

Maritime Contracts and Private International Law: Between Party Autonomy and Uniform Law

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SUMMARY: 1. Introduction: Contracts for carriage of goods by sea as a domain traditionally governed by usages of the community of traders. – 2. The role of private international law rules, with particular regard, on a European level, to the Rome I Regulation (EC Regulation No. 593/2008), and their coordination with uniform law conventions. – 3. The importance of party autonomy within the said rules and the limits to the possibility of designating a uniform law convention as the law applicable to a contract of carriage of goods by sea. – 4. Party autonomy and the balancing of the contractual positions of the parties: differences between contracts for carriage on liner terms and charter parties. – 5. Concluding remarks.

1. Introduction: Contracts for carriage of goods by sea as a domain traditionally governed by usages of the community of traders

Maritime law, with particular regard to the law governing transport of goods by sea, stands as a particularly significant component of the legal framework within which the 21st Century Maritime Silk Road shall develop. As a matter of fact, this area of the law has traditionally evolved based on the practice of the operators involved in the domain of trade concerned. This being international in nature, involving in the great part of cases the carriage of goods between ports falling under the jurisdiction of different sovereigns, its regulation by rules of national, or, rather, at a time preceding the establishment of modern States, local law, appeared as unsatisfactory, despite a general assumption whereby as a matter of principle carriers ought to have been considered as subject to the law of the home port. It is in a period pre-dating the creation of national States that the substance of the rules governing contracts for the carriage of goods by sea evolved from the concrete practice of the operators concerned, giving rise to a body of rules of a customary nature, following a path substantially analogous to that of the *lex mercatoria*, as developed in respect of other segments of international trade. Eventually, the said usages developed from the practice of carriage of goods by sea have undergone a process of codification, giving rise to famous collections of such usages, of which the *Livre du consulat de la mer* of the second half of the XIIIth Century and the *Raccolta anonima di costumi marittimi del Mediterraneo integrati dalla giurisprudenza consolare*, dating from mid-XVth Century, stand out as the most famous examples.¹

It is in more modern times, between the end of the XIXth and the beginning of the XXth Centuries, that the usages developed from the practice of international carriage of goods by sea have made their way into internationally binding rules of

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¹ See generally S. M. Carbone, 'Conflits de lois en droit maritime' (2009) 340 *Recueil des cours de l'Académie de droit international de la Haye* 65, 73 ff.

law, as a consequence of a new privately led process of codification. This has been heralded most notably, after some first attempts by the International Law Association as an international scientific association, by the *Comité maritime international* (CMI), a body which might be qualified as a non-governmental organization, consisting in fact of an international association featuring as its members the largest operators from different countries in the field of shipping, which undertook the responsibility of drafting the texts of the earliest maritime law conventions, introducing uniform rules of a substantive nature governing carriage of goods by sea, of which the Hague Rules of 1924 represent the most notable example.²

It has then been upon the advent of a new political and economic climate within the domain of international relations following the vague of decolonization in the 1960s and 1970s that the movement towards an international codification of the rules of maritime law took a different, more institutionalized pattern, with an increased role being granted to inter-governmental organizations and their specialized agencies, considered as better suited to sort out a suitable balance between the interests involved, which appeared to extend beyond those of the largest carriers which were conveyed by the efforts of the CMI. This later phase of the activity of international codification of the rules of maritime law found its most notable, but, at the same time, not totally successful, expression in the Hamburg Rules of 1978,³ as well as, more recently, in the Rotterdam Rules of 2009.⁴

2. The role of private international law rules, with particular regard, on a European level, to the Rome I Regulation ((EC Regulation No. 593/2008), and their coordination with uniform law conventions

² International Convention for the Unification of certain Rules relating to Bills of Lading, Brussels, 25 August 1924 (Hague Rules), 120 LNTS 155, later amended by the Protocol of 23 February 1968 to amend the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 (Visby Protocol), 1412 UNTS 128, and by the Protocol of 21 December 1979 to amend the International Convention for the unification of certain rules relating to bills of lading (Hague Rules) as modified by the Amending Protocol of 23 February 1968 (Visby Protocol), 1412 UNTS 146 (Brussels Protocol). See Carbone (n 1), 83 ff.; P. Ivaldi, 'Carriage of Goods by Sea', in J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Vol. 1 (Edward Elgar 2017), 261 ff.

³ United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978, 1695 UNTS 3. The Convention has to date 34 Contracting Parties, among which the major shipping countries are not included, since these have preferred to remain bound by the Hague-Visby Rules. See Carbone (n 1), 90 ff.; Ivaldi (n 2), 262.

⁴ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11 December 2008, A/RES/63/112. The Convention, opened for signature in Rotterdam on 23 September 2009 and intended to provide an updated legal framework reflecting modern transport practices where carriage by sea is frequently combined with transport by road or rail from the premises of the consignor to those of the consignee, is not yet in force, having so far received just five ratifications or accessions. See Ivaldi (n 2), 262.

As experienced in other segments of international trade law, such as, most notably, that of international sales of goods, the adoption, thanks to the driving force of the private parties concerned rather than of inter-governmental bodies, of international conventions bearing uniform rules of a substantive nature in respect of contracts for carriage of goods by sea could not entirely dispose of the conflict-of-laws problem in respect of a field which, being, as noted, international in nature, inherently implies legal relationships connected to more than one legal system. It is in fact trite to observe that rules contained in international conventions bearing uniform rules of a substantive nature, such as, on the one side, the Hague Rules of 1924 and their subsequent amending protocols, and, on the other side, the Hamburg Rules of 1978, or, subsequently, the Rotterdam Rules of 2008, may not be considered as likely to provide an entirely exhaustive regulation of all legal issues likely to arise in the practice of the field concerned, so that the need for conflict-of-laws rules identifying the legal system to be resorted to for the purposes of regulating unsettled issues might not be ruled out altogether.⁵

Furthermore, international conventions bearing uniform rules of a substantive nature normally contain rules determining their scope of application, establishing the prerequisites either of a personal or of a territorial nature triggering their application, thereby clearly presupposing the existence of legal relationships, albeit potentially amenable to their substantive scope of application, which nonetheless are not going to be regulated by them. In turn, the rules contained in a uniform law convention for the purposes of setting out the scope of application of its rules tend to operate in a mode which is strongly resembling that of conflict-of-laws rules, most notably those of a unilateral nature, since they fix the connecting factors, normally to one or more contracting parties to the convention concerned, based on which the rules it contains shall apply.⁶

The question has frequently been discussed in the relevant legal literature as to whether the rules contained in a uniform law convention shall directly apply in those cases falling under their respective scope of application independently of the operation of private international law rules, or whether, instead, their application shall be made dependant from the fact of those rules designating the law of a contracting State to such a convention, in such terms as to make its rules applicable *in lieu* of the otherwise applicable rules contained in that State's domestic law. In respect of such a question, while it is generally assumed that the priority the rules contained in a uniform law convention enjoy over domestic law applies also in respect of conflict-of-laws rules, the grounds justifying such a

⁵ See generally concerning the relationships between uniform law conventions and conflict-of-laws rules, among others, A. Malintoppi, 'Les rapports entre droit uniforme et droit international privé' (1965) 116 *Recueil des cours de l'Académie de droit international de la Haye* 1, 17 ff.; E. Vitta, 'International Conventions and National Conflict System' (1969) 126 *Recueil des cours de l'Académie de droit international de la Haye* 111, 187 ff.; C. Pamboukis, 'Droit international privé holistique: droit uniforme et droit international privé' (2007) 330 *Recueil des cours de l'Académie de droit international de la Haye* 9, 176 ff.

⁶ See, concerning the nature and function of the rules establishing the scope of application of uniform law conventions as compared to private international law rules, among others, Malintoppi (n 5), 22 ff.; Vitta (n 5), 192 ff., 187 ff.; Pamboukis (n 5), 180 ff.

result have nonetheless appeared as controversial. On the one side, the assumption has been defended that the rules contained in a uniform law convention should have priority over private international law rules which might lead to the application of the law of a third country not going to apply its rules. This in consideration of the overridingly mandatory nature which, in respect of Contracting States, the uniform set of rules contained in a uniform law convention would possess.⁷ This assumption, based on the rigid nature of the regime embodied in most uniform law conventions namely in the field of contracts of carriage, cannot be considered as entirely persuasive, due regard being had to the difficulty of identifying a genuinely general interest in upholding the option in favour of a given legal regime as concerns the relationships between the parties to an international transport contract, such as to justify a derogation to the normal operation of private international law rules.⁸

On the other side, the probably more persuasive justification of the priority to be granted to the application of uniform law conventions in respect of situations falling within their scope of application vis-à-vis the private international law rules of their contracting States lies in their speciality. The argument based on the speciality of the rules contained in a uniform law convention relates not only to that sort of *sui generis* speciality which has been pointed to for the purposes of justifying in general terms their priority over potentially conflicting domestic law rules, something which would be of little avail as concerns the relationships with private international law rules contained in turn in an international convention – or, as it is currently the case, in a legal act of the European Union such as the Rome I Regulation on the law applicable to contractual obligations – but also, and more decisively, to speciality *ratione materiae*. In fact, uniform law conventions in the field of transport law generally provide a specific regulation of a substantive nature addressing particular types of contract, likely to achieve an apposite balance between the interests at stake in those special types of contracts, which cannot be considered as equally targeted by private international law rules, including those contained in international conventions or in EU legal acts such as the Rome I Regulation, which might contain rules identifying the law applicable to contracts in general, or, at most, to contracts of transport of either goods or persons taken as a whole.⁹

The logic of speciality appears nonetheless inherent also in the rules embodied, namely, at first in the Rome Convention on the law applicable to contractual obligations of 1980 and, currently, in the Rome I Regulation No. 593/2008 as concerns their coordination with other international conventions. In this respect, it shall be noted that the change supervened in the legal nature of the

⁷ See P. Ivaldi, *Diritto uniforme dei trasporti e diritto internazionale privato* (Giuffrè 1990), 25 ff.

⁸ See, with particular regard to the rather narrow definition of overridingly mandatory rules adopted under Article 9(1) of the EC Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I), G. Biagioni, 'Art. 5 (Contratti di trasporto)', in F. Salerno and P. Franzina (eds), *Regolamento CE n. 593/2008 sulla legge applicabile alle obbligazioni contrattuali. Commentario* (2009) Le nuove leggi civili commentate 717, 719.

⁹ See G. Contaldi, 'Il contratto internazionale di trasporto di persone', in N. Boschiero (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti* (Giappichelli 2009) 359, 367 ff.

instrument, from an international convention, though strictly linked with the achievement of the objectives of the EC Treaty, to an EU legal act, has inevitably had an impact also on the coordination with other relevant international instruments. In fact, while Article 21 of the Rome Convention contained an unfettered subordination clause, declaring in general terms that it would not affect other international conventions of which contracting States were or would become parties, without distinguishing between conventions containing private international law rather than uniform law rules, the corresponding rule embodied under Article 25 of the Rome I Regulation is conceived in more stringent terms, in a twofold direction. First, coherently with the lines set by the CJEU case law concerning the principle of parallelism between internal and external competences of the EU, the rule states that the Regulation shall not affect international conventions of which Member States are parties at the time of the adoption of the Regulation itself, assuming that as concerns the conclusion of new conventions the external competence of the EU would be called into play. Secondly, and more significantly for the purposes of the point under consideration, Article 25(1) of the Rome I Regulation specifies that the Regulation itself shall not affect those international conventions which lay down conflict-of-laws rules relating to contractual obligations. The rule, in its concrete terms, would therefore not exclude that the private international law rules contained in the Regulation might affect the application of international conventions containing uniform law rules of a substantive nature, since these conventions, even though naturally deemed to apply in respect of cases likely to raise conflict-of-laws issues, do not themselves lay down conflict-of-laws rules, unless, as noted, the rules contained in a uniform law convention for the purposes of determining its scope of application may be considered as functionally equivalent to private international law rules. In this respect, even if an extensive interpretation of the expression used in the relevant part of Article 25(1) of the Rome I Regulation has been proposed, in such terms as to allow its application vis-à-vis any international convention concerning contractual obligations in cases posing conflict-of-laws issues,¹⁰ probably the most persuasive solution lies in arguing that uniform law conventions for the very fact of introducing uniform rules of a substantive nature operate on a different plan as compared to an instrument containing uniform private international law rules such as the Rome I Regulation, so that the relationships between the two types of instruments shall be construed in terms of complementarity rather than of conflict.¹¹

Ultimately, no conflict is likely to arise between, on the one side, the international conventions bearing uniform rules concerning contracts of carriage of goods by sea and, on the other side, the conflict-of-laws rules contained in the Rome I Regulation, insofar as the uniform law conventions are deemed to apply of their own force in their contracting States whenever the circumstances triggering their application, as specified in the relevant provisions of the

¹⁰ See A. Bonfanti, 'Le relazioni intercorrenti tra il regolamento Roma I e le convenzioni internazionali (in vigore e non)', in Boschiero (n 9), 383, 395 ff.

¹¹ See P. Franzina, 'Art. 25 (Relazioni con convenzioni internazionali in vigore)', in Salerno and Franzina (n 8), 935, 937 ff.

convention concerned, are met. Accordingly, the conflict-of-laws rules contained in the Rome I Regulation would come for consideration only insofar as the relevant uniform law convention would not apply, or, rather, as concerns the regulation of issues not settled under such a convention.¹²

Coming to the specific terms in which the main uniform law conventions concerning carriage of goods by sea determine their scope of application, the Hague Rules of 1924, as amended pursuant to the Visby Protocol of 1968 (so-called Hague-Visby Rules), provide under Article 10 for their application to bills of lading contemplating carriage of goods between ports located in different States, irrespective of the nationality of the ship or of the parties, in three alternative sets of circumstances. Precisely, whenever the bill of lading is issued in a contracting State, or the carriage takes place from a port in a Contracting State, or the parties have opted for the application of the uniform law convention, either directly, or indirectly, by means of a choice in favour of the law of a State that would give effect to them. Similar options are contemplated under the Hamburg Rules of 1978, whose Article 2 adds to the same alternative grounds for the application of the Rules in question, as respectively contemplated by Article 10 of the Hague-Visby Rules, the location of the port of discharge in a Contracting State. Differently, the more recent Rotterdam Rules of 2009, not yet in force, further extend, coherently with their broader substantive scope, encompassing also carriage of goods taking place just partly by sea, the grounds triggering their application, with reference to the location in a Contracting State also of the place of receipt or delivery of the goods. Conversely, Article 5 of the latter Rules do not refer to the issuance of the bill of lading or other document embodying the contract of carriage in a Contracting State as a ground for application of the rules in question, such a ground appearing largely obsolete, nor to the choice by the parties of either the rules in question or the law of a State giving effect to them as grounds likely to trigger their application.¹³

3. The importance of party autonomy within the said rules and the limits to the possibility of designating a uniform law convention as the law applicable to a contract of carriage of goods by sea

As the examples provided by Article 10 of the Hague-Visby Rules as well as by Article 2 of the Hamburg Rules aptly demonstrate, the role of party autonomy is particularly significant in the domain of maritime contracts, with particular regard to contracts for the international carriage of goods, as inherently commercial contracts. This is reflected also in the conflict-of-laws rules embodied under Article 5(1) of the Rome I Regulation, which contemplates the choice by the parties pursuant to Article 3 of the Regulation as the general rule, while

¹² See, pointing to an express indication in this sense, as contained under Article 10, Appendix B of the Berne Convention of 9 May 1980 concerning international carriage by rail, Ivaldi (n 7), 136 ff.

¹³ See generally Ivaldi (n 2), 262 ff.

providing for objective connecting factors for finding the law applicable to such contracts which are to be resorted to only in the absence of choice.¹⁴

As it is well known, Article 3 of the Rome I Regulation contemplates in very broad terms the freedom of the parties to choose the law applicable to the contract, including the possibility to choose the law applicable to one or more specific issues within the contract, so-called *dépeçage*, and the possibility to subsequently change the choice initially made.¹⁵ It appears noteworthy that, as concerns contracts of carriage of goods, as contracts normally concluded between traders, the plain reference made under Article 5(1) of the Rome I Regulation to the general rule on choice of the applicable law by the parties contained in Article 3 of the same Regulation confers an unfettered discretion on the parties to choose virtually the law of any country, even unconnected, in principle, with the substance of the contract. A comparable breadth is not contemplated, instead, as concerns contracts of carriage of persons, where passengers normally enjoy a weaker bargaining position as compared to carriers.¹⁶ Actually, as we shall note, this situation of imbalance between the bargaining powers of the parties may not be a peculiarity just of contracts of carriage of persons, being instead likely to be traced also within the context of contracts of carriage of goods on liner terms, where the shipper of the goods is substantially called to accept the content of the clauses, including the choice-of-law one, set out by the carrier¹⁷. Conversely, passengers in a contract of carriage of persons are not necessarily to be identified with consumers, since persons might embark on a journey out of professional purposes. Nonetheless, Article 5(2) of the Rome I Regulation limits the choice by the parties in respect of a contract of carriage of persons to a limited array of laws presenting a close link to the substance of the contract, even if, ultimately, these are not prevalingly closer to the legal sphere of the passenger rather than that of the carrier.¹⁸

A controversial issue concerning the choice of the applicable law by the parties having a special relevance in the domain concerned, in consideration of the option contemplated namely under Article 10 of the Hague-Visby Rules as well as under Article 2 of the Hamburg Rules for the parties directly to stipulate that the rules of a uniform law convention shall apply to their contract of carriage, relates to whether for the purposes of the rule as laid down under Article 3 of the Rome I Regulation the law to be chosen by the parties shall necessarily be the law of a given State – be it a Member State or a third country according to the universal or

¹⁴ See generally Biagioni (n 8), 723 ff.; K. Thorn, ‘Art 5 Rom-I VO’, in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht – EuZPR/EuIPR. Kommentar*, Vol. 3 (4th ed., Otto Schmidt 2016) 262, 273 ff.

¹⁵ See generally, among others, F. Marrella, ‘Funzione e oggetto dell’autonomia della volontà nell’era della globalizzazione del contratto’, in Boschiero (n 9), 15 ff.; A. Gardella, ‘Art. 3 – Libertà di scelta – I’, in Salerno and Franzina (n 8), 611 ff.

¹⁶ See Biagioni (n 8), 725 ff.; Contaldi (n 9), 362 ff.; Thorn (n 14), 273.

¹⁷ See Carbone (n 1), 124 ff.

¹⁸ See, critically noting the scarce likelihood of the broad range of alternative laws available for choice by the parties pursuant to Article 5(2), Rome I Regulation, to adequately serve the purpose of protecting the interests of the passenger as allegedly weaker party to the contract, Biagioni (n 8), 726; Contaldi (n 9), 363 ff.

erga omnes approach of the conflict of laws rules contained in the Regulation. It has in fact been debated whether the parties' choice might also address other bodies of law, such as, on the one side, an international convention containing uniform rules of substantive law, such as the Hague-Visby Rules or the Hamburg Rules, or, on the other side, non-binding sets of rules, such as the UNIDROIT Principles on international commercial contracts, or the Principles of European contract law (PECL), or, more broadly, the *lex mercatoria* or other unwritten bodies of law.

In this respect, it might be appropriate to recall that the final text of Article 3 of the Rome I Regulation as adopted omits a specification included in the rule as conceived in the proposal tabled by the European Commission in 2005, whereby the parties would have been entitled to choose as the law applicable to their contract principles and rules of substantive contract law, recognized internationally or within the European Community, as it then was.¹⁹ As generally acknowledged, the said specification would have allowed a *kollisionsrechtliche Verweisung*, i.e., a choice as the applicable law, addressed not just to substantive rules of contract law as would have been included in a uniform law convention, but also to non-binding sets of principles, provided these could be considered as recognized either at an international level or at least on an EU scale. Allegedly, the wording used suggested the admissibility of a choice as the law applicable to a contract of sets of principles such as the UNIDROIT Principles or the PECL, or the prospective Common European sales law (CELS), to the exclusion of unwritten bodies of law such as the *lex mercatoria*. The nature of such a choice as a *kollisionsrechtliche Verweisung* was further confirmed by the second part of the rule as contained in Article 3(2) of the Commission's proposal. The rule made provision as to how to fill-in gaps revealed by the selected rules or principles of law, in terms which appeared substantially inspired by the solution embodied for the same purposes under Article 7(2) of the 1980 UN Convention on Contracts for the International Sales of Goods (CISG),²⁰ providing that reference ought to have been made for that purpose to the general principles inherent in the rules or principles concerned, or, failing this, to the law applicable in the absence of choice pursuant to the other rules of the Regulation.²¹

The said specification having been dropped from the final text of Article 3 of the Rome I Regulation as adopted, with the rule remaining totally silent in this

¹⁹ See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, Article 3(2).

²⁰ See generally, as concerns the solution proposed in this respect under Article 7(2), CISG, among others, M. J. Bonell, 'Article 7', in C. M. Bianca and Michael J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987), 65, 75 ff.; Franco Ferrari, 'Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale' (1996) 48 *Revue internationale de droit comparé* 813, 841 ff.

²¹ See, concerning the solution contemplated under Article 3(2) of the European Commission's proposal, P. Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles' (2006) 95 *Revue critique de droit international privé* 331, 335 ff.; F. Marrella, 'Prime note circa la scelta del diritto applicabile alle obbligazioni contrattuali nella proposta di regolamento «Roma I»', in P. Franzina (ed.), *La legge applicabile ai contratti nella proposta di regolamento «Roma I»* (Cedam 2006), 28, 35 ff.

respect, guidance may still be sought from the preamble to the Regulation, whose Recital No. 13 actually points to the opposite, and more traditional, avenue of a *materiellrechtliche Verweisung*. Accordingly, the parties might incorporate into their contract by reference a non-State body of law or an international convention, thereby meaning not as the law governing the contract, but, rather, as part of their contractual stipulations, likely to apply only insofar as not precluded by mandatory rules of the law applicable in the absence of choice.²²

In this respect, and returning to the specific hypothesis contemplated under Article 10 of the Hague-Visby Rules or Article 2 of the Hamburg Rules, of an express reference by the parties to either uniform law convention, it seems worth considering that the effects of such a reference are not likely to be the same in that case, where an international convention bearing binding uniform rules of substantive law is being referred to, as compared to cases where non-binding sets of principles are being referred to. In fact, uniform law conventions, differently from non-binding principles, are likely to apply as part of the law governing the contract, insofar as such law is the law of a Contracting State and the contract would be likely to fall under the scope of application of the convention concerned, pursuant to its own rules concerning its application. In substance, a choice by the parties, as would be included in a so-called *paramount clause*, whereby their contract of carriage of goods would be governed by the Hague-Visby Rules pursuant to Article 10 of those rules, or by the Hamburg Rules as contemplated under Article 2 of the latter, would be tantamount to a choice of law in terms of a *kollisionsrechtliche Verweisung*, insofar as the question arises before the courts of a Contracting State to either convention, expected to give way to the application of the rules contained in that convention within their own scope of application, that is, provided the conditions autonomously posed by the relevant convention for the purposes of its application are met. The situation would obviously be different, and more likely to correspond to a pure *materiellrechtliche Verweisung* in cases where the question arises before the courts of a non-contracting State, not expected to give way to the application of the rules contained in the convention referred to by the parties, or where the conditions for the application of the uniform law convention concerned are not met. Plainly as a *kollisionsrechtliche Verweisung* would instead operate a choice made in favour of the law of a Contracting State, as alternatively contemplated under Article 10 of the Hague-Visby Rules or under Article 2 of the Hamburg Rules, since in such a case either set of Rules would apply *in lieu* of the otherwise applicable rules of domestic law of that Contracting State in matters of carriage of goods by sea.²³

The rules of domestic law of either the law chosen by the parties, or of the law applicable in the absence of choice, will in any event be deemed to apply in

²² See, concerning the situation obtaining following the deletion of the proposed Article 3(2) of the Commission's proposal and the introduction of Recital No. 13 into the Preamble of the Rome I Regulation, among others, Marrella (n 15), 36 ff.; Gardella (n 15), 619 ff.

²³ See, for a particularly clear distinction between the said different figures of a *materiellrechtliche Verweisung* and of a *kollisionsrechtliche Verweisung* likely to lie behind a choice by the parties in favour of the application of a uniform law convention such as the Hague-Visby Rules or the Rotterdam Rules, Thorn (n 14), 273.

respect of those issues not governed by the rules contained in the uniform law convention concerned, since the above-mentioned solution consisting of having regard to the principles inherent in the convention concerned for the purposes of addressing unsettled issues may well apply concerning so-called internal gaps in the convention, that is, questions falling within the material scope of the convention but left unsettled by it, and not as concerns external gaps, that is, for the purposes of settling issues non intended to be governed by the convention concerned.²⁴

4. Party autonomy and the balancing of the contractual positions of the parties: differences between contracts for carriage on liner terms and charter parties

As mentioned, whereas contracts for the international carriage of goods by sea are normally envisaged as quintessentially commercial contracts, that is, as contracts concluded between traders, in respect of which, unlike contracts for the carriage of passengers, as a matter of principle no question in terms of protection of weaker parties should arise, nonetheless the balancing between the bargaining powers of the parties might not necessarily be the same throughout different types of contracts available in the practice for organizing the carriage of goods by sea. This has inevitable consequences in terms of the need for a more stringent and rigid regulation concerning the liability of the carrier towards the shipper for loss of or damage to the goods, or for delay in arrival or discharge at the port of destination, the extent of such a liability lying at the core of the substantive legal issues likely to arise from a contract of carriage of goods by sea. The situation in this respect is quite different as concerns contracts of charter party, where, in substance, a ship is being rented, either for an agreed period of time (so-called time charter), or for a specified journey (so-called voyage charter) for the purposes of carrying goods from one port to another, normally located, in the practice of international trade, in different countries, realizing a form of carriage conventionally named as transport on tramp terms, as compared to transport on liner terms, documented by a bill of lading or by a sea waybill. In the latter set of circumstances, the shipper entrusts the carriage of the goods with a carrier for a pre-determined journey performed by the latter as part of a regular service, implying the carriage of goods dispatched by several shippers. Accordingly, whereas the clauses of a charter party are more likely to be negotiated on a basis of substantial equality of bargaining power, within the context of transport on liner terms generally the shipper is bound to accept the standard terms practiced by the carrier in respect of the service required.²⁵

²⁴ See, with regard to the distinction between internal and external gaps in respect of a uniform law convention, Ferrari (n 20), 842 ff. and 'CISG and Private International Law', in F. Ferrari (ed), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (Giuffrè 2003) 19, 39 ff.; see also Pamboukis (n 5), 141 ff., and, with specific regard to the domain concerned, Ivaldi (n 7), 135 ff.

²⁵ See generally Carbone (n 1), 123 ff.

This may contribute to justify the fact that uniform law conventions in the field of carriage of goods by sea have primarily addressed contracts of carriage on liner terms, in respect of which the imbalance as concerns bargaining power between shippers and carriers is more sensible and, accordingly, the need to fix internationally agreed standards appeared as particularly pressing, as a remedy to the variety among the legislative solutions prevailing in the countries more extensively concerned with maritime traffic. In fact, the Hague Rules of 1924, in presupposing for the purposes of their application the circumstance of a bill of lading having been issued in a Contracting State, were clearly drafted with liner transport in mind, and such an inherent feature of the Rules has remained unaffected by the later Visby Protocol, irrespective of the fact that the latter, as mentioned, introduced further prerequisites for the application of the Rules, since, anyway, the rules as amended still presuppose the issuing of a bill of lading.²⁶ Nonetheless, in the practice the possibility has been clearly envisaged for the parties to a charter party to submit their contract to the Hague, or Hague-Visby, Rules, by means of a paramount clause, thus showing that the rules in question, though essentially conceived for liner transport, could nonetheless apply also to carriage of goods based on a charter party. However, the choice in such a case would present the nature of a simple *materiellrechtliche Verweisung* in the sense pointed out above.²⁷

Incidentally, it is worth noting that as concerns the Hamburg Rules of 1978, these expressly exclude under Article 2(3) their application to charter parties, though clarifying that the exclusion does not extend to a bill of lading issued by a carrier who operates the ship based on a charter party, in which case the Rules might well apply to the contractual relationship between the carrier and the holder of the bill of lading, when this is not the charterer. Conversely, the Hamburg Rules, displaying in this greater flexibility as compared to the Hague or Hague-Visby Rules, might apply to contracts of carriage of goods by sea documented other than by a bill of lading, such as contracts documented by a sea waybill, as a non-negotiable transport document.²⁸ The same line set out by the Hamburg Rules appears to be followed by the more recent, but not yet in force, Rotterdam Rules of 2009. These also expressly exclude, under Article 6(1) charter parties or other contracts concerning the use of a ship or of a space thereon, adding, under Article 6(2) a more general exclusion in respect of all contracts for the carriage of goods on non-liner terms, with the exception of cases where no charter party or other contract for the use of a ship or space thereon has been concluded and a transport document, or an electronic transport record as defined in the Rules themselves, has been issued.

²⁶ See, concerning the difficulties this is causing as concerns the applicability of the Hague-Visby Rules in respect of contracts of carriage of goods by sea documented by a sea waybill, as a document which, differently from a bill of lading, is non-negotiable in nature, G. M. Boi, 'Sea waybills and other transport documents', in J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Vol. 2 (Edward Elgar 2017), 1615, 1617 ff.

²⁷ See, pointing to such a practice, Carbone (n 1), 145.

²⁸ See Boi (n 26), 1619.

The option developed in the practice for the parties to make the Hague-Visby Rules applicable also in respect of contracts of carriage of goods by sea based on a charter party, to which of themselves they would not apply, shows that while within their own scope of application uniform law conventions may be considered as likely to apply directly and independently of a choice by the parties or of the interplay of private international law rules, this does not rule out the possibility for the rules contained in a uniform law convention to be made applicable also to a contract of carriage of goods by sea not falling within their scope of application, as a consequence of a choice by the parties. Nonetheless, coherently with the distinction made out above concerning the effects that a choice by the parties in favour of the application of a uniform law convention might have in those cases where, failing other prerequisites for its application, such a choice would not automatically trigger its application, within the legal framework of the Rome I Regulation such a choice would be rather likely to be construed as a *materiellrechtliche Verweisung*. That is, the parties' choice in this case would appear as the result of an exercise of party autonomy operating on the level of substantive law, in terms of determining the material content of the contract of carriage to be concluded by the parties, and not as a *kollisionsrechtliche Verweisung*, that is, as a choice of the applicable law in terms of private international law. Indeed, an international convention is strictly speaking not binding law beyond its scope of application. Accordingly, the rules contained in a uniform law convention when made applicable outside their scope of application purely as a consequence of a choice by the parties would not prevail over the mandatory rules of the law applicable pursuant to the relevant rules of private international law.²⁹

As concerns the rules of private international law to be relied upon for the said purpose, it has been noted already that, as far as EU Member States subject to its application are concerned,³⁰ the Rome I Regulation contains a special provision devoted to contracts of carriage, subdivided in two separate rules concerning, respectively, contracts of carriage of goods and of persons. With regard to the former, which form essentially the subject of our enquiry, Article 5(1) of the Regulation, while finding in the law chosen by the parties pursuant to the general rule under Article 3 of the Regulation the law applicable to the contract of carriage, sets out a series of objective criteria to be relied upon for the purposes of establishing the law to be applied in the absence of a choice by the parties. The latter criteria shall be relied upon in those cases where, as mentioned above, a

²⁹ See Thorn (n 14), 273.

³⁰ Incidentally, it is worth noting that the Rome I Regulation applies in all of the EU Member States except Denmark, which, as it is well known, does not participate in the adoption of EU legal acts concerning the space of freedom, security and justice. Conversely, the Regulation, or, rather, the domestic rules incorporating it with non-substantial adaptations, continue to apply in the UK after its withdrawal from the EU, as provided for under the Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019/834. See P. Beaumont, 'Some reflections for the way ahead for UK private international law after Brexit' (2021) 17 *Journal of Private International Law* 1, 2; A. Dickinson, 'Realignment of the planets – Brexit and European Private International Law' (2021) *IPRax – Praxis des internationalen Privat- und Verfahrensrechts* 213, 218.

choice by the parties in favour of the application of a uniform law convention is not likely to fulfil the requirements set out by the convention itself for it to be made applicable of its own force. Furthermore, even in those cases where, in the circumstances contemplated, for example, under Article 10 of the Hague-Visby Rules, a choice by the parties in favour of the Rules would suffice for that purpose, the objective criteria provided for under Article 5(1) of the Rome I Regulation would be called into question for the purposes of finding the law deemed to apply to issues not governed by the convention concerned.³¹

With regard to the domain covered by the special conflict of laws rule contained under Article 5 of the Rome I Regulation concerning contracts of carriage of goods, it shall be noted incidentally that a preliminary question was submitted to the European Court of Justice concerning the substantive scope of application of the rule, as previously contained under Article 4(4) of the Rome Convention of 1980 on the law applicable to contractual obligations. The answer the Court provided in its *ICF* judgment properly reflected the sensible variety of types of contracts for the carriage of goods by sea, clarifying that a flexible and essentially teleological interpretation of the notion of contract of carriage shall be relied upon also for the purposes of the said rule, the same, in principle, applying in respect of the rule as now contained in the Rome I Regulation. Accordingly, also contracts based on a charter party, implying the renting of a ship for a certain period of time (so-called *time charter*) or for a pre-determined journey (so-called *voyage charter*), shall be considered as falling within the scope of the said notion, insofar as the renting of the ship is instrumental to the carriage of goods.³²

In the event of the absence of a choice by the parties, contracts of carriage of goods by sea in respect of which the existing uniform law conventions would not apply shall be subject, pursuant to the objective connecting factors contemplated under Article 5(1) of the Rome I Regulation, to the law of the country where the carrier has his habitual residence. The application of this rule, which of itself would appear consistent with the other conflict-of-laws rules set out under Article 4(1) of the Regulation for the purposes of establishing the law applicable to a series of specific types of contract in the absence of a choice by the parties, and which appear inspired by the underlying logic that the law of the country where the party owing the performance characterizing the contract has his or her habitual residence³³, is nonetheless made subject to further conditions. These are clearly meant to safeguard a sufficient balance between the respective positions of the parties, by requiring that the place of receipt, or, alternatively, the place of delivery of the goods, or the habitual residence of the consignor as the other party to the contract, shall be situated in the same country.

³¹ See, concerning the interplay between uniform law conventions concerning contracts of carriage of goods and the rule under Article 5(1) of the Rome I Regulation, Biagioni (n 8), 718 ff.

³² European Court of Justice, Case C-133/08 *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV, MIC Operations BV* [2009] ECR I-9710, para. 33 ff.

³³ See generally, concerning the principles inspiring the determination of the applicable law in the absence of choice by the parties pursuant to the general rule under Article 4 of the Rome I Regulation, among others, Ugo Villani, "La legge applicabile in mancanza di scelta dei contraenti", in Boschiero (n 9), 149, 150 ff.; A. Leandro, 'Art. 4 (Legge applicabile in mancanza di scelta)', in Salerno and Franzina (n 8), 637, 638 ff.

As a fall-back rule to be resorted to in case none of those alternative conditions is met, Article 5(1) of the Rome I Regulation refers to the rather blunt rule whereby the contract shall be governed by the law of the country where the place of delivery stipulated by the parties is located. This may amount to a specification of the rather traditional rule of the *lex loci destinatae solutionis*, being the place of delivery of the goods to be carried under the contract virtually the place where the essence of the obligations undertaken by the carrier shall be fulfilled. The rule, taken as a whole, reflects a rather unconvincing ambiguity between the pursuit of the objective of striking a balance, in terms of familiarity with the applicable law, among the positions of the parties, the need to ensure clarity and predictability as concerns the establishment of the applicable law absent a choice by the parties – as revealed particularly by the fact of having recourse to a set of hierarchically ordered conflict-of-laws rules – and that of ensuring an effective connection between the contract and the law called to regulate it. The latter objective is revealed by a general exception clause, set out under Article 5(3) of the Regulation, in substantially the same terms as that contained under the general rule of Article 4, and deemed to apply both as concerns the law applicable to contracts for the carriage of goods and to contracts for the carriage of persons. According to the rather standard drafting of the said clause, the rules providing for the determination of the law applicable to either type of contract of carriage in the absence of choice by the parties, as set out, respectively, under paragraphs 1 and 2 of the rule, shall be set aside whenever the contract is manifestly more closely connected with the law of a country other than that to which those rules are pointing.³⁴

5. Concluding remarks

Contracts for carriage of goods by sea may be considered as a field of election for a confrontation between uniformity of regulation and party autonomy. As concerns the pursuit of uniformity, this particular field reveals the criticality of achieving a suitable coordination between different means of ensuring, though the adoption of binding rules, the substantive objective of uniformity. These consist, on the one hand, of international conventions bearing uniform rules of substantive law, deemed in principle to provide an autonomous set of rules applicable to all contracts falling under their scope of application irrespective of the applicable law, and, on the other hand, of conventions – or, within the special framework of a regional economic integration organization such as the European Union, of legal acts – setting out common rules of private international law. As we have noted, as a general rule the latter sort of rules shall come into account in respect of those cases where the former shall not apply of their own force.

As concerns the role of party autonomy, this shall inevitably be larger where uniform law conventions either so allow, by enabling, when certain prerequisites

³⁴ See, concerning the objective criteria set out under Article 5(1) of the Rome I Regulation for the purposes of finding the law applicable to a contract of carriage of goods by sea in the absence of choice by the parties, Biagioni (n 8), 723 ff.; Thorn (n 14), 274 ff.

are met, the parties' choice to trigger their application, or do not apply altogether. This the case, as concerns uniform law conventions on carriage of goods by sea, with contracts embodied in a charter party, in respect of which the need for binding uniform rules of substantive law has traditionally been less perceived, presuming a substantial balance between the bargaining powers of the parties, and where, in the practice, uniformity has to some extent been attained by the widespread use of standard terms.³⁵ As we have pointed out, the role of party autonomy in terms of choice in favour of the application of a uniform law convention shall also be different depending on whether such a choice relates to a contract capable of falling within the scope of application of the convention whose rules are chosen, triggering therefore its application as binding in respect of the contract (with an effect amounting to that of a *kollisionsrechtliche Verweisung*) and likely to prevail on the otherwise applicable rules of domestic law, or to a contract not falling within the scope of application of the convention whose rules are being chosen. As mentioned, in the latter case the choice by the parties in favour of the rules contained in a uniform law convention will amount to a simple reception of those rules as part of the contractual stipulations of the parties (so-called *materiellrechtliches Verweisung*), and therefore subject to the mandatory rules of the law applicable to the contract.

In this respect, as noted, party autonomy may also take the form, in those cases where uniform law conventions do not apply, or, where they may apply, in respect of issues not governed by them, of the choice in favour of the law of a given country as applicable to the contract. Apart from those cases where – as contemplated namely under the Hague-Visby Rules as well as under the Hamburg Rules – a choice by the parties of the law of a Contracting State to a uniform law convention is contemplated by the convention concerned as a ground capable, provided certain prerequisites are met, to trigger its application, the freedom by the parties to choose the law applicable to a contract of carriage of goods is left unfettered by the conflict of laws rules applicable throughout the EU Member States bound by the Rome I Regulation, and embodied in its Article 5. As mentioned, the latter provision, in fact, refers to the parties' choice as the main connecting factor in respect of contracts of carriage of goods, providing just as a fall-back option for objective connecting factors, to be resorted to for establishing the applicable law in the absence of choice.

³⁵ See, concerning the limits inherent in the achievement of uniformity by means of standard forms of contract, as developed by the shipping industry, in consideration both of their being subject to the mandatory rules of the applicable law, and of their style of drafting, frequently leaving different options open for the parties' choice, Carbone (n 1), 120 ff.