applies to the part which was defective due to faulty material or error in design before the damage occurred. However, the exclusion does not apply if the defective part was approved by a classification society. Another important element is that CL. 12-4 does not exclude cover for consequential damage. Consequently, Cl. 12-4 does not constitute an absolute exclusion of faulty material or error in design as perils. The clause is rather a partial exclusion, as it excludes parts of the losses caused by such perils.

The purpose of this chapter is to go into detail regarding the perils faulty material and error in design. As the terms "faulty material" and "error in design" are used in a consolidated manner throughout the Nordic Marine Insurance Plan, the discussion will be based on the terms as used in Cl. 12-4 and the remarks in the Commentary.

The cover provided in the Nordic Marine Insurance Plan is built on several considerations and principles. This will be discussed in Chapter 4.2, especially in relation to faulty material and error in design. These

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35 See Cl. 2-8

36 For similar partial exclusions for losses caused by faulty material and error in design, see also Cl. 18-20 and Cl. 19-15 regarding cover under the insurance for mobile offshore units and builder's risk respectively.

countervailing considerations and principles are central in order to understand the totality of the cover provided under the Nordic Marine Insurance Plan. Then the concept of the perils faulty material and error in design will be discussed in detail in Chapters 4.3 and 4.4 respectively. The considerations and principles mentioned in Chapter 4.2 will be used actively in Chapter 4.3 and 4.4 as elements to interpret the scope of the perils. Lastly, a comparison between the two perils will be carried out in Chapter 4.5 along with some finishing remarks.

4.2 Considerations and Principles

The purpose of insurance is to transfer the risk of unforeseen losses from the assured to the insurer. This fundamental principle is also the basis for the Nordic Marine Insurance Plan.[37] A contract should seek to create a balance between the parties, resulting in a fair and reasonable contract.[38] In an insurance contract, this balance is achieved as the insurer agrees to compensate the assured for a pre-agreed scope of cover against a premium paid by the assured. The premium should represent the risk the insurer undertakes.[39] The risk is normally calculated based on the qualities of the vessel, previous damage to the vessel itself and similar vessels, technical management and other factors that may affect the risk of a damage occurring. Based on the principles of fairness and reasonableness, the insurer's liability should coincide with the risk included in the premium.[40] Consequently, the assured may carry out a cost-benefit analysis and transfer any unwanted risks to the insurer. The insurer must, on the other hand, carry out a similar analysis to ensure that the premium is sufficient to cover the risk he agrees to undertake.[41]

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37 See e.g. Commentary, p. 256

38 T. Wilhelmsen, *Planen som Nordisk Plan*, 2019, pp. 24–25

39 T. Wilhelmsen, *Planen som Nordisk Plan*, 2019, pp. 24–25

40 T. Wilhelmsen, *Planen som Nordisk Plan*, 2019, pp. 24–25

41 T. Wilhelmsen, *Flexibility, foreseeability and reasonableness in relation to the Nordic Marine Insurance Plan 2013*, 2013, p. 48

The calculation of premium represents the risk for potential damage. As such, it is not reasonable to include costs of repairs that will occur with absolute certainty, such as ordinary maintenance. It would be disproportionately expensive for both the insurer and the assured to insure these costs. Consequently, the premium should represent the objective risks outside the assured's control – the risk of unforeseen damage and loss.[42] The subjective risks that are within the assured's control are to some extent described as the assured's duties in the Nordic Marine Insurance Plan.[43] Thus, the structure of the contract implies that the purpose of the insurance is to regulate events caused by risks outside the assured's control.

The concepts of faulty material and error in design somewhat challenge the above starting point. Both faulty material and error in design are defects that may exist in the vessel for a long period of time. From a general insurance law point of view, losses resulting from such defect are excluded from cover as the losses are considered to be inevitable.[44] The possibility for faulty material and error in design for vessels is affected by the fact that the shipowners may choose material and design as they see fit in order to improve the performance of the vessel. This decision may entail a significant degree of risk, especially if the material or design is experimental and relatively untested.[45] If all incidents caused by error in design and faulty material were covered in full, the insurer would in principle underwrite "the quality of work processes that are directly or indirectly affected by choices made by the shipowner".[46] In marine insurance, these choices are considered to be a business decision containing a calculated risk, where both the rewards and risk should rest with the assured.[47] Hence, when the assured carries out a cost-benefit analysis to

42 T. Wilhelmsen, *Planen som Nordisk Plan*, 2019, pp. 24–25
43 See Chapter 3 of the Nordic Marine Insurance Plan
44 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 299
45 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 299
46 Commentary, p. 291
47 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 299

consider whether to invest in a new design or material, the assured should not be able to transfer the known risks to the insurer.

On the other hand, a loss caused by error in design or faulty material may also appear just as unexpectedly as any other, which indicates that it should be considered a transferrable and objective risk. Both the timing and the extent of loss will be outside the assured's control, which justifies using the insurance as a mechanism to cover the risk.[48] Furthermore, error in design and faulty material may not only occur in relation to new designs to enhance performance, but also in more conventional design. In such cases, the risk will not be a calculated risk taken by the assured, but rather an unfortunate incident.[49] The rationale of covering unforeseeable losses would be particularly strong in these situations.

The Nordic Marine Insurance Plan seeks to balance the above-mentioned considerations as described on page 291 of the Commentary:

> *"The cover provided by the Plan supports innovation to the extent that the costs of restoring the vessel to its original condition are covered but not the costs of remedying any shortcomings that the incident reveals about the design or technology itself. The rewards and therefore the costs of innovation and technological development belong firmly with the equity investors."*

Consequently, the "financial need for compensation that is the underlying rationale for this cover must be weighed against the considerations that were traditionally used against such cover".[50] In the Nordic Marine Insurance Plan, Cl. 12-4 represents a measure to maintain this balance in practice, as it provides cover for the loss incurred by the assured without covering the costs of renewing the design or material.

The balance is also protected by another central principle of insurance law: the assured should not benefit from an insurance claim. The insurer undertakes the risk for damage and the consequent costs to repair the

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48 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 299

49 S. Brækhus & A. Rein, *Håndbok i kaskoforsikring: på grunnlag av Norske Sjøforsikringsplan av 1964,* 1993, p. 110

50 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 300

vessel to its original state.[51] Hence, the settlement should not put the assured in a better position than before the casualty. This principle is also challenged when it comes to losses caused by faulty material and error in design. The faulty material or error in design represents a defect to the vessel. Following a damage, both the damage and the defect will be rectified. As the rectification will leave the vessel without the previous defect, the assured will be in a better position than before the casualty. Consequently, the rules concerning cover for losses caused by faulty material and error in design must seek to take this betterment into consideration.

4.3 Faulty Material

The term "faulty material" implies that the material used in the part in question suffers from a deficiency. The term does not delineate towards any type of material and it must be presumed that it includes all types of material, including raw material that can be used individually or combined to create a part.

The term "faulty" indicates that the material must be weaker or in a worse condition than what can be expected from the material. The Commentary uses a similar definition and defines "faulty material" on page 294 as a situation where: "the material used in some part of the vessel suffers from some weakness or deficiency compared to applicable standards". In order to establish if the material is faulty, it is important to establish which standard that should be applied when assessing whether the material is below applicable standards. Neither the term "faulty material" nor the wording in the Commentary give any direct guidelines.

The role of the classification society is central throughout the Nordic Marine Insurance Plan, and the approval is so important that it is a prerequisite for cover, cf. Cl. 3-14. From this perspective, the standard applied by the class is clearly an acknowledged standard in the contract.

[51] T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, pp. 279–280

This implies that the standard set by the classification societies could be used an applicable standard.

Another standard is the one applied by the industry in general, such as manufacturers and yards. It could be argued that these industry standards may be driven by cost-benefit analyses, where economic benefits could be weighted more favorably than safety. If the rationale of using such a standard is solely the safety of the material, one should be careful to use industry standards when assessing the material standard, as this may allow for minor shortcomings in the material provided sufficient economic advantages. There are institutions, such as the government and independent research hubs, that will not have any apparent economic incentives, which might result in an objectively higher standard.

However, for the purpose of the insurance, it may be disproportionately strict to expect that the assured must use the highest possible standard on the material. Safety is strictly regulated in both the Nordic Marine Insurance Plan and in the industry in general.[52] Thus, it must be expected that even institutions driven by economic incentives uphold a satisfactory safety level. Based on the system of the Nordic Marine Insurance Plan, it would also be unfortunate if the highest possible standard was determinative, as this could result in a high number of parts being "faulty" compared to the high standard. In a worst-case scenario, it could result in abuse from the insurers with an excessive use of the exclusions for cover.

To summarize, the standard applied by the classification societies appears to balance out the above-mentioned concerns. The classification standard has a clear focus on safety, whilst it does not require the assured to invest in the best available material. Thus, by way of a conclusion, the classification standard should be the leading standard when assessing whether the material is below applicable standards.

It could be argued that faulty material often may be the result of an unfortunate incident. Material that is intrinsically sound, but inadequate

[52] See Chapter 3 of the Nordic Marine Insurance Plan. Reference is also made to the International Convention for the Safety of Life at Sea, the International Safety Management Code and similar international regulations

for its intended purpose should be considered as an error in design.[53] Hence, the term faulty material only includes incidents where the vessel is equipped with material with a lower quality than what could be expected. This will rarely occur as a consequence of a business risk knowingly taken by the assured. Faulty material may instead occur as a consequence of malfunctioning during the manufacturing process or because there may be something wrong with the material itself.[54] Consequently, it could be argued that the principle of unforeseeability should carry a lot of weight. On the other hand, even though a damage caused by faulty material might be highly unpredictable, the repairs would still leave the vessel in a better condition than before the casualty. Hence, even though the business element is less prominent in these cases, there is still a need to balance the countervailing considerations and principles for losses caused by faulty material.

4.4 Error in Design

4.4.1 The Concept of "Error in Design"

The term "design" is understood to be the process relating to the planning of form and function of an object. The term relates to the characteristics of the object, and includes layout, functionality, shape, material, dimensions and how the object should look once constructed. The term also includes how the object fits into adjacent machinery and the general construction of the vessel. Even though the planning process is the most prominent part of the term "design", also the completed object will be included, as this represents the outcome of the planning process.

The Commentary defines «design» on page 295 as:

> *"(…) the entire process of defining how the various parts of the vessel should be configured and assembled, how they should be manufactured and the exact nature and quality of the material to be used."*

[53] Commentary, p. 294

[54] Commentary, p. 294

The term "error" may be defined in two ways. Firstly, it can relate to the characteristics of the object, as these may be unfit or inadequate for its intended use. Secondly, the term can be interpreted similarly to the term "faulty material", which implies that the design is erroneous as it deviates from an applicable expected standard. In the Commentary, the two categories are called objective and subjective errors, respectively. The distinction is primarily of theoretical importance, as the cover for objective and subjective errors is the same. Still, the distinction demonstrates the different considerations and principles behind Cl. 12-4 as well as the variations within the term «error in design». Hence, a more thorough discussion about the two categories is necessary.

The objective errors are defects that become apparent after the vessel is in operation. In other words, during the design process it was expected that the design would work well, but after the design is used in operation, it becomes apparent that it does not function as anticipated. Hence, the design is objectively not functioning.

The Commentary defines an objective error on page 295 as a design that is "suitable in the light of current knowledge and standards but is subsequently shown to be inadequate for reasons that were not understood at the time the vessel was built". Conventional designs are normally tested and eventually also used for some time in the business. Such designs will rarely be faulty based on subsequent knowledge, especially once tested for some time in the market. New designs, on the other hand, involves a higher element of risk, as there is some uncertainty as to how the design will function in practice.

> An example is the IMO 2020 Low Sulphur Regulation, which have resulted in a boost of scrubbers being installed worldwide. Some of the scrubber designs have turned out to be less than favorable, resulting in extensive damage.[55] Without concluding on the scope of cover of scrubber damage, the IMO 2020 illustrates how new regulations force the shipowner to take certain business decisions that could affect the insurance cover.

[55] Mahajan, *Learning as we go: challenges with the use of exhaust gas scrubbers*, 2019

Subjective errors in design share a lot of the characteristics of faulty material, as the question of whether an error exists will be determined based on established standards. Hence, it will be a subjective error if the design does not meet the market expectation to the quality and function of such a design.[56]

The Commentary defines subjective errors on page 295 as a defective design "in the light of current knowledge and established standards". Hence, the material strength, production methods or other stress factors to which the object may be exposed turns out to be weaker than it ought to be, given the knowledge and established standards available at the time of construction.[57]

Similarly to faulty material, subjective errors often may be the result of unfortunate incidents rather than experimental and new design.[58] The shipowner will normally approve design or repair plans for the vessel and should be able to trust that the yard delivers in accordance with such plans. Consequently, it could be argued that a potential error will be outside the shipowner's responsibility.

4.4.2 Considerations and Principles

In order to get a complete understanding of how "error in design" should be interpreted and handled under the Nordic Marine Insurance Plan, it is natural to look to the underlying considerations and principles, as these are the reason why errors in design are partly excluded from cover.

The Commentary elaborates on the term "error in design" with several circumstances that should be considered in order to get a full understanding of the terms.[59] These elements are all closely connected with the considerations and principles behind the exclusion for error in design and faulty material. The first element is related to the controlling

[56] The applicable standard should be evaluated in the same way as for faulty material. Reference is made to the discussion in Chapter 4.3

[57] T. Wilhelmsen and H. Bull, *Handbook on Hull Insurance,* 2017, p. 301

[58] S. Brækhus & A. Rein, *Håndbok i kaskoforsikring,* 1993, p. 112

[59] Commentary, p. 296 with further comments in T. Wilhelmsen and H. Bull, *Handbook in Hull Insurance,* 2017, pp 301–304

principle of foreseeability. As this is a governing principle it will influence all the other elements to some extent. The second element is related to how long it took for the damage to develop and to be discovered. This element demonstrates the borderline to Clauses 10-3 and 12-3. The third element is an evaluation of whether the part would have been changed if the assured became aware of the defect before it resulted in a damage. Fourthly, it is important to assess the degree of seriousness related to the defect and whether it has the potential of causing a casualty. Lastly, it should be discussed whether the defect is a consequence of a business risk willingly taken by the assured.

The controlling principle of insurance law is to provide a safeguard against unforeseeable losses.[60] To maintain the contractual balance, only the unforeseen risks should be for the insurer's account. The degree of unforeseeability will vary a great deal depending on the type of error in design. On one hand, damage occurring as a consequence of experimental designs could be more foreseeable. Furthermore, the risk for such damage will normally not be a part of the agreed premium. Hence, cover of such losses could cause a contractual imbalance. Losses occurring as a consequence of conventional designs will, on the other hand, often be unexpected for the assured.[61] In these cases, the assured has selected a design which was supposed to be adequate and well-functioning, but damage still occurred due to unfortunate circumstances. Consequently, the risk of incentivizing experimental design is relatively low in these cases, whilst the principle of unforeseeability applies to a high degree.

The second element to consider is the time aspect. The aspect of time will be relevant in two ways. The first way is related to how long it took for the damage to occur. In other words, how much time passed by from the part was installed in the vessel until the casualty and consequent damage occurred. If a part is damaged almost immediately after installation, or at least years before reaching its expected lifetime, it is a clear indication that there is something wrong with the part either due to an external

[60] See e.g. Commentary, p. 256

[61] S. Brækhus & A. Rein, *Håndbok i kaskoforsikring,* 1993, p. 112

factor or due to the design.[62] Similarly, if a part has functioned for many years before a damage occurs, it is more likely that the damage is caused by either wear and tear, or an external factor. If there are no previous indications that the part did not function as it was supposed to, it is unlikely that the damage was caused due to an error in design. Thus, it can be presumed that an error in design will manifest into a damage relatively quickly after installation, as the definition of an "error in design" is that the part does not work. Hence, it will be difficult to argue that a part suffers from an error in design if it works for several years before suddenly malfunctioning. Still, the time element must be considered a general rule of thumb, and it must be specifically evaluated based on the circumstances, the affected part and the error.

The second way that time is relevant is related to whether the damage occurred suddenly or developed gradually. A damage that develops gradually is more foreseeable, and the assured may plan and budget for the necessary modifications.[63] Hence, a gradually developed damage will most likely not be regarded as a consequence of an error in design, but rather a foreseeable and natural consequence of the way the vessel has been operated, and thus unrecoverable in accordance with Cl. 10-3.

Both the above-mentioned aspects of time demonstrate the borderline between losses caused by error in design and losses excluded from cover in accordance with Cl. 10-3. Some losses that are a normal consequence of the running of the ship may occur earlier than expected if the vessel is operated in more demanding conditions than normal. This does not necessarily mean that the design is inadequate. If the assured uses the vessel in more demanding conditions, the risk of damage should be apparent to the assured and within his control. Consequently, the assured should carry the costs if the risk materializes.[64]

The third element is related to whether the part would have been changed if the assured became aware the defect before it resulted in a damage. As mentioned above, the term "error" indicates that the part in

[62] Commentary, p. 295–296

[63] T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, pp. 302–303

[64] S. Brækhus & A. Rein, *Håndbok i kaskoforsikring,* 1993, p. 100

question is designed in a way that is unfit for its intended use or that the design is unable to perform as it is supposed to. Thus, a prudent shipowner would undertake measures to change it when the error is discovered.[65]

The fourth element is related to the degree of seriousness related to the defect and whether it has the potential of causing a damage. On page 295 of the Commentary it is stated that:

> *"the focus is on the safety of the vessel and avoiding any breakdown in operation, these being the focus of the classification process. One cannot argue that a vessel suffers from an error in design simply because parts become worn out more quickly than anticipated."*

The remarks in the Commentary indicates that the error in design must have the potential of causing a casualty. This can be seen in connection with the consideration of covering unforeseen losses for the assured.[66] If the risk is low and a potential damage develops gradually, similarly to wear and tear, the rationale behind the cover does not apply to the same extent.

The last element to consider is whether the design is a consequence of a business risk willingly and knowingly taken by the assured. The rationale of Cl. 12-4 is to balance the risk of underwriting new technology and the assured's need for economic compensation for unbudgeted losses. As such, the insurance should not be a remedy to remove the economic risk of investing in experimental technology.[67] This element is clearly described in the Commentary on page 295:

> *"Nor is it an error in design in cases where the party responsible for ordering the vessel has deliberately chosen solutions that entail a degree of uncertainty about serviceability or useful lifetime, for example new technology that is not yet fully tested. Similarly, if the party ordering the vessel has adopted design solutions on the basis of inadequate analysis or in order to save money."*

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65 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 301

66 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 302

67 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 300 with further references to the Commentary p. 291

The statement should be read in connection with the general consideration behind the cover provided by Cl. 12-4 that the insurer should not underwrite the assured's business risks. If the assured chooses to invest in a design that entails a higher risk of damage, such a damage should be for the assured's account, as both the risk and award form part of the totality of the cost-benefit analysis. Furthermore, such a loss will be more foreseeable and predictable, reducing the need to insure a potential financial loss.[68]

4.5 Finishing Remarks

The perils faulty material and error in design appear to be quite different at a first glance. However, based on the above discussions, there are several similarities between the two perils. These similarities justify that they are handled in the same manner in the Nordic Marine Insurance Plan.

The most prominent similarities are found between faulty material and subjective errors in design. Both categories are defined by the material or design being below an applicable standard. Furthermore, the defect will less often be the result of a business risk taken by the assured, but rather an unfortunate incident. Hence, the degree of unforeseeability will also be relatively similar.

It could, however, be argued that the definitions in the Nordic Marine Insurance Plan are somewhat unfortunate. The definition of the term "error in design" is very broad and it includes both faulty design and erroneous design, represented by subjective and objective errors respectively. Due to the broad definition, the countervailing considerations that justify the rules in the contract will apply with different strength. As an example, the business element will apply to a much higher degree for objective errors than subjective errors. Consequently, it could be better to separate between faulty design and erroneous design.

[68] T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, pp. 303–304

It could also be argued that the broad definition of the term "error in design" makes the term "faulty material" superfluous. It is clearly stated that the choice of material is included in the definition of design. Hence, material that is inadequate for its intended use should, according to the Commentary, be defined as error in design. Further to this line of reasoning, the term "error" also includes design that is below an applicable standard and thus faulty. As the material is a part of the design, a wide interpretation of "error in design" would thus involve "faulty material".

The distinction between error in design and faulty material could also be unfortunate in relation to some of the remarks in the Commentary. The considerations and principles mentioned in Chapter 4.4.2 primary apply for the term "error in design".[69] However, due to the inherent similarities of the terms "error in design" and "faulty material", the same considerations and principles should be considered to apply to the same degree for both terms. Hence, the remarks in the Commentary may give a simplified presentation of faulty material.

An alternative structure could be to separate between faulty material and design, and error in design. By doing so, the considerations would apply to a more similar degree within the categories. Losses caused by faulty material and design would to a higher degree trigger the principle of unforeseeability. Losses caused by error in design would, on the other hand, entail a higher degree of business risk, which justifies that the risk should be for the assured's account. Hence, the need to balance the countervailing considerations applies to a higher degree for this category. Still, a similarity between the two categories is that the peril represents a defect in the vessel. If the defect results in a damage, the repairs will normally result in a betterment of the vessel, leaving the assured in a better economic position than before the casualty. As this goes against the fundamental principles of insurance, there is still a need to regulate the cover for losses caused by such perils.

[69] Commentary, p. 296 with further comments in T. Wilhelmsen and H. Bull, *Handbook in Hull Insurance,* 2017, pp 301–304

5. The Losses Covered

5.1 Introduction

A prerequisite for cover under the Nordic Marine Insurance Plan is that the peril results in a casualty that causes a loss for the assured. The purpose of this chapter is to further define the term "loss" for hull insurances, and thus go into detail regarding the covered losses caused by faulty material and error in design.

The discussion regarding hull insurance will be twofold, as it consists of both cover of damage in accordance with Chapter 12 and total loss in accordance with Chapter 11.

The starting point of the discussion is the scope of Cl. 12-4, to be discussed in Chapter 5.2, as this is the most central clause regarding losses caused by error in design and faulty material. Due to the consolidating structure of the Nordic Marine Insurance Plan, the regulation in Cl. 12-4 also affects the cover for total loss. Thus, Cl. 12-4 is central in understanding the structure and logic of the Nordic Marine Insurance Plan when it comes to losses caused by error in design and faulty material.

Due to the complexity of Cl. 12-4, the discussion will be divided in several parts. Firstly, the concept of damage will be discussed in Chapter 5.2.1, followed by a discussion about the term "part" and class approval in Chapter 5.2.2. Lastly, the economic extent of cover in accordance with Cl. 12-4 will be discussed in Chapter 5.2.3.

The discussion regarding damage under the hull insurance and Cl. 12-4 will be followed by a discussion about the losses covered under the hull insurance for total loss in Chapter 5.3.

5.2 Damage under the Hull Insurance

5.2.1 The Concept of Damage

For a loss caused by faulty material or error in design to be covered under Cl. 12-4, the perils must cause a "damage". Thus, if the assured changes or rectifies parts of the vessel before a damage has occurred, the costs are for his account.

There are especially two elements that put losses caused by error in design and faulty material in a special position when it comes to the concept of damage. Firstly, the peril itself is a defect. This means that it may be difficult to separate a damage from the defect, as the defect might appear as a damage. Secondly, the latent defect is present from the moment the vessel is delivered or repaired.

These elements may cause a complicated borderline between the peril, the casualty and the actual damage. The rules in the Nordic Marine Insurance Plan clearly states that the insurer is only liable for the costs of repairing the damage. Consequently, a mere rectification of the faulty material or error in design cannot be considered a recoverable loss, even though it is a defect to the vessel – the defect must cause a casualty and a damage.

This important borderline is also demonstrated through the countervailing considerations of Cl. 12-4. The insurance should not be used as a measure to carry out improvements to the vessel. The purpose of the insurance is to restore the vessel to the condition it was in prior an unexpected damage. Hence, the assured should not be compensated if he rectifies an inherent defect. Due to this fundamental principle of insurance law, it is important to draw a clear line between the defect, being the peril, and the damage. Furthermore, as it is a prerequisite that the peril results in a casualty, it is important to establish how faulty material and error in design affects this principle.

For most losses covered under the hull insurance, the casualty will often be a distinct event, where the casualty and the damage coincides

in time.[70] This will often also be the case for defects in the form of faulty material or error in design. The defect may be present for a longer period, before resulting in a casualty and causing immediate damage. In these cases, the general rule in Cl. 2-11 sub-clause 1 is easily applicable, as the peril clearly strikes the vessel and causes a loss.

There are, however, situations where an unknown defect, such as error in design or faulty material, results in a gradually developing damage. In these situations, it may be difficult to establish when the peril actually strikes, as the damage is the result of a gradual process influenced by the peril. The Nordic Marine Insurance Plan regulates these matters in Cl. 2-11 sub-clause 2, which states that if an unknown peril results in a damage, the casualty "shall be deemed to be a marine peril that strikes the interest insured at the time the damage starts to develop".[71] Thus, the casualty shall be considered to have occurred when the damage first starts to develop. Consequently, one must establish when a damage caused by faulty material or error in design first starts to develop.

As a starting point, the general rule that a "damage" is an identifiable change must apply also to losses caused by error in design and faulty material. This means that a defect cannot qualify as a damage when it has been present in the same form since the part was installed – the defect must undergo an actual change to manifest as a damage.

The physical change will be somewhat different for losses caused by faulty material and subjective errors in design compared to objective errors in design. Objective errors in design are difficult to objectively measure and test. They will rather be discovered when it becomes clear that the design is not adequate. This will often appear as a sudden casualty, where the design causes damage to the part itself or adjacent parts.

Faulty material and subjective errors in design will, on the other hand, be measurable from the moment the defect is present. The Commentary

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70 T. Falkanger, H. Bull, & L. Brautaset, *Scandinavian Maritime Law,* 2017, pp. 628–629 with further references to ND 1995.335 NCA *Dino 1*

71 The rule in also known as the Anti-Hektor rule, cf. T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, pp.134–135 with further references to ND 1950.458 NSC *Hektor*

indicates that measurable cracks are sufficient to qualify as a damage.[72] If the material is faulty by way of cracks from the moment the part is delivered, the remarks in the Commentary may indicate that the defect itself may qualify as a damage without requiring a causality to occur.[73] However, Cl. 12-4 states that "damage is a result of ... faulty material", which clearly distinguish the terms "damage" and "faulty material".[74]

> The distinction is well demonstrated in Statement of Particular Average 3045 issued in Gothenburg on 25 March 2002 in matter 2001-10:
>
> "*The case concerned the coverage for faulty material in SHC 87 § 8.1.b) no. 2, which as mentioned is similar to NM1P § 12-4. The question was whether or not the insurer was obliged to pay compensation for cracks in the crown wheel in two so-called Azimuth thrusters in a vessel. The parties agreed that the cracks existed already at the delivery of the ship from the building yard, and it was accepted that the cracks were produced in connection with the case-hardening process of the wheels in 1984. The adjuster therefore held that the crown wheels had to be considered as faulty material. It was clear that the relevant parts were approved by the classification society. The assured claimed that errors during the hardening process of the crown wheel constituted the peril, and that this peril had caused the damage in the form of cracks. The insurer, on the other hand, claimed that the cracks were the faulty material per se, and that there was no damage that was covered by the conditions. This was accepted by the adjuster, who held that there were no «indications in the documentation that the cracks have propagated during service or that the defects have developed since the wheels were hardened». Thus, coverage was not granted.*"[75]

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72 Commentary, p. 293

73 Previous versions of the Nordic Marine Insurance Plan and Commentary were more imprecise regarding this issue. Reference is made to Wilhelmsen, *Hull Insurance of "Latent defects,* 2004, p. 268 for further discussions about this topic based on the earlier version of the contract.

74 Wilhelmsen, *Hull Insurance of "Latent defects",* 2004, p. 267

75 As cited in Wilhelmsen, *Hull Insurance of "Latent defects",* 2004, p. 268

To summarize, it appears that the decisive point is that the defect must undergo some kind of change in order to qualify as a damage. This coincides with the opinion that that the peril must change from a dormant to an active state when it causes a casualty.[76] This solution also shows a consistency between Cl. 2-11 sub-clause 1 and 2. In accordance with sub-clause 1, the casualty occurs when the peril strikes, and there will be causality between the casualty and the damage. If, however, the peril does not strike in a clear manner, the casualty will be deemed to have occurred when the damage starts to develop, which will be the earliest time a causal link between the peril and the damage may be established.

5.2.2 The Term "Part" and the Connection to the Classification Societies

The partial exclusion in Cl. 12-4 is closely connected with the term "part". The term is used twice in the clause. Firstly, it is used in order to limit the scope of the exclusion, as the exclusion only applies to the "part or parts of the hull, machinery or equipment which were not in proper condition". Hence, it is only the damage to the defective part that is excluded from cover. Secondly, the term "part" is used as a measure to exclude the exclusion if "the part or parts in question had been approved by the classification society".

The term "part" implies that an entity may be technically or logically separated or defined as a fraction of a whole. Based on a wide interpretation, it must be assumed that every part of the machinery or equipment can be broken down to the smallest possible parts, such as bolts and nails. A more lenient understanding of the term would favor a technical interpretation where a part is understood to mean a self-contained component of a larger entity.

Due to the magnitude of parts onboard a vessel, it is impossible to give an objective definition of the term "part" that includes every component onboard. The term must rather be interpreted on a case to case basis.

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[76] Wilhelmsen, *The distinction between one and more than one insured event,* 2003, Ch. 4.1

However, the Nordic Marine Insurance Plan seems to work with two different definitions of the term "part" within Cl. 12-4.

The first definition is related to the term "part" as used in order to limit the insurer's liability and refers to the "part or parts of the hull, machinery or equipment which were not in proper condition". The Commentary suggests on page 294 that it is a question of identifying the "natural unit of repair" for the damage in question. For this definition of a "part", the technical and economic aspects of the case will be in the center of the evaluation,[77] and the key element is the "natural unit of repair", as stated in the Commentary. This implies that a "part" is the unit that may be repaired or replaced.[78] Thus, if the cause of damage is faulty material in a bolt, this bolt will be considered a "part" if it is possible to repair or exchange this particular bolt. Similarly, if parts of a steel plate is corroded due to error in design, the entire steel plate must be considered to be the "part", if it is natural to remove the entire plate and not only the corroded part.[79]

The second definition is related to the term "part" used as a measure to remove the exclusion, if "the part or parts in question had been approved by the classification society". The wording implies that the damaged part must be subject to class approval. It also implies that the term "part" should be interpreted in accordance with the first definition.

However, the Commentary clearly states on page 292 that the term should be interpreted more leniently, and that it is enough that the part "forms part of a larger unit or assembly for which accept criteria have been specified".

Hence, it appears that the requirement of class approval uses a broader interpretation of the term "part" than the one discussed above. The more lenient interpretation in the Commentary should be seen in connection with how the classification societies approve vessels.[80] The class will not approve every small part or component on a vessel. They will instead

77 T. Falkanger, H. Bull, & L. Brautaset, *Scandinavian Maritime Law,* 2017, p. 661

78 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 297

79 T. Falkanger, H. Bull, & L. Brautaset, *Scandinavian Maritime Law,* 2017, p 661

80 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 305

approve systems that are central for the safety of the vessel, and their objective is to:

> *"verify the structural strength and integrity of essential parts of the ship's hull and its appendages, and the reliability and function of the propulsion and steering systems, power generation and those other features and auxiliary systems which have been built into the ship in order to maintain essential services on board".*[81]

Consequently, the classification societies do not classify every minor part of the vessel, but carries out a control of vital parts and systems. Hence, the insurer cannot require that the assured gets every part approved by class, as this would place a disproportionate burden on the assured.

Still, the class approval is used as a safety measure for the insurer.[82] If the classification society deems a part to be safe, the risk of damage due to untested design may decrease significantly. Hence, the insurer must be able to require a more specified class approval, rather than a general approval of the vessel all-together. This leaves the question of how the term "part" should be interpreted in connection to the requirement of class approval in order to balance insurer's need for a safety measure with how the classification societies actually carry out their approvals.

The classification societies control the essential systems of the vessel, which implies that the interpretation of a "part" should be seen in connection with the system it forms a part of, as for example the steering and propulsion system, and the auxiliary system. The different parts in a system may have different functionalities, but the system should have the same purpose.

It could be argued that the definitions in Cl. 12-4 provides a low degree of foreseeability for both the assured and the insurer, and that it allows for unnecessary conflicts between the parties. The solution might have worked better when the systems and machinery in the industry were

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81 http://www.iacs.org.uk/media/3784/iacs-class-key-role.pdf

82 T. Wilhelmsen & H. Bull, *Handbook in Hull Insurance,* 2017, p. 305

less complex. However, neither of the definitions seem to have taken into account the complexity of newer designs and the emerging technology within the business. The importance of the two definitions are crucial for the totality of the insurance cover. Firstly, it will decide which part or parts that are excluded from cover. Secondly, it will decide whether those parts might be recoverable after all. Consequently, it may have a great effect on the settlement amount, which further increases the need for a clear rule.

On the other hand, it could be argued that it is the complexity of the new technology that makes it impossible to create absolute and objective rules. Furthermore, it could be argued that as the costs of renewing the defect part are often low, the total effect on the settlement amount will be minor. However, with this line of reasoning, it brings the question of whether the rule is superfluous, as the monetary effect might be low compared to the possible conflicts it may create.

Still, the rule concerning error in design and faulty material has remained relatively unaltered since the 1964 version.[83] This long tradition indicates that the rule works well in practice. Furthermore, the contract is negotiated with all relevant parties in the industry, which indicates that the result is balanced and benefits all parties equally. This presumed balance is a very good reason to trust that the wording provides a fair and reasonable result.[84]

5.2.3 The Economic Extent of Cover

The Nordic Marine Insurance Plan operates with a distinction between the primary and consequential damage. The primary damage is considered to be the direct consequence of the peril, whilst any other damage emerging due to the primary damage is considered to be consequential damage. Wilhelmsen describes the primary damage as the part that "was the first that was struck and consequently triggered the casualty", whilst

[83] See § 175 in the 1964 version. Still, the Commentary has undergone several changes

[84] T. Wilhelmsen, *Flexibility, foreseeability and reasonableness in relation to the Nordic Marine Insurance Plan 2013*, 2013, p. 64

it is a consequential damage when "the casualty can be traced back to another factor, where the part concerned was struck as a result of this factor".[85]

The distinction is also used within other types of non-marine insurances, and Nygaard describes the consequential damage as

> "*… consequent upon the factual/historical development of the damage. (…) Thus in this instance it is a question of a chain of causation leading from the primary damage to the subsequent development of the damage or secondary damage*".[86]

In Cl. 12-4 the distinction between the primary and consequential damage is demonstrated in the wording "the insurer is not liable for the costs of renewing or repairing the part or parts of the hull, machinery or equipment which were not in proper condition". Thus, the clause only excludes cover for the primary damage – the part which was damaged due to faulty material or error in design.[87] The exclusion does not apply to the losses occurring as a consequence of the primary damage.

The rule of consequential losses may result in random coverage of losses for the assured.[88] If the assured notices or becomes aware of the error in design or faulty material before it manifests in a damage, the entire rectification will be for the assured's account, even if the chance of a damage occurring is imminent. If, on the other hand, the assured becomes aware of the defect because of the damage, all consequential losses will be covered as a minimum.

The rules concerning primary and consequential damage allows the insurer to exclude the costs related to renewing the part that was defective prior to the damage, provided that the part was not class approved. Hence, it is a measure that seeks to balance the countervailing considerations of losses caused by faulty material and error in design. The exclusion of the

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85 T. Wilhelmsen, *The Norwegian Marine Insurance Plan and Substandard ships*, 2000, p. 236

86 N. Nygaard, *Placing the Burden of Proof of a Hypothetical Cause*, 2001, p. 441

87 Provided that the part was not approved by a classification society

88 S. Brækhus & A. Rein *Håndbok i kaskoforsikring,* 1993, p. 112

costs of repairing the defective part places the risk of a poor business risk with the assured. At the same time, the assured will be compensated for the larger extent of the loss, the consequential damage, which will to a higher degree be unforeseeable.

Another aspect of the economic extent of cover is the general principle that the assured should not benefit from an insurance claim. When a defect results in a damage, the repairs will include both damage repairs and rectification of the defect. Cl. 12-4 only excludes costs related to the primary damage, also provided that the part was not approved by class. Thus, any other costs related to rectifying the defect will not be included in the exclusion. To ensure that the assured does not gain from the insurance settlement, Cl. 12-4 must be seen in connection with Cl. 12-1. It is stated in Cl. 12-1 sub-clause 1 that:

> *"If the vessel has been damaged without the rules relating to total loss being applicable, the insurer is liable for the costs of repairing the damage in such a manner that the vessel is restored to the condition it was in prior to the occurrence of the damage."*

The principle of betterments is further specified in Cl. 12-1 sub-clause 3:

> *"If the repairs have resulted in special advantages for the assured because the vessel has been strengthened or the equipment improved, a deduction from the compensation shall be made limited to the additional costs caused by the strengthening or the improvement."*[89]

The starting point in Cl. 12-1 is that the assured shall be compensated for all costs in connection with the repairs, and thus be put in the same economic situation as before the damage occurred. Hence, Cl. 12-1 directly addresses the principle that the assured should not benefit from the casualty.

The connection between the Cl. 12-1 and Cl. 12-4 is emphasized in the Commentary on page 294:

[89] The content of Cl. 12-1 sub-clause 3 is only a clarification of sub-clause 1, and is to some extent superfluous, cf. Commentary p. 280

> *"…the principles in Cl. 12-1 apply and the insurer is not liable for any additional costs that are incurred for the purpose of rectifying the original error. The insurer's obligation under Cl. 12-1 is to pay for the cost of restoring the vessel to the same condition it had before the casualty. The extra costs of any improvements must be for the account of the assured."*

Consequently, Cl. 12-4 is supplemented by Cl. 12-1. As a result, the assured will not get compensated for the costs of rectifying and improving the faulty material or error in design, even if the defective part was approved by the classification society. However, the deduction is "subject to the condition that the strengthening or the improvement has made the repairs more expensive".[90]

To summarize, the economic extent of cover in Cl. 12-4 will to some extent work as a measure to ensure that risk connected to faulty material and error in design is placed for the assured's account. At det same time, the consequential losses, which will be more unforeseeable, are covered by the insurance. Consequently, Cl. 12-4 balances the countervailing considerations and principles that apply for losses caused by error in design and faulty material. The clause does not, however, exclude all expenses related to improvement of the defective material or design. The consolidated structure of the Nordic Marine Insurance Plan ensures that the general principles in Cl. 12-1 supplements Cl. 12-4. This way, compensation is limited to the actual costs of restoring the vessel and thus ensures that the assured does not benefit from the damage.

5.3 Total Loss

Chapter 11 of the Nordic Marine Insurance Plan applies when a casualty results in damage that is so extensive that the vessel must be considered a total loss. Chapter 12 only applies when the rules in Chapter 11 are inapplicable. As a consequence, Cl. 12-4 regarding error in design and faulty material does not directly apply in the event of a total loss. Still,

[90] Commentary, p. 280

due to the consolidated structure and logic of the Nordic Marine Insurance Plan, many of the same considerations and principles will apply if faulty material or error in design results in a total loss. The purpose of this chapter is to present the rules regarding total loss and discuss how they are affected in relation to faulty material and error in design, in light of the considerations and principles discussed in Chapter 4.2.

A vessel may become a total loss in three ways. The vessel may be "lost without there being any prospect of it being recovered" or be "so badly damaged that it cannot be repaired", cf. Cl. 11-1. Cl. 11-1 does not contain any information about excluded peril, and the all-risk principle must apply. As the partial exclusion for faulty material and error in design only directly applies for Chapter 12, the aforementioned alternatives of total loss will not be affected if the cause of the casualty is faulty material or error in design.

The third way a vessel may be a total loss is by condemnation.[91] According to Cl. 11-3, the conditions for condemnation are met when:

> *"(…) casualty damage is so extensive that the cost of repairing the vessel will amount to at least 80 % of the insurable value, or of the value of the vessel after repairs if the latter is higher than the insurable value."*

The first two alternatives for total loss represent objective total losses, where the vessel is objectively lost or is so damaged that it is objectively impossible to repair. The rules regarding condemnation represent a borderline to Chapter 12, as Chapter 12 applies as long as the threshold for condemnation is not met.[92] Consequently, Cl. 11-3 will be influenced by the concept of damage in Chapter 12, and the cover may be affected if the cause of the casualty is faulty material or error in design.

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[91] Sometimes referred to as Constructive Total Loss (CTL). However, the term is not used in the Commentary or case law. Furthermore, the term CTL is much wider under English insurance conditions, and the term should thus be used with caution. See C. Haugli Sørensen, *Konstruktivt totalforlis – Kondemnasjonsvilkår og totaltapsoppgjør etter Norsk Sjøforsikringsplan og spesialvilkår,* 2008, p. 26

[92] C. Haugli Sørensen, *Konstruktivt totalforlis,* 2008, p. 33

The decisive question is thus how to calculate the costs related to the "casualty damage" and how this calculation will be affected if the cause of the casualty is faulty material or error in design.

The term "casualty damage" implies that the casualty must be recoverable in accordance with the Nordic Marine Insurance Plan. However, the term "cost of repairing the vessel" is general and implies that all costs that occur in order to restore the vessel should be considered.

The Commentary to Cl. 11-3 states that the term "casualty damage" only includes damage that "according to its nature is covered by the insurance".[93] Based on this statement, it could be argued that only recoverable costs should be included in the calculation. Such a solution would coincide with the general principles, as the assured should not benefit from an insurance claim. If unrecoverable damage is included in the calculation, the assured could in theory claim for a total loss due to a minor recoverable damage by including severe unrecoverable damage due to lack of maintenance.[94] Such a solution would clearly benefit the assured.

This aspect is elaborated in the Commentary states on page 266:

> *"The assured shall not be able to obtain a constructive total loss by ignoring the upkeep of the ship. However, if the damage is of such a nature as to make the insurer liable under Cl. 12-3 or Cl. 12-4, this will also have to be taken into consideration when determining the question of condemnation."*

The remarks in the Commentary are somewhat ambiguous, as they do not refer to which costs related to damage caused by Cl. 12-4 that should be taken into consideration. However, the general remarks imply that only recoverable costs should be included. This indicates that in the event of a loss caused by faulty material or error in design, only the recoverable costs should be included.

Such a solution would also be in line with the general considerations and principles mentioned above. The calculation would not include the

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93 Commentary, p. 266

94 C. Haugli Sørensen, *Konstruktivt totalforlis,* 2008, p. 45

risks that the assured is responsible for. It would, however, include the consequential and unforeseen losses. Consequently, the calculation only includes the costs the assured would have received compensation for if the damage were less extensive and the rules in Chapter 12 applied.

The solution also ensures an internal logic in line with the consolidated structure in the Nordic Marine Insurance Plan. It would create a random solution if the excluded losses due to faulty material or error in design were to be included in the calculation of condemnation but excluded for hull damage.

To summarize, the rules relating to total loss are not directly influenced if the casualty is caused by error in design or faulty material. To form a consistency within the contract, the rules in Chapter 12 will still have an indirect effect if the total loss occurs by way of condemnation. This way, the calculation of a possible condemnation includes the unforeseeable losses but excludes losses that must be considered to be a business risk and the costs of improving the quality of the vessel by rectifying a defect.

6. Finishing Remarks

The objective of this thesis has been to discuss how losses caused by faulty material and error in design are handled in the Nordic Marine Insurance Plan. The governing perspectives have been the considerations and principles that justifies the rules concerning error in design and faulty material, and the structure and internal logic in the Nordic Marine Insurance Plan.

The discussions have demonstrated how the structure of the Nordic Marine Insurance Plan is central in understanding how these losses are handled. Firstly, the thesis has demonstrated how the distinctions between the perils, the casualty and the damage are central throughout the contract. In relation to losses caused by error in design and faulty

material, this distinction is particularly interesting, as latent defects challenge the standard concept of damage. Secondly, the discussions have shown how the structure of the contract influences the totality of cover under different types of insurances.

Another aspect is how the considerations and principles for the cover for losses caused by error in design and faulty material play a central role throughout the Nordic Marine Insurance Plan. The purpose of the insurance is to compensate the assured for unforeseen losses, not expected losses that the assured may budget for. This governing principle is represented in the calculation of premium and the entire contract is based on this risk allocation. As an example, expected losses within the assured's control are specifically excluded in Cl. 10-3.

As faulty material and error in design may be the result of a subjective business risk taken by the assured, the rules in the Nordic Marine Insurance Plan seek to ensure that any losses resulting from these risks are for the assured's account. This is demonstrated in the partial exclusion of cover in Cl. 12-4.

Another central principle in the Nordic Marine Insurance Plan is that the assured should not benefit from an insurance claim. The thesis has demonstrated how both Cl. 12-4 and Cl. 12-1 protect this principle. Cl. 12-4 primary focus on cover of the primary damage caused by error in design and faulty material, and thus excludes cover for the part that was defective due to the assured's own risk. Cl. 12-1 is a more general clause, which ensures that all betterments are left for the assured's account. Hence, both clauses seek to protect the same principle, but in slightly different manners. Still, they will both directly affect the cover in the event of a damage caused by faulty material or error in design.

The thesis has also discussed the distinction between faulty material and error in design, and demonstrated how the considerations and principles apply with different strength depending on the peril. Faulty material and subjective errors in design are more often a result of an unfortunate incident. Hence, the underwriters will to a smaller degree underwrite the assured's business decisions. Consequently, it could be argued that the cover for these losses is somewhat unbalanced. Objective

errors will, on the other hand, illustrate losses where the intended balance of countervailing considerations works better.

The thesis has pinpointed some challenges related to the structure of cover for losses caused by faulty material and error in design, such as the categorization of faulty material and error in design, and the term "part". Still, the conclusion is that the Nordic Marine Insurance Plan is a balanced and fair contract in relation to losses caused by faulty material and error in design. The underlying considerations and principles justify the partial exclusion of cover and ensure a fair risk allocation. This balance is further protected as the contract is regularly revised by the involved parties, ensuring a dynamic set of rules where the parties may influence the direction of the amendments. The dynamic contract, the clear principles and the consolidated nature of the Nordic Marine Insurance Plan ensure that the contract is balanced and well equipped when facing losses caused by faulty material and error in design, both due to conventional material and designs, and new technologies.

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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.

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