Achieving uniform interpretations of uniform rules : a case study of containerisation and carriage of goods by sea.

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Abstract

This thesis explains that the development of the law of the carriage of goods by sea has led to the appearance of the Hague, Hague-Visby and Hamburg Rules. The existence of these different conventions plainly contributes to the breakdown of uniformity. The thesis, nevertheless, argues that international uniformity is still valuable since it reduces the legal costs significantly. However, many conflicts arise among the various countries in interpreting these conventions. Such conflicts lead to uncertainty and unpredictability, and in consequence, to the increase of legal costs. In proving the latter, the thesis examines and evaluates the conflicts of interpretations of these conventions brought on by containerisation.

The thesis proves the inadequacy of various propositions on the question of how to avoid such conflicts. It argues, however, that the failure to consider foreign decisions is a significant factor of having such conflicts. In proving the latter, the thesis provides a comparative study in evaluating various courts' decisions that relate to containerisation. The thesis, however, evaluates different measures to achieve international uniform interpretations. Most of these measures are not completely satisfactory solutions to such achievement. Accordingly, the thesis examines the obstacles that may face the applicability of comparative law in practice, and the capability of avoiding these obstacles. The thesis also offers various observations in relation to how the national courts shall consider comparative law.

The key point is that the divergence that characterised the interpretation of the existing conventions will reappear unless there is some obligation on national courts to consider and apply comparative law. The thesis therefore proposes that any future convention relating to the law of carriage of goods by sea shall specify that the national courts of every contracting state shall refer to the decisions of the other contracting states when dealing with questions of interpretation.

ACHIEVING UNIFORM INTERPRETATIONS OF UNIFORM RULES: A CASE STUDY OF CONTAINERISATION AND CARRIAGE OF GOODS BY SEA

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Acknowledgement & Dedication

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I dedicate this thesis to my beloved wife Lara, my daughter Zain, and my parents who have always given me their love, encouragement and support.

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A.C.	*Appeal Cases*
A.L.Q.	*Arab Law Quarterly*
A.M.C.	*American Maritime Cases*
Am. J. Comp. L.	*The American Journal of Comparative Law*
Aust. B.L. Rev.	*Australian Business Law Review*
Brit. Y.B. Int'l. L.	*The British Year Book of International Law*
Brooklyn L. Rev.	*Brooklyn Law Review*
Cal. W. Int'l. L.J.	*California Western International Law Journal*
Ch. D.	*Law Reports, Chancery Division*
C.L.R.	*Commonwealth Law Reports*
C.P.	*Law Reports, Common Pleas*
Enc. P. Int'l. L.	*Encyclopaedia of Public International Law*
Eng. Rep.	*English Reports*
Euro. Trans. L.	*European Transport Law*
Ex. C.R.	*Canada Exchequer Court Reports*
F. Cas.	*Federal Cases (USA)*
F.2d	*Federal Reporter, Second Series (USA)*
F.3d	*Federal Reporter, Third Series (USA)*
F. Supp.	*Federal Supplement (USA)*
Hous. J. Int'l. L.	*Houston Journal of International Law*
Int'l. Comp. L.Q.	*International & Comparative Law Quarterly*
Int'l. Enc. Comp. L.	*International Encyclopaedia of Comparative Law*
J.B.L.	*The Journal of Business Law*
J.L. Econ.	*The Journal of Law & Economics*
J.M.L.C.	*Journal of Maritime Law & Commerce*
J. Transnat'l. L.P.	*Journal of Transnational Law & Policy*
K.B.	*King's Bench*
L. Ed.	*Lawyer's Edition, United States Supreme Court Reports*

L.M.C.L.Q.	*Lloyd's Maritime & Commercial Law Quarterly*
Lloyd's Rep.	*Lloyd's Law Reports*
L.Q.R.	*The Law Quarterly Review*
M.L.J.	*McGill Law Journal*
Mar. Law.	*The Maritime Lawyer*
Pace L. Rev.	*Pace Law Review*
Pacific L.J.	*Pacific Law Journal*
Q.B.	*Queen's Bench*
S. Ct.	*Supreme Court Reporter (USA)*
Scandinavian Stud. L.	*Scandinavian Studies in Law*
St. John's L. Rev.	*St. John's Law Review*
Student L. Rev.	*Student Law Review*
Texas L. Rev.	*Texas Law Review*
Trans. L.J.	*Transportation Law Journal*
Tul. L. Rev.	*Tulane Law Review*
U. Miami L. Rev.	*University of Miami Law Review*
U. Pa. L. Rev.	*University of Pennsylvania Law Review*
U.S.	*United States Supreme Court Reports*
Va. J. Int'l. L.	*Virginia Journal of International Law*
Vand. J. Transnat'l. L.	*Vanderbilt Journal of Transnational Law*
W.L.R.	*Weekly Law Reports*

Declaration

The material contained in this thesis has not been submitted for a degree in this or any other University.

Statement of Copyright

CHAPTER I: INTRODUCTION & METHODOLOGY

1.1. Introduction

The principal objective of many international conventions is to achieve international uniformity of legal rules within their various contracting states. However, the uniform application of the texts of such conventions is by no means guaranteed, as conflicting national interpretations of international uniform conventions constitute a fact of international legal life. Substantive international uniformity, accordingly, cannot be achieved by only a uniform text but by both a uniform text and uniform interpretations of such text. Consequently, one must recognise that achieving both a uniform text and uniform interpretations of such text should not be separated, because the aim of achieving the former is to reach the latter. The present thesis examines the cause of the conflicts of national interpretations of uniform rules relating to the law of carriage of goods by sea, and how these conflicts can be reduced. It argues that the failure to consider comparative law[1] is a significant factor of having these conflicts of interpretations. It therefore proposes that any future convention relating to the law of carriage of goods by sea shall specify that the national courts of every contracting state shall refer to the decisions of the other contracting states when dealing with questions of interpretation.

The development of the law of the carriage of goods by sea in the last century has led to the appearance of three conventions, namely the Hague, Hague-Visby and Hamburg Rules. Although each of these conventions was

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[1] The phrase "comparative law" is used in this thesis as a technique or a methodology for the consideration of foreign decisions by national courts.

intended to achieve substantive international uniformity, inconsistent judicial interpretations have contributed to significant degrees of differences[2]. Carriage of goods by containers is an appropriate subject to examine and evaluate such differences. The reasons behind choosing this subject are: First, the subject of containerisation contains many cases and comments, English, American, Canadian and others, that are suitable for examining the cause of inconsistent interpretations of the Hague, Hague-Visby and Hamburg Rules. Second, the practical importance of containerisation in the shipping industry is such that the lack of uniformity creates significant unnecessary legal costs. Third, the issue of international uniformity regarding carriage of goods by sea has not been linked specifically with the subject of containerisation. There are, of course, many publications on international uniformity in shipping law generally, but they make a general comparison among the Hague, Hague-Visby and Hamburg Rules[3]. There are also studies on international uniformity in relation to subjects other than containerisation[4], and there are studies on containerisation, but not linked to international uniformity[5]. This thesis is

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[2] Of course, the appearance of the three different regimes themselves, plainly contribute to the breakdown of uniformity.

[3] See, for example, Robert Force, "A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)", (1996) 70 Tul. L. Rev. 2051; R. Glenn Bauer, "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules-A Case by Case Analysis", (1993) 24 J.M.L.C. 53; John O. Honnold, "Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg?", (1993) 24 J.M.L.C. 75; A.J. Waldron, "The Hamburg Rules-A Boondoggle For Lawyers?", [1991] J.B.L. 305.

[4] See, for example, Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729.

[5] See, for example, Bissell Tallman, "The Operational Realities of Containerisation and Their Effect on the "Package" Limitation and the "On-

unique in its use of the law of containerisation as a means of investigating obstacles to uniform interpretation.

The aim of the present thesis is to argue that a significant cause of the appearance of conflicts of interpretations of the Hague, Hague-Visby and Hamburg Rules specifically, and uniform rules generally, is the failure to consider comparative law[6]. Thus, the thesis proposes that if in the future a new convention governing the law of carriage of goods by sea appears, the drafters should specify a provision, which provides that for the purpose of the interpretation of the Convention, the national courts of every Contracting State shall consider other decisions of other Contracting States. The thesis acknowledges that the present position of international uniformity in relation to carriage of goods by sea is such that there is an urgent need for a new convention, since the existence of the three different conventions plainly contributes to breakdown uniformity. Nevertheless, the key point is that the divergence that characterised the interpretation of the existing conventions will reappear unless there is some obligation on national courts to consider and apply comparative law.

Deck" Prohibition: Review and Suggestions", (1970-1971) 45 Tul. L. Rev. 902; David F. McEwen, "Per Package Limitation-A Diverging Approach in Canadian Courts", [1976] L.M.C.L.Q. 269; Frank M.K. Wijckmans, "The Container Revolution and the per Package Limitation of Liability in Admiralty", (1987) 22 Euro. Trans. L. 505.

[6] This means that providing clarified provisions is not enough to achieve uniform interpretations.

1.2. Methodology

The method of the present thesis is a comparative and doctrinal one. It analyses and evaluates the inconsistent decisions of the different national courts of different countries in relation to sea-carriage of goods by containers, to ascertain the cause of the appearance of these inconsistent decisions. The thesis, in consequence, clarifies how the failure to impose a duty to consider comparative law leads to these inconsistent decisions. In so doing, the thesis concentrates on examining the Hague Rules 1924 decisions, not the Hague-Visby or the Hamburg Rules, since there are only very few reported cases on containerisation in relation to the latter two rules. The thesis, therefore, examines mostly the United States decisions, and some other common-law countries' decisions, such as the United Kingdom and Canada. The reasons behind depending largely on the United States decisions are: First, the United States still gives effect to the Hague Rules 1924. Second, the subject of containerisation has created a serious problem among the United States Circuit Courts, where many United States' cases are inconsistent with each other in dealing with this subject. In addition, this subject has created unique conflicts of interpretations, which only existed among the United States Circuit Courts due to different factors. Third, many argue that conflicts of interpretations among the various countries' decisions appear because of the different languages and the different legal systems. The United States, however, has a common language and a common law. In spite of this, inconsistent decisions have appeared among the United States Circuit Courts. The United States decisions, therefore, plainly constitute a suitable environment for investigating

and examining the conflicts of interpretations among the various national courts.

The second chapter of this thesis is an introduction to the unification of international commercial law in general. This chapter deals with two topics: The first is the tendency of the international community (countries and international organisations) to unify international commercial law. This section briefly introduces the role of the most prominent international organisations in establishing various international conventions that relate to international commercial law. The section also addresses the importance of comparative law in the working method of these international organisations, where they prepare comparative law reports or studies designed for the preparation of conventions. The second topic of this chapter, on the other hand, examines the obstacles that face the attempts to achieve international unification. This section deals with the conflicts among the various national courts in interpreting international conventions, and the different theories of many international organisations, courts, and commentators in solving such conflicts. The section also explains that such conflicts have led several commentators to argue that the idea of achieving international uniformity is illusory. The purpose behind this chapter is to contend that the international community is becoming more involved in the unification of international commercial law by adopting international conventions, which are usually the product of comparative law studies. Its purpose also is to submit that the international uniform interpretation of international conventions is not usually followed by the implementation of such conventions. The chapter ends by

asking whether we do need substantive international uniformity, namely international conventions and uniform interpretations of such conventions. If so, then how can we achieve international uniform interpretations of uniform rules?

The law of carriage of goods by sea was one of the fields in which efforts were made to obtain international uniformity. The sea is not part of the territory of any country, and in consequence, carriage of goods by sea is usually international carriage. In this sense, uniformity has always appeared to be of the essence in carriage of goods by sea or even in maritime law generally[7]. The following chapters of this thesis, accordingly, concern the achievement of international uniformity in the field of carriage of goods by sea. The third chapter of this thesis introduces the international unification of carriage of goods by sea. This chapter is divided to two parts: The first clarifies the development of the liability of the carrier of goods by sea, where the Hague, Hague-Visby and Hamburg Rules are at present in force in many countries. The primary aim of these conventions, like many other conventions, is to create uniform rules to be adopted by the nations of the world. However, although these conventions recognise the importance of international uniformity, the existence of these three different conventions plainly contributes to the breakdown of uniformity. Some countries adopted the best convention that fit with their own interests, while other countries created their own codes, which are a combination of various provisions of the Hague,

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[7] See René David, "The International Unification of Private Law", (chapter 5) (1975) 2 Int'l. Enc. Comp. L. 1 at 150-51.

Hague-Visby, and Hamburg Rules, as well as other non-uniform domestic provisions.

Although the Hague, Hague-Visby and Hamburg Rules recognise the importance of international uniformity, they raise an important question: Do we really need uniform rules? In other words, what are the advantages of having uniform rules? This question must be examined because one might argue that since the above first part shows that the international community has lost interest in reaching international uniformity, then there is no need for reaching international uniformity. The second part of the third chapter, accordingly, argues that achieving international uniformity is still valuable. Two arguments are discussed in this part. The first is that uniform rules reduce overall costs of accidents, namely the costs of the damage or loss of the goods or the ship and the costs of injuries to persons. This argument is not convincing since it lacks any empirical evidence, and therefore, our concern is with the second argument. The second argument is that uniform rules reduce legal costs, namely the costs of the procedures of the transactions and the costs of litigation. This argument also lacks any empirical evidence, but it contains indirect evidence and is more logical or sensible than the first argument. The core of this chapter, therefore, is not only to introduce the present position of international uniformity in relation to the law of carriage of goods by sea, but also to argue that international uniformity is valuable since it reduces the legal costs significantly.

In arguing that the uniformity of the law of carriage of goods by sea reduces legal costs, we assumed that the Hague, Hague-Visby and Hamburg

Rules are uniformly interpreted among the various countries. Of course, the role of the drafters when drafting these conventions is to reach both uniform text and uniform interpretation of such text. However, after drafting these conventions, the role would logically be transferred to the national courts of the countries that adopted these conventions to reach international uniform interpretations. In reality, many conflicts arise among the various countries in interpreting these conventions. Such conflicts, in fact, lead to uncertainty and unpredictability, and in consequence, there will not be reduction in legal costs. In proving this argument, the fourth chapter examines and evaluates the conflicts of interpretations of these uniform rules brought on by containerisation. Initially, the chapter provides a brief background on the advent of containerisation and how this brought many advantages to shippers, carriers and the whole shipping industry. The chapter, on the other hand, introduces the conflicts that have been brought on by containerisation. Conflicts of interpretations appeared in relation to whether a container is the package or its contents are the packages, and whether the carriage of a container on-deck deprives carriers from the limitation of liability. The chapter investigates how such conflicts would increase the transaction costs and litigation. The chapter also explains the indirect impact of the advent of containerisation on several conflicts that already existed, and investigates how such impact increases litigation. These conflicts relate to the "fair opportunity" doctrine and the "customary freight unit" concept. In examining the conflicts of interpretations that relate to containerisation, the chapter concludes that there should be a mechanism to significantly reduce such conflicts; otherwise,

the Hague, Hague-Visby and Hamburg Rules would not produce reduction in transaction costs and litigation. This means, in consequence, that investigating how can we achieve uniform interpretations of uniform rules is a valuable issue, which urgently needs examination.

By examining the conflicts of interpretations that relate to containerisation, the next chapters of the thesis evaluate and analyse how to achieve international uniform interpretations of uniform rules. As a first step, the recognition of why conflicts of interpretations appear is surely necessary for establishing the basics of the arguments in relation to the question of how to avoid such conflicts. The fifth chapter, therefore, examines a number of proposals, suggested by different commentators, to understand why conflicts of interpretations arise. Some suggest that the imprecise drafting of international conventions creates conflicts of interpretations. Others suggest that the various methods by which countries implement international conventions create conflicts of interpretations. According to these commentators, such methods create textual variations and lead the judges to lose sight of the international character of the international convention. Many commentators, however, argue that the impact of domestic law create conflicts of interpretations. Even several commentators allege that conflicts of interpretations arise because common-law countries interpret international conventions in a different manner than civil-law countries. These proposals would without doubt play a role in explaining why conflicts of interpretations arise among the various national courts, but would not cover all types of conflicts. In other words, none of these different proposals is entirely

satisfactory, since each of them only explains some conflicts. The method in this chapter of proving the inadequacy of these propositions is by a comparative study in evaluating various countries decisions, mainly the United States decisions, that relate to containerisation.

Reviewing the above various propositions of the commentators and looking at how these propositions identify the problem of conflicts of interpretations creates an appropriate atmosphere to evaluate how conflicts of interpretations could be handled. The sixth chapter, therefore, examines the above suggestions on why conflicts of interpretations arise and explains how such conflicts could be avoided significantly. The chapter provides various decisions on containerisation as examples regarding the propositions of why conflicts of interpretations arise. It reveals that the failure to impose duty to consider comparative law is a significant factor in conflicts of interpretations since national courts usually interpret the international uniform rules independently, without considering foreign decisions. Although there is some consideration of comparative law by various national courts, still it is not persuasive. Many conflicts of interpretations could have been avoided if there was an appropriate reference to comparative law. The chapter, in consequence, addresses the significance of considering foreign decisions in reducing conflicts of interpretations. In doing so, the chapter investigates and analyses how the national courts of the various countries should consider foreign decisions. By this means, the chapter explains the methods and principles of interpretations of the various decisions that relate to containerisation.

The identification and clarification of the significant role of comparative law in reducing conflicts of interpretations leads us to question how we can achieve international uniform interpretations of international uniform rules that relate to law of carriage of goods by sea. The seventh chapter deals with the latter issue. Initially, the first part of the chapter examines and evaluates different measures, offered by different commentators and courts, for reaching international uniform interpretations. Some argue that developing specific uniform principles and rules of interpretation can lead to international uniform interpretations of uniform rules. Others argue that taking an advisory opinion from an international organisation as a guide of interpretation may lead to international uniform interpretations. Many, on the other hand, believe that the creation of an international court of appeals for construing international uniform rules is the best approach in achieving international uniform interpretations. Some, however, disregard the importance of achieving international uniformity in general, and argues that the application of the proper law of the contract avoids conflicts of interpretations, since such application meets the expectations of the parties of a contract of carriage by sea. Most of these measures are not completely satisfactory solutions to achieve international uniform interpretations of uniform rules. The second part of the chapter, on the other hand, focuses on the importance of comparative law in achieving international uniform interpretations. This part examines and evaluates the obstacles that may face the applicability of comparative law in practice, and the capability of avoiding these obstacles. This part also offers various observations in relation to how

the national courts shall consider comparative law. The key point of this chapter is that the consideration of comparative law is probably the most adequate solution to achieve international uniform interpretations of uniform rules.

CHAPTER II: THE UNIFICATION OF INTERNATIONAL COMMERICAL LAW

2.1. Introduction

One of the problems of our time is the need to reconcile the demands of the national state with the ideal of international co-operation. The present world order is still founded on the concept of the national state, but we cannot disregard the tendency towards the unification of international commercial law. Indeed, such unification has acquired a great importance and become quite successful in spite of its occasional failing. Prominent among its results are the various international conventions in particular fields, providing a uniform law, which have either incorporated their dispositions into the national laws of the signatory states or committed each state to modify its national law to make it agree with the convention. However, despite the success of many conventions concerning international commercial law, where many are at present implemented by a large number of states, they have not been interpreted uniformly among the various national courts. Therefore, various national courts, international organisations and commentators emphasize that the interpretation is valuable as the implementation of international conventions. As Scott, L.J. observed, "the maintenance of uniformity in the interpretation of a rule after its international adoption is just

as important as the initial removal of divergence"[1]. The real problem, of course, is how such divergence can be avoided.

The purpose of this chapter is to set out, in as brief as possible, the prominent international organisations and their role in creating various international conventions governing international commercial law. This chapter also sheds some light on the problems likely to confront the various national courts in interpreting such conventions, and the manner in which these courts could be likely to approach and resolve these problems.

2.2. The Tendency Towards the Unification of International Commercial Law

Through the centuries, international commercial law developed in different stages. In European medieval times, international commercial law took the form of international customary rules. These rules were then incorporated into the national laws of the various countries, but in this stage, international commercial law did not lose its international character since international commercial customs continued to grow among the international community[2]. This kind of international development suggests that complete state independence in a matter of law results in anarchy at the international level. The National law of every country is usually the product of its own historical, economic, and political developments, but is not designed for the regulation of international commercial relations. In reality, states will keep

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[1] *The Eurymedon*, [1938] Q.B. 41 at 61. Of course, there are many similar observations that can be found in later cases of various states.

[2] For a detailed discussion on the historical development of international commercial law, see Clive M. Schmitthoff, "The Unification of the Law of International Trade", [1968] J.B.L. 105 at 108.

independent and sovereign, but this cannot and must not mean total isolation. In supporting this argument, for example, some states affirm their independence but feel bound to one another by a common culture or by common economic interests. In the United States, for example, the 51 states preserve their autonomy in many fields but they coordinate in the development of their legal systems in certain fields. A similar situation also exists among many countries not allied by federal systems, such as the Scandinavian countries and the Arab League countries. At present, because of the development of international intercourse, such as the simplicity of transportation and the boost of mobility of people and capital, the world has become a smaller place, and in consequence, this has resulted in expansion of international commerce. According to these developments, it is doubtful whether any legal system, even of a large country such as the United States, can be satisfactorily developed in ignorance of the legal systems of other countries. If a country isolates itself from other legal systems, the development of the law of such country is likely to suffer[3]. The present world order is still founded on the concept of the national state, but the world community has tended to unify international commercial law.

To regulate international commercial relations in the contemporary time, the world community has recognised that such relations require international laws uniformly understood and acceptable to all countries and construed in the same manner by all national and international courts, where

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[3] See René David, "The International Unification of Private Law", (chapter 5) (1975) 2 Int'l. Enc. Comp. L. 1 at 4 -5.

these courts are required to consider such relations. In this context, Schmitthoff observes that:

> We are beginning to rediscover the international character of commercial law and the circle now completes itself: the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade[4].

The present international commercial law differs radically from national laws. The present international commercial law is the product of comparative law, which consists of norms, practices, and usages expressed in various national laws, and then are compiled by international organisations and agencies. In the present world order, studies in comparative law are necessary for many reasons. Many law reforms in the different national systems profit from studying the experience of various legal systems. It can be asked, therefore, whether the different national laws would not benefit from a more systematic harmonisation. International organisations, courts, and many commentators recognise the benefits of achieving uniformity in international commercial law. Predictability and stability of international commercial relations are the most important benefits of such unification. The parties of an international transaction usually worry about the application of unpredictable rules to their business relationship in case of a dispute appeared among them. Minimising or eliminating the possibilities of unpredictable rules by providing international uniform laws reduces transaction costs and litigation[5]. These benefits prove

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[4] Clive M. Schmitthoff, "Modern trend in English Commercial Law", in *Tidskrift Utgiven av Jurisdiska Föreningen Finland*, (1957) at 354, quoted in Schmitthoff, *supra* note 2, at 108.

[5] These benefits are discussed in detail in the next chapter, *infra*, at 63-72.

that the idea of unification of international commercial law did not appear by only a desire but also by an urgent need for it.

The world community realised, from the beginning of the appearance of unifying international commercial law, that international unification of commercial law cannot replace the present national systems, where this view is so fictional since the states are not ready to give up even a small part of their sovereignty[6]. In addition, it will hardly be possible to develop a single global code of international trade law acceptable to all countries of the world since this suggestion is not only unrealistic but also may slow down the development of commercial practices and usages and may constitute an obstacle against the continued growth of international customary rules[7]. If international unification of commercial law is understood in this way, then it has very limited prospects for the future. Therefore, the growing tendency towards internationalism, which despite occasional failing, has succeeded in developing new forms of global and regional organisation in different fields. The effort to achieve international uniformity in international commercial law has taken the form of conferences to which the various countries send their representatives, with the hope of drafting conventions embodying uniform rules in a particular area, where these conventions have to be enacted into domestic law by the various countries in order to become effective. That effort has been led by a variety of international organisations, institutions, and associations, such as the United Nations Commission on International Trade

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[6] See David, *supra* note 3, at 4.
[7] See Schmitthoff, *supra* note 2, at 111.

Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), the Comité Maritime International (CMI), and the International Chamber of Commerce (ICC). It is worthwhile to consider these international organisations briefly since they drafted various conventions that govern a wide array of international commercial transactions:

1. UNCITRAL was created in 1966 by a United Nations resolution as a specialist legal body. UNCITRAL embodies thirty-six states, with membership structured to be representative of the various geographic regions and of the principal economic and legal systems of the world. The General Assembly, which established UNCITRAL, recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded UNCITRAL as the vehicle for reducing or removing these obstacles. The purposes of UNCITRAL is, therefore, to "further the progressive harmonisation and unification of the law of international trade"[8]. In relation to its methods of work, UNCITRAL has established three working groups to carry out the preparatory work on subjects within UNCITRAL's program of work. Each of these working groups is composed of all member States of UNCITRAL. These working groups collect and disseminate information on national legislation and modern legal developments, including case law, in the field of international trade[9]. In other words, these working groups prepare comparative law reports for the designation of international

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[8] See United Nations Commission on International Trade Law (UNCITRAL), from the Internet: http://www.uncitral.org/en-index.htm (accessed: 16/8/2000).

[9] See General Assembly resolution 2205 (XXI), sect. II, paras. 8 (d) and (e); UNCITRAL Yearbook, vol. I, 1968-1970, part one, II, E.

uniform rules in particular fields. The most prominent conventions of UNCITRAL, which are already in force, are the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), and the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). The 1980 Vienna Convention provides comprehensive legal rules covering the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract, and other aspects of the contract. This convention became the most widely adopted and influential of UNCIRAL projects. At present fifty-three countries adopted this convention. The Hamburg Rules 1978, however, establishes uniform legal rules governing the rights and obligations of carriers, shippers and consignees under a contract of carriage of goods by sea[10]. These rules are discussed in detail in the next chapter[11].

2. UNIDROIT was first set up in 1926 as an organ of the League of Nations, and then was re-established in 1940 as an independent intergovernmental organisation. It operates in much the same way as UNCITRAL. UNIDROIT membership consists of fifty-eight states, and its purpose is to harmonise and coordinate the private law of the states. UNIDROIT's working methods is performed by the Secretariat, where if necessary assisted by experts in the particular field, who draws up a preliminary comparative law report, designed to ascertain the desirability and feasibility of preparing international uniform rules. Over the years, UNIDROIT has prepared over seventy studies and

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[10] *Id.*

[11] See the third chapter, *infra*, at 50-53.

drafts, which resulted in international conventions, such as the 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague), and the 1964 Convention relating to a Uniform Law on the International Sale of Goods (The Hague). These two conventions did not achieve a real international effect on a worldwide basis since the newly decolonised and developing countries did not accept them, so they get into force only with respect to few countries. UNIDROIT's work has also served as the basis for a number of international conventions, including the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR) (UN/ECE)[12], and the 1980 United Nations Convention on Contracts for the International Sale of Goods (UNCITRAL)[13].

3. The CMI is a non-governmental international organisation, which was formally established in 1897. It is the oldest international organisation in the maritime field. Although it was established after the International Law Association (ILA) by several years, the CMI was the first international organisation concerned totally with maritime law and related commercial

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[12] The intergovernmental UN/ECE Inland Transport Committee, which was established in 1947, created the CMR Convention. "The Inland Transport Committee provides a forum for its member Governments for (i) cooperation and consultation based on the exchange of information and experiences, (ii) the analysis of transport trends and economics and transport policy trends, and (iii) coordinated action designed to achieve an efficient, coherent, balanced and flexible transport system in the ECE region which is based on principles of market economy, pursues the objectives of safety, environmental protection and energy efficiency in transport and takes into account transport developments and policy of member Governments". See Transport Division, from the Internet: http://www.unece.org/trans/Welcome.html (accessed: 15/9/2001).

[13] See International Institute for the Unification of Private Law, from the Internet: http://www.unidroit.org/english/presentation/pres.htm (accessed: 03/9/2001).

practices. Article 1 of the Constitution of the CMI declares that its object "is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects"[14]. At present, the CMI has fifty-three national maritime law members associations (International Sub-Committees). The national associations' memberships include many judges, legal practitioners, academics and those interested in the shipping industry in general, and in maritime law in particular. The International Sub-Committees and subsequent Conferences of the CMI itself do the initial drafting of every convention. The reports of the International Sub-Committees include meetings and questionnaires, which end up in comparative studies designed for the preparation of conventions[15]. The CMI drafted several conventions, including the Convention for the Unification of Certain Rules of Law Relating to Bills of lading and Protocol of Signature "Hague Rules 1924", and the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of lading, signed at Brussels on 25 of August 1924 Visby Rules. These two conventions, as the Hamburg Rules, govern the rights and obligations of carriers, shippers and consignees under a contract of carriage of goods by sea[16].

4. The ICC differs significantly in its structure from the international organisations mentioned above. It draws its membership from many of the private sectors in every part of the world. It was founded in 1919, and one of

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[14] See Comité Maritime International-History, from the Internet: http://www.comitemaritime.org/histo/his.html (accessed: 03/9/2001).

[15] *Id.*

[16] These rules are discussed in detail in the next chapter, *infra*, at 39-48.

its purposes is to standardise contractual terms of particular transactions. Its national committees coordinate with their member companies and associations, who are engaged in international business, in addressing the concerns of the business community. The ICC gives priority to the issues that most urgently concern its members. The members set ICC's agenda. The members are instrumental in the development of international trading instruments. The ICC also coordinates its activities with other organisations, such as the CMI. Unlike other organisations, the ICC provides an arbitration service that allows it to supervise the interpretations of its instruments. The ICC created various uniform rules that govern the conduct of business across borders, including the International Chamber of Commerce's International Rules for the Interpretation of Trade Terms (Incoterms), and the Uniform Customs and Practice for Documentary Credits (UCP). Incoterms provides standard trade definitions that are most commonly used in international contracts to make international trade easier and help traders in different countries to understand one another. The UCP, however, provides international standard for letter of credit[17].

Apart from the above international conventions, it is also worthwhile to mention the Warsaw Convention on Air Transport. In 1922 various groups representing the air carrier industry, including the Air Transport Committee of the International Chamber of Commerce, began an international effort to deal with air transport. The French government organized a diplomatic conference

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[17] See International Chamber of Commerce, from the Internet: http://www.iccwbo.org/home/intro_icc/introducing_icc.asp (accessed: 06/9/2001).

in 1925, where this conference had led to the creation of an International Technical Committee of Aerial Legal Experts[18]. This Committee began work in 1926, which ended in 1929 in the approval of the Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air)[19]. This Convention governs, in general, the liability of air carriers for injuries to passengers and cargo. The Convention is one of the most widely adopted projects, where at present 146 countries ratified or acceded it[20].

What we have seen during the twentieth century and up to the present moment is a systematic effort to enlist various countries and groups in the unification of international commercial law. This effort succeeded in many areas but still there are obstacles that face such unification.

2.3. The Consequences of the Unification of International Commercial Law

The practical consequences of the general trend of unifying international commercial law have now to be defined. Several comments are necessary in examining the obstacles that face unification.

It is not enough to have international conventions be implemented in the various countries. These conventions must also be interpreted in the same manner in every country, which has adopted them. This raises the question: To

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[18] See Paul B. Stephan, "The Futility of Unification and Harmonisation in International Commercial Law", (1999) 39 Va. J. Int'l. L. 743 at 769.

[19] Warsaw Convention 1929, from the Internet: http://www.forwarderlaw.com/archive/warsaw.htm (accessed: 06/9/2001).

[20] See Survey, International Conventions: Membership List", from the Internet: http://www.informare.it/dbase/convuk.htm (accessed: 10/9/2001).

what extent is this so? The interpretation of the written text of international conventions is a problem in every country. This problem has been the subject to many studies, and a variety of theories propounded[21]. It is necessary, at first, to recall that many countries developed methods of interpretation to ensure uniformity of interpretation of their ordinary domestic laws. This problem, therefore, is not only at the international level but also at the domestic level. In the international level, however, the risk of differing interpretations is greater than in domestic law. Methods of interpretation differ more widely from one country to another. National courts have given the terms of many international conventions different meanings in different countries. Some courts rely on the literal meaning of the terms of the international convention, while others rely on the purpose of the provisions or the convention as a whole. National courts also try, in many cases, to reconcile their interpretation with domestic rules, where this has lead to different interpretations. The textual variations of international conventions among the various countries also constitute a problem that lead to different interpretations. *Travaux préparatoires* (preparatory work), which might clarify the meaning of some terms or provisions, are more difficult to consult in case of international conventions than in that of domestic law[22].

Many national courts' decisions, in interpreting international conventions concerning international commercial law, afford examples to how

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[21] See, for example, R.J.C. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 Int'l. Comp. L.Q. 450; Honnold, *Uniform Law For International Sales Under the 1980 United Nations Convention*, (1999).

[22] See David, *supra* note 3, at 95.

divergence of interpretation occurs among the national courts. The following concrete example demonstrates how the national courts apply varieties of interpretations. In *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*[23], an English case, the members of both the Court of Appeal and the House of Lords differed in interpreting the provisions of the Geneva Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR). The facts of this case were as follows: The defendants contracted with the plaintiffs to carry 1000 cases of whisky from the plaintiff's place of business in Glasgow to Tehran in Iran. The contract was subject to the CMR Convention. The defendants' driver loaded the whisky on his lorry and drove to London, where the whisky was stolen. The value of the whisky was about £7000. As the whisky was intended for export, the plaintiffs had not paid the excise duty of about £30,000 on it. However, since the whisky was stolen in London, the plaintiffs paid the excise duty according to section 85 of the Customs and Excise Act 1952. Therefore, the sum paid by the plaintiffs was about £37,000. On the plaintiffs' claim against the defendants for compensation under Articles 17 and 23 of the CMR Convention, Master Jacob held that the compensation to which the plaintiffs were entitled under these Articles included the excise duty, and in consequence, gave them judgment for about £37,000. The defendants appealed[24].

Article 17 of CMR Convention provides, in part, that "the carrier shall be liable for the...loss of goods...occurring between the time when he takes

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[23] [1977] 1 Q.B. 208.
[24] *Id*, at 210.

over the goods and the time of delivery". In addition, Article 23(1) provides that the carrier's liability is to be "calculated by reference to the value of the goods at the place and time at which they were accepted for carriage". The Court of Appeal and even the House of Lords agreed that this meant that *prima facie* compensation was limited to the original value of the whisky, which was about £7000. However, the dispute between the plaintiffs and the defendants was whether Article 23(4) could be read in a manner as to allow recovery from the defendants of the sum paid for the excise duty, which was about £30,000. Article 23(4) provides that:

> In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss...but no further damages shall be payable.

The Court of Appeal and the majority of the House of Lords held that the excise duty constituted "charges incurred in respect of the carriage of the goods". Although the Court of Appeal and the majority of the House of Lords reached the same conclusion, the significance of the *James Buchanan* case resides not in the decision itself but in the various methods afforded in interpreting international conventions, which are explained below.

In the court of Appeal Lord Denning M.R. argued that the English methods of interpretation differ from the European methods. In England, he stated, judges stick closely to the literal interpretation of the words, while the European judges give greater attention to the purpose underlying legislation. Therefore, he argued that the English courts should apply the European method of interpretation in order to avoid conflicts of interpretations among the various states. Lord Denning, in consequence, stated that Article 23(4)

refers only to "other charges incurred in respect to the carriage of the goods", but says nothing about the charges consequent to the loss of the goods. This, according to Lord Denning, is a gap that should be filled. He stated that it would unfair that the plaintiffs bear the expense of the excise duty when the loss resulted solely from the negligence of the defendants' driver. He argued that the drafters of the CMR Convention must be presumed to have intended this to be the case. He held that the plaintiffs were liable for the full £37,000, and therefore, dismissed the appeal[25]. Roskill and Lawton L.J.J. dismissed the appeal, but considered that Article 23(4) of the English text in referring to "other charges incurred in respect of the carriage of the goods" was ambiguous. According to them, in case of ambiguity, it is permissible to refer to the French text of the Convention to solve such ambiguity. Roskill and Lawton L.J.J. referred to the French text and argued that the French language in this text is quite general, and clearly entitle the plaintiffs to recover the excise duty[26].

There are two points that should be mentioned in relation to the Court of Appeal's decision. First, Denning, Roskill and Lawton agreed that in interpreting international conventions, we should not refer to the English common law rules[27]. In other words, we should not reconcile our interpretation with domestic rules. Second, whether their methods of interpretation were correct or not, they were all concerned with achieving

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[25] *Supra*, at 213-15.
[26] *Supra*, at 215-24.
[27] *Supra*, at 211, 218, and 221.

international uniform interpretations of the CMR Convention. For example, Lord Denning stated that:

> This article 23, paragraph 4, is an agreed clause in an international convention. As such it should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany. Compensation should be assessed on the same basis, no matter in which country the claim is brought[28].

In the House of Lords[29], on the other hand, Lord Denning's method of interpretation was criticised by the Law Lords. The House of Lords refused to consider that this was a case of a gap in the legislation, on the ground that this approach entailed the courts' usurping the powers of legislature[30]. In addition, the Court of Appeal was advised that there existed no decisions in other countries on Article 23(4) of the CMR Convention[31], but it turned out that in the House of Lords there was discussion of two decisions. One of the cases, a Dutch case, *British-American Tobacco Co. (Nederland) B.V. v. van Swieten B.V.* (unreported), was similar to the present case. The Dutch case was also concerned with the excise duty but unlike in the present case, a judgement was given in favour of the carrier. Lord Wilberforce and Lord Salmon refused to follow the latter decision. Although both Lords stressed that their interpretation should be in harmony with other countries' decisions, they stated that in *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*[32], twelve different interpretations of the courts of various countries were produced

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[28] *Supra*, at 213. See also Roskill and Lawton L.J.J., at 215-16 and 221-22.
[29] [1978] A.C. 141.
[30] *Id*, at 153, 156, 160, 166, and 170.
[31] *Supra* note 23, at 215.
[32] [1977] 1 W.L.R. 625.

concerning the meaning of specific provisions of the CMR Convention. Because of this confusion, they argued that the English courts must rely on their own methods of interpretation[33].

As to the method of interpretation of Roskill and Lawton L.J.J. in the Court of Appeal, the House of Lords divided on when the English courts are permitted to seek the assistance of the other language texts of the original convention. It has always been accepted to refer to foreign language texts only when the English text is ambiguous, but Lord Wilberforce suggested that this limitation should be relaxed and the English courts should have the liberty to consult the foreign language texts, without any limitation[34]. However, Lord Edmund-Davies refused this relaxation[35]. The House of Lords did not accept that Article 23(4) was ambiguous and even strongly doubted whether Roskill and Lawton L.J.J. could have gained any assistance from the French text of Article 23(4)[36].

The majority in the House of Lords held that the phrase "charges incurred in respect of the carriage of the goods" of Article 23(4) was wide enough to include the excise duty[37]. The minority, on the other hand, argued that since there was no gap or ambiguity in Article 23(4), then the literal approach is preferable, and in consequence, held that the wording of Article

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[33] *Supra* note 29, Lord Wilberforce, at 153-4; Lord Salmon, at 161.
[34] *Supra* note 29, at 152.
[35] *Supra* note 29, at 167.
[36] *Supra* note 29, at 152, 158, 161, 167, and 170.
[37] *Supra* note 29, Lord Wilberforce, at 152; Viscount Dilhorne, at 157; Lord Salmon, at 160.

23(4) excludes the excise duty[38]. The conclusion of the case is, therefore, that although the members of both the Court of Appeal and the House of Lords were concerned with reaching uniformity of interpretation of international conventions, there was no unity among their methods in interpreting the CMR Convention.

What observations can be made after a study of cases concerning the divergence of interpretation of international conventions that relate to international commercial law? Opinion is divided among international organisations, courts and many commentators. The first group argues that there are methods where conflicts of interpretations of international conventions can be reduced significantly. Various national courts, for example, argue that considering foreign decisions by the national courts in interpreting conventions can enhance ensuring uniformity of application of conventions. Kirby, J. of the Australian High Court, for example, in *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corp. – The "Bunga Seroja"*[39] observed that:

> The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts.

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[38] *Supra* note 29, Lord Edmund-Davies, at 168; Lord Fraser, at 170.

[39] A.M.C. 427 at 480 (1999), from the Internet: http://comitemaritime.org/jurisp/ju_interpre.html (accessed: 3/9/2001).

In fact, many International organisations recognise the value of comparative law in achieving international uniform interpretations of international conventions. The CMI, for example, seeks at present to set up an international Website of an up to date record of decisions of all national courts on the application and interpretation of international maritime conventions in national laws[40]. Several commentators[41], on the other hand, argue that creating an international court of appeals can lead to the achievement of international uniform interpretations of conventions. Other commentators[42], however, argue that international uniform interpretations can be achieved by obliging the courts to take an advisory opinion from an international organisation as a guide of interpretation. These suggestions and many others are examined and evaluated later in this thesis[43].

The second group, on the other hand, argues that conflicts of interpretations among the various national courts prove that the idea of unification is an unrealistic issue. Mann[44], for example, believes that uniformity of law is illusory, elusive, and leads to intensification of conflicts of interpretations. It could be argued, therefore, that divergence in interpretation is very dangerous to uniformity of law. Such divergence can

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[40] See Comité Maritime International, from the Internet: http://comitemaritime.org/jurisp/ju_intro.html (accessed: 10/9/2001).
[41] See, for example, Charles L. Black, "The Bremen, COGSA and the Problem of Conflicting Interpretation", (1973) 6 Vand. J. Transnat'l. L. 365; David Michael Collins, "Admiralty-International Uniformity and the Carriage of Goods by Sea", (1985-1986) 60 Tul. L. Rev. 165 at 202-03.
[42] See Sauveplanne, Unidroit 1959, at 283.
[43] See the seventh chapter, *infra*, at 177-204.
[44] F.A. Mann, "Uniform Statutes in English Law", (1983) 99 L.Q.R. 376 at 383 and 399.

result in the birth, in the minds of many commentators and any interested person or groups, of the belief that unification of law has only limited effect.

2.4. Conclusion

The first part of this chapter has described various intergovernmental and non-governmental organisations striving for uniformity in relation to international commercial law. UNCITRAL, UNIDROIT, CMI, ICC, and many other organisations are still working hard in the developing of international conventions concerning international commercial law wherever possible. This effort of unification of international commercial law has served as a useful means for promoting comparative research and deepened our understandings of the institutions of international commerce. The second part of this chapter, on the other hand, has explained that in spite of the effort of many international organisations in unifying international commercial law, the various national courts do not uniformly interpret international conventions. Several international organisations, courts, and commentators proposes solutions for achieving uniform interpretations of international conventions, while others argues that unification of international commercial law is a fictional issue.

The discussion of this chapter raises important issues for examination in the rest of this thesis: whether all the effort, time, and money invested by intergovernmental and nongovernmental organisations in the search for uniformity of international commercial law is worthwhile. In other words, are the efforts towards uniformity a waste of time and money? If the answer to the latter question is no, then another question may arise: is it important to reach

uniform interpretations of international conventions? The writer believes that the evaluation and examination of the interpretation of international conventions is not only an interesting subject but also a valuable one since it is closely connected with the general question of whether uniformity of international commercial law is important. The writer argues that with proper intention given to how national courts interpret international conventions, there are several methods for achieving uniformity in such field. At present and at least for the near future, the writer believes that the consideration of foreign decisions by the national courts is a significant factor in reducing conflicts of interpretations of international conventions concerning international commercial law. The subject of sea-carriage of goods by containers is an excellent example of an area of law that badly need revisiting. This subject is our consideration in the next chapters of this thesis to prove the above arguments.

CHAPTER III: THE DEVELOPMENT AND THE IMPORTANCE OF INTERNATIONAL UNIFORMITY REGARDING THE LAW OF CARRIAGE OF GOODS BY SEA

3.1 Introduction

Striving for uniformity in relation to the law of carriage of goods by sea or to maritime law generally is not a modern phenomenon. Throughout the centuries, the need to unify maritime law has led to codes and laws by which nations seek to regulate matters of common interests, at least on a regional basis. In the twelfth century, the Rules of Oleron, a maritime code that was followed for many centuries, were applied from Northern Europe to the Mediterranean. The Consolato del Mare, very similar to the Rules of Oleron, appeared in the Mediterranean Sea, while the Rules of Visby, a subsequent formulation of the Rules of Oleron, prevailed in the North Sea and Baltic. These codes did not have any national boundaries, and each one was quite successful in creating one language for the community of international maritime commerce. However, the efforts to achieve uniform maritime law declined with the growth of nationalism. The advent of nationalism jeopardized such uniformity, where new laws were enacted to protect national interests rather than those of the international maritime community. The regulation of maritime commercial relationships at the national level became

increasingly unsatisfactory since the number of sovereign states multiplied with the collapse of colonial empires[1].

How different is maritime law today? As explained in the previous chapter, the present world order is still founded on the concept of the national state, but the efforts to achieve uniform maritime law are revived by the creation of international conventions to regulate certain maritime issues. In the context of the law of carriage of goods by sea, several international conventions appeared to regulate this issue, but many countries refuse to subscribe to them so that such law, to a certain degree, is neither uniform nor universal. This situation led many commentators to question whether uniformity in the law of carriage of goods by sea is valuable or not.

This chapter is divided into two parts. The first attempts to explain the status of the law of carriage of goods by sea today, and explores the lack of uniformity as many countries adopted various international conventions concerning such law. The second part, on the other hand, investigates whether the unification of the law of carriage of goods by sea is valuable.

3.2. The Development of the Liability of the Carrier of Goods by Sea

3.2.1. The Nineteenth Century-Freedom of Contract and Exculpatory Clauses

In the early nineteenth century, a strict liability system protected cargo owners. In both common law and civil law systems, carriers were strictly

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[1] For a detailed discussion on the history of maritime law, see Gordon W. Paulsen, "An Historical Overview of the Development of Uniformity in International Maritime Law", (1982-1983) 57 Tul. L. Rev. 1065.

liable for cargo damage or loss. Carriers, however, could escape this strict liability if they could prove two points: The first is that their negligence had not contributed to the loss, and the second is that one of the four excepted causes, namely, act of God, act of public enemies, shipper's fault, or inherent vice of the goods, was responsible for the loss. In other words, if one of the above exceptions applied, carriers were liable only if they had been at fault, but in all other situations, they were liable without fault. This situation led many national courts and commentators to describe the carrier as "insurer" of the goods[2]. It is interesting to note that although the legal situation of the carriage of goods by sea of the early nineteenth century, as described above, was very strict with carriers, there was real international uniformity in relation to the carrier's liability at that time.

By the late nineteenth century, the situation changed. Carriers avoided the strict liability and placed the risk of loss of or damage to the goods on their customers (the shippers) by including exculpatory clauses in their bills of lading[3]. British and American shipowners issued bills of lading of the same

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[2] See, for example, *Forward v. Pittard*, 99 Eng. Rep. 953 at 956-57 (K.B. 1785) (per Lord Mansfield); Michael F. Sturley, "The History of COGSA and the Hague Rules", (1991) 22 J.M.L.C. 1 at 4-5; Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions", (1996) 23 Trans. L.J. 471 at 474.

[3] The exculpatory clauses included losses and damage from "thieves; heat, leakage, and breakage; contact with other goods; perils of the seas; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; nonresponsibility for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit." See Benjamin W. Yancey, "The Carriage

sort, and so did almost all other foreign shipowners[4]. Only small German shipowners, on the other hand, adopted a different uniform bill of lading, which gave emphasis to their liabilities as carriers[5]. Accordingly, the degree of international uniformity in relation to the carrier's liability at that time was very high, since almost all shipowners of the world issued bills of lading of the same sort.

3.2.2. Reaction to Exculpatory Clauses-Early Legislation

National responses to the situation of the late nineteenth century differed from one country to another depending largely on the size of the merchant fleet[6]. In the United States, for example, the federal courts permitted carriers to limit their liability under some circumstances, but did not allow them to escape liability for their own negligence[7], or for their failure to provide a seaworthy ship[8]. Likewise, the Japanese Commercial Code invalidated agreements exempting a carrier "from liability for damages caused by the ship owner himself, or by the wilful act or gross negligence of the crew

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of Goods: Hague, COGSA, Visby and Hamburg", (1983) 57 Tul. L. Rev. 1238 at 1240.

[4] See M. Bayard Crutcher, "The Ocean Bill of Lading-A Study in Fossilization", (1970-1971) 45 Tul. L. Rev. 697 at 709, citing S. Dor, *Bills of Lading Clauses and the Brussels International Convention of 1924*, at 13 (France), 16 (Great Britain), 18 (Italy) (1956).

[5] *Id.*

[6] See David Michael Collins, "Admiralty-International Uniformity and the Carriage of Goods by Sea", (1985-1986) 60 Tul. L. Rev. 165 at 166.

[7] See, for example, *Compania de Navigacion La Flecha v. Brauer*, 168 U.S. 104 at 117 (1897).

[8] See, for example, *Pacific Mail Steamship v. Ten Bales Gunny Bags*, 18 F. Cas. 950 (D. Cal. 1874) (No. 10,648).

or any other employee, or by the fact that the ship is unseaworthy"[9]. Conversely, the British courts viewed the carrier's strict liability as a default rule that should be applied only in the absence of an agreement to the contrary. Thus, in regard to freedom of contract, shippers and carriers could agree to a risk allocation where carriers assumed no liability even for their own negligence[10]. Most European and Commonwealth countries followed the British approach[11].

In an effort to protect the American cargo interests from the British and other foreign shipowners' bills of lading, the United States Congress passed the Harter Act in 1893[12]. At that time, the British carriers were politically powerful in Great Britain itself, but not in the overseas Dominions. Therefore, the cargo interests in Australia, New Zealand, and Canada were powerful enough to direct their governments to enact "Harter-style legislation". Outside the British Empire, the French-Morocco also enacted "Harter-style legislation". In this context, Sturley argues that many other countries including France, the Netherlands, Spain, Denmark, Norway, Sweden, Finland, Iceland,

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[9] See Japan Commercial Code Art. 592 (trans. Yang 1911), quoted in Sturley, *supra* note 2, at 5-6.

[10] See *Re Missouri S.S. Co.*, [1889] 42 Ch. D. 321. The use of negligence clauses by the British shipowners had begun following the decision of the Court of Common Pleas in *Grill v. General Iron Screw Collier Co.*, [1866] 1 C.P. 600. See Sturley, *supra* note 2, at 5.

[11] *Id.*

[12] Ch. 105, 27 Stat. 445 (1893) (codified at 46 U.S.C. app. §§ 190-96 (1997)). See Jan Ramberg, "Freedom of Contract in Maritime Law", [1993] L.M.C.L.Q. 178 at 179. The Act was introduced by Congressman Michael Harter of Ohio, which was eventually enacted under his name. See Sturley, *supra* note 2, at 12-13.

and South Africa were at least considering the adoption of "Harter-style legislation"[13].

The Harter Act invalidated certain exculpatory clauses, where British and other foreign shipowners used to list such clauses in their bills of lading to exonerate themselves from their liability of loss or damage to the goods at sea. However, the Act did not address any limitation clauses to the carrier's liability. Carriers, therefore, were capable of including such clauses in their bills of lading to limit their liability to nominal amounts[14]. Consequently, the Harter Act, though an important step in the development of the law of carriage of goods by sea, as a whole, was, at best, a partial, and, at worst, an unsatisfactory solution[15]. The Harter Act was significant in determining the way that international uniformity would take, but this occurred more through foreign imitation of it than through the United States efforts to spread its principles[16].

3.2.3. The CMI and the Effort to Achieve International Uniformity-The Hague Rules 1924

The threat to international uniformity, which was created by the above developments, encouraged various international organisations to unify the

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[13] Sturley, *supra* note 2, at 17-18.

[14] See Andrea R. Luciano, "Much Ado About Packages: Containers & the COGSA Limitation of Liability Provision", (1982) 48 Brooklyn L. Rev. 721 at 723.

[15] See Howard M. McCormack, "Uniformity of Maritime Law, and Perspective From the U.S. Point of View", (1999) 73 Tul. L. Rev. 1481 at 1520; Mandelbaum, *supra* note 2, at 476.

[16] Sturley's opinion is that prior to 1921, the United States failed to participate in the international movement for unifying the law of carriage of goods by sea. Sturley, *supra* note 2, at 36.

world's maritime laws. In order to achieve this goal, these organizations have depended primarily on the promulgation of international conventions that deal with different aspects of maritime laws[17]. The attempt to promulgate international uniformity in the field of maritime law had taken the shape of conferences where the states send delegations to draft international conventions in particular areas. The Comité Maritime International (CMI), founded in Belgium in 1897, led that attempt[18]. In 1921, the International Law Association's Maritime Law Committee adopted uniform rules in relation to carriage of goods by sea, which were formulated by the CMI[19]. Although shipowners argued that freedom of contract was best for all parties, they stated that "if freedom of contract in the over-sea carrying trade was to be restricted, it should be on international and not on national lines"[20]. Shipowners, therefore, were willing to accept these uniform rules rather than the danger of the appearance of different legislations in the countries where they did business[21]. Harter-style legislations already existed in many parts of the British Empire, but shipowners had feared that there might soon be Harter-style legislation in France, Spain, the Netherlands, South Africa, Finland, and

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[17] See Collins, *supra* note 6, at 165-66.
[18] See Charles S. Haight, "Babel Afloat: Some Reflections on Uniformity in Maritime Law", (1997) 28 J.M.L.C. 189 at 194.
[19] See Collins, *supra* note 6, at 167.
[20] See Report of the International Shipping Conference held at London, 23rd, 24th, and 25th November 1921, at 42 (Sir Norman Hill, who represented the Liverpool Steamship Owners Association and was the leading spokesman for shipowners). Reprinted in Michael F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) Vol. 2, at 181.
[21] *Id.*

the Scandinavian countries[22]. Many cargo interests, including several chambers of commerce, trade associations, bankers, and underwriters, approved these uniform rules[23]. On the other hand, some cargo interests, such as the English National Federation of Corn Trade Associations and the Institute of American Meat Packers, criticised them[24]. Three years later, these uniform rules were modified into the form of a convention at the International Diplomatic Conference of Maritime Law in Brussels, and adopted under the name of International Convention for the Unification of Certain Rules Relating to Bill of Lading, known as the Hague Rules 1924. The delegates who drafted the Hague Rules recognized the value of international uniformity by stressing this purpose in the official title: "Brussels Convention for the *unification* of Certain Rules of law Relating to Bills of lading"[25].

The British government put the Hague Rules into the statute books (British Carriage of Goods by Sea Act 1924) before the rest of the world had completed the diplomatic formalities of the Rules. The Parliament of the United Kingdom recognised the importance of international uniformity when adopting legislation based on the Hague Rules. Sir Leslie Scott, Member of the House of Commons in the Second Reading of the carriage of goods by sea Bill in 1924, stated that:

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[22] See Sturley, *supra* note 2, at 25.
[23] See Comité Maritime International, London Conference, October 1922, at 160-162. Reprinted in Sturley, *supra* note 20, at 292-294.
[24] See Sturley, *supra* note 2, at 25-26.
[25] (emphasis added). See John F. Wilson and Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea,* V/1/CONV-V/6/CONV, (October 1980) at 1.

> That draft convention [Hague Rules] has now been agreed to by a very large number of nations...who have acted as sponsors of this movement for the unification of maritime law[26].

The British ratified the Hague Rules on February 1930. Other countries in the British Empire soon followed the British. Australia and India, for example, enacted their Carriage of Goods by Sea Act in 1924 and 1925. Outside of the British Empire, in 1927, Belgium and the Netherlands recognized the Hague Rules with national legislation. Italy enacted the Hague Rules as domestic law in 1929, while Spain and Portugal ratified the Hague Rules in 1930 and 1931[27]. However, it took over thirteen years to achieve a compromise in the United States. In 1936, the United States Congress passed the Carriage of Goods by Sea Act (COGSA), which adopted, with minor alterations, the Hague Rules. The Congress of the United States recognized the need of international uniformity when enacting its carriage of goods by sea Act. For example, Senator White, during the floor debates in 1935, stated that: "the [COGSA] bill is designed to bring about uniformity in ocean bills of lading"[28]. In addition, Charles S. Haight, the chairman of the Bill of Lading Committee of the International Chamber of Commerce, stated in his testimony before a United States Senate Subcommittee in 1927 that:

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[26] See Parliamentary Debates: Official Report, House of Commons (5th series-Volume 174) at 1561 (1924). Reprinted in Michael F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules,* (1990) Vol. 1, at 589.

[27] See Sturley, *supra* note 2, at 35-36.

[28] 79 Cong. Rec. 13341 (1935). See also 79 Cong. Rec. 8954 (1935) (statement of Sen. Thomas) "The [COGSA bill] is simply to bring about uniform usage of bills of lading in the transhipment of goods and makes the usage uniform". Reprinted in Sturley, *supra* note 26, at 587.

> Uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the shipper and his underwriter from the responsibility of the carrier and his underwriter. The all-important question is that you draw the line somewhere and that the line be drawn in the same place for all countries and for all importers[29].

The following year, the United States ratified the Hague Rules (July 1937)[30].

The maritime nations of the world agreed on the Hague Rules in an effort to unify the rules governing carriage of goods by sea. The Hague Rules have enjoyed widespread success throughout the world. For example, within two years of the ratification of the rules by the United States, France, Italy, Germany, Poland, Finland, and the three Scandinavian countries followed it[31]. The Hague Rules entered into force on 2 June 1931. At present, the convention itself has either been ratified or acceded to by sixty-two countries, and only one country is landlocked[32].

3.2.4. The CMI Amendments to the Hague Rules 1924-The Hague-Visby Rules 1968

As mentioned in the previous section, the Hague Rules 1924 were intended to unify certain rules of law relating to carriage of goods by sea. At the beginning, they achieved that purpose. In addition, they produced in their

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[29] See International Convention for the Unification of Certain Rules in Regard to Bills of Lading for the Carriage of Goods by Sea: Hearing on Executive E Before a Subcommittee of the Senate Committee on Foreign Relations, 70th Cong., 1st Sess. 3 (1927). Reprinted in Michael F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules,* (1990) Vol. 3, at 327.

[30] *Id*, at 55.

[31] See Sturley, *supra* note 2, at 55-56.

[32] George F. Chandler, "A Survey of the Cargo by Sea Conventions as They Apply to Certain States", from the Internet: http://www.admiraltylaw.com/cargo%20regimes.htm (accessed: 28/9/2001).

times a fairer balance of carriers and shippers interests than previously existed[33]. The Hague Rules were a workable set of rules that were acceptable to the world community, but changes in technology such as the container revolution, which the drafters of the Hague Rules could not have expected, made the rules less workable and less acceptable[34]. In addition, the changing world political position, as previous colonies became self-governing countries, and the problem of conflicts in interpretation of the Hague Rules among the national courts, were other important issues that made the Hague Rules less acceptable[35]. This, in consequence, led the Comité Maritime International (CMI) to consider amendments to the Hague Rules at its 1963 conference in Stockholm. This culminated in the 1968 Brussels Protocol to the Hague Rules, known as the Hague-Visby Rules 1968[36]. The amendment introduced by the Hague-Visby Rules 1968 included the following prominent issues:

1. Provide a new provision for containerisation: Carriage of goods by containers appeared in the 1960s. The Hague-Visby Rules 1968, accordingly added a new provision regarding containerisation[37].

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[33] See William Tetley, "The Lack of Uniformity and the Very Unfortunate State of Maritime Law in Canada, the United States, the United Kingdom and France", [1987] L.M.C.L.Q. 340 at 341.

[34] This issue is discussed in detail in the fourth chapter, *infra*, at 79.

[35] See David C. Fredrick, "Political Participation and legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules", (1991) 22 J.M.L.C. 81; Michael F. Sturley, "Uniformity in the Law Governing the Carriage of Goods by Sea", (1995) 26 J.M.L.C. 553 at 560.

[36] "Protocol 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 (23 February 1968)". See Wilson & Debattista, *supra* note 25, at 7.

[37] This issue is discussed in detail in the fourth chapter, *infra*, at 80.

2. Attempts to standardise and raise the carrier's limitation of liability: The Hague Rules 1924, under Article 4(5), provide that the carrier's limitation of liability is 100 pounds per package or unit. The Hague-Visby Rules 1968, under the same Article, changed this limitation of liability to Frs. 10.000 per package or unit, or Frs. 30 per kilo. The Hague-Visby Rules 1968 attempted to provide a uniform standard of limitation of liability by stating that a "franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900"[38].

3. Address the "Himalaya" problem: This problem named for the ship "Himalaya" in the case of *Alder v. Dickson*[39]. The problem arose when successful attempts had been made by claimants to get round the limitations and exceptions contained in the bills of lading by suing servants or agents of the carrier in tort rather than on the contract of carriage[40].

4. Relieve carriers from liability for the negligence of an independent contractor: If an action is brought against an independent contractor, this independent contractor is not entitled to all exceptions and limitations of liability available to carriers under the Hague-Visby Rules 1968[41].

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[38] See Wilson & Debattista, *supra* note 25, at 7-8.
[39] [1955] 1 Q.B. 158.
[40] For a full discussion of this problem, see, for example, Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729 at 755-73; Joanne Zawitoski, "Limitation of Liability for Stevedores and terminal Operators Under the Carrier's Bill of Lading and COGSA", (1985) 16 J.M.L.C. 337 at 343-49; D.G. Powles, "The Himalaya Clause", [1979] L.M.C.L.Q. 331.
[41] For a detailed discussion of this issue and all other amendments, see Anthony Diamond, "The Hague-Visby Rules", [1978] L.M.C.L.Q. 225.

In 1971, the British Parliament enacted the Carriage of Goods by Sea Act. This Act was the first one that based on the Hague-Visby Rules 1968, where it received the Royal Assent on 8 April 1971[42]. The British shipping industry supported the Act[43]. The British government, however, decided not to implement the Act unless and until a sufficient number of countries ratify the Hague-Visby Rules 1968 in order to bring it into force[44]. The Hague-Visby Rules came into force on 23 June 1977, after its ratification by ten countries[45], and the British Carriage of Goods by Sea Act 1971 was implemented on the same day[46]. It was not the United Kingdom but the Scandinavian countries that gave the lead in implementing legislation based on the Hague-Visby Rules 1968[47].

On the other hand, in the United States, within only a few weeks after the appearance of the Hague-Visby Rules 1968, shippers supported their ratification by the United States. Joseph A. Sinclair, on behalf of the Commerce and Industry Association of New York (a shipper's organization), wrote to then Secretary of State Dean Rusk that his members were very pleased with the Hague-Visby Rules 1968, and hoped that they would be

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[42] *Id*, at 235.
[43] See N.R. McGilchrist, "The New Hague Rules", [1974] L.M.C.L.Q. 255 at 255.
[44] See Diamond, *supra* note 41, at 235. Article 13 of the Hague-Visby Rules provides that international implementation of the Rules would follow ratification of them by ten states of which at least five should have a minimum of one million gross tons of tonnage. See Wilson & Debattista, *supra* note 25, at 10.
[45] These countries are: Denmark, Ecuador, France, Lebanon, Norway, Singapore, Sweden, Switzerland, Syria and the United Kingdom.
[46] See Note, "The Hague-Visby Rules Now Operative in United Kingdom", [1977] L.M.C.L.Q. 512 at 512.
[47] See Diamond, *supra* note 41, at 235.

ratified by the United States[48]. Similarly, Joseph Baittner, on behalf of the Singer Company, summarized the opinions of most U.S. shippers by expressing support for the Hague-Visby Rules 1968 as a fair solution to ship owner and shipper interests[49]. Conversely, shipowners strongly opposed ratification of the Hague-Visby Rules. Ralph E. Casey, then President of the American Merchant Marine Institute (AMMI), representing most U.S. ship owner interests, stated that the prospects for ratification were doomed. In his letter to then Secretary of State Dean Rusk dated 22 May 1968, Ralph E. Casey expressed the strong opposition of the AMMI to the implementation of the Hague-Visby Rules1968 by the United States, and on behalf of ship owners' interests, he criticized it[50]. Similarly, Benjamin W. Yancey, formerly the President of the United States Maritime Law Association (USMLA)[51], in his letter to then Secretary of State Dean Rusk dated 17 May 1968, expressed his sharp disagreement with the Hague-Visby Rules 1968[52]. According to the above opposition from major parts of the maritime industry, the Executive Branch decided not to ratify the Hague-Visby Rules 1968. This was the sole

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[48] See Allan I. Mendelsohn, "Why the U.S. Did Not Ratify the Visby Amendments", (1992) 23 J.M.L.C. 29 at 40.

[49] *Id.*

[50] See Mendelsohn, *supra* note 48, at 40-44.

[51] The principal objectives of the Maritime Law Association of the United States (USMLA), which was formed in 1899, were "to advance reforms in the maritime law of the United States, to facilitate justice in the administration of maritime law, and to promote uniformity in the enactment and interpretation of maritime law". See Maritime Law Association of the United States, from the Internet: http://www.richmond.edu/~jpjones/boating/ (accessed: 22/11/1999).

[52] See Mendelsohn, *supra* note 48, at 45-48.

reason why the Hague-Visby Rules 1968 were not ratified by the United States[53].

The Hague-Visby Rules 1968 are an update to the original Hague rules 1924. Not all the countries that adopted the Hague Rules 1924 ratified or acceded to the Hague-Visby Rules 1968. For example, Algeria, Cuba, Cyprus, Fiji, Grenada, and the United States of America did not adopt the Hague-Visby Rules 1968. However, some countries, such as Iceland and Indonesia, who did not from the beginning ratify or accede to the Hague Rules 1924, adopted the Hague-Visby Rules 1968. Consequently, although the Hague-Visby Rules 1968 intended, as the Hague Rules 1924, to unify the law of carriage of goods by sea, their appearance plainly contributed in breaking down international uniformity. At present, the convention itself (Hague-Visby Rules 1968) has either been ratified or acceded to by fifty-two countries, and only two countries are landlocked[54].

3.2.5. The 1979 Protocol Amendment to the Hague-Visby Rules 1968

Article 4(5) of the Hague Rules 1924, as stated in the previous section, provides that the limitation of the carrier's liability is 100 pounds sterling per package or unit. The Hague-Visby Rules, under the same Article, changed this limitation into Frs. 10,000 per package or unit, or Frs. 30 per kilo. The currency of reference in Article 4(5), therefore, was changed from pounds

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[53] See Mendelsohn, *supra* note 48, at 51-52.

[54] George F. Chandler, "A Survey of the Cargo by Sea Conventions as They Apply to Certain States", from the Internet: http://www.admiraltylaw.com/cargo%20regimes.htm (accessed: 28/9/2001).

sterling to francs. Article 4(5) of the Hague-Visby Rules also provides that a "franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900" commonly known as a "Pioncare gold Franc". If the expectation of the Hague-Visby Rules about the stability of gold had been right, then these changes would have produced a uniform standard. However, as Tetley observed, "neither the value nor the price of gold has been stable in relation to other goods or to national currencies"[55]. Therefore, there are two systems of valuing gold, namely the free market value and the official national values[56].

Accordingly, in 1979, the Hague-Visby Rules were amended to cover currency exchange imbalances. The amendment was called as Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (21 December, 1979)[57]. This protocol revised the gold standard to a system using a Special Drawing Rights (S.D.R.), the value of which is calculated daily by the International Monetary Fund ("the value of the S.D.R. is based on the weighted average of the values of a basket of key currencies")[58]. The limitation of liability was increased under this protocol to 667 S.D.R.'s per package or unit, or 2 S.D.R.'s per kilo[59].

The 1979 Protocol in respect of Special Drawing Rights (S.D.R.) entered into force 14 February 1984. Some Hague-Visby countries did not adopt the 1979 Protocol, such as Ecuador, South Africa, Sri Lanka, Syria,

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[55] William Tetley, *Marine Cargo Claims*, (2d ed., 1978) at 448.
[56] *Id.*
[57] See Comité Maritime International, from the Internet: http://comitemaritime.org/jurisp/ju_intro.html (accessed: 10/9/2001).
[58] See Collins, *supra* note 6, at 172-73.
[59] See Mandelbaum, *supra* note 2, at 481-82.

Tonga, and Vietnam. Consequently, although the 1979 Protocol intended to provide a uniform standard for the carrier's limitation of liability, its appearance by itself also contributed in breaking down international uniformity. At present, the 1979 Protocol has either been ratified or acceded to by thirty-seven countries, and only two countries are landlocked[60].

3.2.6. UNCITRAL and the Effort to Create New Convention-The Hamburg Rules 1978

For many years, the developing countries did not desire that the CMI play the role of unifying the law of carriage by sea, since, according to their opinion, it was biased to carriers[61]. In fact, in 1970, the political United Nations Conference on Trade and Development (UNCTAD)[62] made a study on the significance of the Hague Rules in relation to contemporary trade situations. The result of the study viewed the Rules as an unfair product for the developing countries[63]. Therefore, in 1971, work began in the United Nations Conference on Trade and Development (UNCTAD), and then shifted to the United Nations Commission on International Trade Law (UNCITRAL). In 1976, UNCITRAL introduced draft rules for unifying the law of carriage of

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[60] George F. Chandler, "A Survey of the Cargo by Sea Conventions as They Apply to Certain States", from the Internet: http://www.admiraltylaw.com/cargo%20regimes.htm (accessed: 28/9/2001).

[61] See Collins, *supra* note 6, at 194; Joseph C. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)", (1975-1976) 7 J.M.L.C. 69 at 73.

[62] UNCTAD was created in 1964, in Geneva, as a permanent intergovernmental body. Its primary aim is to accelerate economic growth and development especially in relation to developing countries. See Patrick J.S. Griggs, "Uniformity of Maritime Law-An International Perspective", (1999) 73 Tul. L. Rev. 1551 at 1558.

[63] See McGilchrist, *supra* note 43, at 257.

goods by sea[64]. In consequence, in 1978, the United Nations Convention on the Carriage of Goods by Sea, known as the Hamburg Rules, was adopted by a diplomatic conference in Hamburg, Germany. The delegates who drafted the Hamburg Rules recognized the value of international uniformity by stressing this purpose under Article 3, which states that:

> In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity[65].

As mentioned above in this chapter, the United States' shipowners and the United States Maritime Law Association (USMLA) strongly opposed the adoption of the Hague-Visby Rules 1968[66]. However, during the mid-1970s, the United States' shipowners and the United States Maritime Law Association (USMLA) changed their views on the Hague-Visby Rules 1968 by describing it as a positive contribution to international maritime law. Shipper interests, on the other hand, abandoned their support for the Hague–Visby Rules 1968, and quickly supported the Hamburg Rules 1978[67]. It is clear that these changes of views took place because of the appearance of creating the new convention, namely the Hamburg Rules 1978. The construction of the Hamburg Rules 1978 is significantly different from the Hague-Visby Rules 1968, and would provide for an increase in carrier liability[68]. For example, under Article 6(1)(a) of the Hamburg Rules 1978, the

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[64] See Collins, *supra* note 6, at 194.
[65] See Wilson & Debattista, *supra* note 25, at 53.
[66] *Supra*, at 47.
[67] See Mendelsohn, *supra* note 48, at 52; Mandelbaum, *supra* note 2, at 484.
[68] For a general comparison between the Hague-Visby and Hamburg Rules see, for example, Robert Force, "A Comparison of the Hague, Hague-Visby,

liability of the carrier for loss or damage is limited to 835 SDRs per package or other shipping unit or 2.5 SDRs per kilogram of gross weight of the goods lost or damaged, whichever is higher[69]. The Hamburg Rules 1978 not only increased the limits of liability beyond the increased limits introduced in the original Hague-Visby Rules 1968 but also the 1979 Protocol of the Visby Amendments, which mentioned above[70]. On the other hand, a comparison between the former conventions and the Hague Rules 1924 clarify the latter are out-dated, and created many problems for both carrier and shipper interests, such as the container problem. Therefore, it is logical that both carrier and shipper interests would change their views, and preferred the adoption of the more beneficial convention that suits their own interests, namely the Hague-Visby or the Hamburg Rules.

The Hamburg Rules entered into force on 1 November 1992. At present, no developed country, such as the United States of America, United Kingdom, Canada, Germany and France, has ratified the Hamburg Rules. It is argued[71] that this is because the Hamburg Rules 1978 are a result of political

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and Hamburg Rules: Much Ado About (?)", (1996) 70 Tul. L. Rev. 2051; R. Glenn Bauer, "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules-A Case by Case Analysis", (1993) 24 J.M.L.C. 53; A.J. Waldron, "The Hamburg Rules-A Boondoggle For Lawyers?", [1991] J.B.L. 305; Douglas A. Werth, "The Hamburg Rules Revisited-A look at U.S. Options", (1991) 22 J.M.L.C. 59.

[69] See Wilson & Debattista, *supra* note 25, at 56.

[70] *Supra*, at 49.

[71] See Frederick, *supra* note 35, at 105; George F. Chandler, "After Reaching a Century of the Harter Act: Where Should We Go From Here?", (1993) 24 J.M.L.C. 43 at 44-55; George F. Chandler, "A Comparison of 'COGSA', the Hague/Visby Rules, and the Hamburg Rules", (1984) 15 J.M.L.C. 233 at 236.

compromise rather than a real commercial compromise[72]. Kozolchyk, for example, argues that:

> Substantive uniformity [is]...only attainable when the various participants in the transactions arrive at a consensus with respect to the fairness of their rights and duties. This was the lesson of the success of the Harter Act and of the Hague Rules and of the failure of the Hamburg Rules[73].

From this point, although the Hamburg Rules 1978, as the Hague and Hague-Visby Rules, intended to unify the law of carriage of goods by sea, again their appearance by themselves contributed in breaking down international uniformity[74]. At present, the convention itself has either been ratified or acceded to by twenty-seven countries, where ten countries are landlocked[75].

3.2.7. Current Developments-Hybrid Systems v. International Uniformity

At present, the world has three international regimes in relation to carriage of goods by sea, namely, the Hague, Hague-Visby, and Hamburg Rules. However, because some Hague-Visby countries have adopted the 1979 SDR Protocol Amendment to the Hague-Visby Rules 1968, while others have not, there are actually four international regimes in relation to carriage of goods by sea. In recent years, many countries have enacted their own carriage

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[72] In the United States, the Hamburg Rules were frequently criticised as that no developed country adopted them. See Bauer, *supra* note 68, at 53.

[73] Boris Kozolchyk, "Evolution and Present State of the Ocean Bill of Lading from a Banking Law Prospective", (1992) 23 J.M.L.C. 161 at 245.

[74] Sturley argues that with the United States support, the Hamburg Rules "might be a vehicle for greater international uniformity" because the United States was major factor in the extensive international approval of the Hague Rules 1924. Sturley, *supra* note 35, at 568.

[75] George F. Chandler, "A Survey of the Cargo by Sea Conventions as They Apply to Certain States", from the Internet: http:/ www.admiraltylaw.com/cargo%20regimes.htm (accessed: 28/9/2001).

of goods by sea legislation. Some of these countries enacted legislation including hybrid provisions from both the Hague-Visby and Hamburg Rules, as well as the original Hague Rules 1924, while others did the same but added nationalistic rules[76]. The number of the international regimes in relation to carriage of goods by sea is five, which are as follows:

1. Where the Hague Rules 1924 are in force;

2. Where the Hague-Visby Rules 1968 are in force;

3. Where the Hague-Visby Rules 1968 and the 1979 SDR Protocol are in force;

4. Where the Hague Rules 1924 and the 1979 SDR Protocol are in force;

5. Where the Hamburg Rules are in force.

However, because some countries created their own codes, which are a combination of various provisions of the Hague Rules 1924, the Hague-Visby Rules 1968, the 1979 SDR Protocol, and the Hamburg Rules 1978, as well as other non-uniform domestic provisions, the number now exceeds five.

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[76] Such as Australia, Canada, China, Germany, Japan, Korea, New Zealand, the Nordic countries (Denmark, Finland, Norway and Sweden), and South Africa. For a general discussion of this issue see: William Tetley, "The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law", (1999) 30 J.M.L.C. 595; L. Li, "The Maritime Code of the People's Republic of China", [1993] L.M.C.L.Q. 204; Peter N. Prove, "The Proposed Amendments to the Carriage of Goods by Sea Act 1991, and International Uniformity", (1997) 1 at 10, from the Internet: http://law.uniserve.edu.au/law/pub/icl/transcon/intUniformity.html (accessed: 23/11/1999); Rok Sang Yu and Jongkwan Peck, "The Revised Maritime Section of the Korean Commercial Code", [1993] L.M.C.L.Q. 403; Paul Myburgh, "Maritime Transport and Marine Pollution: Law Reform in New Zealand", [1995] L.M.C.L.Q. 167; C.C. Nicoll, "Significant Carriage of Goods by Sea Reform in New Zealand", (1995) 26 J.M.L.C. 443; Hugo Tiberg, "The Nordic Maritime Code", [1995] L.M.C.L.Q. 527.

All of the above systems are inconsistent with each other, and therefore, each represents another different international regime in relation to carriage of goods by sea. In addition, it is very clear that the focus of the debate in the above systems has surely not been on achieving international uniformity, but on having a fair solution for both national carriers and shippers, and on having an international regime to best meet domestic interests[77]. In supporting this argument, in the United States, for example, because the power of carriers and shippers is nearly equal, neither of them has the power to enact its own favoured rules (whether the Hague-Visby or the Hamburg Rules), but each has the power to block the other[78]. While in the United Kingdom, for example, because carriers are in control, there was no conflict in adopting the Hague-Visby Rules 1968.

In 1994, the degree of the breakdown of international uniformity in relation to carriage of goods by sea prompted the Comité Maritime International (CMI) to circulate a questionnaire to its member national associations seeking their views to stop the progress of this breakdown[79]. The United Nations Commission on International Trade Law has also commented

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[77] See Prove, *Id*, at 12.

[78] See Michael F. Sturley, "Proposed Amendments to the US Carriage of Goods by Sea Act: A Response to English Criticisms", [1999] L.M.C.L.Q. 519 at 520.

[79] CMI, Hague-Visby/Hamburg Rules: Questionnaire for the Member National Associations 2 (1994). The response to the questionnaire was overwhelming: "The great majority of the [national associations'] replies is to the effect that [the current] proliferation [of differing regimes] is not acceptable." (1995) 1 CMI News Letter 2.

on the confusion and lack of international uniformity in the area[80]. However, the Comité Maritime International (CMI) adopted a report, at its Annual General Assembly in New York City on 7 May, 1999, which recommend against amending the Hague-Visby Rules 1968 or adopting a new international convention in relation to carriage of goods by sea. Instead, both the CMI and UNCITRAL decided to undertake a long-term general study on a completely different subject, namely a broadly based convention on aspects of marine transport[81]. It is interesting to note that the Canadian Maritime Law Association (MLA), at the CMI General Assembly, proposed that the CMI should draft a new international convention in relation to carriage of goods by sea. The chairman of the meeting, the CMI Vice-President, the CMI Secretary General, and the Chairman of the CMI Carriage of Goods Committee opposed the proposition[82]. The United States was the only one that supported the proposition, as long as this proposition does not interfere with the progress of the United States new proposed Carriage of Goods by Sea Act. Therefore, the proposition failed[83]. It could be argued, in consequence, that there are no

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[80] United Nations Commission on International Trade Law, Status of the Hamburg Rules, UN Doc. A/CN.9/401/Add.1, at 2 (para.8) (1994).

[81] See Tetley, *supra* note 76, at 596.

[82] It should be noted that it is not clear why the CMI and UNCITRAL refused to create a new international convention in relation to carriage of goods by sea. Tetley argues that "part of the problem is perhaps that neither organisation is completely "transparent"...UNCITRAL rarely takes an official position on its practices, while the CMI often gets its back up over public criticism or suggestions". William Tetley, "NGO's and Transparency-A Fitting Way to Celebrate in New York", (from Fairplay Magazine, April 22 (1999) at 40) from the Internet: http//www.admiraltylaw.com/tetley/fairplay.htm (accessed: 22/11/1999).

[83] See Tetley, *supra* note 76, at 616-617.

immediate prospects that a new convention will appear in the near future in relation to carriage of goods by sea.

3.3. The Importance of International Uniformity Regarding the Law of Carriage of Goods by Sea

The conclusion of the previous part of this chapter is that the international community has lost interest in achieving international uniformity in relation to the law of carriage of goods by sea. Each country adopted a convention, or hybrid provisions from two conventions, or hybrid provisions from a convention and some domestic rules, depending on what suited its own interests. However, this does not mean that international uniformity is not valuable. This part, accordingly, argues that international uniformity is still valuable. Two arguments are discussed in this part: The first is that international uniformity is valuable because it reduces overall costs of accidents, namely the costs of the damage or loss of the cargo or the ship and the costs of injuries to persons. The second argument is that international uniformity reduces legal costs, namely the costs of the procedures of the transactions and the costs of litigation. However, since the first argument, as will be seen, is not convincing, our concern is in the second one.

3.3.1. First Argument: Uniform Rules Reduce Overall Costs of Accidents

An argument might be made that uniform rules reduce overall costs of accidents. In other words, uniform rules reduce loss by giving financial incentives to act safely. This argument, however, does not depend on any practical evidence that can show whether uniform rules reduce overall costs of

accidents or not. Economists and law commentators, in consequence, made it clear that international uniform rules will have no effect on carriers' behaviour to act safely. This is explained below accordingly.

Sturley[84] argues that a lack of uniform rules in relation to the law of carriage of goods by sea imposes real costs on the commercial system. Cargo damage or loss is an inevitable result of transporting goods by sea. He argues that liability rules that govern the carriage of goods by sea may affect the level of damage or loss[85], but no liability rules would eliminate damage or loss completely. Thus, he states that the law must divide the financial responsibility for this damage or loss, and this influences the actions of those who are parties in the enterprise. He explains, therefore, that a carrier, a shipper, and a potential buyer must choose the appropriate level of care for the shipment. According to Sturley, all of these choices will be based partly on the liability rules that allocate the risk of damage or loss. Hence, liability rules have an effect on safety and accidents.

Economists, on the other hand, dispute the above arguments. Professor R.H. Coase, in his article "The Problem of Social Cost"[86], points out that liability rules would not affect the conduct of the parties of a contract. He suggests that whenever people encounter legal rules that do not suit their own

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[84] Sturley, *supra* note 35, at 558; Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence", (1993) 24 J.M.L.C. 119 at 126-27.

[85] For the same opinion, see Kenneth Diplock, "Conventions and Morals-Limitation Clauses in International Maritime Conventions", (1969-1970) 1 J.M.L.C. 525 at 527-28.

[86] (1960) 3 J.L. Econ. 1.

interests, they may negotiate around those rules and create a beneficial and socially optimal solution. The fundamental idea of Coase's theorem, therefore, is that a change in rules of liability does not necessarily affect the allocation of risks between the parties to the contract, or a way in which the parties decide to reduce the risks of loss.

Sturley, in his article "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence"[87], considers Coase's theorem. He states that in a perfect world, or at least in perfect markets, there would be no transaction costs[88], and there would be perfect information[89]. Accordingly, he states that Coase's theorem explains why it makes no difference how the law allocates the risk in this hypothetical perfect world. Sturley explains that, under this hypothetical perfect world, the parties, who have perfect information and no transaction costs, would negotiate to reach the best efficient risk allocation in spite of what the law imposes. In consequence, changing the liability rules will have no influence on deciding which party will be responsible for any damage or loss[90]. Sturley, however, argues that anyone can recognise that transactions

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[87] *Supra* note 84, at 122-23.

[88] Shippers and carriers, for example, could negotiate the terms of their contracts without investing any money or time. In addition, the parties of a contract, such as a shipper and a carrier, could solve any dispute that arises under their contract without spending money on lawyers and other litigation expenses. Sturley, *supra* note 84, at 122.

[89] The parties of a contract could calculate the specific chances of the arriving of the cargo safely at its destination. In addition, the parties of a contract could calculate the cost of taking extra care of the cargo, and could accurately predict the benefit that they can achieve by this extra care of the cargo. Sturley, *supra* note 84, at 123.

[90] Sturley, *supra* note 84, at 123.

cost money in our real world, and liabilities cannot be reallocated without someone bearing these costs. He states that we will never see bills of lading where the liability terms are individually negotiated and litigation will continue to be expensive. Insurers also know that information is not perfect and not a free commodity. Even the parties of a contract, in a sophisticated commercial transaction, often make decisions without the benefit of information, which is available but too expensive to gather[91]. Sturley, therefore, argues that Coase's theorem, which can only apply in a hypothetical perfect world, may provide a helpful starting point against which to measure events in the real world, but with expensive transactions and imperfect information, liability rules may affect the level of damage or loss.

If we suppose that Sturley's above arguments against Coase's arguments are right, does this mean that liability rules reduce overall costs of accidents? There is still another argument that runs against Sturley. Toedt[92] argues that liability rules are not an effective inducement to carrier prudence. In other words, liability rules would not affect the level of care of the carrier in relation to the cargo. Initially, Toedt argues that non-economic factors influence the conduct of the carrier to the extent that they may frustrate the influence of economic motivations. For example, the sea itself provides inducements to prudence, since it threats the physical safety of the ship, crew, and the individuals who handle cargo. The desire for peer and self-approval also provides inducements to prudence. Toedt also argues that if we assume

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[91] Sturley, *supra* note 84, at 125.
[92] D.C. Toedt, "Defining 'Package' in the Carriage of Goods by Sea Act", (1982) 60 Texas L. Rev. 961 at 974-75.

that economic motivations provide inducements to prudence, it is questionable whether potential liability will play a role among such motivations. Thus, he argues that the economic impact linked with loss of customer goodwill and industry reputation, for example, could be a stronger motivation than liability rules. Whatever motivation the liability rules can provide, according to Toedt, will be attenuated by the effect of the carrier's insurance.

Sturley[93] argues that liability rules are an effective inducement to carrier prudence. To prove his argument, he provides the following example: Suppose that the carrier's prediction of a total loss of the ship (worth $20 million) and its goods (worth $10 million) is a 0.01% chance. If the carrier's responsibility is only in relation to the ship, then the predicted loss is $2000. If the carrier can cut the risk of total loss in half (which represents a $1000 predicted savings) for $999, then he will spend the money for additional precautions. Nevertheless, if it costs $1001 to cut the risk of total loss in half, then he will not do it. However, once the carrier considers the value of the goods, then the predicted savings rise to $1500, and the $1001 precaution now makes economic sense[94]. Therefore, Sturley argues that imposing liability for the goods on the carrier provides the motivation for the carrier to take more care of the ship and the goods-a motivation that the interest of the carrier in the ship alone was not enough to provide. Furthermore, Sturley argues that:

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[93] *Supra* note 84, at 129. For the same opinion, see Diplock, *supra* note 85, at 527-8.

[94] However, according to Coase's theorem, this follows that without imposition of liability, the shipper will pay up to $499 to the carrier, and therefore, both carrier and shipper could reach an efficient solution.

> In an era when a few carriers are still sailing vessels that should have been retired years ago and covering their cash flows through reduced maintenance, some of the most serious risks occur in situations where the cargo is worth far more than the ship. If the economic carrier's only incentive for careful navigation is based on the value of the vessel, he will fail to take precautions that he would have taken if he were also liable for damage to the cargo[95].

Sturley acknowledges that if we lack the information needed to determine how liability rules will influence risks, it is impossible to predict how these rules will affect the motivations to care for the goods[96]. He, therefore, acknowledges that in order to prove that liability rules might affect the level of damage or loss, it needed to be supported by empirical evidence[97]. Sturley observes that there is no empirical evidence in his arguments. He argues that since there is no direct empirical evidence, it is possible to test the issue with indirect evidence[98]. He considers all his above argument, in this section, as an indirect evidence for proving that liability rules may affect the level of damage or loss. Accordingly, he argues that indirect evidence is better than no evidence at all[99]. It should be noted that Sweeney[100] suggests that the lack of information in our subject is because insurance companies are reluctant to offer the statistics, which they consider as confidential information[101].

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[95] Sturley, *supra* note 84, at 129. Of course, this is not according to Coase's theorem, because, according to Coase, the parties can negotiate the contract of carriage and reach an efficient solution.
[96] Sturley, *supra* note 84, at 132.
[97] Sturley, *supra* note 84, at 148.
[98] Sturley, *supra* note 84, at 148.
[99] Sturley, *supra* note 84, at 149.
[100] Sweeney, *supra* note 61, at 108.
[101] Many commentators also acknowledge the lack of empirical evidence. See, for example, Erling Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice", (1981) 12 J.M.L.C. 299 at 314; William Tetley, "The Hamburg Rules-A Commentary", [1979] L.M.C.L.Q. 1 at 4; John D. Kimball,

Another suggestion is that the information plainly does not exist in any usable form, since collecting information about losses and risks is very expensive. Therefore, it could be that insurance companies have determined that the value of the information to them is not worth the costs of collecting it[102]. In consequence, it could be argued that the international shipper and carrier interests are hesitant to make the effort and to spend so much money for reaching international uniformity, which could be, in their view, more that it worth since we lack the information for proving that liability rules reduce overall costs of accidents.

All Sturley and Toedt's above arguments, in this section, lack any empirical evidence. Although each of them realises that his arguments lack any empirical evidence, each one is convinced that his arguments are much more logical than the other. It is the writer's belief that Sturley and Toedt's arguments are not convincing since they lack any empirical evidence. In other words, we need an empirical evidence to prove whether liability rules affect the level of care of the carrier in relation to the cargo. From this point, our concern is in the second argument, namely international uniformity reduces legal costs, which we now turn to accordingly.

3.3.2. Second Argument: Uniform Rules Reduce Legal Costs

Many commentators argue that international uniformity is valuable because it reduces legal costs, namely transaction costs and litigation. Of

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"Shipowner's Liability and the Proposed Revision of the Hague Rules", (1975) 7 J.M.L.C. 217 at 250.

[102] See Sturley, *supra* note 84, at 148.

course, the important question that arises in this context is: Is there any direct evidence to prove that international uniform rules reduce legal costs? There is not any direct evidence that proves the reduction of legal costs that uniform rules can bring; nonetheless, there are sensible arguments and indirect evidence that proves this issue.

Logically, a lack of uniform rules will make carriers offer different freight rates depending on each individual case. Insurers will quote different premiums, and therefore, expense and delay will arise in examining the details of each individual contract of carriage or the liability of the carriers in relation to the goods, which they insure. Moreover, buyers and sellers of goods cannot agree to the price of the goods until they know the cost of carriage and insurance. Commercial dealings with the goods in transit by way of resale cannot be done until the potential buyers determine what protection they require[103]. Consequently, the economic purpose of limitation of liability, which is set in the Hague Rules and other conventions, is to enable the carrier, on the ground of knowing that his liability is limited to a figure[104], to offer standard freight rates for all cases. Thus, there would be no delay and cost to him and to the owner of the cargo, which would be arose by valuating the shipment and by changing the freight rate accordingly[105]. These logical arguments are recognised by many national courts. For example, in

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[103] See Diplock, *supra* note 85, at 527.
[104] For example, in the Hague Rules 1924, under Article 4(5), the limitation of liability is limited to £100 per package or unit.
[105] See Diplock, *supra* note 85, at 529.

Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer[106], a United States case, the Second Circuit stated that:

> At the time of its enactment [Hague Rules 1924] the House Report, H.R. Rep. #2218, 74th Cong., 2d Sess. 7 (1936), said,
> 'The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading'[107].

If the law is uniform, it is logical to say that this will simplify the law for the citizens of the nations of the world, their lawyers, their courts and every interested party, to know their rights and obligations, wheresoever these happened to arise. Of course, this will lead in the end to avoid conflicts of law and litigation will be less necessary[108]. In effect, this will reduce transaction costs. A uniform law is particularly valuable in relation to carriage of goods by sea because carriage of goods by sea transactions involves parties from different countries. This can be explained as follows: Every transaction involves at least two countries: the shipper's and the consignee's. The carrier may be a third country. In addition, the carrier's indemnity insurer, the cargo underwriter, and the bank that finances the transaction may increase the total number of countries involved. Moreover, each of these parties may participate

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[106] 422 F.2d 7 (2d Cir. 1969).

[107] *Id*, at 14-15. See also *Tessler Brothers (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 438 at 445 (9th Cir. 1974) (One of the specific purposes of COGSA was to obviate the necessity for shipper to make a detailed study of the fine print clauses of a carrier's regular bill of lading on each occasion before shipping a package).

[108] See Tetley, *supra* note 33, at 340-41; Paul B. Stephan, "The Futility of Unification and Harmonization In International Commercial Law", (1999) 39 Va. J. Int'l. L. 743 at 746 and 750.

in other transactions, each involving different countries. Therefore, these transactions could be subject to litigation in any of the countries involved or even in another country where a claimant obtains jurisdiction over the ship[109]. In this context, Tetley observes that:

> Most national maritime law crosses international borders. In other words, national maritime law is usually international law in its application. For example, the national law governing contracts of chartering or of carriage of goods is international, because the contract, although made in one country, is necessarily for the whole voyage and usually covers carriage to one or more foreign countries[110].

Only uniform rules, in consequence, can provide the certainty and predictability for this matter.

All the above arguments, in this section, can be supported by the following Congressional testimony in the United States: In 1998, a witness gave a Congressional testimony[111] on the new proposed United States Carriage of Goods by Sea Act (U.S. COGSA)[112]. The witness was in agreement with enacting the new proposed U.S. COGSA. The witness was Walter M. Kramer, the President of the American Institute of Marine Underwriters ("AIMU"). Kramer showed the importance of transaction costs to cargo insurance. He stated that AIMU is the trade association representing American insurers who write more than 80% of the ocean marine or transportation insurance

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[109] See Sturley, *supra* note 35, at 559.

[110] William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions-How to Adopt an International Convention", from the Internet: http://tetley.law.mcgill.ca/uniformarlaw.htm (accessed: 13/11/2000).

[111] Federal Document Clearing House Congressional Testimony (April 21, 1998, Tuesday).

[112] The United States' Maritime Law Association (USMLA) created this proposition.

generated in the United States. He explained that the United States ocean marine insurance market writes $2 billion in direct written premiums every year. AIMU members insure the ships, which carry the United States exports and imports as well as the liabilities of shipowners. However, the most important component of AIMU members' premium income is cargo insurance, where $1 billion of the ocean marine premiums come from cargo insurance. Cargo insurance, according to Kramer, facilitates international trade by insuring against all transit risks, and provides invaluable protection to exporters and importers. He observed that:

> When cargo is damaged in transit, the parties to the sales contract can rely upon cargo insurance to pay claims swiftly throughout the world. It is then up to the cargo insurers to attempt to recover such losses from the shipowner or other party who caused the loss. The success of such recovery efforts affects directly the loss experience and premium rates paid by shippers. Cargo insurance is inexpensive...because of the ability of cargo insurers to recover from carriers or others who are responsible for cargo damage.

Kramer, however, explained that because of an unfortunate decision by the United States Supreme Court, the ability of American marine insurers to make recoveries from carriers or others who are responsible for cargo damage or loss is in jeopardy. The United States *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* decision[113] involved a clause in a bill of lading inserted by a foreign shipowner requiring a United States importer to submit to foreign arbitration. The Supreme Court, in this case, ordered the United States courts to dismiss cases if the bill of lading contained a clause requiring the lawsuit to be brought in a foreign country. Kramer argued that because of this decision,

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[113] 115 S. Ct. 2322, 1995, A.M.C. 1817 (1995).

foreign shipowners could now unilaterally deprive American cargo owners of the right to pursue claims against them in the United States courts since cargo interests have no opportunity to negotiate the contents of a bill of lading. In fact, because of this decision, recovery actions against foreign shipowners by Americans are being forced abroad to jurisdictions where the costs of pursuing the claims, and the usually disappointing outcomes, are such that seeking recovery there is for the most part fruitless. As a practical matter, according to Kramer, forcing cargo interests abroad to pursue recoveries has lessened the protections guaranteed by the existing COGSA, which enacted the Hague Rules 1924, to American shippers. Therefore, Kramer argued that "the inevitable results will be an increase in costs: either in increased premiums to the shipper or unprofitable results for the insurer, or both". Kramer stated that:

> Cargo insurance is extremely competitive. Today, insurers compete globally. An account in Boston may be placed with insurers in Europe or Asia. American marine insurers must be in a position to meet this global competition. If American marine insurers cannot pursue claims in American courts, they are forced to decide between certain high costs in unpredictable foreign legal systems or simply writing off the claims. Either choice will eventually add significantly to loss ratios. If the American insurers raises premiums, it could lose the account to a foreign insurer who faces no such restriction...Now AIMU members are being forced to forgo claims against carriers responsible for the losses...The resulting negative impact on net loss experience will be detrimental to U.S. policyholders who may be forced to pay higher premiums, possibly making them less competitive.

Kramer's testimony clearly indicates that a lack of international uniform rules increases transaction costs. If the law of carriage of goods by sea is uniform, then the above *Sky Reefer* decision will not affect cargo insurers in recovering from carriers or others who are liable for cargo damage or loss. There will not be unpredictable foreign legal systems where cargo interests are

forced to pursue their claims. In other words, recovery in the United States courts or in other foreign courts will not make a difference since the protections guaranteed for shippers are the same under the international uniform rules.

The above example explains how the lack of uniform rules increases transaction costs, but it should be admitted that we do lack the exact figures in providing the amount of reduction of costs that international uniformity could bring. As mentioned in the previous section, Sweeney[114] suggests that we do lack the information in our subject because insurance companies are unwilling to provide the statistics since they consider it as confidential information. In addition, Sturley[115] suggests that insurance companies have decided that the importance of the information to them is not worth the costs of gathering it. It could be argued, therefore, that carrier and shipper interests are not willing to take the risk and spend so much money for achieving international uniformity, which could be, in their view, much more than it worth since we lack the information to provide the amount of reduction of costs that international uniformity could bring[116].

As an indirect evidence of the importance of international uniformity, as mentioned earlier in this chapter, in 1994, the Comité Maritime International (CMI) circulated a questionnaire to its member national associations seeking their views as to stop the breakdown of uniformity in

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[114] Sweeney, *supra* note 61, at 108.
[115] Sturley, *supra* note 84, at 148.
[116] Of course, there are other obstacles to international uniformity. For example, governments' interference in relation to the law of carriage of goods by sea is an important obstacle to international uniformity.

relation to the law of carriage of goods by sea. The response to the questionnaire was overwhelming: "The great majority of the [national associations'] replies is to the effect that [the current] proliferation [of differing regimes] is not acceptable"[117]. In addition, the United Nations has recognised the confusion that exists in the law of carriage of goods by sea. For example, the United Nations Commission on International Trade Law (UNCITRAL) stated that:

> In recent years some States have adopted, and presently some other States are about to adopt, laws that combine elements from the Hague regime and the Hamburg Rules; those laws, however, do not follow a uniform approach in combining the two regimes[118].

This indirect evidence shows that the awareness of the CMI, the United Nations, and even other international organisations, of the urgent need to achieve international uniformity did not exist from nothing. It could be argued that the existence of different liability rules in different countries is creating very high legal costs, and therefore, these organisations are trying to achieve international uniformity in order to reduce such costs.

One can argue, on the other hand, that if legal costs are so high, then why we did not achieve international uniformity until today? It is clear from our discussion in the first part of this chapter that the political process for achieving international uniformity has broken down[119]. In other words, every country is interested in achieving the liability rules that suit its own interests without considering the international interests. In addition, it could be argued

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[117] *Supra*, note 79.
[118] *Supra*, note 80.
[119] *Supra*, at 53-56.

that, at present, the international institutional arrangements are weak. The CMI, UNCITRAL, and other organisations are not powerful enough to guide the international shipper and carrier interests for achieving international uniformity. Tetley, indeed, blames the CMI and UNCITRAL for the current situation of the breakdown of international uniformity in relation to carriage of goods by sea, where he observes that:

> The CMI, amongst many other international conventions, adopted the world's most important international carriage of goods by sea rules, the Hague/Visby Rules (1968/1979). UNCITRAL, a much younger NGO (formed in 1966), adopted its own international carriage of goods by sea rules-the Hamburg Rules (1978). But neither the CMI nor UNCITRAL has been able to update its own particular Rules or to make them compatible one with another, despite the fact that shipping nations all over the world have been crying for such updating and uniformity...The international shipping community is thus torn between Hague/Visby and Hamburg...How did we fall into this lack of uniformity mess? No doubt because UNCITRAL and the CMI are reluctant to act. UNCITRAL wants the Hamburg Rules or nothing at all and is virtually silent. The CMI has not wanted to offend any of its members on one side or the other and has produced a report of alternatives, concluding that nothing should be done at this time[120].

Tetley also comments on why at present the CMI and UNCITRAL do not take part in leading the international community to achieve international uniformity, where he states that:

> Part of the problem is perhaps that neither organisation is completely transparent, the new flavour of the times. UNCITRAL rarely takes an official position on its practices, while the CMI often gets its back up over public criticism or suggestions[121].

Therefore, it could be argued that we need these international organisations to be powerful enough to guide carrier and shipper interests to achieve international uniformity. If every international organisation acts by its own,

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[120] Tetley, *supra* note 82.
[121] Tetley, *supra* note 82.

then we will probably have a new round of uncertainty. In other words, only cooperation among these international organisations can bring international uniformity, otherwise, the history may repeat itself and a battle of conventions may appear as the present situation.

3.4. Conclusion

The efforts to promulgate international uniformity in the field of the law of carriage of goods by sea had led to the appearance of the Hague, Hague-Visby and Hamburg Rules, which were created by the CMI and UNCITRAL. These conventions try to achieve the accession of all the countries of the world, but none has yet succeeded. Apart from these conventions, many countries created their own codes, which are a combination of various provisions of the above conventions including some domestic provisions. This situation plainly undermines international uniformity. As Sturley observes: "any informed observer should be able to see that there is no real international uniformity today"[122].

The above situation indicates that the international community has lost interest in achieving international uniformity in relation to the law of carriage of goods by sea. This situation, in fact, has made many commentators argue that international uniformity is still valuable, and that the international community should not hesitate in striving for such uniformity. Some argue that international uniform rules concerning carriage of goods by sea reduce overall costs of accidents. In other words, international uniform rules have an

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[122] Sturley, *supra* note 35, at 564.

effect on safety and accidents. This argument is hardly convincing since it lacks any empirical evidence. Others, on the other hand, argue that international uniform rules reduce transaction costs and litigation. Although this argument lacks any direct evidence, it is more sensible than the previous argument. The Congressional testimony of Walter M. Kramer, President of the AIMU, is very valuable since he represents the majority of the American insurers. His testimony, as explained in the second part of this chapter, clearly indicates that a lack of international uniform rules increases transaction costs. In addition, it is logical to say that the existence of international uniform rules meets the expectations of the parties of the contract of carriage of goods by sea. The predictability and certainty of the law that should apply on a contract of carriage of goods by sea can, therefore, reduce litigation. In other words, when conflicts arise among the parties on which law should be applied, this plainly increases litigation. Likewise, the extensive anxiety of many international organisations for achieving international uniformity in relation to the law of carriage of goods by sea is indirect evidence, which probably proves that such uniformity reduces legal costs.

In arguing that international uniformity of the law of carriage of goods by sea is still valuable, we supposed that the Hague, Hague-Visby and Hamburg Rules are uniformly interpreted among the various states. However, it should be admitted that without this supposition, it would not be hard for anyone to submit that international uniformity is no more than a waste of time and money. In fact, if the above uniform rules are not uniformly interpreted, then probably they will not lead to reduce transaction costs and litigation. The

next chapter, in consequence, attempts to prove the latter issue by focusing on the conflicts of interpretations of these uniform rules brought on by containerisation. It is for this reason, this thesis is intending to clarify the importance of achieving uniform interpretations of uniform rules and how such uniformity could be achieved.

CHAPTER IV: CONTAINERISATION AND INTERNATIONAL UNIFORM INTERPRETATIONS OF UNIFORM RULES

4.1. Introduction

The drafting of international conventions in relation to carriage of goods by sea is the first aspect of achieving international uniformity among the various countries. The second aspect is the international uniform application of such conventions. In the previous chapter, we argued that international uniform rules that relate to carriage of goods by sea are valuable since they reduce transaction costs and litigation. In so doing, we assumed that these rules are interpreted in an international uniform manner among the various countries. In practice, however, international uniform interpretations of these rules have not followed their enactment. In other words, conflicts arose among the various countries in interpreting these rules. This chapter, therefore, argues that since these rules were not interpreted in an international uniform manner, then they would not produce reduction in transaction costs and litigation. In fact, the creation of the uniform rules in relation to carriage of goods by sea leads the citizens, lawyers, courts and every interested person in every country to know what the law is, but such knowledge is not enough to meet the expectations of these parties if there are conflicts of interpretations regarding such law.

This chapter, in consequence, focuses on the conflicts of interpretations of the uniform rules in relation to carriage of goods by sea brought on by containerisation. The first part of this chapter briefly clarifies how containerisation has brought many advantages to shippers and carriers

alike, and even to the whole shipping industry. The second part, on the other hand, defines the conflicts that have been brought on by containerisation, and analyses how such conflicts would produce increase in the transaction costs and litigation instead of reduction. The third part, however, examines the indirect influence of the advent of containerisation on several conflicts that already existed, and clarifies how the impact of such advent on these issues resulted in increasing litigation. Finally, this chapter concludes that as long as there is no mechanism for reducing these conflicts significantly, uniform rules will not produce reduction in transaction costs and litigation.

4.2. The Advent of Containerisation

The transition in the methods of carriage of goods by sea from break-bulk to unitisation and now to containerisation has brought many advantages for the whole shipping industry. The term break-bulk is used to refer to traditional non-unitised or non-containerised cargo[1]. A break-bulk shipment is one "in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port"[2]. This was not considered as an efficient solution for carriage of goods, and therefore, unitisation or palletisation was employed, so that several cartons can be stacked on a flat wooden tray and then moved by means of a forklift truck.

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[1] See *Matsushita Electric Corporation of America v. SS Aegis Spirit*, [1977] 1 Lloyd's Rep. 93 at 96.

[2] See *Northeast Marine Terminal Co. v. Caputo*, 53 L. Ed. 2d 320 at 336-37 (1977).

The consolidation of goods on pallets reduced labour costs, protected the goods and facilitated loading and discharging from the vessel[3].

In the 1960s, on the other hand, carriage of goods by containers was employed[4]. The United States Coast Guard, which is responsible for approving containers used for international transportation under Customs seal, proposes a detailed definition of "container" as:

> An article of transport equipment (liftvan, portable tank, or other similar structure including normal accessories and equipment when imported with the equipment), other than a vehicle or conventional packaging [which is] ...strong enough to be suitable for repeated use...specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading...[f]itted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; [and]...so designed as to be easy to fill and empty[5].

This definition not only describes what the container is but also clarifies some of the advantages of containerisation in comparison with break-bulk carriage. Before containerisation, it would take, for example, 126 men working 84 hours each in discharging and loading approximately 11,000 tons of goods

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[3] See Bissell Tallman, "The Operational Realities of Containerisation and Their Effect on the 'Package' Limitation and the 'On-Deck' Prohibition: Review and Suggestions", (1970-1971) 45 Tul. L. Rev. 902 at 907.

[4] See George Denegre, "Admiralty-Carrier-Owned Shipping Container Found not to be COGSA Package", (1982) 56 Tul. L. Rev. 1409 at 1412. For a detailed discussion on the appearance of containerisation see, for example, Seymour Simon, "The Law of Shipping Containers: (Part I)", (1973-1974) 5 J.M.L.C. 507; Matt Hannes, *The Container Revolution*, (1996); Gerhardt Muller, *Intermodal Freight Transportation*, (3rd ed., 1995); Joseph A. Calamari, "The Container Revolution and the $500 Package Limitation-Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative", (1977) 51 St. John's L. Rev. 687.

[5] Proposed Regulation, 49 C.F.R. § 420.3(3), published at 34 Fed. Reg. 14054 (Sept. 4, 1969), quoted in Edward Schmeltzer and Robert A. Peavy, "Prospects and Problems of the Container Revolution", (1969-1970) 1 J.M.L.C. 203 at 203.

abroad a break-bulk vessel. While 42 men, working 13 hours each, could handle the same amount of containerised goods[6]. Carriage of goods by containers also has many advantages over unitisation or palletisation carriage, especially in relation to the safety of the goods. Therefore, on many occasions, pallets are consolidated into containers. In general, the consolidation of goods on containers reduced the total costs of transport, increased protection, reduced pilferage and simplified every aspect of cargo movement[7]. These advantages of containerisation are considered as a great effect on globalisation. John Micklethwait and Adrian Wooldridge, in their textbook, *A Future Prefect: The Challenge and Hidden Promise of Globalisation*[8], observe that:

> Something that has had an even greater effect on globalisation is really no more than a twenty-foot-long metal box...it [containerisation] has changed many manufacturers' perspectives on the world. Cheaper, quicker transportation opened up new markets, encouraging even small firms to go global, and allowed companies to "source" components from the other side of the world and to experiment with "just in time" manufacturing methods. No longer relying on huge factories and warehouses, manufacturing has become a leaner business, with companies outsourcing their supply systems to logistics specialists.

The emergent use of containers marks a significant technological step within the shipping industry. Their use expanded through the years very fast

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[6] This example is taken from Andrea R. Luciano, "Much Ado About Packages: Containers & the COGSA Limitation of Liability Provision", (1982) 48 Brooklyn L. Rev. 721 at 722.

[7] For a detailed discussion on the advantages of containerisation, see, for example, Carl E. McDowell, "Comment on Insurance and Liability", (1972) 3 J.M.L.C. 503; Samir Mankabady, "Some Legal Aspects of the Carriage of Goods by Container", (1974) 23 Int'l. Comp. L.Q. 317; David M. Sassoon, "Trade Terms and the Container Revolution", (1969) 1 J.M.L.C. 73 at 77-78; Henry A. Tombari, "Trends in Oceanborne Containerisation and its Implications for the U.S. Liner Industry", (1979) 10 J.M.L.C. 311 at 311-12.

[8] (2000) at 34.

because of the substantial advantages they provide over break-bulk and unitisation transport. Therefore, both carriers and shippers enjoy corresponding economic benefits from containerised cargo carriage.

4.3. The Conflicts That Have Been Brought By The Advent of Containerisation

Although containerisation brought many benefits for shippers and carriers alike, it also brought noticeable problems. The appearance of containerisation has distorted the statutory framework that defines the liabilities and limitations of the carrier and the shipper. The limitation of the carrier's liability in the event of goods damaged or lost, under the Hague Rules 1924, is based on the system of "per package or unit". Article 4(5) of the latter rules provides, in part, that:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.
>
> By agreement another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named...[9].

Article 4(5) and even the other provisions of the Hague Rules 1924 do not deal with containers transport. In fact, since containerisation appeared in the 1960s, the framers of the Hague Rules 1924 cannot be blamed because such

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[9] See John F. Wilson and Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea*, V/1 CONV-V/6 CONV, (October 1980) at 3-4.

technology was not within their contemplation who had in mind break-bulk transport. As mentioned in the previous chapter, the Hague Rules 1924 were amended in 1968 by a Protocol, which was called the Hague-Visby Rules, in order to deal with containerisation and other issues[10]. Although the latter rules deal with containerisation in relation to the carrier's limitation of liability, they do not deal with carriage of containers on-deck. The Hamburg Rules 1978, on the other hand, have dealt with containerisation, in relation to the carrier's limitation of liability, in nearly the same way as the Hague-Visby Rules 1968 did[11]. The Hamburg Rules, unlike the Hague-Visby Rules, deal with carriage of containers on-deck[12].

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[10] For a more detailed discussion on this issue, see the third chapter, *supra*, at 44-45. Article 4(5) of the Hague-Visby Rules provides, in part, that:
"(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of Frs. 10,000 per package or unit or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.
(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph." See Wilson & Debattista, *Id*, at 7-8.

[11] Article 6 of the Hamburg Rules 1978 provides, in part, that:
"1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher...

As explained in the previous chapter, the primary purpose of creating the Hague Rules 1924, and even the Hague-Visby and Hamburg Rules, was to avoid certain exculpatory clauses, which exonerated carriers from their liability of loss or damage to goods at sea[13]. To avoid such exculpatory clauses, the drafters of these rules have created limitation clauses for the carrier's liability, which are mentioned above[14]. Article 4(5) of the Hague Rules 1924, for example, prevents the carriers from limiting their liability to an amount less than £100 per package or unit. The limitation clauses not only protect shippers but also carriers. The concept of limitation of liability, for example, protects carriers from the risks associated with goods of high-undisclosed value and, by establishing a standard level of liability, enables

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2. For purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply:
(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.
(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.
4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed." See Wilson & Debattista, *supra* note 9, at 56-57.

[12] Article 9 of the Hamburg Rules 1978 provides, in part, that:
"The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations." See Wilson & Debattista, *supra* note 9, at 58.

[13] See the third chapter, *supra*, at 36-38, 40, 45 and 50.

[14] Simon describes the limitation clauses as "an early consumer protection law". Seymour Simon, "Container Law: A Recent Reappraisal", (1976) 8 J.M.L.C. 489 at 489.

them to offer uniform and cheaper freight rates[15]. However, although the limitation clauses provide a standard level of liability, the advent of containerisation has created conflicts to such standard of liability. Such conflicts increase transaction costs and litigation. These conflicts, and how they increase transaction costs and litigation, are explained below accordingly.

4.3.1. The "Package Limitation" Conflict

Article 4(5) of the Hague Rules 1924 states that the carrier's liability is limited to a specific amount, being "per *package* or unit"[16]. Article 4(5) does not define the term "package", and there is no other provision in the Hague Rules 1924 that define this term. In addition, there is nothing from the debates in the Hague Conference 1921, nor from those in the subsequent conferences that led to the creation of the Hague Rules 1924, to indicate the precise meaning of the term "package". In determining the meaning of the term "package" by referring to the legislative history of the Hague Rules 1924, the United States Second Circuit in *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft & Columbus Lines, Inc.*[17] observed that:

> No doubt the drafters [of the Hague Rules 1924] had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common-sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation[18].

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[15] See John F. Wilson, *Carriage of Goods by Sea*, (3rd ed., 1998) at 194.
[16] (emphasis added). See Wilson & Debattista, *supra* note 9.
[17] 375 F.2d 943 (2d Cir. 1967).
[18] *Id*, at 945.

However, what seemed a uniform, a predictable, and a common-sense standard in 1924 became outmoded by the advent of containerisation in the 1960s. Such advent contributed to the obsolescence of "package" as a descriptive term. This can be explained by the following example: if 100 boxes were placed into a container, and then this container was damaged or lost, what is the compensation that a shipper can get from a carrier? In other words, does the container constitute a "package" or does its contents (the 100 boxes) constitute packages? The answer to this question is very important to the allocation of the risk of loss in ocean transportation. The problem of determining how the loss should be allocated in a liability situation has brought a debate between carriers and shippers. On the one hand, it is hard for shippers to accept that the whole container will be regarded as one package since almost in all cases the value of the container's contents are much more than £100, which is the amount of the carrier's liability per package under the Hague Rules 1924. On the other hand, it is hard for carriers to accept that the contents of the container will be regarded as packages especially in case where the container was placed and sealed by the shipper and the carrier does not have any clue what the contents of the container are. Thus, both shippers and carriers have a persuasive defence in their arguments.

The United States' District Court for the Southern District of New York, for example, in *Marcraft Clothes, Inc. v. M.V. Kurobe Maru*[19], acknowledged the practical effects of the package limitation provision, where it stated that:

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[19] 575 F. Supp. 239 (S.D.N.Y. 1983).

> This 1936 statute [The United States COGSA, which adopted the Hague Rules 1924] must now be applied in a universe of shipping technology significantly altered by the advent of containerisation. The risk of commercially unreasonable results has become substantial. In this case, for example depending on the meaning given to the term "package", the defendant might face maximum liability as low as $500 or as high as $2.2 million[20].

As will be seen in the next chapters, conflicts of interpretations of the Hague Rules 1924 arose, in different national courts, regarding whether to consider the container itself as a package, or its contents as packages[21].

What then is the practical impact of such conflicts of interpretations on the transaction costs and litigation? Our argument, as stated in the previous chapter, is that uniform rules are important since they reduce transaction costs and litigation[22]. We stated that the economic purpose of the carrier's limitation of liability under Article 4(5) of the Hague Rules 1924 is to enable the carrier, on the ground of knowing that his liability is limited to a figure, to offer standard freight rates for all cases. Therefore, there will be no delay and cost to him and to the shippers, which will arise by valuating the shipment of each case individually and by changing the freight rate accordingly. However, the financial difference in determining the meaning of the term "package" does not serve the economic interests of shippers and carriers alike. In the *Marcraft* case above, the carrier's liability could have been as high as $2.2 million or as low as $500. Logically, such financial difference does not lead the carrier to know at the time of the contract that his liability is limited to a specific figure, and in consequence, the economic purpose of Article 4(5) will be defeated. In

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[20] *Id*, at 240.
[21] See the fifth chapter, *infra*, at 106-114; the sixth chapter, *infra*, at 135-46.
[22] See the third chapter, *supra*, at 63-72.

addition, such financial difference creates problems for the insurance companies who need to know at the time of the contract of carriage the extent of the carrier's liability on which the premium will be fixed. Insurers will quote different premiums, and in consequence, delay and expense will arise in examining the details of each individual contract of carriage or the liability of the carriers in relation to the goods, which they insure. Furthermore, this financial difference produces litigation. When the perceptions of both shippers and carriers of the likely outcome of a dispute vary by an amount, which is large enough to cover the expenses of litigation, then it is logical for both shippers and carriers to pursue a lawsuit. In supporting this argument, as will be seen in the next chapters, there are large amount of cases in the United States, for example, in relation to whether the container is a package, or its contents are packages[23].

4.3.2. The "Unreasonable Deviation" Conflict

Prior to the appearance of the Hague Rules 1924, carriage of goods on-deck of the vessel has been treated as an unreasonable deviation[24], where such act nullifies the contract of carriage including the protection of any limitation clauses in this contract. This act, in consequence, had the effect of making the carrier responsible for the cargo as an insurer[25]. The advent of

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[23] See the fifth chapter, *infra*, at 106-114; the sixth chapter, *infra*, at 135-46.
[24] Unreasonable deviation means if the carrier unreasonably places the goods under a risk, which is not contemplated in the intended voyage. See R. Glenn Bauer, "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules-A Case By Case Analysis", (1993) 24 J.M.L.C. 53 at 56.
[25] See Laurence B. Alexander, "Containerization, The Per Package Limitation, and the Concept of "Fair Opportunity"", (1986) 11 Mar. Law. 123 at 130;

containerisation, however, has brought difficulties to the application of the unreasonable deviation concept on carriage of goods on-deck. From the earliest days of containerisation, containerships were specially designed to carry containers on deck. Stacking systems minimise the risk of loss or damage to the goods overboard, and such goods are no longer at particular risk from on-deck carriage since they are containerised[26]. Such advent requires an answer to the question of whether to consider carriage of containers on-deck as unreasonable deviation or not.

The Hague Rules 1924 and the Hague-Visby Rules 1968 do not apply to carriage of goods on-deck. Article 1(c) of the Hague and Hague-Visby Rules provides that:

> In these Rules the following words are employed, with the meanings set out below:-
> (c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried[27].

Two requirements need to be satisfied in order to avoid the operation of the Rules. First, the cargo must actually be carried on deck and, secondly, this fact must be expressly stated on the bill of lading. Unless both requirements are met, the Hague Rules or the Hague-Visby Rules will still control the contract of carriage. These two requirements are clear, but in most cases, the containers would be carried on-deck without a statement in the bill of lading that the containers were in fact so carried. This means that in most cases the Hague

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Patrick Griggs and Richard Williams, *Limitation of liability for Maritime Claims*, (2d ed., 1991) at 125.

[26] See Mark D. Booker, *Containers: Conditions, Law and Practice of Carriage and Use*, (1987) Vol. 1, at 144.

[27] See Wilson & Debattista, *supra* note 9.

and Hague-Visby Rules would apply. This raises the question: Does this mean that carriage of containers on-deck would not constitute unreasonable deviation? There are conflicts among many national courts on whether carriage of containers on-deck is considered as unreasonable deviation under the Hague and Hague-Visby Rules. Article 4(5) of the Hague and Hague-Visby Rules provides that "in any event" the carrier's liability shall be limited to a stipulated amount. This means that in all events the carrier shall not be deprived from his right of limitation under Article 4(5). Despite this wording, as will be discussed in detail in the next chapters, different national courts divided over the meaning and effect of the words "in any event" in Article 4(5)[28]. Some national courts acknowledged the wording of Article 4(5) and argued that the carrier should not be deprived from his limitation right if he committed an unreasonable deviation. Other national courts, however, were unwilling to attribute much significance to the wording of Article 4(5) and argued that carriage of containers on-deck deprives the carrier from the benefit of the limitation under the latter Article.

The conflicts of interpretations in determining whether the carriage of containers on-deck constitutes unreasonable deviation do not serve the economic interests of shippers and carriers. As stated in relation to the term "package" in the previous section, the economic purpose of Article 4(5) of the Hague Rules 1924 will be logically defeated if carriers cannot know at the time of the contract that their liability is limited to a specific figure. It follows that the lack of a standard level of limitation of liability because of the

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[28] See the fifth chapter, *infra*, at 115-17; the seventh chapter, *infra*, at 186-90.

conflicts of interpretations regarding the carriage of containers on-deck creates delay and expense to insurance companies in examining every contract of carriage individually. In addition, the huge financial difference between paying a specific limited amount of liability and paying the whole amount of the damaged or lost cargo increases litigation. Such financial difference grants shippers the motive to pursue a lawsuit.

4.4. The Indirect Impact of Containerisation on Conflicts of Interpretations

The appearance of containerisation has an influence on some conflicts that have already existed, where this has resulted in creating more conflicts of interpretations. This, in consequence, increased litigation. In fact, these conflicts have only existed in the United States due to different factors:

4.4.1. The "Unit Limitation" Conflict

Under Article 4(5) of the Hague Rules 1924, the carrier's limitation of liability is per "package", and in case of goods not shipped in packages, per "unit"[29]. Neither Article 4(5) nor the other provisions of the Hague Rules 1924 define the term "unit". In addition, there is no indication to the precise meaning of the term "unit" in the legislative history of the latter rules. As will be explained in detail in the next chapters, the United States Congress passed the Carriage of Goods by Sea Act 1936 (COGSA)[30], which adopted the Hague

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[29] See Wilson & Debattista, *supra* note 9.

[30] The United States Carriage of Goods By Sea Act (COGSA 1936), 46 United States Code (U.S.C.) §§ 1300-1315, from the Internet: http://www.cargolaw.com cogsa.html (accessed: 20-5-2001).

Rules 1924 with minor alterations[31]. One of these changes is that the term "unit" has been changed to "customary freight unit". The United States Circuit Courts construed the latter term as the unit of measurement used to calculate the freight[32]. However, other countries, such as the Untied Kingdom and Canada, when incorporated the Hague Rules 1924, did not change the term "unit". These countries, therefore, construed the term "unit" as the "shipping unit", namely the physical unit as received by the carrier from the shipper, for example, an unboxed car, a crate, a container, a bale, or a sack. These conflicts of interpretations, of course, appeared before the existence of containerisation.

The practical impact of the differences in construing the unit limitation leads to unreasonable results. If the term "unit" is construed to mean a "shipping unit", what may conceivably be called a package, equally constitutes a shipping unit, although some shipping units are not packages as defined and discussed above. In other words, all packages are shipping units, but not all shipping units are packages[33]. On the other hand, if the term "unit" is construed to mean a "freight unit", the position will be significantly different, because the calculation based on the "freight unit" will be higher than that based on the "shipping unit". In other words, the maximum liability of the carrier will be greater than that based on the "shipping unit"[34]. This can be explained as follows: Assume that a cargo of four unboxed large motors weighing 50 tons each was prepared for shipment. If we assume that the

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[31] See the fifth chapter, *infra*, at 104; the sixth chapter, *infra*, at 148.
[32] The "freight unit" is usually a weight or volume of the goods, for example, tons, cubic feet.
[33] See Tallman, *supra* note 3, at 904.
[34] See Samir Mankabady, *International Shipping Law*, (1991) Vol. II, at 44.

freight was calculated on the basis of weight, which here is the ton, and if the "unit" is construed to mean a "shipping unit", the carrier's liability would be limited under Article 4(5) of the Hague Rules 1924 to £400 (being £100 X 4). On the other hand, the carrier's liability would be limited under Article 4(5) of the Hague Rules 1924 to £20,000 (being £100 X 50 X 4) if the "unit" is construed to mean a "freight unit". The first calculation, in this example, can be said as in favour of carriers, while the second one in favour of shippers. The financial difference in determining the meaning of the term "unit" increases litigation. In every case, the carrier might have the chance to reduce his liability to as little as £100 per unit, and at the same time, the shipper might also have the chance to increase the carrier's liability to a much higher amount.

The above discussion raises the following question: what is the impact of the appearance of containerisation on this issue? Within the appearance of containerisation, the conflicts of interpretations of defining the term "customary freight unit" in the United States became more complex. As will be discussed later in this thesis, in many cases, because containers carried the goods, the Circuit Courts found out that the term "customary freight unit" was difficult to apply for the limitation purpose[35]. In these cases, the Circuit Courts considered the contents of the containers as the freight units, but the freight charge was computed on a flat container rate. This resulted in creating a problem to know how to apply the freight unit on each unit in the containers. Therefore, these courts remanded this issue to be determined by their District

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[35] See the sixth chapter, *infra*, at 153-55.

Courts. It could be argued, therefore, that the appearance of containerisation has lead, in many cases, to the inadequacy of applying the term "customary freight unit" on goods. Consequently, the inapplicability of the term "customary freight unit" on containers cases may lead the Circuit Courts to put different criteria in solving such issue, and this leads to more conflicts of interpretations.

4.4.2. The "Fair Opportunity" Conflict

The package and unit limitation of liability is one part of Article 4(5) of the Hague Rules 1924. The other part is the declaration of value by which a shipper can adjust a carrier's negligence liability to his needs, and consequently avoid the application of the package and unit limitation[36]. The reason behind adding this second part is that it would permit the parties to ascertain at the time of the contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation[37]. The United States Circuit Courts, however, developed a new requirement in relation to the second part of Article 4(5). These Circuit Courts argued that the package and unit limitation of liability of Article 4(5) may not become effective, unless the shipper is afforded a fair opportunity to declare a higher than $500 liability rate[38] by paying a correspondingly greater charge. In other words, if the carrier did not give the shipper a fair opportunity to declare

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[36] See Wilson & Debattista, *supra* note 9.
[37] See the United States case: *Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 at 816 (2d Cir. 1981).
[38] The United States COGSA 1936, under Article 1304(5), changed the liability rate from £100 into $500.

a higher value, he would lose the applicability of the $500 limitation, and accordingly would pay the whole amount of the damaged or lost cargo. This requirement is well known in the United States as the "fair opportunity" doctrine.

As will be discussed in detail in the next chapters, the "fair opportunity" doctrine has rendered the United States Circuit Courts' decisions inconsistent with the international understanding of the Hague Rules[39]. Foreign courts do not even acknowledge that the "fair opportunity" doctrine exists in Article 4(5) or even in any other provisions of the Hague Rules 1924. Above all, the subsequent failure by the United States Circuit Courts to explain the origin of the "fair opportunity" doctrine has created inconsistent decisions among such Circuit Courts in determining what constitutes a "fair opportunity".

Although the existence of the "fair opportunity" doctrine was not due to the appearance of containerisation, there were conflicts among many Circuit Courts in whether to apply this doctrine on the containers cases. As will be explained in the next chapters, the line of the inconsistent decisions among the Circuit Courts in applying this doctrine on containers cases has created more conflicts of interpretations[40]. The conflicts among the United States Circuit Courts in applying the "fair opportunity" doctrine, therefore, increase litigation. Because of this conflict, in every case the shipper has the chance to argue that he has not been given the opportunity to declare a higher value. In

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[39] See the fifth chapter, *infra*, at 98-102 and 126-28; the sixth chapter, *infra*, at 164-72.

[40] *Id.*

other words, in every case the shipper might has the chance to avoid the applicability of the $500 limitation, and in consequence, the carrier would pay the whole amount of the damaged or lost cargo. Accordingly, since the shipper's perception of the likely outcome of the dispute regarding whether he has been given a fair opportunity or not vary by an amount large enough to cover the expenses of litigation, then it is logical for such shipper to pursue a lawsuit.

4.5. Conclusion

The appearance of containerisation has brought many advantages for shippers and carriers alike, and even for the whole international maritime industry. In spite of these advantages, conflicts of interpretations arose in the application of the uniform rules that relate to the carriage of goods by sea, especially the Hague Rules 1924, on the subject of containerisation. Conflicts of interpretations appeared as to whether the container is the package or its contents are the packages, and whether carriage of containers on-deck deprives the carrier from limiting his liability. The huge financial differences in determining the meaning of the term package, and the applicability of the limitation clauses on the on-deck carriage of containers, defeat the economic purpose of the limitation clauses in reducing the transaction costs. In addition, such differences increase conflicts of interpretations and therefore litigation increases. The existence of the "fair opportunity" doctrine and the "customary freight unit" concept, where containerisation has an indirect influence on them, also increase litigation.

Consequently, having a mechanism for reducing conflicts of interpretations that relate to containerisation would achieve the purpose of creating the uniform rules that relate to carriage of goods by sea, which is an international uniform interpretation of such rules. Such an achievement would reduce the transaction costs and litigation. Therefore, by examining the above conflicts of interpretations that relate to containerisation, the next chapters of this thesis investigate and analyse how we can achieve international uniform interpretations of uniform rules. In so doing, as will be seen, different national courts have construed identical and non-identical provisions in different ways, and these conflicting interpretations have undermined the uniformity of the uniform rules. Accordingly, as Sturley[41] states: "although the resulting partial uniformity is preferable to total diversity, there is still considerable room for improvement". Consequently, as we shall see in the next chapters, it is the writer's belief that the importance of comparative law and its role in achieving international uniform interpretations should be considered, since it is the way that conflicts of interpretations could be significantly reduced.

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[41] Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729 at 729.

CHAPTER V: WHY CONFLICTS IN INTERPRETATIONS OF UNIFORM RULES ARISE

5.1. Introduction

The importance of international uniform interpretations of uniform rules that relate to carriage of goods by sea as an aid to reach substantive international uniformity has been recognised by different national courts. In the United States, for example, the Supreme Court recognised that international uniform interpretations of the Hague Rules 1924 are valuable[1]. Lower American courts also recognised this issue[2]. In addition, United Kingdom courts recognised the value of international uniform interpretations in relation to both the Hague Rules 1924[3] and the Hague-Visby Rules 1968[4]. Australian courts also recognised the issue in relation to uniform rules generally, and especially the Hague Rules 1924[5]. In general, these national courts recognised that conflicts of interpretations of uniform rules impose real costs on the shipping industry and increase litigation, which the previous

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[1] See *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 at 301 and 306-08, 1959, A.M.C. 879 at 882 and 885-88 (1959); *Vimar Segurosy Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322 at 2328, 1995, A.M.C. 1817 at 1823-24 (1995).

[2] See, for example, *Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 at 815 and 820-21 (2d Cir. 1981).

[3] See, for example, *Foscolo Mango and Co. v. Stag Line Ltd.*, [1932] A.C. 328 at 332 and 334; *Riverstone Meat Co. v. Lancashire Shipping Co.* (The Muncaster Castle), [1969] 1 Lloyd's Rep. 57 at 67 and 86; *The River Gurara*, [1996] 2 Lloyd's Rep. 53 at 62.

[4] See, for example, *The Morviken*, [1983] 1 Lloyd's Rep. 1 at 5; *Kenya Railways v. Antares Co. Pte. Ltd.*, [1986] 2 Lloyd's Rep. 633 at 637; *The River Gurara*, [1996] 2 Lloyd's Rep. 53 at 62.

[5] See, for example, *Shipping Corporation of India Ltd. v. Gamlen Chemical Co. (Asia) Pty. Ltd.*, [1981] 147 C.L.R. 142 at 159.

chapter examined in detail. Such recognition, however, is not enough to solve the problem of conflicts of interpretations of uniform rules. To solve this problem, we need first to understand why conflicts of interpretations arise. Consequently, this chapter explains the different suggestions that are proposed by different writers to understand why conflicts of interpretations arise. However, none of these different suggestions has a completely satisfactory explanation of why conflicts of interpretations arise, since they only explain some conflicts.

In proving the inadequacy of these propositions, our method, in this chapter, is to examine the United States decisions in relation to the problem of containerisation, which mentioned in the previous chapter. As stated in the first chapter of this thesis, the reason of choosing the United States is that this country contains a large amount of cases regarding the subject of containerisation that are suitable for examining the cause of the inconsistent interpretations of uniform rules[6]. In addition, this chapter examines other countries decisions in relation to the same subject, but only specific cases for proving specific points.

5.2. Why Conflicts of Interpretations of Uniform Rules Arise

5.2.1. The Different Connotations of the Technical Terms of Uniform Rules

International uniform laws are no better protected against the risk of having ambiguity in their provisions than any other laws. The term "package", for example, is not defined under Article 4(5) or the other provisions of the

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[6] See the first chapter, *supra*, at 4-5.

Hague Rules 1924. The lack of defining such term has lead to conflicts of interpretations among many national courts on whether to consider containers or their contents as packages[7]. Some commentators argue that conflicts of interpretations of uniform rules arise because of the ambiguity in the provisions of such uniform rules. Jacob W.F. Sundberg, for example, in his article "A Uniform Interpretation of Uniform Law"[8], suggests that the technical terms, whether they are legal terms, special terms or any terms, of the uniform rules often have different connotations in the different legal systems, and this leads to conflicts of interpretations. He argues that the greater the degree of abstractness expressed by the technical terms the more conflicts of interpretations arise.

Sundberg's suggestion implies that conflicts of interpretations arise through the imprecise drafting of the uniform rules. This suggestion, however, is inadequate to explain why conflicts in interpretations arise. Although clear drafting of uniform rules can reduce some conflicts of interpretations, providing clear uniform rules does not necessarily mean that judicial results will be uniform. Accordingly, Sundberg's suggestion does not explain why still there are conflicts of interpretations among the national courts when the provisions of the uniform rules are clear. This is explained below in detail under the "fair opportunity" doctrine, which was created by the United States' Circuit Courts.

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[7] See the fourth chapter, *supra*, at 82-83.
[8] (1966) 10 Scandinavian Stud. L. 219 at 221.

5.2.1.1. The Different Connotations of the Technical Terms of Uniform Rules: The "Fair Opportunity" Example

It is unnecessary to say that the clarity of the provisions of the uniform rules would always lead to international uniform interpretations of such rules. Whether the provisions were clear or ambiguous, conflicts of interpretations might arise in both situations. Article 4(5) of the Hague Rules 1924, for example, states, in part, that:

> Neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> By agreement another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named[9].

Article 4(5) provides in clear terms that the carrier shall not "in any event" be liable for more than £100 per package or unit. Nevertheless, as mentioned in the previous chapter, the United States Circuit courts have held that if the carrier did not give the shipper a "fair opportunity" to declare a higher value, the package and unit limitation would not apply[10]. In other words, the carrier would lose the applicability of the package and unit limitation and accordingly would pay the whole amount of the damaged cargo, unless the shipper is afforded a "fair opportunity" to declare a higher value. This requirement is well known in the United States as the "fair opportunity" doctrine. This doctrine contradicts with Article 4(5) since this Article undoubtedly

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[9] (emphasis added). See John F. Wilson and Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea*, V/1/CONV-V/6/CONV, (October 1980) at 3-4.

[10] See the fourth chapter, *supra*, at 91-92.

determines that in all events the carrier shall not lose his right of limiting his liability.

The "fair opportunity" doctrine developed in the United States under the railroad[11] and the Harter Act cases[12]. After the doctrine had developed in this context, the Ninth Circuit adopted it for the first time in a COGSA case, *Tessler Brothers (B.C.) Ltd. v. Italpacific Line*[13]. In this case, the Ninth Circuit decided that:

> A significant restriction on a carrier's right to limit liability to an amount less than the actual loss sustained is that the carrier must give the shipper 'a fair opportunity to choose between higher or lower liability by paying a corresponding greater or lesser charge'[14].

The Ninth Circuit also stated that Article 4(5) limits the carrier's liability to a specific amount unless a higher amount is inserted in the bill of lading. The Ninth Circuit, however, ignored the fact that Article 4(5) provides that such higher amount can be arranged by agreement between the shipper and the carrier, and in consequence, there is no obligation on the carrier to notify the shipper of such arrangement. The Ninth Circuit also misinterpreted Article

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[11] See, for example, *Hart v. Pennsylvania Railroad Co.*, 112 U.S. 331 (1884); *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953).

[12] See, for example, *Isbrandtsen Company, Inc. v. United States of America*, 201 F.2d 281 (2d Cir. 1953) (COGSA did not apply since the case involved a shipment between two foreign ports); *Sommer Corp. v. Panama Canal Co.*, 475 F.2d 292 (5th Cir. 1973) (COGSA did not apply since the case involved damage occurring after discharge). For a detailed discussion see: Michael F. Sturley, "The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act", (Part "I") (1988) 19 J.M.L.C. 1 at 6-13.

[13] 494 F.2d 438 (9th Cir. 1974).

[14] *Id.* at 443. Quoting *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953); *Sommer Corp. v. Panama Canal Co.*, 475 F.2d 292 (5th Cir. 1973).

4(5), where this Article does not put a restriction on the carrier's limitation of liability, but instead provides that such limitation shall not be restricted in any event. In spite of this, the Ninth Circuit claimed the existence of the "fair opportunity" doctrine in Article 4(5), and therefore held that there were two clauses in the bill of lading in this case, which proved that the carrier gave the shipper a fair opportunity to avoid the package and unit limitation. One clause recited the language of Article 4(5) of COGSA, and the other was the "Paramount Clause", namely, a clause that stated that the bill of lading was subject to the provisions of COGSA. Although the Ninth Circuit's decision was erroneous in adopting the "fair opportunity" doctrine, this decision has been the basis for all of the current law on the subject.

The Ninth Circuit Court and even the other Circuit Courts, which followed the Ninth Circuit Court in adopting the "fair opportunity" requirement[15], claimed that Article 4(5) of the Hague Rules 1924 requires the carrier to notify the shipper of his right to declare a higher value. In other words, these Circuit Courts claimed that the "fair opportunity" doctrine does exist in Article 4(5). However, Article 4(5) and even the other provisions of the Hague Rules 1924 do not require the carrier to notify the shipper of his right to declare a higher value. Instead, Article 4(5) just mentions that the

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[15] See, for example, *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992); *Nippon Fire & Marine Ins. Co. v. M/V Tourcoing*, 167 F.3d 99 (2d Cir. 1999); *Gamma-10 Plastics v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994); *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427 (9th Cir. 1993); *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990); *Unimac Co. v. C. F. Ocean Service*, 43 F.3d 1434 (11th Cir. 1995). All of these cases involved containerised cargo.

£100 limitation applies, unless the shipper declares the nature and value of the goods. Thus, it is the shipper's choice to declare a higher value for the goods[16]. In addition, Article 4(5) states that "by agreement" another maximum amount than the £100 limitation may be fixed. The phrase "by agreement" confirms that it is the parties' choice to declare a higher value for the goods, and in consequence, there is no obligation or requirement on the carrier to notify the shipper of his right to declare a higher value. In fact, some judges in the Ninth Circuit and even other Circuit Courts admitted that the doctrine of "fair opportunity" is not found in the language of the Hague Rules 1924. For example, in *Carman Tool & Abrasives, Inc. v. Evergreen Lines*[17], Kozinski, J. acknowledged that the doctrine of "fair opportunity" "is a judicial encrustation, designed to avoid what courts felt were harsh or unfair results"[18]. It should be noted also that commentators, whether they agree with the adoption of the "fair opportunity" doctrine or not, acknowledge that this doctrine does not exist in the provisions of the Hague Rules 1924[19]. Therefore,

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[16] Sturley states that shipper's declaration of a higher value is a decision for the shipper alone. There is nothing suggest that the carrier has any duty to call the opportunity to the shipper's attention. Michael F. Sturley, "The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act", (Part "II") (1988) 19 J.M.L.C. 157 at 170 and 175.

[17] 871 F.2d 897 (9th Cir. 1989).

[18] *Id*, at 900. See also *Henley Drilling Co. v. McGee*, 36 F.3d 143 at 147 (1st Cir. 1994) (CYR, J.).

[19] See Mary L. Moreland, "Comment: COGSA Section 1304(5): 'Fair Opportunity' Update", (1996) 20 Mar. Law. 423 at 423; Laurence B. Alexander, "Containerisation, The Per Package Limitation, and the Concept of "Fair Opportunity"", (1986) 11 Mar. Law. 123 at 139-140; Jerome C. Scowcroft, "Recent Developments Concerning the Package Limitation", (1989) 20 J.M.L.C. 403 at 416; Daniel A. Tadros, "COGSA Section 4(5)'s 'Fair Opportunity' Requirement: U.S. Circuit Court Conflict and Lack of

the "fair opportunity" doctrine does not exist in Article 4(5) or in any other provision in the Hague Rules 1924, and is, in fact, a United States judicial invention[20].

The "fair opportunity" doctrine, the "brain child" of the United States courts, has rendered the United States Circuit Courts' decisions inconsistent with the international understanding of the Hague Rules 1924. Foreign courts do not even acknowledge that such doctrine exists. In effect, several commentators observe that the "fair opportunity" doctrine undermines the uniformity of the Hague Rules 1924. Tadros[21], for example, argues that the United States Supreme Courts must reject the "fair opportunity" doctrine in order to align the United States judicial system with foreign judicial systems in their interpretations of the Hague Rules 1924. In addition, Sturley[22] states that the "fair opportunity" doctrine interferes with the primary purpose of the Hague Rules 1924, which is achieving international uniformity, because other nations have not made the same mistake.

From this point, Sundberg's argument that conflicts of interpretations arise through differences in the interpretation of the technical terms of uniform rules is inadequate since it does not go far enough to explain why still there

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International Uniformity: Will the United States Supreme Court Ever Provide Guidance", (1992) 17 Mar. Law. 17 at 34; Sturley, *supra* note 16, at 165; Mary T. Reilly, "COGSA $500 Package Limitation: Shipper's Opportunity to Declare a Higher Value", (1982) 13 J.M.L.C. 245 at 252.

[20] Sturley also explains that the legislative history of the United States COGSA did not contain any discussion of the shipper's right to declare a higher value. *Supra* note 16, at 170.

[21] *Supra* note 19, at 36. See also Howard M. McCormack, "Uniformity of Maritime Law, and Perspective From the U.S. Point of View", (1999) 73 Tul. L. Rev. 1481 at 1529.

[22] See Sturley, *supra* note 12, at 20-23; Sturley, *supra* note 16, at 165.

are conflicts of interpretations when the provisions of the uniform rules are clear.

5.2.2. The Different Methods By Which Countries Incorporate Uniform Rules

Some writers[23] suggest that the various methods by which countries incorporate uniform rules into their domestic law lead to conflicts of interpretations. Selvig[24], for example, argues that in enacting uniform rules, different countries follow different procedures. Some adopt a special statute, which is a plain translation of the uniform rules, while others incorporate several provisions of the uniform rules in their codes. The different provisions could be disconnected from their original context and would be incorporated in the systems of the codes. Thus, this change would lead to conflicts of interpretations. In other words, Selvig's argument suggests that the different methods by which the countries incorporate the uniform rules create textual variations of such rules in the various countries, and this leads to conflicts of interpretations. It should be noted that Selvig's argument has a close relationship with the previous argument that says that conflicts of interpretations arise because the technical terms of the uniform rules often

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[23] See Erling Selvig, *Unit Limitation of Carrier's Liability*, (1961) at 4; Giles, *Uniform Commercial Law*, (1970) at 58; Sundberg, *supra* note 8, at 224; C.H. Schreuer, "The Interpretation of Treaties by Domestic Courts", (1971) 45 Brit. Y.B. Int'l. L. 255 at 257 and 264-65; F.A. Mann, "The Interpretation of Uniform Statutes", (1946) 62 L.Q.R. 278 at 289; F.A. Mann, "Uniform Statutes in English Law", (1983) 99 L.Q.R. 376 at 389-90; I.M. Sinclair, "The Principles of Treaty Interpretation and Their Application by the English Courts", (1963) 12 Int'l. Comp. L.Q. 508 at 530-34 and 549-51; Athanassios Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading*, (1962) at 181-82.

[24] *Id.* at 4.

have different connotations in the different legal systems. The procedures of enacting the uniform rules could introduce new technical terms that have different connotations in the different legal systems. For example, in 1936, the United States Congress passed the Carriage of Goods by Sea Act (COGSA)[25], which adopted, with minor alterations, the Hague Rules 1924. One of these changes is that the "per package or unit" limitation under article 4(5) of the Hague Rules 1924 was changed into "per package or customary freight unit". Thus, the term "unit" has been changed to "customary freight unit". However, under the United Kingdom's Carriage of Goods by Sea Act, there is some authority in the English cases that the term "unit" in Article 4(5) is defined as a shipping unit[26]. In addition, the Supreme Court of Canada has the same position as the United Kingdom[27]. These changes in defining the term "unit" have created conflicts of interpretations[28].

Giles[29] also suggests that the various methods of implementing the uniform rules not only lead to textual variations but also to losing sight of the international character of such rules. He argues that divergence would appear if the substance of uniform rules were embedded in a national code in which judges lose sight of their international character. Therefore, he states that the

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[25] The United States Carriage of Goods By Sea Act (COGSA 1936), 46 United States Code (U.S.C.) §§ 1300-1315, from the Internet: http://www.cargolaw.com/cogsa.html (accessed: 20/5/2001).
[26] See *Studebaker Distributors Ltd. v. Charlton Steam Shipping Company, Ltd.*, [1938] 1 K.B. 459 at 467.
[27] See *Anticosti Shipping Company v. Viateur St- Amand*, [1959] 1 Lloyd's Rep. 352 at 358; *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, [1973] 2 Lloyd's Rep. 469 at 475.
[28] This issue is discussed in detail in the next chapter, *infra*, at 148-61.
[29] *Supra* note 23, at 58.

best method in avoiding such divergence is to adopt the uniform rules as they stand, as the United Kingdom did when adopted the Hague Rules 1924.

Selvig's and Giles's above suggestions, however, are inadequate to explain why conflicts in interpretations of uniform rules arise. In regard to Selvig's suggestion, although the adoption of the uniform rules in their original text contributes to uniformity of interpretation of such rules, conflicts of interpretations arise among the national courts of different countries and even of the same country in spite of the fact that the uniform rules are adopted in their original text. Francesco Berlingieri, in his Article "Uniformity in Maritime Law and Implementation of International Conventions"[30], has the same argument. He states that the adoption of conventions in their original text could not by itself achieve international uniform interpretations of these conventions since courts frequently differ even in the same country. On the other hand, in regard to Giles's suggestion, there is no reason to suppose that if the uniform rules were incorporated into the national code of a country, then the national courts of such country would always lose sight of the international character of such rules. When such national courts recognise the international character of the uniform rules, conflicts of interpretations may arise in spite of such recognition. In addition, we should not suppose that the national courts would always be more restrictive or less restrictive in their interpretations just because they did not recognise the international character of the uniform rules, and vice versa.

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[30] (1987) 18 J.M.L.C. 317 at 349.

Consequently, the first part of this section clarifies the inadequacy of Selvig's argument in explaining why conflicts of interpretations arise by examining the term "package", where this term was adopted by the United States in its original text. The Second part, however, evaluates some of the United States' Carriage of Goods By Sea Act decisions for proving the inadequacy of Giles's suggestion in explaining why conflicts of interpretations arise.

5.2.2.1. The Textual Variations of the Uniform Rules: The "Package" Example

Adoption of the uniform rules in their original text would surely contribute in achieving international uniform interpretations of such rules, but would not completely guarantee such achievement. In many cases, conflicts of interpretations could arise when the uniform rules are adopted in their original text. Article 4(5) of the Hague Rules 1924, for example, states that the carrier's liability is limited to a specific amount "per *package* or unit"[31]. As mentioned in the previous chapter, Article 4(5) and even the other provisions of the Hague Rules 1924 do not define the term "package"[32]. In addition, there is no indication in the legislative history of the Hague Rules 1924 to the precise meaning of the term "package". The term "package" under Article 4(5) has been adopted by the United States in its original text. Nevertheless, the United States Circuit Courts' decisions are inconsistent with each other in relation to whether a container itself constitutes a "package", or its contents

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[31] (emphasis added). See Wilson & Debattista, *supra* note 9, at 3.
[32] See the fourth chapter, *supra*, at 82.

constitute packages. This controversy has appeared mostly in the United States, but there is also case law in other jurisdictions.

In the 1960s, after the appearance of containerisation, the United States Circuit Courts dealt on a case-by-case basis with the issue of containerisation in relation to the carrier's limitation of liability[33]. By the 1970s, the United States Circuit Courts developed three separate and distinct tests to solve the problem of whether a container constitutes a package, or its contents constitute packages:

1. In 1971, in the *Leather's Best Inc. v. S.S. Mormaclynx* case[34], the Second Circuit created the "intention of the parties test". Under this test, the Second Circuit considered that the term "package" in COGSA was:

> More sensibly related to the unit in which the shipper packaged the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be contained[35].

The Second Circuit stated that the purpose of Article 4(5) of COGSA was to set a floor below which the carrier should not be permitted to limit his liability. To consider the container as a "package" would defeat that purpose. The Second Circuit stressed that when the number of packages is disclosed in

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[33] See, for example, *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft & Columbus Lines, Inc.*, 375 F.2d 943 (2d Cir. 1967) (this case relates to palletisation); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969) (this case relates to containerisation).

[34] 451 F.2d 800 (2d Cir. 1971).

[35] *Id*, at 815.

the shipping documents and the container is carrier-owned, the container generally should never be considered as a package[36].

2. In 1973, however, in *Royal Typewriter Co. v. M.V. Kulmerland*[37] the Second Circuit created an alternative test, the "functional economics test", which contradicts with the "intention of the parties test" above. The crucial point in this test was that the contents of a container would be deemed packages only if they would have been capable of withstanding shipment as a conventional break-bulk cargo. If they would not, there would be a presumption that the container constituted the "package"[38].

3. In 1979, on the other hand, in *The Complaint of the Norfolk*[39] the Eastern District of Virginia created the "each case to be taken on its merits test". Clark, J., the creator of this test, concentrated on a list of twelve factors, which he believed should be considered to determine whether a container is a package or not[40].

The United States Circuit Courts did not regard the above three tests as mutually exclusive and frequently more than one test was invoked in a particular case[41]. In the 1980s, however, the Circuit Courts examined and

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[36] The "intention of the parties test" was followed in *Du Pont de Nemours International S.A. v. S.S. Mormacvega Etc.*, 493 F.2d 97 (2d Cir. 1974).

[37] 483 F.2d 645 (2d Cir. 1973).

[38] The "functional economics test" was followed in *Cameco Inc. v. American Legion*, 514 F.2d 1291 (1974); *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 543 F.2d 967 (2d Cir. 1976).

[39] *The Complaint of the Norfolk Baltimore and Caroline Inc*, Eastern District of Virginia, 478 F. Supp. 383 (1979).

[40] *Id*, at 392. The "each case to be taken on its merits test" was followed in *Croft & Skully Co. v. M/V Skulptor Vuchetich*, (The Southern District of Texas) 508 F. Supp. 670 (1981).

[41] See, for example, *Cameco Inc. v. American Legion*, 514 F.2d 1291 (1974).

analysed these tests and attempted to create some form of rationalisation. One of the most influential cases in the 1980s is *Mitsui & Co. Ltd. v. American Export Lines*[42]. In this case, the district court applied the "functional economics test" first announced in the *Royal Typewriter* case above. The district court concluded that the contents of the containers, not the containers themselves, were the packages, since such contents could withstand as a conventional break-bulk cargo. On appeal, the Second Circuit affirmed the result, but in a different way, and rejected and abandoned the "functional economics test"[43]. Friendly, J. revised the "each case to be taken on its merits test" first announced in the *Complaint of the Norfolk* case above. In addition, Friendly, J. revised the "intention of the parties test" first announced by him in *Leather's Best* case above. In the majority opinion, in the *Mitsui* case, Friendly, J. reaffirmed the position that he had taken in the *Leather's Best* case, that containers are "functionally part of the ship"[44]. The *Mitsui* case was decided in the context of carrier-furnished containers, and the panel expressly limited its decision on situations where the bill of lading show the number of packages included in the containers. Friendly, J. did not give a solution in relation to situations where the bill of lading provides no information of the contents of the container[45]. Thus, the *Mitsui* court left the former situations open without any solution.

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[42] 636 F.2d 807 (2d Cir. 1981).
[43] *Id.* at 818-19. It should be noted that on appeal, in this case, even the creator of the "functional economics test" had abandoned it. At 825.
[44] *Supra*, at 816.
[45] *Supra*, at 821.

The *Mitsui* case influenced the subsequent cases. Some Circuit Courts answered the question, which was left open in the latter case, where they stated that where the contents of a container are not disclosed in the bill of lading, the container and not its contents is regarded as a package[46]. In addition, some Circuit Courts expanded the scope of the *Mitsui* approach to cases where the container is not carrier supplied, if the bill of lading discloses the contents of the container[47], and to cases where the packages are listed on some other documents other than the bill of lading[48].

Although many cases followed the *Mitsui* approach, there were conflicts of interpretations in relation to whether the *Mitsui* approach should apply to pallets or not. The Eleventh Circuit Court expanded the *Mitsui* approach to be applied on pallets[49], while the Second Circuit Court refused to do so[50]. In addition, there were conflicts of interpretations in relation to the description of the container's contents in the bill of lading. The Eleventh Circuit Court held that the heading "Number of Packages" in the bill of lading

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[46] See, for example, *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006 at 1013 (2d Cir. 1985); *Universal Leaf Tobacco v. Companhia De Navegacao*, 993 F.2d 414 at 417 (4th Cir. 1993); *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd.*, (11th Cir. 2001) from the Internet: http://laws.findlaw.com/11th/994375opn.html (accessed: 20/6/2001).

[47] See, for example, *Smythgreyhound v. M/V Eurygenes*, 666 F.2d 746 at 749 (2d Cir. 1981); *Marcraft Clothes, Inc. v. M.V. Kurobe Maru*, 575 F. Supp. 239 at 242 (S.D.N.Y. 1983).

[48] See, for example, *Allstate Insurance Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169 at 172-73 (5th Cir. 1981); *Belize Trading, Ltd. v. Sun Ins. Co. of New York*, 993 F.2d 790 at 792 (11th Cir. 1993).

[49] See *Vegas v. Compania Anonima Venezolana*, 720 F.2d 629 at 630-31 (11th Cir. 1983).

[50] See *Allied Int'l Am. Eagle Trading Corp. v. S.S. Yang Ming*, 672 F.2d 1055 at 1061 (2d Cir. 1982); *Monica Textile Corporation v. S.S. Tana*, 952 F.2d 636 at 640 (2d Cir. 1991).

is controlling in determining whether a container or its context constitute the packages[51], while other Circuit Courts held that the heading "Description of Packages and Goods" in the bill of lading is controlling[52].

It seems obvious from the above discussion that the 1970s tests are inconsistent with each other. In fact, the Circuit Courts' method of interpretation differed, where this lead to inconsistent decisions. In the *Leather's Best* case above, although the Second Circuit's method of interpreting the term "package" depended on the intention of the parties, it was influenced by its argument that the purpose of the Hague Rules 1924 was not to consider the container itself as a package, since the container is functionally a part of the ship[53]. In effect, some commentators criticises the *Leather's Best* case by arguing that it is illogical that the container changes from a part of the ship into a package when the shipper fails to disclose the contents or when the container is owned or supplied by the shipper. The container is either a part of the ship or it is a package for purposes of Article 4(5) of the Hague Rules 1924[54]. In the *Royal Typewriter* case above, however, although the Second Circuit stated that the statutory purpose of Hague Rules 1924 required a

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[51] See, for example, *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 at 1082 (11th Cir. 1985); *Sony Magnetic Products Inc. v. Merivienti O/Y*, 863 F.2d 1537 at 1541-42 (11th Cir. 1989); *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd.*, (11th Cir. 2001) from the Internet: http://laws.findlaw.com/11th/994375opn.html (accessed: 20/6/2001).

[52] See, for example, *Monica Textile Corporation v. S.S. Tana*, 952 F.2d 636 at 638 (2d Cir. 1991); *Universal Leaf Tobacco v. Companhia De Navegacao*, 993 F.2d 414 at 416-17 (4th Cir. 1993); *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427 at 1433 (9th Cir. 1993).

[53] *Supra* note 34, at 815.

[54] See Mary Elizabeth Reisert, "A Container Should Never Be a Package: Going Beyond *Mitsui v. American Export Lines, Inc.*", (1982) 2 Pace L. Rev. 309.

"functional economics test", it did not point out precisely what this purpose would be[55]. The "functional economics test" was widely criticized by both commentators[56] and the United States Circuit Courts[57]. The main criticism against this test is that it fosters economic waste. The shipper will always need to pack his goods as it was before the appearance of containerisation, instead of saving money in using economical packaging, in order to make them functional. Thus, this means that the shipper will no longer benefit from using containers. On the other hand, in the *Complaint of the Norfolk* case above, Clark, J. concluded that the determination of whether a particular container is a package cannot be controlled by a talismanic formula but necessitates analysis of the facts of each case in the light of congressional policy[58]. However, Clark, J. did not specify what the congressional policy would be. In *Smythgreyhound v. M/V Eurygenes*[59], the Second Circuit argued that the list of the twelve factors in the former case are not a "common sense test" that would help to avoid the pains of litigation. The failure to state how much weight to accord to each of the criteria on the list invites inconsistent results. Thus, the former tests' methods of interpretation were vague, and therefore, instead of

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[55] *Supra* note 37, at 648.

[56] See, for example, M.E. De Orchis, "The Container and the Package Limitation-The Search for Predictability", (1974) 5 J.M.L.C. 251 at 257; George Denegre, "Admiralty-Carrier-Owned Shipping Container Found Not to be COGSA Package", (1982) 56 Tul. L. Rev. 1409 at 1415; John F. Wilson, *Carriage of Goods by Sea*, (3rd ed., 1998) at 197.

[57] See, for example, *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277 at 1281 (5th Cir. 1982); *Allstate Insurance Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169 at 172 (5th Cir. 1981); *Matsushita Electric Corporation of America v. SS Aegis Spirit*, [1977] 1 Lloyd's Rep. 93 at 99-101.

[58] *Supra* note 39, at 392.

[59] 666 F.2d 746 (2d Cir. 1981).

bringing uniform interpretation of the term "package", these tests have created more conflicts of interpretations regarding the definition of the term "package".

Many cases, on the other hand, followed the *Mitsui* case above, but still the interpretation of the term "package" in some circumstances is not uniform, where the Circuit Courts also used different methods of interpretation. In *Vegas v. Compania Anonima Venezolana*[60], for example, the Eleventh Circuit's method of interpreting the term "package" depended on the purpose of Article 4(5), which is to set a reasonable figure below which the carrier should not be permitted to limit his liability. Thus, the Eleventh Circuit expanded the *Mistui* approach to be applied on pallets for the purpose of Article 4(5). The Eleventh Circuit also supported its conclusion by referring to Article 4(5)(c) of the Hague-Visby Rules, where this Article interchangeably uses the words "container, pallet or similar article of transport"[61]. However, in *Allied Int'l Am. Eagle Trading Corp. v. S.S. Yang Ming*[62], the Second Circuit refused to apply the *Mitsui* approach on pallets. The Second Circuit ignored the purpose of Article 4(5) and distinguished the *Mitsui* case on the basis that containers are to be treated differently than other shipping units because of their size and function in the shipping industry[63].

Whether the Hague Rules 1924 were adopted in their original text or with alterations to the original text, conflicts of interpretations could arise in

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[60] 720 F.2d 629 (11th Cir. 1983).
[61] *Id*, at 630-31.
[62] 672 F.2d 1055 (2d Cir. 1982).
[63] *Id*, at 1061.

both situations. It was not the textual variations that lead to conflicts of interpretations in defining the term "package" in relation to containers above, but the different methods of interpretation of the United States Circuit Courts. Accordingly, Selvig's above suggestion that the textual variations of uniform rules lead to conflicts of interpretations is inadequate to explain why such conflicts arise.

5.2.2.2. The Ignorance of the International Character of the Uniform Rules: The "U.S. COGSA" Example

A problem distinct from the above textual variations arises in the case where the uniform rules do not become directly applicable, but have to be re-enacted in a domestic legislation. The United States, for example, adopted the Hague Rules 1924 by re-enacting them in a special legislation, the Carriage of Goods by Sea Act (COGSA) 1936[64]. According to Giles's suggestion[65], such re-enactment leads the United States Circuit Courts to lose sight that COGSA is an implementation of an international uniform rules, namely the Hague Rules 1924. This, in consequence, leads to conflicts of interpretations. Our argument in this context, however, is that Giles's suggestion is inadequate to explain why conflicts of interpretations arise since his proposition does not extend to the situation where the conflicts of interpretations appear in spite of the recognition of the international character of the uniform rules.

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[64] The United States Carriage of Goods By Sea Act (COGSA 1936), 46 United States Code (U.S.C.) §§ 1300-1315, from the Internet: http://www.cargolaw.com/cogsa.html (accessed: 20/5/2001).
[65] Giles, *supra* note 23, at 58.

It is unnecessary to assume that because of the re-enactment of the Hague Rules in the United States COGSA then the United States Circuit Courts would always lose sight of the international character of the Hague Rules. In many cases, the United States Circuit Courts did recognise the international character of the Hague Rules, but in spite of this recognition, conflicts of interpretations arose. As mentioned in the previous chapter, Article 4(5) of the Hague Rules 1924 provides that "in any event" the carrier shall not be deprived from the package and unit limitation[66]. In spite of this wording, different national courts divided over the meaning and effect of the words "in any event" in relation to whether the carrier should be deprived from his limitation right if he committed an unreasonable deviation. The United States Circuit Courts, for example, divided over whether the phrase "in any event" under Article 4(5) should be applied on the unreasonable deviation doctrine. In *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*[67], for example, the Second Circuit examined the question of whether carriage of containers on-deck constitutes an unreasonable deviation or not. Anderson, J. stated that:

> The Hague Rules, which leaned heavily on the Harter Act, were promulgated in 1921 and amended by the Brussels Convention in 1924, under the sponsorship of maritime nations and representatives of ocean shipping, to provide a set of uniform provisions for ocean bills of lading. This country [the United States] joined the Brussels convention in 1936, and, to make its adherence effective, passed COGSA, which duplicates the Hague Rules practically word by word...The purpose behind the Harter, the Hague Rules and COGSA were to achieve a fair balancing of the interests of the carrier, on the one hand, and the shipper, on the other, and also to effectuate a

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[66] See the fourth chapter, *supra*, at 87.
[67] 422 F.2d 7 (2d Cir. 1969).

> standard set of provisions for ocean bills of lading...'The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924...The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade'[68].

Although this statement clearly shows that Anderson, J. recognised the international character of the Hague Rules 1924, Anderson, J. ignored the purpose behind Article 4(5), where this Article clearly provides that in all events the carrier shall not be deprived from his right to limit his liability. Anderson, J. was unwilling to attribute much significance to the phrase "in any event" under Article 4(5), and argued that the Hague Rules 1924 were not intended to change the existing law on unreasonable deviation. Instead of concentrating on Article 4(5), Anderson, J. focused on the clauses of the bill of lading in reaching the latter argument. He stated that where the bill of lading provides that the carrier is permitted to carry the goods on-deck, such clause is intended to lessen the carrier's liability. Anderson, J. pointed out that the carrier is not allowed to lessen his liability under Article 3(8) of the Hague Rules, where this Article provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect...

Therefore, the majority in Second Circuit concurred with the reasoning of Anderson, J. and held that carriage of containers on-deck deprived the carrier

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[68] *Id*, at 11-12. Quoting *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301, 79 S. Ct. 766, 769, 3 L. Ed. 2d 820 (1959).

of the benefit of the package and unit limitation under Article 4(5)[69]. Hays, J., however, dissented the majority opinion and argued that the carrier should not be deprived from his limitation right if he committed unreasonable deviation. He stated that the majority sought to make much of the clause in the bill of lading and claimed that such clause is ineffective. He argued that even if we suppose that the majority was right, such clause would not serve to invalidate the entire bill of lading[70]. Hays, J. observed that Article 4(5) by its express terms applies "in any event". He stated that:

> Perhaps if the stowage of the cargo on deck had constituted a breach of the contract of carriage, its provisions would be inapplicable. But it seems highly unlikely that without including some more specific statutory direction the draftsman of COGSA intended that a breach of contract should relieve the carrier and the shipper of their rights and duties under the Act[71].

Consequently, the implication from this case suggests that when the United States Circuit Courts recognise the international character of the Hague Rules 1924, conflicts of interpretations may arise in spite of such recognition.

The recognition of the international character of the Hague Rules 1924 also may in no way influence the methods of interpretations of the Circuit Courts. In other words, whether the United States Circuit Courts recognised or did not recognise the international character of the Hague Rules, this might not effect their methods of interpretations. As explained in the previous part of this section, conflicts of interpretations arose among the United States Circuit

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[69] *Supra*, at 18.
[70] *Supra*, at 19.
[71] *Supra*, at 20.

Courts in defining the term "package" in relation to containers[72]. In *Monica Textile Corporation v. S.S. Tana*[73], for example, the Second Circuit examined the question of whether the container itself constitutes a package or its contents constitute packages. The Second Circuit stated that:

> Long before COGSA was enacted, industrialized nations recognised the need to reconcile the desire of carriers to limit their potential liability with their vastly superior bargaining power over shippers...The nations at the Brussels Convention of 1924 balanced these competing concerns with a per-package limitation on liability...The principles established by the Brussels Convention became the template for COGSA...'The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924'...Unhappily, neither the statute nor its legislative history provides any clue as to the meaning of "package" in the Act[74].

The Second Circuit in the above statement recognised the international character of the Hague Rules 1924, but such recognition did not help this Circuit Court to solve the problem of defining the term "package" in relation to containers. The Second Circuit acknowledged that these uniform rules do not provide any clue as to the definition of the term "package". Therefore, the Second Circuit followed its own precedents in defining the term "package". The Second Circuit held that the contents of the container, not the container itself, are the packages. As will be discussed in detail in the next chapter, the Second Circuit's decision is inconsistent with other Circuit Courts' decisions[75]. At this stage, however, it needs only be said that the recognition of the international character of the Hague Rules did not influence the Second

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[72] *Supra*, at 106-114.
[73] 952 F.2d 636 (2d Cir. 1991).
[74] *Id*, at 638. Quoting *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301, 79 S. Ct. 766, 769, 3 L. Ed. 2d 820 (1959).
[75] See the sixth chapter, *infra*, at 139-43.

Circuit in reaching its decision. Consequently, in many cases, conflicts of interpretations may arise despite the recognition of the international character of the uniform rules.

5.2.3. The Impact of Domestic Law

A noticeable problem arises in relation to the achievement of international uniform interpretations of uniform rules where the national rules and techniques, which have escaped unification, effect the interpretation of the uniform rules. In many cases, international uniform rules are applied very differently in the various countries, depending upon certain domestic laws followed by the judges in practice. Some writers, therefore, suggest that conflicts of interpretations arise due to the influence of domestic law in interpreting uniform rules, which differ from one country to another. Sturley[76], for example, argues that conflicts of interpretations arise because of the impact of substantive domestic law on the process of interpreting uniform rules. He states that, "when a national court must interpret a uniform law...a court will try to reconcile the uniform law with the domestic law"[77]. Similarly, Schreuer[78] argues that every country tends to apply the concepts and methods of its own municipal law. He states that intentionally or unintentionally national courts have a tendency to follow their own precedents and concepts even in situations where they are required to interpret and apply law that does

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[76] Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729 at 743.
[77] *Id*, at 744.
[78] *Supra* note 23, at 264.

not exist in their own domestic laws. Accordingly, Peacock[79] argues that national courts must be willing to disregard prior domestic law. He observes that reliance on prior domestic law is a frequent problem in, for example, common law courts because they greatly stress on the importance of precedents.

Interpreting international uniform rules, however, is not simply a matter of looking to the provisions and construing such provisions according to the domestic principles or rules. The problem goes deeper than that. In many cases, national courts try to reconcile the interpretation of the uniform rules with the international understanding of such rules. In spite of this reconciliation, conflicts of interpretations arise. Thus, the weakness in the impact of domestic law argument is that it does not explain why there are conflicts of interpretations when the national courts interpret the uniform rules by depending on the international character of such rules. This is explained below under the "*River Gurara*" case.

5.2.3.1. The Impact of Domestic Law: The "*River Gurara*" Example

The *"River Gurara"* case[80], which was decided by the English courts, relates to the application of the Hague Rules 1924 to containers[81]. In fact, it

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[79] J. Hoke Peacock, "Note: Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts", (1990) 68 Texas L. Rev. 977 at 1000.

[80] [1996] 2 Lloyd's Rep. 53.

[81] It should be clarified that the United Kingdom has adopted the Hague-Visby Rules 1968. However, the English courts in the *River Gurara* case applied the Hague Rules 1924 since the cargo was mostly shipped under bills of lading in

was the first time, under the "*River Gurara*" case, that the English courts dealt with the problem of defining the term "package" in relation to containers[82]. Under this case, although the domestic law did not influence the judges in the original trial and on appeal, conflicts of interpretation appeared.

In this case, vessel *River Gurara* suffered an engine breakdown, and subsequently the vessel broke up and sank with a total loss of cargo. Much of that cargo was containerised. The issue, in this case, was whether each container constitutes a package or the contents of each container constitute packages. Since there is no provision in the Hague Rules 1924 that deals with the issue of defining the term "package" in relation to containers[83], Colman, J. traced the development of this issue in the United States, and also referred to Canadian, Australian, French, and Netherlands cases. In examining these countries' decisions, the issue that Colman, J. was concerned of is that the conclusions of that if the bill of lading disclosed the contents of the container, then the contents and not the container are the packages. If, on the other hand, the bill of lading only described the number of the containers, then the container itself should be considered the package, and not its contents[84]. Colman, J. decided that:

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the same form, where under that form the carriage of goods was subject to legislation at the ports of shipment incorporating the Hague Rules 1924.

[82] Colman, J., in this case, acknowledged that this is the first time that the English courts have to deal with the problem of defining the term "package" on containers in relation to the Hague Rules 1924. In addition, he stated that up till now there has been no judgment of the English courts which has dealt with this problem in relation to the Hague-Visby Rules 1968. *Supra*, at 54 and 55.

[83] See the fourth chapter, *supra*, at 82.

[84] *Supra*, at 59-61.

> Where, however, the meaning and application of the rules [Hague Rules 1924] is unclear, as it is in the present case due to the development of new modes of international transport, the English Courts confronted with competing constructions neither of which is inconsistent with the wording of the Convention, should, in the interests of the harmonisation of international jurisprudence on the subject, regard as a paramount consideration the fact that the Courts of other jurisdictions, particularly of the great trading nations, have given the Convention one particular meaning and rejected the other. Unless the language of the Convention is capable only of one meaning our Courts should reach that conclusion which achieves international uniformity. To adopt a eccentric construction without compelling linguistic justification would be wrong in principle[85].

Accordingly, Colman, J. concluded that the construction of Article 4(5) of the Hague Rules 1924 which the English courts should now adopt is that which have been reached by the American, Canadian, Australian, French and Netherlands courts, in order to achieve international uniformity. Colman, J. held that since the contents of the container, in the *River Gurara* case, were described in the bill of lading, then every item described in the bill of lading must be considered as a package. He observed that the particulars in the bill of lading were to be treated as conclusive, and so each container itself should not be considered as a package. In reaching this decision, Colman, J. acknowledged that the interpretation of the Hague Rules 1924 should not be controlled by domestic precedents, where he quoted what Lord Macmillan said in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd.*, [1932] A.C. 328 at 350:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of

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[85] *Supra*, at 62.

> the rules should be construed on broad principles of general acceptation[86].

On appeal[87], however, Phillips, L.J. declined to follow the United States and Canadian decisions, as Colman, J. did. Phillips, L.J. stated that:

> While I appreciate the desirability of international uniformity. I am unable to accept that the basis of limitation under the unamended Hague Rules depends upon the agreement of the parties as to what constitute the relevant 'packages', as represented by the description of the cargo on the face of the bill of lading[88].

He was persuaded by the submission that the Hague Rules 1924 were designed to prevent carriers imposing unrealistically low limits of liability. If the parties are allowed to agree as to their own definition of packages through the bill of lading, carriers could succeed in escaping the minimum limit of liability intended by the Hague Rules 1924[89]. Philips, L.J. recognised that this submission is in conflict with Article 4(5)(c) of the Hague-Visby Rules, where this Article provides that:

> Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit[90].

Nevertheless, he argued that the description in the bill of lading is not conclusive as to the contents of the containers. Phillips, L.J. admitted that his

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[86] Colman, J. also acknowledged that the interpretation of the Hague-Visby Rules should not be controlled by domestic precedents (quoting what Lord Diplock said in *The Hollandia*, [1983] 1 Lloyd's Rep. 1). *Supra*, at 62.
[87] *The River Gurara*, [1997] W.L.R. 1128. The appeal against Colman, J. was dismissed.
[88] *Id*, at 1139.
[89] *Supra*, at 1139.
[90] *Supra*, at 1135.

ruling is inconvenient and can lead to uncertainty, but that cannot justify an interpretation, which the Hague Rules 1924 cannot bear. Therefore, he felt obliged to stick to the original purpose and structure of the Hague Rules 1924[91].

Mummery, L.J., concurred with the result of Phillips, L.J.. In addition, Hirst, L.J. concurred that this appeal should be dismissed, but would do so on precisely the same grounds as those adopted by Colman, J., namely, applying the approach now adopted by the American, Canadian, Australian, French and Dutch courts, and in effect treating the Hague Rules 1924 as having the same effect as the Hague-Visby Rules 1968[92]. Consequently, the majority in the Court of Appeal did not agree with the reasoning of Colman, J. in the original trial.

The court in the original trial reached its decision by following other foreign decisions since the Hague Rules 1924 do not deal with the subject of containerisation. On the contrary, the Court of Appeal refused to follow the court in the original trial and stuck with the original purpose of the Hague Rules 1924. Consequently, it seems obvious that although the English domestic law did not influence the judges in the original trial and on appeal,

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[91] *Supra*, at 1141. Chuah criticized the ruling of Phillips, L.J. by stating that: "In a world of documentary sales, this ruling seems somewhat constructive. It might be suggested that the court's insistence on proof of contents in containers detracts from the sanctity of the bill of lading. After all international commercial norms are such that a document which is conforming on its face should be accepted with no questions asked". Jason C.T. Chuah, "Carriage of Goods By Sea-Hague Rules-Meaning of 'Package' or 'Unit'", (1997) 22 Student L. Rev. 57.

[92] *Supra*, at 1142-43. Hirst, L.J. also stated that he fully recognizes the shortcomings of this approach as demonstrated by Phillips, L.J., but in his judgment, these are outweighed by the need for international uniformity.

conflicts of interpretation arose. Thus, the influence of domestic law in interpreting uniform rules might explain some conflicts of interpretations, but it does not go far enough to justify various conflicts, which appear in spite of the recognition of the international character of the uniform rules.

5.2.4. The Difference Between Common Law Courts and Civil Law Courts

The legal technique of the civil law courts differs radically from that of the common law courts. When a civil law judge is faced with deciding a case, he or she may turn immediately to the code, and then to the authoritative interpretations, which have been placed thereon by different commentators. The courts' decisions are usually of little or no weight to such judge. A common law judge, on the other hand, usually gives more weight to precedents, and ignores the opinion of the commentators. In other words, a common law court gives more weight to precedents when interpreting the law before it, while a civil law court gives more weight to academic literature. Some writers[93], in consequence, suggest that conflicts of interpretations in international uniform rules arise because common law courts approach a problem in a different way than civil law courts[94]. Beutel[95], for example,

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[93] See Frederick K. Beutel, "The Necessity of a New Technique of Interpreting the N.I.L.-The Civil Law Analogy", (1931) 6 Tul. L. Rev. 1; Mann, *supra* note 23, at 278-91; Robert F. Blomquist, "The Proposed Uniform Law on International Bills of Exchange and Promissory Notes: A Discussion of Some Special and General Problems Reflected in the Form and Content, Choice of Law, and Judicial Interpretation Articles", (1979) 9 Cal. W. Int'l. L.J. 30 at 67; R.J.C. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 Int'l. Comp. L.Q. 450 at 458; Peacock, *supra* note 79, at 1000.

[94] It should be noted that this argument and the argument in the previous section, which says that conflicts of interpretations arise because of the impact

explains the conflicts between common law courts and civil law courts in detail. On the one hand, common law courts decide a case by depending on precedents, ignoring the plain meaning and purpose of the uniform rules as a whole, and this leads to conflicts of interpretations[96]. On the other hand, civil law courts decide a case by using the provisions of the uniform rules as a starting point. In this situation, some civil law courts adopt strict legal constructions of the terms of the uniform rules, while other civil law courts adopt a broad dictionary meaning of the terms of the uniform rules, and this leads to conflicts of interpretations.

The difference in interpreting the uniform rules between common law courts and civil law courts, however, is an inadequate argument to explain why conflicts of interpretations arise. This argument does not explain why there are conflicts of interpretations among the United States, Canada, and the United Kingdom, for example, although these are common law countries, or between France and Germany, for example, although the latter are civil law countries. This is explained below under the "fair opportunity" doctrine.

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of domestic law, could be categorised under one point, which is conflicts of interpretations arise because of the different methods by which national courts interpret uniform rules.

[95] *Supra*, at 6-9.

[96] See also Gutteridge, *Comparative Law*, (1946) at 109; William M. Hargest, "Keeping the Uniform State Laws Uniform", (1927) 76 U. Pa. L. Rev. 178 at 181.

5.2.4.1. The Difference Between Common Law Courts and Civil Law Courts: The "Fair Opportunity" Example

As mentioned earlier in this chapter, the "fair opportunity" doctrine is the creation of the United States Circuit Courts[97]. This doctrine has never been adopted in any other common law country. For example, the Australian court in *P.S. Chellaram & Co. Ltd. v. China Ocean Shipping Co.*[98] refused to follow the fair opportunity doctrine[99]. Carruthers, J. did not find it necessary to make any decision about it. The doctrine also was not considered on appeal[100]. Davies and Dickey[101] argued that as the doctrine is a "judicial invention", there is no reason to suppose that it should be adopted in Australia.

In addition, in 1959, the Canadian Supreme Court in *Anticosti Shipping Company v. Viateur St- Amand*[102] addressed the possibility of requiring the carrier to notify the shipper of the opportunity to make excess value declaration. The bill of lading, in this case, had given the shipper no clue of his right to declare a higher value. In fact, the carrier had lost the bill of lading, and never delivered it to the shipper. The Court nevertheless applied the package and unit limitation of Article 4(5) of the Hague Rules 1924, where it stated that:

> The limitation is clearly for the benefit of carriers by water, dictated by considerations of important policy. I see no ground for implying any duty on the part of the carrier to bring the fact of limitation to the notice of a shipper or in any other respect to concern himself with the requirement which the statute makes equally apparent to both

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[97] *Supra*, at 98.
[98] [1988] 1 Lloyd's Rep. 413.
[99] *Id*, at 428.
[100] [1991] 1 Lloyd's Rep. 493.
[101] Martin Davies and Anthony Dickey, *Shipping Law*, (2d ed., 1995) at 301.
[102] [1959] 1 Lloyd's Rep. 352 at 358.

> parties...The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement[103].

Although this case was before the appearance of the fair opportunity doctrine in the United States COGSA cases, it indicates that the Canadian courts refused to apply the fair opportunity doctrine.

Several commentators also assert that the "fair opportunity" doctrine is not followed in any other country. Tadros, for example, states that foreign courts do not even acknowledge that such a doctrine exists[104]. Likewise, Tetley observes that the "fair opportunity" doctrine has not been raised in nations which have adopted the Hague-Visby Rules or in countries (usually civil law jurisdictions) where the courts are bound by statute interpretation first and are much more reluctant to legislate judicially[105].

The "fair opportunity" doctrine is just one example of the conflicts of interpretations among the common law countries. There are many other conflicts among such countries, such as defining the term "package" in relation to containers[106]. The different methods of interpretation between common law courts and civil law courts might explain some conflicts of interpretations of uniform rules, but still there are conflicts of interpretations among common law courts themselves, or among civil law courts themselves. Therefore, the idea that common law courts approach a problem in a different

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[103] This rule was followed in *Sept Iles Express Inc. v. Tremblay*, [1964] Ex. C.R. 213 at 219.
[104] Tadros, *supra* note 19, at 36. See also McCormack, *supra* note 21, at 1529.
[105] William Tetley, *Marine Cargo Claims*, (3rd ed., 1988) at 887.
[106] Compare, for example, the English case, *The River Gurara*, [1997] W.L.R. 1128, with the United States Circuit Courts' decisions.

way than a civil law court is not a completely satisfactory argument to explain why conflicts of interpretations arise.

5.3. Conclusion

This chapter has sought to identify, in the field of uniform rules that relate to carriage of goods by sea, why conflicts of interpretations arise. The existence of conflicts of interpretations of uniform rules regarding carriage of goods by sea and in general is well recognised by many writers, where they offer different suggestions in relation to the question of why conflicts of interpretations arise. Some suggest that the imprecise drafting of uniform rules creates the conflicts of interpretations of uniform rules. Such imprecise drafting would surely contribute in creating conflicts of interpretations among the national courts, but would not cover all kinds of conflicts. This suggestion offers no help in identifying the conflicts of interpretations that appear when the provisions of the uniform rules are clear. On the other hand, others suggest that conflicts of interpretations arise because of the various methods by which countries implement the uniform rules. Such methods not only create textual variations but also lead the judges to lose sight of the international character of the uniform rules. However, conflicts may arise in spite of adopting the uniform rules in their original text, and in spite of recognising the international character of the uniform rules. Of those who suggest, however, that the impact of domestic law create conflicts of interpretations, do not explain why conflicts of interpretations arise when the national courts interpret the uniform rules by depending on the international character of the uniform rules. Even those who suggest that common-law countries would interpret the uniform

rules in a different manner than civil-law countries do not recognise that there are also conflicts among the common-law countries themselves, or among the civil-law countries themselves. Reviewing the various suggestions and looking at how these suggestions identify the problem of conflicts of interpretations reveals that each suggestion plays its part in explaining why conflicts of interpretations arise. Accordingly, none of these suggestions has a completely satisfactory explanation of why conflicts of interpretations arise.

The list of instances, which illustrate why conflicts of interpretations arise, could be continued for many pages and with reference to various subjects other than the subject of containerisation in the field of carriage of goods by sea. A further enumeration of examples would add nothing to the clarification of the real problem: Could conflicts of interpretations by handled? The next chapter of this thesis clarifies that the failure to study foreign law is a significant factor in conflicts of interpretations because courts interpret uniform rules independently, without regarding foreign decisions.

CHAPTER VI: ARE CONFLICTS OF INTERPRETATIONS OF UNIFORM RULES AVOIDABLE?

6.1. Introduction

The previous chapter examined and evaluated the suggestions of different writers on why conflicts of interpretations arise in relation to international uniform rules. In general, these writers imply that conflicts of interpretations are avoidable, but only Mann[1] argues that such conflicts are unavoidable. Mann argues that conflicts of interpretations of uniform rules are almost certain to arise. He states that the longer uniform rules are in force the more conflicts of interpretations arise. He supports his argument by two points, which he believes are significant in conflicts of interpretations: First, the text of uniform rules may differ from one country to another, and this leads to conflicts of interpretations. In other words, conflicts of interpretations arise because of the different methods by which countries incorporate uniform rules into their domestic law. Second, conflicts of interpretations arise due to the method of interpreting uniform rules, which differ from one country to another. Mann's argument implies a rational point: it is unrealistic for anyone to argue that conflicts of interpretations of uniform rules could be eliminated completely[2]. Nevertheless, that does not mean that conflicts of interpretations could not be reduced significantly. Our argument, therefore, is that the above

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[1] F.A. Mann, "Uniform Statutes in English Law", (1983) 99 L.Q.R. 376 at 390-91.

[2] It should be noted that in 1946, Mann stated that reducing conflicts of interpretations should be welcomed. F.A. Mann, "The Interpretation of Uniform Statutes", (1946) 62 L.Q.R. 278 at 291.

two conflicts that Mann suggests and even other kinds of conflicts could be handled.

The writers that argue that conflicts of interpretations are avoidable do not provide a detailed discussion on how such conflicts could be handled. Instead, they only provide a brief proposition on how such conflicts could be handled[3]. This chapter, on the other hand, examines and analyses how conflicts of interpretations of uniform rules could be handled. In so doing, this chapter clarifies that conflicts of interpretations can be reduced significantly if the national courts are obliged to consider foreign decisions. In fact, several writers recognise the value of considering foreign decisions in handling conflicts of interpretations[4]. However, these writers do not provide a detailed discussion on how such consideration is significant in reducing conflicts of interpretations.

The methodology of this chapter is to examine the suggestions of the different writers, which mentioned in the previous chapter, on why conflicts of interpretations of uniform rules arise. By this means, this chapter explains how such conflicts could be avoided. It examines the United States Circuit Courts'

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[3] These propositions are going to be discussed in the next chapter, *infra*, at 177-204.

[4] See Jacob W.F. Sundberg, "A Uniform Interpretation of Uniform Law", (1966) 10 Scandinavian Stud. L. 219 at 237; Francesco Berlingieri, "Uniformity in Maritime Law and Implementation of International Conventions", (1987) 18 J.M.L.C. 317 at 317, 346 and 350; R.J.C. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 Int'l. Comp. L.Q. 450 at 458-59; Giles, *Uniform Commercial Law*, (1970) at 194; Erling Selvig, *Unit Limitation of Carrier's Liability*, (1961) at 4; Honnold, *Uniform Law For International Sales Under the 1980 United Nations Convention*, (1999) at 95-98; F.A. Mann, "Documentary Credits and Bretton Woods", (1982) 98 L.Q.R. 526 at 528; Mann, *supra* note 1, at 384-5.

decisions and some other countries' decisions, in relation to the problem of containerisation, for proving the significance of considering foreign decisions in reducing conflicts of interpretations. In doing so, this chapter clarifies how the national courts should consider foreign decisions. It also explains the methods and principles of interpretations, which were considered by these cases.

6.2. Are Conflicts of Interpretations Avoidable?

6.2.1. Are Conflicts of Interpretations That Arise Through the Differences in the Interpretation of the Terms of the Uniform Rules Avoidable?

Although adroit drafting of international uniform rules can, to some extent, reduce conflicts of interpretations, it surely cannot be a comprehensive solution for achieving international uniform interpretations of such rules. In reality, drafting international uniform rules may contain ambiguous and confusing terms and even sentences, and it sometimes may not contain of provisions that deal with a specific problem[5]. As mentioned in the previous chapter, Sundberg suggests that conflicts of interpretations arise because the terms of uniform rules often have different connotations in the different legal systems[6]. Sundberg observes that we need to find a solution to check and balance such conflicts of interpretations. While this observation clearly shows that Sundberg suggests that such conflicts are avoidable, he does not provide a

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[5] The best example is the Hague Rules 1924, which do not contain any provisions that deal with containerisation.

[6] See the fifth chapter, *supra*, at 97, Jacob W.F. Sundberg, "A Uniform Interpretation of Uniform Law", (1966) 10 Scandinavian Stud. L. 219 at 221.

detailed discussion on how the divergence could be handled. This section, therefore, considers the conflicts that arise through the interpretations of the terms of the uniform rules, and how they could be handled.

Any term in the uniform rules could be construed in different ways in the different legal systems, and this would lead to conflicts of interpretations. The term "package", for example, under Article 4(5) of the Hague Rules 1924 was construed in different ways in different legal systems, and this has lead to conflicts of interpretations. As mentioned in the previous chapter, the United States Circuit Courts decisions are inconsistent with each other in relation to whether a container constitutes a package or its contents constitute packages[7]. In the 1980s, 1990s and 2000s, the United States Circuit Courts followed the United States Second Circuit's decision, *Mitsui & Co. Ltd. v. American Export Lines*[8], in defining the term "package" in relation to containers. Although the United States Circuit Courts followed the latter decision, there are still conflicts of interpretations in some specific points. For example, conflicts of interpretations arose in relation to the description of the container's contents in the bill of lading. In many cases, the Circuit Courts did not consider each other decisions since they are not obliged to do so, and therefore, the result was inconsistent decisions. This section argues that these conflicts of interpretations could be reduced significantly if the United States Circuit Courts were obliged to consider each other's decisions. In considering other Circuit Courts' decisions, the Circuit Courts should put an effort in examining

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[7] See the fifth chapter, *supra*, at 106-114.
[8] 636 F.2d 807 (2d Cir. 1981).

and evaluating these decisions carefully. The brief and the careless citation of such decisions might lead, in many cases, to a new round of conflicts of interpretations, and in consequence, to inconsistent decisions. Thus, the key point in this context is that the consideration of other Circuit Courts' decisions might not reduce conflicts of interpretations if the Circuit Courts did not examine other Circuit Courts' decisions carefully.

6.2.1.1. The Differences in the Interpretation of the Terms of the Uniform Rules: The "Package" Example

As will be discussed in the next chapter, the United States Circuit Courts are not obliged to consider each other's decisions[9]. This impliedly suggests that each Circuit Court considers other Circuit Courts decisions as being foreign decisions. In many cases, however, the Circuit Courts did consider each other's decisions. The careful and the detailed examination of other Circuit Courts' decisions was a crucial point in achieving consistent decisions among these Circuit Courts. For example, in 1985, in *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*[10], five containers worth of woven baskets and rattan goods, which were wrapped and tied into various bundles before packing them into the containers, were damaged. The district court held that the contents of the containers were packages rather than the containers themselves[11]. On appeal, the Eleventh Circuit, in considering other Circuit Court's decision, *Allstate Insurance Co. v. Inversiones Navieras Imparca,*

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[9] See the seventh chapter, *infra*, at 225.
[10] 765 F.2d 1076 (11th Cir. 1985).
[11] *Id*, at 1078.

C.A.[12], noted that the task of defining the term "package" falls on the courts since there is no legislative definition of such term[13]. In defining the term "package" in relation to containers, the Eleventh Circuit noted that the Fifth Circuit in the latter case followed the rule of the Second Circuit in *Mitsui & Co. Ltd. v. American Export Lines*[14]. In the latter case, the Second Circuit argued that the container would not be considered as a package as long as the bill of lading disclosed the number of packages inside such container. The Eleventh Circuit's consideration of the former Circuit Courts' decisions lead it to question the fact that if the bill of lading did not disclose the number of packages inside the container, then would the container itself be the package. The Eleventh Circuit evaluated the rule of the Second Circuit in *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*[15] in answering the latter question. In so doing, the Eleventh Circuit summarised the principles of the latter case in defining the term "package", where it stated that:

> (1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves[16].

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[12] 646 F.2d 169 (5th Cir. 1981).
[13] *Supra*, at 1079.
[14] 636 F.2d 807 (2d Cir. 1981).
[15] 759 F.2d 1006 (2d Cir. 1985).
[16] *Supra*, at 1080.

The Eleventh Circuit acknowledged that the latter two rules of the Second Circuit represent a reasonable method for applying Article 4(5) to containerisation[17].

The Eleventh Circuit examined the five bills of lading in the *Hayes-Leger* case. The first bill of lading listed the number of packages as "Two Thousand Six Hundred Forty One Packages". The goods were described as "2,641 Packages Woven Baskets and Rattan Furniture". The second bill of lading listed the number of packages as "One Container Only". The goods were described as "One Container Said to Contain: 3,542 Packages Woven Baskets and Rattan Furniture". The other three bills of lading contained listings and descriptions identical to those in the first bill of lading, except for the numbers. The Eleventh Circuit argued that the second bill of lading listed "One Container Only", and did not disclose to the carrier the number of packages within the container. The description of goods in the bill of lading as 3542 packages of baskets and furniture was insufficient to indicate to the carrier that the goods were packaged. The Eleventh Circuit followed the rule of the *Binladen* case above. The Second Circuit in the latter case stated that if the shipper intends to rely on the description of goods in the bill of lading to disclose to the carrier the number of packages in a container, such description must indicate the number of items qualified as packages, such as bundles cartons or the like[18]. Consequently, the Eleventh Circuit held that the shipment must be treated as one of goods not shipped in packages. It stated that the

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[17] *Supra*, at 1080.
[18] *Supra*, at 1081.

"customary freight unit" limitation, not the package limitation, applies on such shipment, and in consequence remanded the case to the district court to decide what is the "customary freight unit" for such shipment[19]. On the other hand, the Eleventh Circuit held that the other bills of lading did disclose the number of packages, and consequently the contents, not the containers, were packages. Thus, the Eleventh Circuit agreed with the decision of the district court in the first, third, fourth and fifth bills of lading, and reversed the decision in relation to the second bill of lading[20].

The Eleventh Circuit above depended on other Circuit Courts' decisions in reaching its decision. It examined and analysed other Circuit Courts' decisions carefully. This careful examination helped the Eleventh Circuit to formulate questions in relation to how to provide a general rule for solving the problem of defining the term "package" in regard to containers. The Eleventh Circuit was cautious in adopting a general rule, which was not in conflict with other Circuit Courts' decisions. The Eleventh Circuit's sensible way of considering other Circuit Courts' decisions lead it to be consistent with these courts. It could be argued, therefore, that such consideration impliedly suggests that the Eleventh Circuit was concerned with reaching a decision that was consistent with other Circuit Courts' decisions. In fact, the Eleventh Circuit was concerned with achieving uniform decisions, where it stated that:

> As the Second Circuit noted, the rules comport with the 1968 Brussels Protocol and provide much-needed certainty...Uniformity is also an important consideration, since vessels often travel between different

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[19] *Supra*, at 1081.
[20] *Supra*, at 1082.

jurisdictions. We therefore adopt the rules announced by the Second Circuit in *Binladen BSB Landscaping*[21].

The conclusion of the *Hayes-Leger* case above is that the United States Circuit Courts might reach uniform decisions if every Circuit Court considered other Circuit Courts' decisions. In many cases, however, the Circuit Courts considered other Circuit Courts' decisions, but did not reach a uniform interpretation in defining the term "package" in relation to containers. In many cases, indeed, the Circuit Courts failed to understand and misinterpreted other Circuit Courts' decisions. Even, in some situations, the Circuit Courts misinterpreted their own precedents. The main reason behind this might be the poor and the brief examination or evaluation of such decisions. In 1992, for example, in *Monica Textile Corporation v. S.S. Tana*[22], the Second Circuit misinterpreted its own precedents and even other Circuit Courts' decisions, where such misinterpretation has lead to inconsistent decisions. In this case, a shipment of 76 bales of cotton cloth, loaded into a container, which was stuffed and sealed by the shipper, was damaged. The "Description of Goods" column of the bill of lading stated that the shipment consisted of 76 bales. The "Number of Packages" column contained the number "1". The line labelled "Total Number of Packages or Units in Words" contained the word "One". The district court [*"Monica I"*] initially held that where the bill of lading discloses the number of units as the contents of the container, those units

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[21] *Supra*, at 1080.
[22] 952 F.2d 636 (2d Cir. 1992).

constitute packages[23]. However, the district court [*"Monica II"*] reversed itself and held that the container rather than its contents was the package[24]. The district court reversed itself on the basis of the Second Circuit decision in *Seguros Illimani S.A. v. M/V Popi P*[25], which held that for COGSA purposes the number of packages specified in the "Number of Packages" column of the bill of lading is generally controlling. On appeal, the Second Circuit reviewed its own precedents in relation to the development of defining the term "package" regarding containers. In so doing, the Second Circuit acknowledged that the definition of the term package in relation to containers depends on what the bill of lading discloses. Thus, its method of defining the term "package" is similar to the Eleventh Circuit's method in the *Hayes-Leger* case above. In fact, the Second Circuit went on to state that its rule in the *Mitsui* case, which mentioned above, has been followed by other Circuit Courts. It even went further and quoted the *Hayes-Leger* case, where the Eleventh Circuit in the latter case stated that, "the *Mitsui-Binladen* approach seems to be gaining favour in the rest of the country [the United States]"[26].

The Second Circuit, in the *Monica* case, followed its own rule in the *Mitsui* case, which states that where the bill of lading discloses the contents of the container, the container is not the package. The Second Circuit also

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[23] *Monica Textile Corporation v. S.S. Tana*, 731 F. Supp. 124 at 127 (S.D.N.Y. 1990) [*"Monica I"*].
[24] *Monica Textile Corporation v. S.S. Tana*, 765 F. Supp. 1194 at 1195-96 (S.D.N.Y. 1991) [*"Monica II"*].
[25] 929 F.2d 89 (2d Cir. 1991). This case involved 600 separate steel strapped bundles, each containing 15 tin ingots. The issue therefore was whether there were 600 packages or 9000 (600 X 15) packages.
[26] *Supra*, at 639.

considered its own precedent rule in *Smythgreyhound v. M/V Eurygenes*[27], where it stated that when the bill of lading refers to both containers and other unites susceptible of being COGSA packages, it is inherently ambiguous. Such ambiguity should be resolved against the carrier, and in consequence, the container would not be considered as a package[28]. Therefore, the Second Circuit noted that the bill of lading, in the *Monica* case, is ambiguous since such bill refers to both container and the 76 bales as being packages. The Second Circuit, accordingly, held that the decision of the district court in *"Monica I"* was correct, and hence, *"Monica II"* was reversed.

Superficially, it might appear from the above discussion that the Second Circuit, in the *Monica* case, was concerned with achieving uniform interpretation in defining the term "package" in relation to containers among the United States Circuit Courts, but this was not the case. The Second Circuit, in the *Monica* case, argued that the *Seguros* case above did not purport to apply to containers, and the district court's application of the *Seguros* case rule to the container context was erroneous[29]. The Second Circuit decided that:

> Notwithstanding the insertion in the number-of-packages column(s) of the bill of lading of a number reflecting the number of containers, where the bill of lading discloses on its face what is inside the container(s) and those contents may reasonably be considered COGSA packages, the latter, not the container(s), are the COGSA packages[30].

This means that the Second Circuit in this case refused to consider the "Number of Packages" column as a starting point in determining the number

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[27] 666 F.2d 746 at 753 (2d Cir. 1981).
[28] *Supra*, at 642.
[29] *Supra*, at 638.
[30] *Supra*, at 641.

of packages as the Eleventh Circuit in the *Hayes-Leger* case did. The Second Circuit argued that its precedent, the *Binladen* case, accorded little or no weight to the number in the "Number of Packages" column[31]. However, in the latter case, the Second Circuit, in fact, did depend on the "Number of Packages" column, as discussed above in the *Hayes-Leger* case. The Second Circuit, in the *Monica* case, only quoted references showing the benefit of the *Mitsui-Binladen* approach. It did not examine the *Binladen* case at all[32]. It seems obvious, therefore, that the Second Circuit misunderstood the rule of its own precedent in the *Binladen* case. The Second Circuit not only misinterpreted its own precedent but also other Circuit Courts' decisions. It quoted the *Hayes-Leger* case, for example, without evaluating it, where the Eleventh Circuit in the latter case reached a decision that was inconsistent with the decision of the present case.

The Second Circuit, in the *Monica* case, cited and quoted its own precedent and other Circuit Courts' decisions without evaluating such decisions carefully. Its brief reference to such decisions, lead it to reach a sloppy decision, which was in conflict with these decisions. It is interesting to note, on the other hand, that the Second Circuit, in the *Monica* case, stated that, "the *Mitsui-Binladen* approach is consistent with the position of the international community"[33]. While this statement impliedly suggests that the Second Circuit was concerned with reaching international uniform decisions,

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[31] *Supra*, at 640.
[32] *Supra*, at 639-40.
[33] *Supra*, at 640. Quoting E. Flynn & G. Raduazzo, *Benedict on Admiralty* , (7th ed. 1991) § 167, at 16-34.

such statement could not by itself assist the Second Circuit to reach a decision that does not conflict with other Circuit Courts' decisions.

In the 1990s and 2000s, the above *Hayes-Leger* case and the *Monica* case were followed by various Circuit Courts. Although these Circuit Courts were concerned with reaching a uniform interpretation in defining the term "package" in relation to containers, their brief citation of other Circuit Courts' decisions and their unawareness of the conflicts of interpretations among these decisions, has lead them to reach inconsistent decisions. In 1993, for example, in *Universal Leaf Tobacco v. Companhia De Navegacao*[34], six containers, each held 90-99 cases of tobacco, were damaged and the tobacco cases in five other containers were partially damaged. There were eight separate forms of bills of lading in all. The "Number of Packages" column in each bill of lading listed the number of the containers. The "Description of Goods" column, however, in each bill of lading listed the total number of the tobacco cases. Furthermore, in the same section in each bill of lading, the identification numbers of each container were followed by the number of the tobacco cases in each. The Fourth Circuit followed the Second Circuit decision in the *Monica* case above, and held that each case of tobacco constitutes a package, rather than the containers themselves. The Fourth Circuit did not consider any other Circuit Court's decisions other than the Second Circuit's decisions. The Fourth Circuit examined the Second Circuit's decisions, but did not mention the Second Circuit's decision in the *Binladen* case, which mentioned above,

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[34] 993 F.2d 414 at 416-17(4th Cir. 1993). See also the Ninth Circuit's decision in *All Pacific Trading, Inc. v. Vessel M V Hanjin Yosu*, 7 F.3d 1427 at 1433 (9th Cir. 1993).

where the latter case contradicts with the *Monica* decision. It seems that the Fourth Circuit assumed that there are no conflicts of interpretations among the Second Circuit's decisions. The Fourth Circuit, therefore, decided that:

> In adopting the Second Circuit's rule [the *Mitsui-Monica* approach] in its entirety, we are influenced in no small part by a desire to fashion a uniform body of law in this area[35].

While the effort of the Fourth Circuit in finding a general rule by itself constituted a good step towards achieving uniform decisions, the above statement would surely lead to another round of uncertainty in the area of defining the term "package" in relation to containers.

On the other hand, in 2001, in *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd.*[36], the "Number of Packages" column in the bill of lading listed the container size "1 X 40". The "Description of Goods" column stated that the shipment consisted of "5000 Units Men's Suits". The Eleventh Circuit followed its own precedent, the *Hayes-Leger* case above, and argued that the number of packages specified in the "Number of Packages" column of the bill of lading is the starting point in determining the number of packages. Since the "Number of Packages" column only listed the size of the container, the Eleventh Circuit looked beyond the bill of lading to the documents provided by the shipper to determine the number of packages. The Eleventh Circuit held that such documents were insufficient to determine that the 5000 suits were the packages, and therefore the container itself was the package. The Eleventh Circuit evaluated the development of defining the term

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[35] *Supra*, at 417.

[36] (11th Cir. 2001). from the Internet: http://laws.findlaw.com/11th/994375opn.html (accessed: 20/6/2001).

"package" in relation to containers. In so doing, it referred to other Circuit Courts' decisions. The Eleventh Circuit considered the decision of the Second Circuit in the *Monica* case above, but such consideration was so brief that it added very little to its argument. The Eleventh Circuit did not recognise that the *Monica* decision was inconsistent with its own precedent in the *Hayes-Leger* case above. In other words, the Eleventh Circuit did not consider that the *Monica* case refused to consider the "Number of Packages" column as a starting point in determining the number of packages as the Eleventh Circuit in the *Hayes-Leger* case did. In its conclusion, the Eleventh Circuit stated that:

> It is also our hope that by providing a bright-line rule now, such conflicts [the conflicts of defining the term "package in relation to containers] may be avoided in the future and shippers and carriers alike will be on notice as to how to proceed.

Although the above statement is so sensible if it applies in relation to the Eleventh Circuit's decision in the *Monica* case, such statement is not adequate to apply to its decision in the present case since it did not examine and analyse other Circuit Courts' decisions carefully.

The above Eleventh Circuit in the *Fishman* case and the Fourth Circuit in the *Universal Leaf* case were concerned with reaching uniform decisions among the Circuit Courts, and in consequence, to put an end to the conflicts of interpretations in the area of defining the term "package" in relation to containers. These Circuit Courts were convinced that their ruling was adequate for fashioning a uniform body of law in this area. Each of them, however, did not recognise that their ruling was in conflict with other Circuit Courts' decisions. Their ruling, therefore, added very little to the conflicts of interpretations of defining the term "package" in relation to containers.

Consequently, it could be argued that these Circuit Courts' consideration of reaching uniform decisions may not be achieved as long as they do not examine and evaluate each other's decisions sensibly.

The effort of the United States Circuit Courts of achieving uniform decisions in defining the term "package" in relation to containers is the first step toward reaching such uniformity. The next step is to consider each other's decisions in order to reach such uniformity. While the consideration of each other's decisions was achieved in different levels, such consideration was, in many cases, very brief and careless, where this has lead to more conflicts of interpretations. However, obliging these Circuit Courts to consider each other's decisions may, at least, guide these courts to be careful and sensible in considering other decisions. This careful and sensible consideration may lead these courts to reach uniform interpretation of the definition of the term "package" in relation to containers. Consequently, the obligation of considering foreign decisions might make the national courts reach the same results in spite of the fact that the terms of the uniform rules have different connotations in the different legal systems. Thus, conflicts of interpretations could be reduced significantly.

6.2.2. Are Conflicts of Interpretations That Arise Through the Different Methods By Which Countries Incorporate Uniform Rules Avoidable?

The method of implementing international uniform rules differs from one country to another. While some countries adopt the uniform rules as they stand, others re-enact them in a special domestic legislation. As mentioned in

the previous chapter, some writers suggest that conflicts of interpretations arise because of the various methods by which countries incorporate uniform rules into their domestic law[37]. Some of these writers suggest that these different methods lead to textual variations of the uniform rules among the various countries[38], while others suggest that such methods lead to losing sight of the international character of the uniform rules[39]. Although some of these writers argue that these conflicts of interpretations are avoidable[40], others do not explain whether such conflicts are avoidable or not[41]. However, those who argue that such conflicts are avoidable do not provide any detailed explanation on how the divergence could be avoided. The question of how these conflicts could be handled, therefore, requires more than a brief explanation.

An example of the conflicts of interpretations that arise when the uniform rules are incorporated by various methods into the countries' domestic law is the incorporation of the term "unit" under Article 4(5) of the Hague Rules 1924. Article 4(5) of the Hague Rules 1924 states that:

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[37] See the fifth chapter, *supra* at 103.

[38] See Erling Selvig, *Unit Limitation of Carrier's Liability*, (1961) at 4; Sundberg, *supra* note 6, at 224; C.H. Schreuer, "The Interpretation of Treaties by Domestic Courts", (1971) 45 Brit. Y.B. Int'l. L. 255 at 257 and 264-5; Mann, *supra* note 2, at 289; Mann, *supra* note 1, at 389-90; I.M. Sinclair, "The Principles of Treaty Interpretation and Their Application by the English Courts", (1963) 12 Int'l. Comp. L.Q. 508 at 530-4, 549-51; Athanassios Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading*, (1962) at 181-2.

[39] See Giles, *Uniform Commercial Law*, (1970) at 58.

[40] See Giles, *Id*, at 193-94. See also Selvig and Sundberg, *supra* note 38.

[41] See Sinclair, Schreuer and Yiannopoulos, *supra* note 38.

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or *unit*...[42].

As mentioned in the fourth chapter, Article 4(5) does not define the term "unit", and there is no provision in these Rules that define the latter term[43]. The term "unit" is somewhat ambiguous since it may be construed as 'shipping unit', or it may mean the 'freight unit'. In 1936, the United States Congress passed the Carriage of Goods by Sea Act (COGSA)[44], which adopted, with minor alterations, the Hague Rules 1924. The following year, 29th of June 1937, the United States ratified the Hague Rules 1924[45]. One of the minor alterations that have been made by the United States is that the term "unit" under Article 4(5) of the Hague Rules 1924 was changed into "customary freight unit". On the other hand, other countries, such as the United Kingdom and Canada, when adopted the Hague Rules 1924, did not change the term "unit" under Article 4(5). These latter countries defined the term "unit" as being a shipping unit. The change in defining the term "unit" by which the United States incorporate the Hague Rules 1924, therefore, has created conflicts of interpretations since other countries incorporated the latter Rules without changing the term "unit".

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[42] (emphasis added). See John F. Wilson and Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea,* V/1/CONV-V/6/CONV, (October 1980) at 3.

[43] See the fourth chapter, *supra*, at 88.

[44] The United States Carriage of Goods By Sea Act (COGSA 1936), 46 United States Code (U.S.C.) §§ 1300-1315, from the Internet: http://www.cargolaw.com/cogsa.html (accessed: 20/5/2001).

[45] For a full detailed discussion on the appearance of United States' COGSA, see Joseph C. Sweeney, "The Prism of COGSA", (1999) 30 J.M.L.C. 543.

The alteration of defining the term "unit" by the United States is not only an example to the conflicts of interpretations that arise through the textual variations but also to the conflicts that arise through losing sight of the international character of the uniform rules. When the United States re-enacted the Hague Rules 1924 in COGSA, the United States Department of State explained that the differences between the Hague Rules 1924 and COGSA were:

> ...intended primarily (1) to clarify provisions in the [Hague Rules] which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to co-ordinate [COGSA] with other legislation of the United States[46].

In addition, the Congress viewed most of the changes as clarifications[47]. The United States attached an "understanding" to its ratification of the Hague Rules 1924, which requires any conflicts between the Hague Rules and COGSA to be resolved in favour of the latter[48]. Therefore, although the Hague Rules 1924 are the "supreme law of the land"[49] under the Constitution, it has no effect when it conflicts with COGSA. Consequently, this means that the United States courts should construe the term "unit" as a "customary freight unit". In fact, in many cases, the United States Circuit Courts did not recognise that the term "customary freight unit" was an alteration to the term "unit" under the Hague Rules 1924. These Circuit Courts, therefore, have lost sight

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[46] See State Department Memorandum (1937) note 88, 51 Stat. at 274.
[47] See 1925 Hearings, at 84-85, 115-17, 178-80 (discussing "customary freight unit" as clarification for the Hague Rules' "unit").
[48] *Supra* note 46, State Department Memorandum note 30.
[49] Constitution of the United States of America, Art. VI, cl.2, from the Internet: http://www.law.cornell.edu/constitution/constitution.overview.html (accessed: 20/5/2001).

that COGSA was a re-enactment of international uniform rules, namely the Hague Rules 1924. Thus, not even once have ever these Circuit Courts mentioned how other countries have construed the term "unit".

Our argument, in this section, is that conflicts of interpretations that arise through the various methods by which countries incorporate uniform rules into their domestic law can be reduced significantly if the national courts are obliged to look at foreign decisions. In considering foreign decisions, it would be better if the national courts put an effort to examine and evaluate several countries' decisions. When the national courts, however, examine only one country's decisions, the risk of reaching inconsistent decisions with other countries' decisions is greater. Thus, the more examination of other countries' decisions the better uniformity would be served.

6.2.2.1. The Different Methods By Which Countries Incorporate Uniform Rules: The "Customary Freight Unit" Example

A comparison between how the United States Circuit Courts' decisions and the Canadian courts' decisions defined the term "unit" goes directly to prove that the consideration of foreign decisions is a significant factor in reducing conflicts of interpretations. It is worthwhile, therefore, to examine and evaluate both countries' decisions.

Although the term "unit" was changed to "customary freight unit", there is no definition for the latter term under the United States COGSA. In 1944, in *Brazil Oiticica, Ltd. v. M/S. Bill*[50], Chestnut, J. stated that:

> The history of the U.S. Carriage of Goods by Sea Act of 1936 is a very interesting one in the field of admiralty law. It was finally passed by Congress to promote uniformity in ocean bills of lading. For many years prior thereto efforts had been made in this and other countries to achieve such uniformity...In 1924 certain rules (the Hague Rules) were adopted by an international convention for the unification of certain rules relating to "Ocean Bills of Lading". In them (Art. 4, s.5) the parallel limitation of liability clause read: "In an amount exceeding 100 pounds sterling per package or unit". These Hague rules have subsequently been adopted in a number of other countries including Great Britain (1925) and the United States (1936). The phraseology of the British statute followed the Hague rules with respect to the wording of the limitation clause. But it will be noted that in the United States Act the phrase "per unit" has been expanded or changed to read "per customary freight unit"...the phraseology finally adopted was intended to be more definite than the shorter phrase "per unit" contained in the Hague Rules[51].

This statement clearly shows that Chestnut, J. acknowledged that the United States COGSA was the result of an international convention, namely the Hague Rules 1924, and that the aim behind COGSA was to promote international uniformity. In other words, Chestnut, J. recognised the international character of the Hague Rules 1924. Although Chestnut, J. acknowledged, in the above statement, that other countries did not change the term "unit" under Article 4(5) of the Hague Rules 1924, he insisted that the alteration of the latter term in the United States was only for the purpose of clarification. Consequently, Chestnut, J. defined the term "customary freight unit", where he stated that:

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[50] 55 F. Supp. 780 (1944).

[51] *Id*, at 782. Quoting Knauth, *Ocean Bills of Lading*, (1937) at 99-110.

> ... I conclude that the phrase 'customary freight unit' in this context in the light of its legislative history, refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. Generally in marine contracts the word 'freight' is used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves ...[52].

Thus, according to Chestnut, J., the term "customary freight unit" refers to the unit upon which the charge for freight is customarily computed and not to the physical shipping unit.

Most of the United States Circuit Courts followed the above definition[53], but some Circuit Courts refused to consider such definition, and therefore, this has lead to inconsistent decisions. For example, in *Isbrandtsen Company, Inc. v. United States of America*[54], the Second Circuit found that the term "customary freight unit" could lead to unreasonable results. In this case, the unit was a locomotive and tender which was likewise the unit for the freight charge in the flat sum of 1000000 U.S. dollars. There were ten in all of these units. The Second Circuit stated that:

> This interpretation may lead to a strange result, for freight on small locomotives under twenty-five tons is computed per ton and consequently would involve a larger liability than is imposed for the more expensive locomotives involved here. But the language of the limitation is controlling and applies to the locomotives and tenders here by its express terms. Our conclusion accordingly is that Isbrandtsen's liability is limited to $500 per unit of locomotive and tender, or $5000 in all[55].

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[52] *Supra*, at 783.
[53] See, for example, *Waterman S.S. Corp. v. U.S. Smelting Refining & Mining*, 155 F.2d 687 at 693 (1946); *Freedman and Slater v. M.V. Tofevo*, A.M.C. 1525 at 1538 (1963).
[54] 201 F.2d 281 (2d Cir. 1953).
[55] *Id*, at 286.

Consequently, since the Second Circuit applied the $500 limitation on every locomotive and tender without calculating the charge for freight, then it seems that the court found that it is more appropriate to consider the goods as being shipping units. This means that the Second Circuit impliedly refused to apply the "customary freight unit"[56], and in consequence, its decision is inconsistent with other Circuit Courts decisions, which applied the "customary freight unit" as defined in the *Brazil* case above.

Several American Circuit Courts also found that the term "customary freight unit" is difficult to apply for the limitation purpose. For example, in *Croft & Scully Co. v. M/V Skulptor Vuchetich*[57], a container loaded with 1755 cases of soft drinks was damaged. The bill of lading described the container and the number of the soft drinks cases. The district court held that the container is the package for limitation purpose. On appeal, the Fifth Circuit reversed the district court and held that the contents and not the container must be considered for the limitation purpose, but held that the soft drinks were goods not shipped in packages and accordingly applied the customary freight unit[58]. The Fifth Circuit followed the definition of the term "customary freight unit" in the *Brazil* case above, and stated that the authorities in the United States are conclusive that such term refers to the unit upon which the charge

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[56] See also, for example, *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714 at 723-4 (4th Cir. 1990).
[57] 664 F.2d 1277 (5th Cir. 1982).
[58] *Id*, at 1281.

for freight is computed and not to the physical shipping unit[59]. The Fifth Circuit stated that:

> From these cases, we deduce that 'customary freight unit' is a question of fact that will vary from contract to contract. Of particular importance in this as in any contractual dispute, then, is the parties' intent, as expressed in the Bill of Lading, applicable tariff, and perhaps elsewhere[60].

In other words, to determine the customary freight unit, we look to the parties' intent, applicable tariff, or even elsewhere[61]. Thus, the Fifth Circuit stated that although the shipper admitted that the freight charge was $2200, computed on a flat container rate, we do not know how the parties arrived at that rate. Does it depend on the contents, value, weight, custom of the trade, applicable tariffs or any other factor? Therefore, the Fifth Circuit remanded the case to the district court to determine what the customary freight unit was for the shipment of the 1755 cases of soft drinks[62]. Consequently, the Fifth Circuit acknowledged the difficulty of applying the term "customary freight unit" for the limitation purpose[63]. It should be noted that the Fifth Circuit was erroneous in stating that the United States courts are conclusive in defining the term "customary freight unit" as being the unit upon which the charge for freight is computed. According to the *Isbrandtsen* case above and other cases, some

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[59] *Supra*, at 1281-2.
[60] *Supra*, at 1282.
[61] See also, for example, *FMC Corporation v. S.S. Marjorie Lykes*, 851 F.2d 78 at 80 (2d Cir. 1988); *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190 at 193 (4th Cir. 1988).
[62] *Supra*, at 1282.
[63] See also *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006 at 1016-17 (2d Cir. 1985) (the court held that the container was not a package, but remanded for a factual determination of whether it was the customary freight unit).

American courts have considered the term "customary freight unit" as being the physical shipping unit. Thus, the Fifth Circuit's decision is inconsistent with the Second Circuit's decision in the *Isbrandtsen* case, where the Second Circuit applied the term "customary freight unit" as being a shipping unit.

Since there are inconsistencies and difficulties in applying the term "customary freight unit" under the United States cases for the limitation purpose, the Canadian cases show how such inconsistencies and difficulties could be avoided, and consequently reduce conflicts of interpretations in relation to the application of such term.

Unlike most of the United States Circuit Courts' decisions, the Canadian Supreme Court held that the term "unit" under Article 4(5) of the Hague Rules 1924 should be construed as being a shipping unit. In 1959, in *Anticosti Shipping Company v. Viateur St- Amand*[64], the Canadian Supreme Court decided that:

> The word 'unit' would, I think, normally applies only to a shipping unit, that is a unit of goods, the word 'package' and the context generally seem so to limit it.

The Supreme Court recognised that some cases considered the term "unit" as being the unit of the charge for freight. The Supreme Court, however, explained that in the present case the bill of lading did not provide any clue as to the freight rate unit. The Supreme Court noted that there was no indication, for example, of a rate based on tonnage or any other weight quantity. The Supreme Court, therefore, argued that although the weight of the truck in this case was indicated, but to assume that the charge was calculated on a rate for

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[64] [1959] 1 Lloyd's Rep. 352 at 358.

100 lb. would bring fractional figure, which would most unlikely to represent the actual basis. In other words, the Supreme Court argued that applying the term "unit" as being the "customary freight unit" would lead to unreasonable results. The Supreme Court decided that the absence of any reasonable ground for extending the term "unit" to that type of measure excludes its application in the present case[65]. The Supreme Court, in reaching this decision, explained that its conclusion was analogous to the United States Second Circuit's decision in the *Isbrandtsen* case, which mentioned above[66]. The Supreme Court considered the latter foreign decision to justify that its decision was consistent with decisions in foreign legal systems. This impliedly suggests that the Supreme Court was concerned with achieving international uniform interpretation in relation to defining the term "unit" of Article 4(5) of the Hague Rules 1924.

While the Canadian Supreme Court in the *Anticosti* case above only considered American cases, in 1973, in *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*[67], the Canadian Supreme Court provided a comprehensive analysis on defining the term "unit" in different legal systems. In the latter case, the Supreme Court, at first, considered its previous decision in the *Anticosti* case. The Supreme Court noted that Rand, J., in the *Anticosti* case, limited the scope of his judgment to situations where the bill of lading does not provide any clue as to the freight rate unit. However, in the present case, the bill of lading specified the freight rate unit as $34 per ton of 2000 lb.

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[65] *Id*, at 358.
[66] *Supra*, at 359.
[67] [1973] 2 Lloyd's Rep. 469.

or 40 cubic feet whichever is the higher. The Supreme Court, therefore, questioned whether such specification would lead to a different result. The Supreme Court, in consequence, evaluated whether the term "customary freight unit", which is applied by the United States cases, is suitable for defining the term "unit" under Article 4(5) of the Hague Rules 1924. The Supreme Court's comparative analysis lead it to question the reason behind the difference between Article 4(5) of the Hague Rules 1924 and Article 4(5) of the United States COGSA 1936. As mentioned above in this section, the United States Department of State explained that the differences between the Hague Rules 1924 and COGSA were intended to clarify the provisions in the Hague Rules, which may be of uncertain meaning. However, the Supreme Court, in the *Falconbridge* case, argued that the alteration of the term "unit" of the Hague Rules 1924 into the term "customary freight unit" in the United States COGSA was not intended to clarify the meaning of the term "unit". The Supreme Court stated that:

> I am satisfied that the words 'per package or, in case of goods not shipped in packages, per customary freight unit' do constitute a change from the Hague Rules as adopted in Great Britain and in Canada[68].

In reaching the latter conclusion, the Supreme Court supported its argument by referring to the United States *Brazil* case, which mentioned above, where the court acknowledged that the United States COGSA "expanded or changed" the term "unit" into "customary freight unit"[69]. After inspecting the term "customary freight unit", the Supreme Court decided that the United States

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[68] *Supra*, at 476 (Ritchie, J.).
[69] *Supra*, at 475.

cases' definition could not be considered as a persuasive authority to follow. The Supreme Court stated that:

> I do not think that they [the words "customary freight unit"] afforded any substantial guidance in the solution of the problem as to the meaning of the phrase 'per package or unit' as it occurs in art. IV, r. 5 [Article 4(5) of the Hague Rules][70].

The Supreme Court criticised the term "customary freight unit" on the ground that the unpackaged units of less careful shippers should not merit greater legal protection than that which prudently prepared packages received[71]. Thus, the United States decisions did not help the Canadian Supreme Court to define the term "unit", nevertheless, the United States decisions helped the Canadian Supreme Court to rule out that the term "unit" should not be defined as being a "customary freight unit".

Consequently, the Supreme Court held that the meaning of the term "unit" as it occurs in the phrase "package or unit" in Article 4(5) of the Hague Rules is a shipping unit, which is a unit of goods[72]. The Supreme Court supported its decision by referring to the United Kingdom decision, *Studebaker Distributors Ltd. v. Charlton Steam Shipping Company, Ltd.*[73], where the court indicated that the term "unit" means a shipping unit, which is any individual piece of cargo[74]. Thus, the Canadian Supreme Court decided

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[70] *Supra*, at 476 (Ritchie, J.).
[71] *Supra*, at 477.
[72] *Supra*, at 475.
[73] [1938] 1 K.B. 459 at 467.
[74] *Supra*, at 476-77. It should be noted also that the Canadian Supreme Court supported its decision by referring to the opinion of the English writers, Temperley and Vaughen in their text book *The Carriage of Goods by Sea Act 1924*, (1932) at 81-82, where they indicate that the term "unit" means a shipping unit. *Supra*, at 476.

that its own precedent in the *Anticosti* case and the United Kingdom *Studebaker* case above are more persuasive authorities to follow than the United States Circuit Courts' decisions in defining the term "unit" of Article 4(5) of the Hague Rules 1924.

The United States Circuit Courts' decisions are not only inconsistent with each other but also inconsistent with other countries' decisions. The method by which the United States Circuit Courts interpreted the term "customary freight unit" was by considering the *Brazil* case's definition above as guidance. The United States Circuit Courts did not consider other countries' decisions, and this had lead to inconsistencies and difficulties in defining such term. Quite apart from the fact that in 1944 the court in the *Brazil* case recognised the wording of Article 4(5) of the Hague Rules 1924 and was aware of their international character, the court gave an interpretation at variance with the international understanding of these rules. In recent days, some Circuit Courts also acknowledged that the term "customary freight unit" is unique to the United States' COGSA, nevertheless, they looked to COGSA cases for guidance in interpreting that term[75]. Most of the Circuit Courts, however, did not realise that the term "customary freight unit" is a departure from the wording of Article 4(5) of the Hague Rules 1924. In the *Isbrandtsen* case above, for example, while the Second Circuit did not recognise that COGSA is the result of international uniform rules, the Second Circuit coincidently reached a decision that was consistent with the international

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[75] See, for example, *Craddock Itern. Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095 at 1108-09 (5th Cir. 1997).

understanding of the Hague Rules 1924. Such coincidence is not enough for reaching international uniform interpretations since the Second Circuit in the latter case was not concerned with uniformity. In the *Croft & Scully* case above, on the other hand, the Fifth Circuit did not recognise that COGSA is the result of an international convention, and therefore, reached a decision that was inconsistent with other Circuit Courts' decisions.

The Canadian courts' decisions, on the other hand, are consistent with the international understanding of the Hague Rules 1924. In the *Anticosti* case above, the Canadian Supreme Court was concerned with uniformity and in consequence, reached a decision that was consistent with the international understanding of the Hague Rules 1924. It should be admitted that the Supreme Court's decision, in the latter case, coincidently was consistent with the United Kingdom decisions. The Supreme Court did not mention any United Kingdom cases and only cited one American case to support its judgment. Although such citation helped the Supreme Court to be consistent with the international understanding of the Hague Rules 1924, our argument here is that when the national courts examine and evaluate more than one country's decisions then the more conflicts of interpretations would be reduced significantly. The *Falconbridge* case above, on the other hand, represents an ideal example of how the national courts can reach uniform interpretations of uniform rules. The Canadian Supreme court, in the latter case, not only recognised the shortcoming of the application of the term "customary freight unit", as the *Anticosti* case and some of the United States cases did, but also considered other countries' decisions in justifying its

decision. If the United States Circuit Courts were obliged to consider foreign decisions, such as the Canadian *Falconbridge* decision, then they might, at least, recognised that their interpretation of the term "unit" was inconsistent with other countries' interpretation of such term. Accordingly, they might have, but not necessarily, considered that their interpretation should be consistent with other countries' decisions. Consequently, although the various methods by which countries incorporate the uniform rules contribute in conflicts of interpretations, obliging the national courts to consider foreign decisions could reduce such conflicts significantly.

6.2.3. Are Conflicts of Interpretations That Arise Through the Impact of Domestic Law Avoidable?

Once the international uniform rules are adopted by a country they are exposed to the impact of the general law of the country concerned. The reported cases on subjects such as the carriage of goods by sea suggest that in practice this issue produces divergence among the national courts of the various countries. In effect, as mentioned in the previous chapter, some writers suggest that conflicts of interpretations arise because of the influence of domestic law on the process of interpreting uniform rules, which differ from one country to another[76]. Some of these writers do not explain whether

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[76] See the fifth chapter, *supra*, at 119, Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729; Schreuer, *supra* note 38, at 264; J. Hoke Peacock, "Note: Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts", (1990) 68 Texas L. Rev. 977.

conflicts of interpretations are avoidable or not[77], while others do. Sturley[78], in his conclusion, argues that the impact of domestic law on interpretation plays a major role in explaining why conflicts of interpretations arise. He states that if we consider measures to reduce the impact of domestic law on interpreting uniform rules, then we can achieve international uniform interpretations of such rules. In other words, Sturley suggests that conflicts of interpretations are avoidable. In addition, Peacock[79] states that:

> The best way to achieve actual international uniformity is for the courts of all countries to base their interpretations of uniform statutes on the intent of the international framers.

This implies that Peacock also suggests that conflicts of interpretations are avoidable. The size of the problem of the impact of domestic law, however, as it affects the achievement of international uniform interpretations of uniform rules can only be gauged by a detailed examination of case law. Without this, no one can say with certainty, as the above writers did, to what extent conflicts of interpretations may be reduced.

The "fair opportunity" doctrine, which mentioned in the previous chapter, is an example to how the domestic law would influence the national courts in interpreting uniform rules, and in consequence would lead to conflicts of interpretations[80]. This doctrine is the creation of the United States

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[77] See Schreuer, *Id.*
[78] *Supra*, at 800-01.
[79] *Supra*, at 1000.
[80] See the fifth chapter, *supra*, at 98.

courts. The doctrine developed under the United States railroad[81] and Harter Act[82] cases. In 1974, the United States Ninth Circuit adopted it for the first time in relation to a carriage of goods by sea case[83]. From that moment, the doctrine has developed under the carriage of goods by sea cases. This doctrine does not exist in any provision in the Hague Rules 1924 or even the Hague-Visby Rules 1968 and the Hamburg Rules 1978. It is a judicial creation[84], and therefore the United States Circuit Courts followed their own precedents in adopting such doctrine. Thus, the United States domestic law has influenced the United States Circuit Courts, and this lead to the creation of the "fair opportunity" doctrine. Since it is a judicial creation, the "fair opportunity" doctrine has never been adopted in any other country[85], and in consequence, conflicts of interpretations arose between the United States decisions and other countries' decisions. By examining the "fair opportunity" doctrine, our aim, in

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[81] See for example, *Hart v. Pennsylvania Railroad Co.*, 112 U.S. 331 (1884); *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953).

[82] See for example, *Isbrandtsen Company, Inc. v. United States of America*, 201 F.2d 281 (2d Cir. 1953); *Sommer Corp. v. Panama Canal Co.*, 475 F.2d 292 (5th Cir. 1973).

[83] *Tessler Brothers (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 438 (9th Cir. 1974).

[84] In *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 at 900 (9th Cir. 1989), the Ninth Circuit admitted that the "fair opportunity" doctrine does not exist in the language of the Hague Rules 1924, "it is a judicial encrustation, designed to avoid what courts felt were harsh or unfair results". See also *Henley Drilling Co. v. McGee*, 36 F.3d 143 at 147 (1st Cir. 1994).

[85] See Howard M. McCormack, "Uniformity of Maritime Law, and Perspective From the U.S. Point of View", (1999) 73 Tul. L. Rev. 1481 at 1529; Daniel A. Tadros, "COGSA Section 4(5)'s 'Fair Opportunity' Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity; Will the United States Supreme Court Ever Provide Guidance", (1992) 17 Mar. Law. 17 at 36; William Tetley, *Marine Cargo Claims*, (3rd ed., 1988) at 887.

this section, is to prove that the influence of domestic law on the process of interpreting uniform rules can be reduced significantly if the national courts are obliged to consider foreign decisions. In so doing, we recognise that the national courts should not use other foreign decisions as a ready-made solution for solving the issue before them. These national courts should finally reach their decisions on a basis elsewhere.

6.2.3.1. The Impact of Domestic Law: The "Fair Opportunity" Example

Most of the United States Circuits Courts addressed the "fair opportunity" doctrine. These Circuit Courts claimed that such doctrine exist in Article 4(5) of the Hague Rules 1924 and did not realise that it is a judicial invention, where the domestic law influenced such courts. Some Circuit Courts, on the other hand, recognised the shortcoming and the uncertainty that such doctrine brought.

In many cases, the Circuit Courts followed each other's decisions in addressing the "fair opportunity" requirement, but, especially the Ninth Circuit, failed to examine and evaluate these decisions carefully. The result was, therefore, conflicts of interpretations among these Circuit Courts. In the United States *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu* case[86], for example, small shipments from multiple shippers consolidated into containers were damaged. The carrier gave nine different bills of lading, and all of them were identical in all material respects. The bills of lading in the "Number of Packages or Containers" columns listed the number of packages within each

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[86] 7 F.3d 1427 (9th Cir. 1993).

container delivered to the carrier. The issue in this case was whether the containers constitute packages, or the containers' context constitutes packages. The Ninth Circuit, at first, clarified that the carrier limitation under Article 4(5) of the Hague Rules 1924 is not absolute, since the shipper must be given the opportunity to declare a higher value of his shipment, and create a higher limitation of liability[87]. In other words, the Ninth Circuit addressed the "fair opportunity" doctrine. In so doing, the Ninth Circuit followed its precedent in *Komatsu, Ltd v. States S.S. Co.*[88]. The Ninth Circuit stated that by listing the number of packages and containers, the shipper availed himself of the opportunity to clarify the liability limits. Thus, since the carrier, in this case, met the standard of what constitutes a "fair opportunity" and consequently was able to limit his liability under Article 4(5), the Ninth Circuit followed other Circuit Courts' decisions[89] in deciding whether the containers constitute packages, or the containers' context constitutes packages. Consequently, the Ninth Circuit held that "listing the number of packages within each container determined the number of packages for the purpose of the limitation liability"[90].

The Ninth Circuit by following its own precedent in addressing the "fair opportunity" doctrine established a new standard for what constitutes a "fair opportunity", other than the standards that were established in the earlier

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[87] *Id*, at 1433.
[88] 674 F.2d 806 at 808-09 (9th Cir. 1982).
[89] *Universal Leaf Tobacco v. Companhia De Navegacao*, 993 F.2d 414 (4th Cir. 1993); *Monica Textile Corporation v. S.S. Tana*, 952 F.2d 636 (2d Cir. 1991).
[90] *Supra*, at 1433.

Ninth Circuit decisions and even other Circuits decisions. The Ninth Circuit only cited its own precedent, the *Komatsu* case, without realising that the latter case and even cases of other Circuit Courts have diverged in the standard they required, and therefore, the result was conflicts of interpretations of what constitutes a "fair opportunity"[91]. Even when it considered other Circuit Courts' decisions in reaching its decision, the Ninth Circuit only cited the Fourth Circuit's decision in the *Universal Leaf* case and the Second Circuit's decision in the *Monica* case without even providing a brief explanation to the facts of these cases. The latter two cases, however, did not address the "fair opportunity" doctrine. These two cases only addressed the issue of whether the containers constitute packages, or the containers' context constitutes packages.

Since the facts of the *All Pacific*, *Universal Leaf*, and *Monica* cases were similar, then it could be argued that it is not understandable why the *All Pacific* case addressed the "fair opportunity" doctrine while the other two cases did not. In fact, Alexander[92] states that, "whether the carrier should be held to the standards of the "fair opportunity" doctrine in all cases is not known". In many cases, however, different Circuit Courts examined the problem of defining the term "package" in relation to containerisation, but did

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[91] The United States Circuit Courts are divided over what constitutes a "fair opportunity". These Circuit Courts have not put a uniform standard of what constitutes a "fair opportunity". See, for example, *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990); *Unimac Co. v. C. F. Ocean Service*, 43 F.3d 1434 (11th Cir. 1995); *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992); *Nippon Fire & Marine Ins. Co. v. M/V Tourcoing*, 167 F.3d 99 (2d Cir. 1999); *Gamma-10 Plastics v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994). All of these cases involved containerised cargo.

[92] Laurence B. Alexander, "Containerisation, The Per Package Limitation, and The Concept of Fair Opportunity", (1986) 11 Mar. Law. 123 at 138.

not address the "fair opportunity" doctrine[93]. As mentioned in the previous chapter, the United States Circuit Courts followed the Second Circuit's decision in *Mitsui & Co. Ltd. v. American Export Lines*[94] to solve the latter problem[95]. The Second Circuit in the latter case impliedly rejected the "fair opportunity" doctrine. The Second Circuit stated that the option to declare a higher value is practically never exercised, where it stated that:

> We find scant force in the argument that there is no need for a fairly strict construction of the package provision since a shipper can always protect himself by declaring a higher value and paying a higher rate[96].

The Second Circuit explained why shippers refused to declare the nature and value of their goods. It noted that the additional carrier-provided insurance, which a shipper purchases by declaring a higher value, covers only damage caused by carrier negligence. The Second Circuit observed that because of this limited coverage the cost of the additional insurance (in the form of an increase in the freight rate) is generally not matched by a comparable savings in the premium for cargo insurance, which must protect against all risks of shipment. Thus, the Second Circuit acknowledged that the carrier-supplied insurance of value is not commercially competitive[97]. In addition, it could be

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[93] See, for example, *Vegas v. Compania Anonima Venezolana*, 720 F.2d 629 (11th Cir. 1983); *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006 (2d Cir. 1985); *Sony Magnetic Products Inc. v. Merivienti O/Y*, 863 F.2d 1537 (11th Cir. 1989); *Belize Trading, Ltd. v. Sun Ins. Co. of New York*, 993 F.2d 790 (11th Cir. 1993).

[94] 636 F.2d 807 (2d Cir. 1981).

[95] See the fifth chapter, *supra*, at 110.

[96] *Supra*, at 815.

[97] Some commentators also have the same argument. See, for example, Kenneth Diplock, "Conventions and Morals-Limitation Clauses in International Maritime Conventions", (1969-1970) 1 J.M.L.C. 525 at 529-30;

argued that in many cases shippers usually do not declare the value of their goods since they consider it as a trade secret. For example, in *Sony Magnetic Products Inc. v. Merivienti O/Y*[98], an employee of the shipper's freight forwarder testified that Sony (the shipper) rarely declared the value of ocean going cargo on the bill of lading. The value was considered a trade secret and the bill of lading is usually widely distributed. One can argue, therefore, that it is not logical for the United States Circuit Courts to require the carrier to notify the shipper of his right to declare a higher value and, at the same time, this declaration is not a general practice that is used in shipping goods. In supporting this argument, many cases show that the shippers from the beginning chose to insure their cargo by an independent insurance company[99].

Returning to the *All Pacific* case above, the Ninth Circuit followed other Circuit Courts decisions, where these Circuit Courts followed the *Mitsui* case above, which impliedly rejected the "fair opportunity" doctrine. It seems that the Ninth Circuit failed to understand and interpret such Circuit Courts' decisions properly. The Ninth Circuit, in fact, has used these Circuit Courts' decisions as a ready-made solution of the problem of defining the term "package" in relation to containers. Thus, the Ninth Circuit citation of such

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Sean Harrington, "Legal Problems Arising From Containerisation and Intermodal Transport", (1982) 17 Euro. Trans. L. 3 at 19.

[98] 863 F.2d 1537 at 1541 (11th Cir. 1989).

[99] The Ninth Circuit has held that "a shipper who chooses to insure its cargo through an independent insurance company has made a conscious decision not to opt out of COGSA's liability limitation", *Vision Airfreight Service Inc. v. M/V National Pride*, 155 F.3d 1165 at 1169 (9th Cir. 1998). See also *Yang Machine Tool Co. v. Sea-land Services Inc.*, 58 F.3d 1350 at 1355 (9th Cir. 1995); *Travelers Indem. Co. v. Vessel Sam Houston*, 26 F.3d 895 at 900 (9th Cir. 1994).

Circuit Courts' decisions adds very little to its argument in addressing the "fair opportunity" doctrine. If the Ninth Circuit, when it followed other Circuit Courts decisions, examined them properly, it might, at least, recognise that such Circuit Courts did not address the "fair opportunity" doctrine. Accordingly, if the Ninth Circuit was obliged to consider other Circuit Courts' decisions, which are considered as being foreign decisions, then it might, but not necessarily, have examined the other Circuit Courts' decisions properly in order to be consistent with them in not addressing the "fair opportunity" doctrine.

Few Circuit Courts who addressed the "fair opportunity" requirement, on the other hand, realised that such requirement was inconsistent with the international understanding of the Hague Rules 1924. These Circuit Courts depended on other Circuit Courts' decisions in realising this issue. In *Henley Drilling Co. v. McGee*[100], for example, the First Circuit refused to adopt the "fair opportunity" doctrine. The First Circuit, at first, noted that in its own precedent, *Granite State Insurance Company v. M/V Caraibe*[101], the District Court of Puerto Rico refused to adopt the "fair opportunity" doctrine. Nevertheless, the First Circuit provided a detailed examination on the existence of this doctrine among the Circuit Courts, and in consequence, noted that these Circuit Courts required the carrier to provide the shipper adequate notice of Article's 4(5) limitation of liability. The First Circuit also noted that

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[100] 36 F.3d 143 (1st Cir. 1994).
[101] 825 F. Supp. 1113 (D.P.R. 1993).

these Circuit Courts divided over the type of notice[102]. In other words, these Circuit Courts divided over what constitutes a "fair opportunity". The shipper in this case, however, claimed that the carrier is not only required to give notice but also to show that published tariffs were available. These published tariffs would give the shipper a choice of valuations of the cargo by a choice of precisely definable freight rates. The shipper relied primarily in his claim on the Fifth Circuit decision, *Brown & Root Inc. v. M/V Peisander*[103]. The First Circuit, on the other hand, argued that careful examination of the authorities discloses that no appellate case required both a valid tariff and a notice as an element of what constitutes a "fair opportunity". The First Circuit also argued that the *Brown & Root* case above, which the shipper depended on in his claim, was reversed on this matter. In addition, the First Circuit recognised that many Circuit Courts directly and impliedly held that a tariff is not required if notice of Article's 4(5) limitation of liability has been given[104]. In conclusion, the First Circuit, in rejecting the "fair opportunity" doctrine, quoted the Ninth Circuit's observation in *Carman Tool & Abrasives, Inc. v. Evergreen Lines*[105]:

> We decline to expand the fair opportunity requirement as suggested by [shipper]. The requirement is not found in the language of COGSA; it is a judicial encrustation, designed to avoid what courts felt were harsh or unfair results. The requirement has been criticised for introducing

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[102] *Supra*, at 145.
[103] 648 F.2d 415 at 424 (5th Cir. 1981).
[104] Citing *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 at 939 (11th Cir. 1990); *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190 at 193 (4th Cir. 1988); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 at 901 (9th Cir. 1989).
[105] 871 F.2d 897 at 900 (9th Cir. 1989).

> uncertainty into commercial transactions that should be governed by certain and uniform rules[106].

The First Circuit also stated that:

> COGSA was...intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, responsibilities and rights of shippers, and liabilities of insurers[107].

The First Circuit did not use other Circuit Courts' decisions as a ready-made solution for the issue before it, as the Ninth Circuit did in the *All Pacific* case above. Instead, the First Circuit's careful and sensible examination and evaluation of the existence of the "fair opportunity" doctrine among the Circuit Courts lead to recognise that such doctrine conflicts with the international understanding of the Hague Rules 1924. These Circuit Courts' decisions not only helped the First Circuit to recognise that shortcoming of the application of the "fair opportunity" doctrine but also to rule out that such doctrine should entirely be rejected. Consequently, obliging the United States Circuit Courts to consider foreign decisions could reduce conflicts of interpretations significantly. In other words, obliging the national courts to look at foreign decisions in deciding their cases could significantly reduce the conflicts of interpretations that arise through the impact of domestic law.

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[106] *Supra*, at 147.

[107] *Supra*, at 147. Quoting its own precedent, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727 at 728 (1st Cir. 1994).

6.2.4. Are Conflicts of Interpretations That Arise Because of the Different Methods of Interpretation Between Common Law Courts and Civil Law Courts Avoidable?

The method of interpretation of the common law courts differs from that of the civil law courts. As mentioned in the previous chapter, some writers suggest that conflicts of interpretations arise because of the different methods of interpretation between common law courts and civil law courts[108]. Some of these writers clarify that such conflicts are avoidable. Beutel[109], for example, argues that conflicts of interpretations cannot be accomplished without developing a new technique of handling legal materials. This means that he suggests that conflicts of interpretations are avoidable. In addition, Blomquist[110] and Munday[111] state that having a special international tribunal could reduce conflicts of interpretation. Thus, they suggest that conflicts of interpretations are avoidable. The important question that arises in this context, however, is what is the best mechanism that should be used in order to avoid the conflicts of interpretations that arise through the different methods of interpretation between common law courts and civil law courts. The answer, as this thesis argues, is: such conflicts could be reduced significantly

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[108] See the fifth chapter, *supra*, at 125, Frederick K. Beutel, "The Necessity of a New Technique of Interpreting the N.I.L.-The Civil Law Anology", (1931) 6 Tul. L. Rev. 1; Mann, *supra* note 2, at 278-91; Robert F. Blomquist, "The Proposed Uniform Law on International Bills of Exchange and Promissory Notes: A Discussion of Some Special and General Problems Reflected in the Form and Content, Choice of Law, and Judicial Interpretation Articles", (1979) 9 Cal. W. Int'l. L.J. 30 at 67; R.J.C. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 Int'l. Comp. L.Q. 450 at 458; Peacock, *supra* note 76, at 1000.

[109] *Supra*, at 18.

[110] *Supra*, at 68.

[111] *Supra*, at 458.

if we obliged the national courts of both the common law countries and the civil law countries to consider each other's decisions. However, as mentioned in the first chapter of this thesis, this thesis examines only the common-law systems' decisions[112]. Thus, this thesis is not intending to compare common law and civil law cases in order to prove how the consideration of foreign decisions could significantly reduce the conflicts between the two systems. Even though, there are some specific points that are worth to be mentioned.

The idea of considering foreign decisions is not a general practice that is used among the common law and the civil law courts in interpreting international uniform rules. As discussed in the previous sections of this chapter, many common law courts interpreted the uniform rules without considering foreign decisions, and this has lead to conflicts of interpretations. Although many of these courts gave considerable weight to their own precedents, their method of interpretation differed in many situations. Some followed the plain meaning of the uniform rules[113], while others followed the purpose of such rules[114]. Even, on the other hand, when civil law courts interpret international uniform rules, some may follow the plain meaning and others may follow the purpose of such rules, but usually these national courts ignore to follow their own precedents. This, in consequence, suggests that both of the common law courts and the civil law courts may coincidently reach the

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[112] See the first chapter, *supra*, at 4.

[113] For example, the Canadian and the United Kingdom courts followed the plain meaning of defining the term "unit" under Article 4(5) of the Hague Rules 1924, where they interpreted such term as a shipping unit.

[114] For example, many United States Circuit Courts claimed that the purpose of the Hague Rules 1924 is to interpret the term "unit" under Article 4(5) as "customary freight unit".

same result by following the plain meaning or the purposive meaning of the uniform rules, and vice versa. Accordingly, it is logical to argue that sometimes both systems may use the same method of interpretation. Nevertheless, this cannot by itself guarantee the achievement of uniform interpretations among these systems. This raises the question: could the methods of interpretations of both systems be narrowed so these national courts could reach the same result? Theoretically, it could be argued that considering foreign decisions may, but of course not necessarily, make the national courts of common-law countries and civil-law countries consider the international character of the uniform rules in order to achieve international uniform interpretations of such rules rather than considering their legal systems in deciding cases. Consequently, obliging the national courts, whether common-law courts or civil-law courts, to look at foreign decisions in deciding their cases could significantly reduce the conflicts of interpretations that arise through the different methods by which common law courts and civil law courts decide their cases.

6.3. Conclusion

When a case is governed by international uniform rules, the national court should, as this chapter argues, investigate the international understanding of such rules. In so doing, this court should consider the interpretation of the uniform rules by foreign decisions. The main purpose behind such consideration is that it leads to a significant reduction in conflicts of interpretations. Such consideration, in fact, reveals many advantages for the national courts in their interpretations. The examination of the cases in this

chapter reveals that the consideration of foreign decisions helps the national courts to formulate questions in relation to the reasons behind the differences between domestic interpretations and foreign interpretations of the issue in question. This consideration also gives the national courts source of possible solutions to the issue in question. In the process of evaluating these solutions, the national courts may decide whether the domestic interpretations or the foreign interpretations are suitable for the issue before them. The national courts may also use foreign decisions in justifying their own decisions.

The consideration of foreign decisions, on the other hand, needs more than a brief citation of foreign decisions. The brief and the careless examination and evaluation of foreign decisions may not help the national court to recognise the international understanding of the uniform rules, and accordingly, this leads to more conflicts of interpretations. In addition, the use of foreign decisions as a ready-made solution for solving the issue before the national court may, in many cases, lead to inconsistent decisions, and in consequence, adds little or nothing to the recognition of the international understanding of the uniform rules. The detailed, the careful, and the sensible examination and evaluation of foreign decisions, however, are crucial points in helping the national court to understand how foreign decisions dealt with the issue before it. In using these crucial points, it is better for the national court to examine and evaluate more than one country's decisions. When the national court examines and analyses several countries' decisions, then the risk of reaching inconsistent decision with other countries' decisions is lower. Consequently, many conflicts of interpretations of uniform rules could

undoubtedly be avoided if the national courts made the extra effort required in considering foreign decisions.

Perhaps the identification and explanation of the consideration of foreign decisions and its role in achieving international uniform interpretations will begin a process of increasing judicial awareness so that conflicts of interpretations can be reduced significantly. A more realistic prediction is that the national courts of the various countries will continue to give little weight to foreign decisions in shaping their interpretations of international uniform rules. Even if the national courts consider foreign decisions, the brief and the careless examination and evaluation of such decisions constitute a problem, which is probably too great to overcome. If this latter prediction is correct, then the next step should be finding measures to overcome such prediction. Accordingly, the next chapter of this thesis clarifies and analyses different measures for reaching international uniform interpretations of uniform rules.

CHAPTER VII: SUGGESTIONS FOR ACHIEVING INTERNATIONAL UNIFORM INTERPRETATIONS

7.1. Introduction

The ideal solution of reaching international uniformity in the law that relates to carriage of goods by sea is that the same provisions should exist in every country and that such provisions should be interpreted in the same manner in all countries in which they are in force. To be realistic, one must be resigned to the fact that in the international sphere, there will always be a tendency for national courts to put differing interpretations upon international uniform rules. Nevertheless, it is possible to reduce the scope for such divergence. Considering foreign decisions is indeed a significant factor in reducing such divergence. The previous chapter examined and analysed the significance of considering foreign decisions in reducing conflicts of interpretations of uniform rules that relate to carriage of goods by sea. This chapter, on the other hand, concerns with how the national courts can achieve international uniform interpretations of uniform rules in relation to carriage of goods by sea.

The first part of this chapter deals with the different suggestions, which are offered by different commentators and courts, of achieving international uniform interpretations of uniform rules[1]. It examines the contributions of

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[1] It should be noted that some writers provide proposals for achieving uniform drafting of a convention. However, these proposals are unrealistic. See Francesco Berlingieri, "Uniformity in Maritime Law and Implementation of International Conventions", (1987) 18 J.M.L.C. 317 at 317 and 349; William Tetley, "The Lack of Uniformity and the Very Unfortunate State of Maritime

these commentators and courts, and argues that some of these contributions are not complete satisfactory solutions to achieve international uniform interpretations of uniform rules. The second part of this chapter, however, deals with the importance of comparative law in achieving international uniform interpretations of uniform rules. Some commentators and courts recognise this issue, while others argue that the consideration of foreign decisions will create difficulties in the process. In consequence, the first section of this part clarifies the problems or the difficulties that might face the consideration of foreign decisions, and how such difficulties could be handled. While the second section proposes different ideas on the question of, how should the national courts consider foreign decisions?

7.2. Suggestions for Achieving International Uniform Interpretations

7.2.1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties

National courts in every country are accustomed to use particular methods of interpretation for their national laws. As mentioned in the previous chapter, such divergence of methods leads to conflicts of interpretations of uniform rules[2]. It is possible to suggest that such conflicts could be handled if these national courts were required to use specific and special uniform methods for the interpretation of uniform rules. The Vienna Convention on the

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Law in Canada, the United States, the United Kingdom and France", [1987] L.M.C.L.Q. 340 at 342-43; Gordon W. Paulsen, "An Historical Overview of the Development of Uniformity in International Maritime Law", (1982-1983) 57 Tul. L. Rev. 1065 at 1066.

[2] See the sixth chapter, *supra*, at 172-74.

Law of Treaties (1969) (Cmnd. 4140), for example, regulates specific methods for the interpretation of uniform rules. Articles 31 and 32 of the Vienna Convention provide that:

> Article 31
> General rule of interpretation
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
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> Article 32
> Supplementary means of interpretation
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable[3].

Under these Articles, the text, the context and the purpose of a treaty and treaty rules play the most prominent roles in interpreting a treaty. Additional rules, such as the preparatory work of a treaty (i.e. *travaux préparatoires*), can provide further guidance in the process of treaty interpretation, but in general,

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[3] Quoted in Rudolf Bernhardt, "Interpretation in International Law", (1984) 7 Enc. P. Int'l. L. 318 at 321.

they are only used as supplementary means. According to Bernhardt, the above Articles are applicable to all categories of uniform rules, and are broad enough to take account of the great variety of uniform rules in present-day international law[4].

The English case *Fothergill v. Monarch Airlines*[5] called for interpreting an Act of Parliament that gave effect to the Warsaw Convention on the liability of air carriers. Under Article 26(2) of that Convention, notice must be given within seven days of "damage", while no notice need to be given for "loss" with respect to baggage. The plaintiff, in this case, failed to give the notice of the loss of part of the contents of his bag. Kerr, J. and the Court of Appeal rejected the defendant's claim that the notice requirement should apply in this case. The House of Lords reversed. All of the Lords' opinions conceded that "damage" would not normally include partial loss of contents of baggage, but ruled that the word "damage" should be given a wider meaning[6]. Lord Diplock and Lord Scarman suggested that in interpreting the uniform rules, which were incorporated into the British law, British courts should follow Articles 31 and 32 above of the Vienna Convention on the Law of Treaties[7]. According to both Lords, the statutes that implement international uniform rules should be interpreted without considering domestic law, but on broad principles of general acceptation. Lord Diplock, for example, stated that:

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[4] *Id*, at 324.
[5] [1981] A.C. 251.
[6] *Id*, at 252-53.
[7] *Supra*, at 282 and 290.

> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] A.C. 141, 152, 'unconstrained by technical rules of English law, or by legal precedent, but on broad principles of general acceptation'[8].

In fact, such idea is not new. In 1932, in the English case *Foscolo Mango and Co. v. Stag Line Ltd.*[9], Lord Macmillan argued that:

> It is desirable in the interests of uniformity that their [the Hague Rules 1924] interpretation should not be rigidly controlled by domestic precedents of antecedent date but rather that the language of the rules should be construed on broad principles of general acceptation[10].

The suggestion of Lord Diplock and Lord Scarman impliedly recommends that Articles 31 and 32 should control the interpretation of uniform rules, which were incorporated into the national laws of different countries. Of course, our concern here is the uniform rules that relate to carriage of goods by sea. In England, the Parliament incorporated the Hague-Visby Rules 1968, for example, into the Carriage of Goods by Sea Act 1971. This raises the question: do Articles 31 and 32 of the Vienna Convention provide a sufficient solution for handling the conflicts of interpretations in relation to the Hague-Visby Rules? This question impliedly raises another broad question: do Articles 31 and 32 provide a sufficient solution to achieve

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[8] *Supra*, at 281-82. See also Lord Scarman, at 293.

[9] [1932] A.C. 328 at 334.

[10] In addition, in 1946, F.A. Mann, in his article "The Interpretation of Uniform Statutes", (1946) 62 L.Q.R. 278 at 290-91, suggested that uniform statutes should be interpreted according to the principles of public international law.

international uniform interpretations of all uniform rules that relate to carriage of goods by sea? Whether the national courts construe the uniform rules, or the statutes incorporating such rules, according to "the broad principles of general acceptation", or according to Articles 31 and 32 of the Vienna Convention, this adds little to avoid the conflicts of interpretations. In other words, if we suppose that the national courts were willing to attempt to use these recommended methods of interpretation, it is uncertain that these methods would lead to international uniform results. These methods may, to some extent, reduce conflicts of interpretations, but they face several problems:

1. Under Article 31(1) of the Vienna Convention, the method of interpretation should be "in accordance with the ordinary meaning to be given to the terms" of the uniform rules, and in accordance with the purpose of such rules. There are, however, conflicts among the national courts in whether to interpret the terms of the Hague Rules 1924 in accordance with the ordinary meaning or in accordance with the purposive meaning of such rules. In the United States, for example, where the Hague Rules 1924 are incorporated into the Carriage of Goods by Sea Act 1936, there are conflicts in whether to define the term "package", under Article 4(5) of the Hague Rules, in accordance with the ordinary meaning or the purposive meaning. Such conflicts have lead to divergent decisions. In *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd.*[11], which mentioned in the previous chapter[12], the United States' Eleventh Circuit Court stated that a package is:

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11 (11th Cir. 2001). from the Internet: http://laws.findlaw.com/11th/994375opn.html (accessed: 20/6/2001).

> A class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods[13].

In this case, the "Number of Packages" column in the bill of lading listed the container size "1 X 40", while the "Description of Goods" column stated that the shipment consisted of "5000 Units Men's Suits". The Eleventh Circuit argued that in defining the term "package" under Article 4(5) of the Hague Rules in relation to containerised shipments, the number of packages specified in the "Number of Packages" column of the bill of lading is the starting point in determining such definition. After examining the bill of lading and other shipping documents, the Eleventh Circuit held that the container itself, not its contents, was the package. The Eleventh Circuit, in its method of interpretation, is consistent with Article 31(1) of the Vienna Convention above. The Eleventh Circuit interpreted the term "package" in accordance with the ordinary meaning of such term in its context, which is consistent with Article 31(1). The Eleventh Circuit considered the parties' agreement in the bill of lading in defining the term "package", which is also consistent with Article 31(3)(a).

On the other hand, in *Marcraft Clothes Inc. v. M.V. Kurobe Maru*[14], the District Court for the Southern District of New York, in defining the term "package" under Article 4(5) of the Hague Rules, stated that:

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[12] See the sixth chapter, *supra*, at 144.
[13] Citing *Aluminios Pozuelo, Ltd. v. S.S. Navigator*, 407 F.2d 152 at 155 (2d Cir. 1968); *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 at 1082 (11th Cir. 1985).
[14] 575 F. Supp. 239 (S.D.N.Y. 1983).

> The term 'package' must be interpreted in light of the dual purposes of Article 4(5), which not only limits liability by fixing an irreducible minimum of immunity, but also voids any agreement designed to reduce the carrier's liability below that level[15].

In this case, the "Description of Goods" column of the bill of lading listed "4400 Sets of Men's Suits With Vest"[16]. The District Court argued that the definition of the term "package" in relation to containerised shipments is more sensibly related to the units in which the shipper packed the goods and described them than to the container itself in which the carrier caused them to be contained. The District Court stated that where the bill of lading discloses the contents of the container; such contents are the packages. Accordingly, since the bill of lading described the contents of the container, the District Court held that the contents of the container, not the container itself, were the packages. The method of interpretation of the District Court in this case is also consistent with Article 31(1) of the Vienna Convention above. The District Court interpreted the term "package" in accordance with the purpose of the uniform rules, namely the Hague Rules. Consequently, although the facts of the latter case and the *Fishman* case above are similar, the decisions are inconsistent with each other. In both cases, the contents of the container were men's suits. The *Marcraft* District Court relied on the purpose of the Hague Rules and considered the men's suits as the packages, while the *Fishman* Eleventh Circuit depended on the ordinary meaning of the term "package" in its context and considered the container itself as the package. The method of

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[15] *Id*, at 242 (citing *Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 at 814 (2d Cir. 1981)).

[16] It is not clear from the case what was inserted in the "Number of Packages" column of the bill of lading.

interpretation of both cases is consistent with Article 31(1) of the Vienna Convention. Thus, it is clear that the United States courts had reached different decisions in using the ordinary meaning of the term "package" in its context and the purpose of the Hague Rules themselves.

2. Under Article 31(1), in the process of interpretation one must look at the treaty in the light of its object and purpose. Mann[17] states that perhaps the Vienna Convention aims to state two aspects of interpretation: the object or purpose of unification, and the object or purpose of the particular provisions[18]. In regard to the first aspect, namely the object or purpose of unification, Mann explains that, in practice, this means that the courts should follow, for example, the practice of foreign courts. Thus, he states that this is subsequent practice in the application of the treaty which Article 31(3)(b) makes an aid to construction[19]. Mann, however, notices that following foreign decisions leads to confusion. He explains that in *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*[20], Megaw L.J. pointed out that in six member States of a convention twelve different interpretations of the same words might be produced. Thus, which interpretation should the national court follow? It is for this reason our proposition in this thesis is that national courts should be obliged to consider, but not obliged to follow, foreign decisions in order to reach international

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[17] F.A. Mann, "Uniform Statutes in English Law", (1983) 99 L.Q.R. 376 at 383.

[18] Mann argues that irrespective of whether or not this is the intention of the Vienna Convention, for the purpose of interpretation the object or purpose of unification, and the object or purpose of the particular provisions are material and significant. *Id.*

[19] *Supra*, at 384.

[20] [1977] 1 W.L.R. 625 at 646 (This case relates to carriage by air).

uniform interpretations of uniform rules. This issue is discussed in detail later in this chapter[21]. It should be noted, however, that although Mann recognises the importance of foreign decisions in achieving uniform interpretations of uniform rules, nonetheless, he states that English courts declined to follow foreign decisions. He acknowledges, for example, that both Lord Wilberforce and Lord Diplock, in the *Fothergill* case above, preferred to ignore foreign decisions because:

> They were not always decisions of the highest courts; they were not binding; the process of the law reporting varies; the facts are not always clearly discernible[22].

Therefore, Mann proposes another solution for avoiding conflicts of interpretations. He suggests that courts and arbitrators should apply the *lex causae* (the proper law of the contract) to avoid conflicts of interpretations among the countries in order to meet the expectations of the parties. His suggestion is discussed in detail in the next section of this chapter[23].

In regard to the second aspect, namely the object or purpose of the particular provisions, Mann argues that the problem is that the purpose of a provision may not always be obvious[24]. In addition, it could be argued that even if the purpose of a provision is clear, conflicts may arise in misunderstanding such purpose. Article 4(5) of the Hague and Hague-Visby Rules, for example, provides that "in any event" the carrier's liability shall be limited to a stipulated amount. As mentioned in the fourth chapter, it is clear

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[21] *Infra*, at 218-21.
[22] Mann, *supra* note 17, at 384.
[23] *Infra*, at 193-99.
[24] Mann, *supra* note 17, at 385.

that the purpose of adding the words "in any event" in Article 4(5) is that the carrier shall not be deprived from his right of limiting his liability in all events[25]. In spite of this clarity, different national courts divided over the meaning and effect of the words "in any event" in relation to whether the carrier should be deprived from his limitation right if he committed an unreasonable deviation. In the United States, for example, the Circuit Courts differed on whether the words "in any event" under Article 4(5) of the Hague Rules 1924 referred to situations where an unreasonable deviation existed. Some Circuit Courts were unwilling to attribute much significance to the "in any event" language and held that the Hague Rules 1924 were not intended to change the existing law on unreasonable deviation, and therefore carriage of goods on-deck deprives the carrier from the benefit of the limitation under Article 4(5). For example, in *Encyclopaedia Britannica Inc. v. S.S. Hong Kong Producer*[26], which mentioned in the fifth chapter[27], the majority in this case recognised that the purpose behind the provisions of the Hague Rules 1924 was to achieve uniformity[28]. The majority, however, did not recognise that the purpose behind the words "in any event" of Article 4(5) was to give the carrier the opportunity to limit his liability in all events[29]. The majority examined the clauses of the bill of lading, and in consequence, clarified that such clauses, which permit the carrier to carry the containers on-deck, intended to lessen the

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[25] See the fourth chapter, *supra*, at 87.
[26] 422 F.2d 7 (2d Cir. 1969), cert. Denied, 397 U.S. 964 (1970). See also *Searoad Shipping Co. v. E.I. Dupont De Nemours & Co.*, 361 F.2d 833 (1966).
[27] See the fifth chapter, *supra*, at 115.
[28] *Supra*, at 11-12.
[29] Only Hays, J. dissented and recognised this issue. *Supra*, at 20.

liability of the carrier. The majority, therefore, held that carriage of the six containers, in this case, on-deck was an unreasonable deviation, and accordingly, the carrier was liable for the full amount of damages sustained without the benefit of his limitation right under Article 4(5). In reaching this decision, the majority also argued that it is not disputed that the damage to the goods in the containers was caused by seawater to which they were exposed by being stowed on-deck.

Other Circuit Courts, on the other hand, held that the words "in any event" demonstrate that the Hague Rules 1924 intended to change the law that existed prior to the existence of these rules in relation to unreasonable deviation. Thus, these Circuit Courts held that carriage of containers on-deck would not deprive the carrier from his right to limit his liability under Article 4(5). In *Du Pont de Nemours International S.A. v. S.S. Mormacvega Etc.*[30], for example, the Second Circuit recognised the absolute terms of Article 4(5), which provides that the carrier in all events has the right to limit his liability[31]. The Second Circuit noted that under Article 4(4) of the Hague Rules 1924 the carrier is protected if he committed any reasonable deviation. The Second Circuit also noted that the latter Article does not define what is and is not reasonable[32]. In deciding whether carriage of containers on-deck constitutes reasonable deviation under Article 4(4), the Second Circuit, unlike the

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[30] 493 F.2d 97 (2d Cir. 1974). See also *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 543 F.2d 967 (2d Cir. 1976); *Houlden and Co. Ltd. and Others v. S.S. Red Jacket*, ([1978] 1 Lloyd's Rep 300; *Electro-Tec Corp. v. S.S. Dart Atlantica*, 598 F. Supp. 929 (D. Md. 1984).

[31] *Id*, at 99.

[32] *Supra*, at 100.

majority in the *Encyclopaedia* case above, argued that the containers on-deck of the vessel, in this case, were not necessarily subject to greater risks than those stowed under deck. The vessel, according to the Second Circuit, was specially reconstructed to permit safe carriage of containers on-deck. Thus, carriage of containers differs from carriage of break-bulk cargo on-deck since the latter could be at greater risk. In addition, the Second Circuit argued that deck stowage was required by the realities and exigencies of the vessel's cargo terminal and the ship loading procedures[33]. This suggests that it is almost impossible for the carrier to state whether the containers of a specific shipper, for example, are going to be on-deck or under deck, and in consequence it is difficult for the carrier to state on the bill of lading that the carriage is on-deck or under deck. Tallman[34] explains this issue in detail, where he observes that:

> A successful containership operation presupposes...that approximately 30 percent of the containers will be carried on deck. Anyone who has witnessed the sight of a fully loaded containership underway will appreciate the requirement that the containers stowed on deck must carry a substantially lighter load than those carried below deck. In addition, the cargo, whether it be containers or break-bulk cargo, must be stowed so as to insure the proper trim of the vessel.
> The location of a particular container on a fully containerised vessel is determined by its weight and size in relation to the weight and size of the other containers to be carried on the same voyage. As the weight of the other containers must be known before the position of a particular container can be ascertained, the voyage location of a container is unknown until all the containers have been delivered to the carrier and weighed. It is, therefore, impractical to endorse an "on-deck" provision on the bill of lading at the time the individual containers are delivered to the vessel.

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[33] *Supra*, at 100.

[34] Bissell Tallman, "The Operational Realities of Containerisation and Their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions", (1971) 45 Tul. L. Rev. 902 at 918.

Consequently, it is unrealistic to blame the carrier of unreasonable deviation and at the same time it is out of his control to decide whether the containers are going to be carried on-deck or under deck. This means that the Second Circuit, in the *Du Pont* case above, suggested that the applicability of the doctrine of unreasonable deviation is inadequate in relation to carriage of containers on-deck. Accordingly, the decision of the Second Circuit was correct in stressing that in all events the carrier must not lose his limitation right under Article 4(5).

The fact that there are conflicts among national courts in recognising the purposes of the uniform rules' provisions proves that requiring the courts to interpret the uniform rules in the light of their object and purpose, as stated in Article 31(1) of the Vienna Convention, adds nothing to solve the problem of conflicts of interpretations of uniform rules. It is not our intention here to argue that national courts shall not refer to the purposes of the provisions of uniform rules in their interpretation, since in many occasions such interpretation does help the national courts in guiding them to interpret such rules properly. Instead, our intention here is to argue that requiring the national courts to consider the purposes of the provisions of the uniform rules is not an efficient solution to solve the problem of conflicts of interpretations of such rules as a whole.

3. According to Article 32 of the Vienna Convention, preparatory work (*travaux préparatoires*) and the circumstances of its conclusion are only supplementary means of interpretation under special circumstances, namely ambiguity of the text or unreasonable results. Although Article 32 addresses

the preparatory work of uniform rules as only subsidiary means of interpretation, Peacock[35] argues that the best way to achieve actual international uniformity is for the national courts of all countries to base their interpretations of uniform rules on the intent of the international framers. This raises the question: does the reference to the preparatory work of the uniform rules by the national courts in their interpretation solve the conflicts of interpretations of such rules? Of course, our concern here is to apply this question on the uniform rules that relate to carriage of goods by sea. The real problem of referring to the preparatory work of the uniform rules is that in many circumstances the intention of the drafters in regard to a provision or a term in these rules is not clear or even does not exist. As mentioned in the third chapter, Article 4(5) of the Hague Rules 1924, for example, does not define the terms "package" and "unit" and neither the debates in the Hague Conference 1921 nor the subsequent conferences that led to the creation of the Hague Rules 1924 indicate the precise meaning of such terms[36]. The problem of containerisation also, which is our subject in this thesis, was not within the framers' of the Hague Rules 1924 contemplation since such issue appeared in the 1960s. Another problem that may arise is that the meaning of the terms of the uniform rules can change with time. For example, as mentioned in the previous part of this section, there are conflicts among national courts on whether to consider carriage of containers on-deck as unreasonable

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[35] J. Hoke Peacock, "Note: Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts", (1990) 68 Texas L. Rev. 977 at 1000.

[36] See the fourth chapter, *supra*, at 82.

deviation[37]. Article 4(4) of the Hague and Hague-Visby Rules provides that the carrier is protected in respect of "any reasonable deviation". However, these rules do not define what is and is not reasonable. Therefore, what is reasonable will always be a matter of fact and, as shipping practices change, what is reasonable will change also. Consequently, what was unreasonable in break-bulk carriage may well be reasonable in containers carriage. In other words, carriage of containers on-deck may well be reasonable. The United States case, *Electro-Tec Corp. v. S.S. Dart Atlantica*[38], for example, supports this argument. In this case, the court held that on-deck stowage of containers is not unreasonable deviation. In dicta, the court noted that it was willing to consider the effect of technological innovation and changing vessel design, namely the appearance of containerships, on the Hague Rules and maritime law. Consequently, the court implied that the word "reasonable" would have to be analysed with flexibility in light of changes in the maritime industry. In addition, the court indicated that a factual inquiry might be made into the type of cargo carried and the type of the ship used for determining reasonableness[39]. Accordingly, it appears that the preparatory work of the Hague Rules may not help the national courts to determine what is reasonable in regard to carriage of containers on-deck.

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[37] *Supra*, at 186-89. See also the fourth chapter, *supra*, at 86-87.
[38] 598 F. Supp. 929 (D. Md. 1984). See also *DuPont de Nemours International v. Mormacvega (The Mormacvega)*, 493 F.2d 97 (2d Cir. 1974), which mentioned in the previous part of this section, *supra*, at 188.
[39] *Id*, at 934.

7.2.2. The *lex causae*: the Proper Law of the Contract

As mentioned in the fourth chapter, the creation of uniform rules in relation to carriage of goods by sea helps both shippers and carriers to be certain what the law is in every country[40]. However, such knowledge is not enough if there are conflicts of interpretations regarding these rules since such conflicts undermine the expectations of the parties if a dispute appears among them on, for example, whether a container is a package or its contents are packages. If the law is internationally uniform in its text and application, both carriers and shippers can predict the outcome of litigation wherever this litigation is. Mann[41], however, argues that the best solution for avoiding the conflicts of interpretations, which undermine the expectations of the parties, is to apply the *lex causae*[42]: as the proper law of the contract. He states that the forum should apply the *lex causae* even if the *lex causae* has adopted or failed to adopt the uniform rules or has accepted them subject to variations or has interpreted them in a specific sense. The forum, however, is required to take the *lex fori*[43] as a guide only when neither party alleges a divergence. He argues that ignoring the proper law of the contract would lead, in most cases, to the exclusive control of the *lex fori*. In consequence, this would lead to unsatisfactory results since the exclusive control of the *lex fori*, in many cases,

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[40] See the fourth chapter, *supra*, at 75.
[41] *Supra* note 17, at 392.
[42] The *lex causae* means: In private international law, the system of law (usually foreign) applicable to the case in dispute as opposed to the *lex fori*. See "A Dictionary of Law", (3ed. 1994) Oxford University Express.
[43] The *lex fori* means: The law of the forum. In private international law, the law of the forum governs matters of procedure, the mode of trial, most matters relating to evidence, the nature of the remedy available, and most matters of limitation of actions based on time bars. *Id.*

undermines the expectations of the parties. This can be explained by the following example[44]: A bill of lading issued for a shipment of containers from London to Hamburg on a German vessel and provided for jurisdiction of the German courts or for arbitration in Hamburg. The German carrier calculated the freight and covered himself by insurance on the ground of his potential liability under the German law. The containers were damaged and a dispute appeared on whether the containers or their contents are the packages. The case was brought in the German courts. Suppose that the German judicial practice take the view that the contents of the containers are the packages, while the English judicial practice take the opposite view. An English law shall not suddenly confront the German carrier who contracts under German law, assesses his freight, and covers himself by insurance on the basis of German judicial practice. The German carrier who expects to be liable for the contents of the containers, which is DM 1 million for example, shall not profit from applying the English law, where his liability will be £100 per container for example. Applying the *lex fori* in this case, which is the German law, is the proper law of the contract. The converse conclusion is equally true: If the carrier was English, then the *lex* fori, which is the German law, shall not suddenly confront an English carrier who contracts under the English law, assesses his freight, and covers himself by insurance on the ground of the English judicial practice. This English carrier shall not be liable for DM 1 million, while he expects to be liable for £100 per container. According to

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[44] This example is taken from Mann's Article, but with some modifications. *Supra* note 17, at 391.

Mann, the conflict of laws was developed for protecting the contractual or other rights and obligations as created by the proper law[45]. Mann acknowledges that the existence of uniform rules renders the conflict of laws unnecessary. However, he states that when the uniform rules are created all problems of private international law disappear unless these rules are variously interpreted in different countries. Therefore, he argues that there is no reason to suppose that the process of the conflict of laws should not apply on the uniform rules[46].

Mann's suggestion, however, ignores the importance of international uniformity of law. His argument suggests that the predictability of the outcome of litigation could be achieved irrespective of whether there are uniform rules. In fact, Mann states that unification of law is:

> ...inadequate, illusory and elusive...In other words unification is an abstract ideal. In the concrete case what is or purports to be done in its name may often contribute to the intensification of diversity[47].

Thus, Mann's argument runs against our argument in this thesis, which is that international uniform rules in relation to carriage of goods by sea are valuable[48]. It is worthwhile to examine and analyse his suggestion since it assumes that applying the proper law of the contract would avoid the conflicts of interpretations of uniform rules, where such conflicts undermine the

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[45] Mann, *supra* note 17, at 392.
[46] Mann, *supra* note 17, at 393. Mann supports his argument by citing: Wolff, *Private International Law*, (1950) at s. 6; Sir Otto Kahn-Freund, Hague Rec. 143 at 193 (1974 iii).
[47] Mann, *supra* note 17, at 399.
[48] See the third chapter, *supra*, at 57.

expectations of the parties. Our argument, however, is that Mann's argument would not, in many cases, lead the parties to predict the outcome of litigation:

1. The difficulty in Mann's proposition is that it cannot be applied when the uniform rules or the statutes incorporating them lay down their own conflict rule, which eliminates or restricts the parties' choice[49]. Although the Hague, Hague-Visby, and Hamburg Rules do not take this course explicitly, it is common for statutes, which incorporate such rules, to specify the compulsory application of these uniform rules in certain circumstances. For example, the United States Carriage of Goods by Sea Act 1936, which incorporates the Hague Rules 1924, provides that "every bill of lading...for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act"[50]. In addition, in England, Parliament provided that the Hague-Visby Rules, "shall have the force of law", and shall apply to all shipments from the British ports[51]. These statutes are compulsory choice of law provisions. In effect, these statutes apply to all disputes within their scope regardless of the proper law of the contract. In other words, these statutes prohibit attempts to deny jurisdiction of the local courts.

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[49] In fact, Mann admits this difficulty, where he states that this is an exception to his proposition. *Supra* note 17, at 394.

[50] The United States Carriage of Goods By Sea Act (COGSA 1936), 46 United States Code (U.S.C.) § 1300, from the Internet: http://www.cargolaw.com/cogsa.html (accessed: 20/5/2001).

[51] See The United Kingdom Carriage of Goods By Sea Act 1971, *Halsbury's Statutes of England and Wales*, (Vol. 39, 1995), Art. 1(2) and 1(3), at 370.

2. Mann argues that his proposition is in harmony with the demands of justice[52]. His proposition, as he argues, leads both shippers and carriers to predict the outcome of litigation. This argument, however, lacks persuasiveness. A vessel usually carries various shipments for different shippers from different countries. In addition, the consignees who shall receive these shipments are also usually from different countries. For saving time and expense, the shippers usually receive a uniform standard form of a bill of lading from the carrier by which it shall be sent to the consignees. Carriers usually provide in such bill a clause stating that the United States COGSA, for example, only governs the contract, or provide a clause stating that all actions shall be brought only before the United States courts. Thus, usually the carrier inserts these clauses without discussing or negotiating them with the shippers. It is, therefore, recognised by many national courts that bills of lading are contracts of adhesion. For example, the United States District Court of Western District of Washington, in *Matsushita Electric Corporation of America v. SS Aegis Spirit*[53], stated that:

> Bills of lading, though, are hardly appropriate vehicles for such expressions of mutual intent, because their contractual terms are commonly the product of unilateral draftsmanship by the carrier incorporating largely self-serving provisions.

This leads us to the point that in many cases shippers and consignees will not be familiar with the choice of law or forum that was chosen by the carrier in the bill of lading. In *Wm. H. Muller & Co. v. Swedish American Line*[54], for

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[52] Mann, *supra* note 17, at 392.
[53] [1977] 1 Lloyd's Rep. 93 at 100.
[54] 224 F.2d 806 (2d Cir. 1955).

example, a New York consignee brought suit in the Southern District of New York for damages to goods on board a Swedish vessel. The Swedish carrier inserted in the bill of lading a clause requiring "any claim against the carrier arising under this bill of lading [to] be decided...in the Swedish courts"[55]. Let us assume that the bill of lading required the application of the Swedish law instead of the Swedish courts. If the United States court, in this case, applied the proper law of the contract, which would be the Swedish law according to Mann's proposition, then the consignee's expectation of applying the United States law would be defeated, since the consignee is not familiar with the Swedish law. This clarifies that in many situations the benefit of applying the proper law of the contract will be only for the carrier. Consequently, in many situations, Mann's proposition would lead the carrier alone, not the shippers or the consignees, to predict the outcome of litigation.

3. Even if we suppose that the above difficulties do not exist and Mann's proposition can be applied in all situations without any problems, his argument still cannot lead the parties to predict the outcome of litigation in all situations. The real problem in Mann's argument is that it ignores the conflicts of interpretations of uniform rules within each country by itself. His proposition assumes that conflicts of interpretations of uniform rules are only among the countries. However, as mentioned in the previous chapter, there are conflicts of interpretations among the United States Circuit Courts, for example, in defining the terms "package" and "unit"[56]. In addition, the United States

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[55] *Id*, at 807.

[56] See the sixth chapter, *supra*, at 135-46 and 150-54.

Circuit Courts, which created the "fair opportunity" doctrine, could not put a standard on what constitutes a fair opportunity[57]. Likewise, as explained earlier in this chapter, there are conflicts among the United States Circuit Courts on whether carriage of containers on-deck constitutes unreasonable deviation[58]. These conflicts of interpretations would not lead the parties to predict the outcome of litigation. In other words, even if the parties' expectations were that the United States law should be applied, the existence of the conflicts of interpretations in such law would not lead them to predict the outcome of litigation.

7.2.3. The Creation of an International Court of Appeals

Recourse to an international court of appeals for all litigation concerning the interpretation of the uniform rules is a possible solution for reducing the conflicts of interpretations of such rules. Some writers[59], in fact, suggest that international uniform interpretations of uniform rules could be achieved by creating an international supreme tribunal. For example, because

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[57] See the sixth chapter, *supra*, at 166.
[58] *Supra*, at 186-89.
[59] See Charles L. Black, "The Bremen, COGSA and the Problem of Conflicting Interpretation", (1973) 6 Vand. J. Transnat'l. L. 365; David Michael Collins, "Admiralty-International Uniformity and the Carriage of Goods by Sea", (1985-1986) 60 Tul. L. Rev. 165 at 202-03; Grant Gilmore and Charles L. Black, *The Law of Admiralty*, (2d ed., 1975) at 191-92; R.J.C. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 Int'l. Comp. L.Q. 450 at 458; Honnold, *Uniform Law For International Sales Under the 1980 United Nations Convention*, (1999) at 95; Robert F. Blomquist, "The Proposed Uniform Law on International Bills of Exchange and Promissory Notes: A Discussion of Some Special and General Problems Reflected in the Form and Content, Choice of Law, and Judicial Interpretation Articles", (1979) 9 Cal. W. Int'l. L.J. 30 at 68.

of the differences between the Hague and Hague-Visby Rules a suggestion is proposed by Black to achieve such uniform interpretations. Black argues that:

> The trouble is that technique for producing uniformity in the world's bill of lading law-the technique of procuring agreement on a text-is fatally defective; a text must be interpreted, and interpretations will surely diverge[60].

According to Black, there is one:

> ...way to insure a satisfactory ongoing approximation to uniformity in the actual working law of ocean bills...The solution would have to be a single international court of appeals, whereto judgments interpreting COGSA [The U.S. COGSA 1936], rendered in the national courts of last resort, could be brought by the nonprevailing party[61].

Black explains that such international court of appeals would exercise a discretionary jurisdiction, but would be authorized to affirm or repeal the judgments of national courts on the points of interpretation[62]. He also states that his suggestion could apply to subjects other than the uniform rules that relate to carriage of goods by sea[63].

Black's suggestion is indeed very effective for achieving international uniform interpretations of uniform rules. It could be argued that may be in the long term this suggestion would be brought in order to reduce conflicts of interpretations significantly. In fact, Black acknowledges that the creation of such court would not be sooner than fifty years, or even a hundred[64]. Of course, this is according to the date when he wrote his Article, which is 1973. One of the obstacles, however, that may face the creation of an international

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[60] *Id*, at 369.
[61] *Supra*, at 370.
[62] *Supra*, at 365.
[63] *Supra*, at 373.
[64] *Supra*, at 373.

court of appeals is that such court limits the states' sovereignty, where the creation of such court gives rise to constitutional objections. This obstacle, however, lacks persuasiveness. Every country in adopting an international convention accepts that it is bound by such convention. The claim that every country is itself the judge of the degree to which it is bound is likely to destroy the aim of the international convention, which is to achieve uniform text and uniform application of such text[65]. Consequently, it is logical to suggest that Black's proposition could be considered as a final step towards achieving international uniform interpretations of uniform rules, while the first step, as this thesis argues, is to impose a duty on the national courts to consider foreign decisions.

It should be noted, however, that Sturley[66] acknowledges that creating an international supreme tribunal goes directly to the heart of the problem of conflicts of interpretations, but at the same time, he argues that it may create greater difficulties in the process. Sturley gives no additional explanation of what these difficulties could be. It could be argued that whatever these difficulties are, at least such a tribunal could significantly reduce conflicts of interpretations of uniform rules. Such an argument could be supported by the European Court of Justice, which plays an effective part in bringing international uniform interpretations among the European national courts.

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[65] See René David, "The International Unification of Private Law", (chapter 5) (1975) 2 Int'l. Enc. Comp. L. 1 at 115.

[66] Michael F. Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 Va. J. Int'l. L. 729 at 801.

7.2.4. The Consultation of an International Organisation

A possible solution of achieving international uniform interpretations of uniform rules is to take an advisory opinion from an international organisation as a guide of interpretation. Sauveplanne in his report to the International Institute for the Unification of Private Law (Unidroit)[67] suggests that in order to achieve international uniform interpretations, an advisory opinion on the meaning of the uniform rules should be compulsory on the judges to be requested from an international organisation. The opinion of the international organisation would be only advisory and would not bind the national courts, but the judges should be forced to suspend their judgment until they receive the opinion of the international organisation on the case before them. Sauveplanne argues that although the advisory opinion would not be binding on the judges, it could make a significant contribution towards ensuring international uniform interpretations of the uniform rules. Judges would not hesitate to accept an interpretation of the uniform rules given by a body, which might well be the best qualified expert on the question of interpretation, especially if the advisory opinion was properly reasoned and took into account the opinions expressed and the decisions issued in other countries.

It is doubtful to argue that Sauveplanne's proposition could significantly reduce the conflicts of interpretations of uniform rules that relate to carriage of goods by sea. Suppose, for example, that the international organisation that should give the advisory opinion was UNCITRAL or CMI.

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[67] Unidroit 1959, at 283.

Of course, it is logical to suggest that one of these organisations should be consulted since the Hague and Hague-Visby Rules were created by the CMI, while the Hamburg Rules were created by UNCITRAL[68]. These organisations are not at present capable to perform the task of giving advisory opinions. Therefore, they would probably resort to experts, especially to those who had written the draft of the Hague, Hague-Visby, or Hamburg Rules. In these circumstances, it is more likely that such experts might reach different opinions. However, even if we suppose that the latter argument lacks persuasiveness, there are still some difficulties that can face Sauveplanne's proposition. The advisory opinion of the international organisation, under Sauveplanne's proposition, should be compulsory on the judges. This obligation not only creates delay and expense but also implicates the international organisation in some circumstances where it is not necessarily competent to intervene.

Let us assume, on the other hand, that Sauveplanne's proposition was voluntary by which it applied by the judges in case of doubt, and in consequence, no delay, expense, and unnecessary intervention might arise. Again, this proposition would still be inadequate for achieving international uniform interpretations of uniform rules. The real problem in Sauveplanne's proposition is that since the opinion of the international organisation would not be binding, this might create another conflict of interpretations other than the conflicts of interpretations that were already among the various countries'

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[68] See the third chapter of this thesis for a detailed discussion on this issue, *supra*, at 40, 44 and 50-51.

decisions. Thus, in many circumstances, instead of bringing uniform interpretations, more conflicts of interpretations were likely to arise since these advisory opinions could be inconsistent with the various countries' decisions.

7.3. The Importance of Considering Foreign Decisions

The previous part of this chapter clarified that the different suggestions of achieving international uniform interpretations of uniform rules, except the suggestion of creating an international court of appeals, are inadequate. This second part, on the other hand, argues that the consideration of foreign decisions plays an important role in achieving such international uniformity. In other words, the consideration of foreign decisions is an adequate solution for such achievement.

As mentioned in the previous chapter, some writers suggest that courts can achieve international uniform interpretations of uniform rules if they consider other foreign decisions, namely recognising the importance of comparative law in achieving international uniform interpretations of uniform rules[69]. For example, Sundberg[70] observes that only the courts have the capability of coping with the developments covered by the uniform rules and the interpretation of uniform rules. Accordingly, he argues that courts could

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[69] See the sixth chapter, *supra*, at 132, Jacob W.F. Sundberg, "A Uniform Interpretation of Uniform Law", (1966) 10 Scandinavian Stud. L. 219 at 237; Berlingieri, *supra* note 1, at 317, 346 and 350; Munday, *supra* note 59, at 458-59; Giles, *Uniform Commercial Law*, (1970) at 194; Erling Selvig, *Unit Limitation of Carrier's Liability*, (1961) at 4; Honnold, *supra* note 59, at 95-98; F.A. Mann, "Documentary Credits and Bretton Woods", (1982) 98 L.Q.R. 526 at 528; Mann, *supra* note 17, at 384-85.

[70] *Id*, at 237.

achieve international uniform interpretations of uniform rules by referring to other countries' decisions relating to the same uniform rules. Similarly, Berlingieri[71] argues that, in practice, international uniform interpretations of uniform rules might only be achieved if the courts of each Contracting State consider the decisions of the courts of other Contracting States on the same issue. He believes that knowledge of other countries' decisions greatly contributes to international uniform interpretations of uniform rules, and therefore, all efforts should be made in order to guarantee the exchange of information among the international community[72]. Likewise, Giles[73] argues that one of the chief factors militating against achieving international uniform interpretations of uniform rules is the failure to consider foreign decisions.

The above writers recognise the importance of considering foreign decisions in achieving international uniform interpretations of uniform rules generally. Our focus, of course, is on the importance of considering foreign decisions in achieving international uniform interpretations of uniform rules that relate to carriage of goods by sea. Unification of the rules relating to international carriage of goods by sea is the object of the Hague, Hague-Visby, and Hamburg Rules. The delegates who drafted the Hague Rules recognized the value of international uniformity by stressing this purpose in the official title: "International convention for the *unification* of certain rules relating to

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[71] *Supra*, at 346.
[72] *Supra*, at 350.
[73] *Supra*, at 194.

bills of lading"[74]. The Hamburg Rules also provide, under Article 3, that "in the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity"[75]. This means that the national courts of all countries should interpret these uniform rules in the same way. It would be absurd that the English courts, for example, should interpret the Hague-Visby Rules differently from the French, German, and Australian courts. This impliedly suggests that the national courts of every country should consider the decisions of other national courts of other countries. It follows that national courts should be able to have recourse to other national courts' decisions. To deny them this recourse would be damage to the unification of the rules, which was the object of signing and enacting these conventions. The United States *Vimar Segurosy Reaseguros, S.A. v M/V Sky Reefer* case, for example, supports this argument, where it stated that:

> In light of the fact that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade"...we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue...Conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern[76].

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[74] (emphasis added) See John F. Wilson and Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea*, V/1/CONV-V/6/CONV, (October 1980) at 1.

[75] *Id*, at 53.

[76] 115 S. Ct. 2322 at 2328, 1995, A.M.C. 1817 at 1823-24 (1995) (quoting *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 at 301, 1959, A.M.C. 879 at 882 (1959)).

Consequently, this indicates that the belief of considering foreign decisions as a significant contribution to achieve international uniform interpretations is not only suggested by commentators and courts but also suggested by the uniform rules themselves. In other words, the Hague, Hague-Visby, and Hamburg Rules indeed suggest that the national courts should consider each other's decisions.

The previous chapter of this thesis examined and analysed how and why the consideration of foreign decisions is a significant factor in reducing conflicts of interpretations of uniform rules that relate to carriage of goods by sea. This raises several questions: What are the difficulties in considering foreign decisions? Could these difficulties be handled? If the answer to the latter question is yes: what are the procedures of considering foreign decisions? To these questions, it is now necessary to turn.

7.3.1. Difficulties in Considering Foreign Decisions

Several obstacles may confront the national courts in considering foreign decisions when dealing with the interpretation of uniform rules, or the statutes incorporating such rules. Collection of information on foreign decisions may be difficult to obtain in many countries. Even if such collection was available, judges might not be ready or well prepared to study foreign decisions. It is, therefore, difficult to say exactly how much impact foreign decisions will have in litigation. In addition, national courts, which have a civil law background, may tend to give greater regard to other civil law judicial decisions than to common law judicial decisions, and vice versa.

These obstacles, and how they could be handled, are explained below accordingly.

7.3.1.1. The Difficulty of Accessing Foreign Decisions

Giles[77] argues that it would be wrong to blame the judges for the failure to consider foreign decisions, since many materials or references are hardly attainable. In other words, Giles acknowledges that there are difficulties in accessing foreign decisions. In fact, in the past, it was difficult to obtain and evaluate foreign decisions, since they were reported in unknown languages. Special measures, however, have appeared to meet this problem.

The task of gathering materials dealing with decisions applying uniform rules is facilitated by international organisations, especially concerned with particular uniform rules. The International Institute For the Unification of Private Law (UNIDROIT), for example, has performed a facility to the public by publishing cases interpreting important conventions in relation to private law. This facility has been performed as follows: from 1956, UNIDROIT published decisions interpreting conventions in its Yearbook, from 1960 in Uniform Law Cases, and from 1973 in UNIDROIT's Uniform Law Review[78]. Moreover, the United Nations Commission on International Trade Law (UNCITRAL)[79], at its 1988 session, established procedures to collect and disseminate decisions applying conventions, including the Hamburg Rules

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[77] *Supra* note 69, at 194.

[78] UNIDROIT Publications, from the Internet: http://www.unidroit.org/english/publications/main.htm (accessed: 20/5/2001).

[79] UNCITRAL Yearbook, Vol. XIX: 1988, at 15-16 and 130-136.

1978, emanated from its work[80]. Each Member State that is a party to the Convention in question is requested to designate a "national correspondent" to obtain and send to the UNCITRAL Secretariat the full text of the decisions in their original languages, and in consequence the Secretariat will make these decisions attainable to the public[81]. The Commission observed that the publication of these decisions in full and in the six official languages of the United Nations would far exceed the resources available to the Secretariat. Thus, the "national correspondents" are requested to prepare abstracts of their countries' decisions in one of the official languages, and in consequence, the United Nations translate these abstracts into the other official languages as part of the regular documentation of the Commission. These abstracts could be initially included in an annual report and later in reports that are more frequent. The Commission also noted that it would be desirable for commercial publishers in the various countries to publish original decisions in full, regardless of whether they were in one of the official languages of the United Nations[82]. Consequently, the Commission explained that:

> Information on the application and interpretation of the international text would help to further the desired uniformity in application and would be of general informational use to judges, arbitrators, lawyers and parties to business transactions[83].

Considerable weight should also be given to one of the new technological developments regarding gathering legal information, which is

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[80] This system also extends to model laws, such as UNCITRAL Model Law on International Commercial Arbitration.
[81] *Supra*, at 15.
[82] *Supra*, at 16.
[83] *Supra*, at 15.

the Internet. This large electronic web contains unlimited information regarding legal matters, and already facilitates accession to the judicial decisions of various countries. The Comité Maritime International (CMI) Singapore Conference 2001, for example, indicated there are possible measures, which can be taken by the CMI to achieve international uniform implementation and interpretation of international conventions. One of these measures is to establish on the CMI Website of a database of the decisions of the national courts of the States of member associations and of other State parties on the interpretation of international maritime conventions. Since the beginning of the year 2000, Professor Francesco Berlingieri started gathering and publishing in his journal *Il Diritto Marittimo* summaries in the English language of various decisions on the interpretation of international maritime conventions. At present, Professor Berlingieri has made available to the CMI all the material published so far. The CMI suggests that the cooperation of all National Associations is very important to keep the database up to date. The CMI, therefore, requests the National Associations to kindly correspond to Professor Berlingieri, at his e-mail addresses, the text of all their national courts' decisions that relate to the interpretation of international maritime conventions. If these decisions are in languages other than English, a summary in English should possibly be provided[84].

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[84] See Comité Maritime International, from the Internet: http://comitemaritime.org/jurisp/ju_intro.html (accessed: 10/9/2001).

Furthermore, Honnold[85] argues that international scholarly writing should be referred to as another aid for reporting and analysing the decisions of various countries in relation to uniform rules. The problem, however, in this argument is that it necessitates weighing the standing, reputation, and expertise of the writers, since many writers may misinterpret the decisions, even of their own country. Such weighing might be impossible in many situations; where usually the judges are not familiar with writers.

In conclusion, accessing foreign decisions in recent days is not as difficult as it was in the past since there are new technical developments for gathering legal information, such as the Internet, and several international organisations, such as UNCITRAL, who are willing to make the accession to foreign decisions much easier and in different languages.

7.3.1.2. The Difficulty of Preparing the Judges to Study Foreign Decisions

Giles[86] argues that even if foreign decisions are attainable, judges are not well prepared for studying foreign legal systems; where he states that:

> The proportion of a judge's work devoted to uniform law is very small compared with the bulk of his work, which deals with purely municipal rules. Considering this and the work load of judges little time and energy is left for general study of foreign legal systems, and the same applies of course to counsel, especially in jurisdictions where their function of providers of precedents is great[87].

This statement impliedly suggests that since judges may have little time and energy to refer to foreign decisions, then delay and difficulties in examining

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[85] Honnold, *supra* note 59, at 96.
[86] *Supra* note 69, at 194.
[87] *Id.*

foreign decisions occur. It is not logical, however, to argue that judges will always face delay and difficulties in examining foreign decisions. If national courts, in dealing with the interpretation of uniform rules or statutes incorporating such rules, consider foreign decisions, then this may reduce the consideration of municipal rules; where judges usually give to their municipal rules heavy weight. In other words, the acceptance of considering foreign decisions by national courts may, to some extent, reduce the impact of domestic law in the interpretation of uniform rules. There is no logical reason to say that judges will always give heavy weight to their municipal rules in their interpretation, even if they accept to consider foreign decisions. The consideration of foreign decisions may make the national courts recognise that their interpretation shall be in conformity with other national courts. Such recognition, therefore, may lead the national courts to give weight to foreign decisions, at least, as much as they give weight to their municipal rules.

Some measures also can help the judges to be well prepared to study foreign decisions. For example, the United Nations Commission on International Trade Law (UNCITRAL)[88], at its 1988 session, considered a proposal to establish a permanent editorial board. The board would proceed to a comparative analysis of the decisions, which had been collected by the Commission, and report periodically to the Commission such analysis. The reports should evidence, for example, the existence of uniformity or divergence in the interpretation of a Convention. Such reports would be substantial aid for judges to study and analyse foreign decisions, and in

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[88] UNCITRAL Yearbook, Vol. XIX: 1988, at 16.

consequence, they may save time and effort in examining foreign decisions. Unfortunately, after deliberation, the Commission decided, for the time being, not to establish such a board. It was suggested, on the other hand, that this proposal would be reconsidered in the light of experience gathered in the collection and dissemination of decisions.

7.3.1.3. The Difficulty of Knowing What Exactly the Impact of Foreign Decisions

Both commentators and courts acknowledge that it is difficult to know what exactly the impact of foreign decisions will be in litigation. As mentioned earlier in this chapter[89], Lord Wilberforce and Lord Diplock in *Fothergill v. Monarch Airlines*[90] explained that considering foreign decisions depends on different factors: whether the decisions are held by the highest courts; whether the decisions are binding; whether the process of law reporting varies; whether the facts of the decisions are examined carefully. Lord Diplock observed that an English court's decision, for example, would not foster international uniformity of interpretation if it were in conflict with a French court of appeal's decision, where such French decision would not be binding on other French courts. The French court of appeal's decision might be inconsistent with another unreported French court of appeal's decision, and could be superseded by a subsequent Court of Cassation's decision, which would have binding effect on lower courts in France. Indeed, such observation

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[89] *Supra*, at 186.
[90] [1981] A.C. 251 at 275-76 and 284.

explains that it is difficult to know the exact impact of foreign decisions in litigation.

Because of the uncertainty of knowing the exact impact of foreign decisions in litigation, some writers refuse to accept the idea that considering foreign decisions is an efficient solution for reducing conflicts of interpretation. Black[91], for example, explains that if national courts considered foreign decisions, then judges in all countries might at least be able to interpret uniform rules in the light of the fact that such uniform rules meant to achieve international uniformity. However, he states that he could not find any American case regarding carriage of goods by sea that is influenced by the fact that uniform rules meant to achieve international uniformity. Therefore, he argues that considering foreign decisions is not enough for solving the problem of conflicts of interpretations of uniform rules. Sundberg[92], however, while acknowledging that it is difficult to know what exactly the impact of foreign decisions will be in litigation, argues that since many courts quote foreign decisions, then presumably these foreign decisions have some impact on the reasoning of the courts[93].

It is possible to suggest, on the other hand, that some measures should be taken to guarantee that foreign decisions have an impact in litigation.

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[91] *Supra* note 59, at 369-70.
[92] *Supra* note 69, at 137-38.
[93] Munday also argues that English courts in relation to uniform rules have referred to foreign decisions from time to time (citing, for example, the English case: *Fothergill v. Monarch Airlines*, [1981] A.C. 251). *Supra* note 59, at 459.

David[94], for example, suggests that an international organisation could draw up periodically general reports, based on reports regarding the interpretation and application of the uniform rules, which the countries would undertake to provide periodically. These reports, according to David, would highlight the conflicts of interpretations of uniform rules, and might go further and explain in which countries the uniform rules were or were not correctly applied. In consequence, he observes that it would be possible to request the authorities in every country to take the steps necessary to avoid wrong interpretations of the uniform rules from being repeated. Such suggestion might guarantee the impact of foreign decisions in litigation. David, on the other hand, acknowledges that many countries might not welcome such suggestion since they might consider it as an attack on their sovereignty. In fact, many countries would be hesitant to accept any control over the way in which they apply the uniform rules. Therefore, David suggests that it would be better to only make it known to the countries how the uniform rules are understood and interpreted in different countries. He argues that perhaps this kind of documentation would make the judges be influenced and guided by foreign decisions applying the uniform rules in question. This kind of method would indeed in no way attack on the countries' sovereignty, but still there would be no guarantee that the national courts would at least consider this kind of documentation. In addition, it is not understandable, according to David's suggestion, how these reports would know which decisions were or were not correct in applying the uniform rules.

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[94] *Supra* note 65, at 109.

On the other hand, an efficient measure that may increase the impact of foreign decisions in litigation is to oblige the courts to consider foreign decisions. This idea, and how it could be achieved, is explained later in this chapter[95]. At this stage it needs only be said that obliging the courts to consider foreign decisions may make the judges recognise the internationality of the uniform rules, and thus interpret them in an international way. This suggests that courts should be influenced by foreign decisions in order to interpret the uniform rules in an international way. However, it should be noted, as mentioned in the previous chapter, that the important factor in considering foreign decisions is the method by which foreign decisions had been interpreted[96]. Some judges might look solely to the ordinary meaning of the words of uniform rules, while others might consider the purpose of the provisions or of the uniform rules themselves. Such divergence plays an important role in whether to consider foreign decisions or not. Consequently, it should be admitted that whether the national courts would consider foreign decisions in their decisions or not is a hard thing to predict, nevertheless, that does not mean that considering foreign decisions would not effect the national courts in deciding their cases, and this was explained in detail in the previous chapter.

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[95] *Infra*, at 225-27.
[96] See the sixth chapter, *supra*, at 173-74.

7.3.1.4. The Difficulty of Considering Common Law Decisions By Civil Law Courts and Vice Versa

Blomquist[97] states that achieving international uniform interpretations of uniform rules by considering foreign decisions is not a realistic solution. He argues that common law courts will tend to give greater attention to other common law foreign decisions than to civil law foreign decisions, and vice versa. With great respect, Blomquist's suggestion is not a common sense argument. There is much to be said in favour of a conclusion in the opposite sense.

Assume that common law courts will tend to give greater attention to other common law foreign decisions than to civil law foreign decisions, and vice versa. In practice, this assumption does not affect our proposition, which is that considering foreign decisions significantly reduce the conflicts of interpretations of uniform rules. It is clear that it was not our intention in this thesis to argue that our proposition would eliminate completely all conflicts of interpretations. Our proposition, however, aims to narrow the various countries' judicial decisions as close as possible with the hope to unify the international interpretations of uniform rules as much as possible. Consequently, it would be logical to argue that there is nothing wrong with the practice of whether to give more attention to common law or to civil law judicial decisions. At least, such practice, if happened, would also contribute in achieving international uniform interpretations of uniform rules.

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[97] *Supra* note 69, at 67-68.

It is satisfactory to note, on the other hand, that, from time to time, common law courts' decisions, for example, have considered other common law and civil law countries' decisions. For example, the *"River Gurara"*[98] case, which mentioned in the fifth chapter, was decided by the English courts in relation to the application of the Hague Rules 1924 to containers[99]. Since the provisions of the Hague Rules 1924 do not deal with the issue of containerisation, the English court traced the development of the issue in the United States, and also referred to Canadian, Australian, French, and Netherlands cases[100]. The English court adopted the decisions, which was reached by the American, Canadian, Australian, French and Netherlands courts, in order to achieve international uniformity. The English courts, in consequence, not only followed common law countries' decisions but also civil law countries' decisions.

7.3.2. How Should the National Courts Consider Foreign Decisions?

There are general points that should be discussed to clarify how national courts should consider foreign decisions of uniform rules that relate to carriage of goods by sea. These points are explained below in detail.

(1) We propose, in this thesis, that national courts should be obliged to consider foreign decisions in interpreting uniform rules. It is important to recognise that we are not proposing that national courts should be obliged to follow foreign decisions. To oblige national courts to follow foreign decisions

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[98] [1996] 2 Lloyd's Rep. 53.
[99] See the fifth chapter, *supra*, at 120.
[100] *Supra*, at 59-61.

means that foreign law would be binding. Such obligation raises the following question: will the national courts accept to be bound in following foreign decisions? It is doubtful that the national courts will welcome such idea. National courts of both common law and civil law countries may not accept that an unknown or unfamiliar foreign law controls their interpretation and application of the uniform rules, or the statutes incorporating such rules. Many countries may consider such idea as an attack to their sovereignty. In addition, it should be borne in mind that obliging the national courts to follow foreign decisions means that we are applying the common law system, namely binding precedents, but in an international way, and this may, and almost certainly, be rejected by the civil law countries.

On the other hand, if the national courts of both common law and civil law countries accept to be bound in following foreign decisions, it is doubtful that such idea will lead to international uniform interpretations of uniform rules. In many cases, this can lead to conflicts of interpretations. For example, as mentioned in the previous chapter, the Canadian Supreme Court in *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*[101], refused to follow the United States' decisions in defining the term "unit", under Article 4(5) of the Hague Rules 1924, as a "customary freight unit"[102]. Instead, the Supreme Court followed the United Kingdom authorities in defining the term "unit" as a shipping unit. If the Canadian Supreme Court was obliged to follow foreign decisions, then the question that might arise is: should the Canadian Supreme

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[101] [1973] 2 Lloyd's Rep. 469.
[102] See the sixth chapter, *supra*, at 157-58.

Court follow the United States' decisions or should it follow the United Kingdom authorities? Whether it followed the United States' decisions or the United Kingdom authorities, the Canadian Supreme Court might face criticism. Some national courts might find that the Canadian Supreme Court should have followed the United Kingdom authorities while others might argue that it should have followed the United States' decisions. Such confusion would lead to more conflicts of interpretations of uniform rules. If, on the other hand, the Canadian Supreme Court was obliged to consider foreign decisions then this would give such a court a choice to consider the most persuasive authority, and this is exactly what the Canadian Supreme Court did. The Canadian Supreme Court's decision in the *Falconbridge* case is only a very simple example that can illustrate the confusion that might arise if the national courts were obliged to follow foreign decisions. In many cases, the confusion would be more than the latter example; where a national court is faced, for example, with more than five different interpretations in different countries[103].

Consequently, following foreign decisions should be a choice not an obligation that the national courts should practice. When the national courts are not obliged to follow foreign decisions, but to consider such decisions, at least the judges may recognise that the uniform rules shall be interpreted in an international way, instead of using their own domestic methods of interpretation. There would, therefore, be some hope of obtaining the

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[103] See, for example, *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*, [1977] 1 W.L.R. 625 at 646.

international uniformity of interpretation desirable for the uniform rules that relate to carriage of goods by sea.

(2) As mentioned in the third chapter of this thesis, at present, there are three uniform rules that govern carriage of goods by sea, namely the Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules 1978, where different countries adopted these conventions[104]. This raises the following question: should the national courts, which adopted the Hague Rules for example, consider foreign decisions of other national courts that adopted the Hague-Visby or Hamburg Rules, and vice versa? The Hague-Visby Rules are an update to the Hague Rules, and therefore, many provisions in both conventions are similar. However, the Hague Rules do not deal with the containerisation and palletisation subjects for example, while the Hague-Visby Rules and even the Hamburg Rules deal with such subjects. Thus, there are differences and similarities in the provisions of these conventions[105]. As will be discussed in detail later in this chapter[106], this present situation is not satisfactory and desperately needs creation of new uniform rules governing the law that relates to carriage of goods by sea. If this happened, then there will be no need to answer the above question. However, for the present time, it is

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[104] See the third chapter, *supra*, at 41-43, 46-48 and 52-53.

[105] The differences and similarities among these conventions have been analysed and discussed by many writers. See, for example, Robert Force, "A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)", (1996) 70 Tul. L. Rev. 2051; R. Glenn Bauer, "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules-A Case by Case Analysis", (1993) 24 J.M.L.C. 53; John O. Honnold, "Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg?", (1993) 24 J.M.L.C. 75; A.J. Waldron, "The Hamburg Rules-A Boondoggle For Lawyers?", [1991] J.B.L. 305.

[106] *Infra*, at 225-27.

worthwhile to answer such question. Our argument here, therefore, is that it is valuable if the national courts, which adopted the Hague Rules for example, are obliged to consider foreign decisions of other national courts that adopted the Hague-Visby or Hamburg Rules, but as long as such consideration does not lead to a different result. This can be explained by the following United States decision.

In *Vegas v. Compania Anonima Venezolana*[107], the shipper consolidated 109 cartons of automobile brake parts in two master cartons built on pallets. The bill of lading described the goods as "Palletised master cartons, STC [said to contain]: 109 cartons: auto brake parts". In reaching its decision, the Eleventh Circuit followed *Allstate Insurance Co. v. Inversiones Navieras Imparca, C.A.*[108]. In the latter case, the Fifth Circuit stated that if the shipper places his packages of goods in a container, and discloses the number of such packages in the bill of lading, then each package or unit within the container, not the container itself, constitutes one package for the limitation purpose. Therefore, the Eleventh Circuit found that there is no distinction between palletised master cartons and containers for the purposes of limitation. In other words, the rule, which applies to containers, must apply on pallets. The Eleventh Circuit supported its conclusion by referring to Article 4(5)(c) of the Hague-Visby Rules, which provides that:

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[107] 720 F.2d 629 (11th Cir. 1983). See also, for example, *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006 at 1015 (2d Cir. 1985); *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076 at 1080 (11th Cir. 1985). See also the Australian case, *P.S. Chellaram & Co. Ltd. v. China Ocean Shipping Co.*, [1988] 1 Lloyd's Rep. 413, and the English case, *The River Gurara*, [1996] 2 Lloyd's Rep. 53.

[108] 646 F.2d 169 (5th Cir. 1981).

> Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit[109].

It is obvious that this Article interchangeably uses the words "container, pallet or similar article of transport". The Eleventh Circuit argued that:

> Looking solely to this provision of the protocol [Article 4(5) of the Hague-Visby Rules 1968] we perceive no basis for any reasoned distinction between a container filled with individual listed packages or cartons and a palletised master carton similarly filled[110].

Accordingly, the Eleventh Circuit held that the 109 cartons, and not the pallets, are the packages for the purposes of limitation, and in consequence applied the $500 limitation to each carton.

Although the court, in the *Vegas* case, was applying Article 4(5) of the Hague Rules 1924, it supported its conclusion by referring to the same Article under the Hague-Visby Rules 1968. This impliedly suggests that courts might not only consider the provisions of other conventions but also foreign decisions that relate to such conventions. The court was so careful in referring to Article 4(5) of the Hague-Visby Rules. The court just referred to Article 4(5) of the Hague-Visby Rules in relation to whether such Article applies on pallets or not. In so doing, the court was cautious in not considering such Article as a whole. If the court, on the other hand, have had considered Article 4(5) of the Hague-Visby Rules as a whole, then it would have raised the carrier's liability to more than $500 per carton. Such increase would be wrong

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[109] See Wilson & Debattista, *supra* note 74, at 7.
[110] *Supra*, at 630-31.

since the United States did not adopt the Hague-Visby Rules 1968, which increase the amount of the carrier's liability. Such increase would also run against the expectations of the parties. The carrier, for example, expects that his liability under the United States COGSA, which incorporated the Hague Rules, is $500 per package or unit. It would be wrong, therefore, to suddenly increase the amount of the carrier's liability by applying, for example, the Hague-Visby Rules. This kind of application would surely run against one of the aims of unifying the rules that relate to carriage of goods by sea, which is to meet the expectations of the parties.

It should be borne in mind, however, that the court, in the *Vegas* case, was not acting as a legislator in referring to Article 4(5) of the Hague-Visby Rules. Instead, the court was only clarifying and supporting its decision by such reference. There is nothing wrong with the idea that courts should refer to other conventions or foreign decisions that relate to such conventions. In many cases, this may help the courts to clarify and support their reasoning. The Hague and Hague-Visby Rules, for example, do not clarify whether the term "unit" under Article 4(5) is a shipping unit or a customary freight unit. The Hamburg Rules, on the other hand, clarify that the term "unit" means a shipping unit. In addition, the Hague and Hague-Visby Rules do not deal with carriage of containers on-deck, while the Hamburg Rules deal with this issue. When dealing with the latter examples, courts may support their reasoning by referring to the Hamburg Rules or foreign decisions that apply such rules, but as long as such consideration does not effect the expectations of the parties.

(3) In order to reach international uniform interpretations of uniform rules among the countries, we also need to have such uniformity in every country itself. One can frequently see several systems in operation in the same country. The United States, for example, have a federal system. The United States Circuit Courts are not obliged to follow each other's decisions. Each Circuit Court has its own system and is only obliged to follow its own precedent. In dealing with the interpretation of the United States Carriage of Goods by Sea Act, as discussed in the fifth and sixth chapters, there are conflicts of interpretations among the Circuit Courts[111]. Consequently, how could we achieve uniform interpretations among the Circuit Courts in the United States? Since every Circuit Court is not obliged to consider other Circuit Courts' decisions, this implies that every Circuit Court considers the other Circuit Courts' decisions as being foreign decisions. It is, therefore, logical to argue that in order to achieve uniform interpretations of uniform rules in the United States, every Circuit Court should be obliged to consider other Circuit Courts' decisions. In other words, our proposition in this thesis should be applied domestically in countries such as the United States, since it has a federal system.

(4) The above arguments, in this section, clarify that national courts should be obliged to consider foreign decisions. This raises the question: how could we oblige the national courts to consider foreign decisions? It is logical to suggest that if in the future a new convention governing carriage of goods by sea

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[111] See the fifth chapter, *supra*, at 99-102, 106-113 and 115-18; the sixth chapter, *supra*, at 135-46, 150-55 and 164-72.

appears, the drafters can add a provision, which states that for the purpose of the interpretation of this Convention, every Contracting State shall consider other decisions of other Contracting States. The best example for this issue is Section 39(1)(c) of the Constitution of the Republic of South Africa, which provides that: "when interpreting the Bill of Rights, a court, tribunal or forum... may consider foreign law"[112].

As mentioned in the third chapter, the Comité Maritime International (CMI) created the Hague and Hague-Visby Rules, while the Hamburg Rules were created by UNCITRAL[113]. Accordingly, the cooperation between the CMI and UNCITRAL and even other international organisations for producing a comprehensive convention relating to carriage of goods by sea can eliminate the result of the appearance of several conventions in the future that relate to the same subject. Perhaps this suggestion leads to the creation of uniform rules that may fill the gaps, which are in the Hague, Hague-Visby and Hamburg Rules, and accordingly may lead the world community to adopt it. Of course, it is possible, on the other hand, that such new convention would be adopted by few nations, which would then lead to another convention beside the Hague, Hague-Visby and Hamburg Rules. Still, the present situation is not satisfactory.

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[112] Constitution of the Republic of South Africa (as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly), Chapter 2, Bills of Rights, Section 39(1)(c), from the Internet: http://www.polity.org.za/govdocs/constitution/saconst02.html#39 (accessed: 20/7/2001).

[113] See the third chapter, *supra*, at 40, 44 and 50-51.

Unfortunately, as mentioned in the third chapter, at present, the CMI and UNCITRAL gave up the proposition of creating a new convention governing carriage of goods by sea[114]. In spite of this matter, that does not mean that the nations should also give up the issue. Instead, the nations should press on the CMI and UNCITRAL in order to re-evaluate the issue, as the Canadian Maritime Law Association did in 1999, which mentioned in the third chapter[115]. The present position desperately needs a co-operation between the CMI and UNCITRAL for creating a new convention covering the law that relates to carriage of goods by sea. On the other hand, there is a hope elsewhere for creating a new convention on the carriage of goods by sea horizon. A group of lawyers from nine European countries, who have no attachment to shipowners, shippers, cargo insurers or P & I, are preparing an intermodal regime, which will be the basis of a Directive of the European Union. This project will start out as non-mandatory and will be such that carriers, outside the European Union, could join in, too. The project demonstrates that there is a will to unify the law that relate to carriage of goods by sea in the European Union, and may extends to the rest of the world[116].

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[114] See the third chapter, *supra*, at 55-56.
[115] *Supra*, at 56.
[116] See William Tetley, "Support Griggs: Plan of Action for the CMI", (from Fairplay Magazine, October 22, 1998) from the Internet: http://www.admiraltylaw.com/tetley/fairplay.htm (accessed: 22/11/1999).

7.4. Conclusion

Some measures should be brought to achieve international uniform interpretations of uniform rules that relate to carriage of goods by sea. In fact, the range of possibilities of such achievement is wide. Some measures, such as developing uniform principles and rules of interpretation for the uniform rules, are hardly convincing or adequate. The text, the context, and the purpose are usually the most important elements in the interpretation of uniform rules, but they do not always lead to clear results, nor is their priority undisputed. Of course, some other rules, such as the preparatory work of the uniform rules, can come into play or are even considered more important by some writers and courts[117]. Other measures, such as applying the *lex causae*, and in particular the proper law of the contract, do little to avoid conflicts of interpretations, since they do not recognise the conflicts that arise in every country by its own. Such measures, of course, ignore the importance of achieving international uniform interpretations of uniform rules, and concentrate on avoiding the conflicts of interpretations in order to meet the expectations of the parties. Further measures, such as taking an advisory opinion form a competent international organisation as a guide of interpretation, may create more conflicts beside the national courts' conflicts of interpretations. Radical measures, such as creating an international court of appeals for construing the uniform rules, are an effective solution for achieving international uniform interpretations of uniform rules. Such

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[117] See, for example, Honnold, *supra* note 59, at 89-90; *Fothergill v. Monarch Airlines*, [1981] A.C. 251.

measures have not been proposed or evaluated by the international shipping community or even international organisations. Therefore, it could be argued that may be in the long term such measures would be brought to solve the problem of conflicts of interpretations.

The consideration of foreign decisions, on the other hand, is a significant factor in achieving international uniform interpretations of uniform rules that relate to carriage of goods by sea. Access to foreign decisions nowadays can be obtained by various methods. The publications of foreign decisions to date have been useful, but primarily national courts have not exercised their influence, in many cases. The advances of using foreign decisions by the national courts of both common law and civil law countries may result in the reduction, or even the abandonment, of referring to the domestic methods of interpretation. Such advances could be achieved by obliging the national courts to consider foreign decisions. The key point that should be borne in mind in this context is that the importance of the recognition of achieving international uniform interpretations of uniform rules that relate to carriage of goods by sea is as much as and may be more than the drafting of such rules.

CHAPTER VIII: CONCLUSION

In practice, the international conventions that relate to carriage of goods by sea have not been interpreted uniformly among the various national courts of the countries that implemented them. The subject of containerisation covers many cases that relate to such conflicts. Among these conflicts of interpretations are whether the container is the package or its contents are the packages, and whether carriage of containers on-deck deprives the carrier from limiting his liability. The subject of containerisation also has an indirect influence on several conflicts that already existed in relation to the "fair opportunity" doctrine and the "customary freight unit" concept. These conflicts of interpretations increase transaction costs and litigation. The huge financial differences in determining the meaning of the term package, and in deciding whether the limitation clauses should be applied on the on-deck carriage of containers, defeat the economic purpose of the limitation clauses of the Hague, Hague-Visby and Hamburg Rules in reducing transaction costs. Such differences, in consequence, increase conflicts of interpretations and therefore litigation increases. In addition, the appearance of containerisation increases the conflicts of interpretations that relate to the "fair opportunity" doctrine and the "customary freight unit" concept. This means, in consequence, that litigation increases. The increase in transaction costs and litigation because of the conflicts of interpretations of international conventions runs against the argument that international uniformity is valuable. One, however, must be realistic and resigned to the fact that there will always be a tendency for the national courts of the various countries to put

differing interpretations upon international conventions, but at the same time, it is possible to reduce the scope for such divergence significantly.

Many attempts have been made by national courts and commentators to achieve international uniform interpretations of international conventions that relate specifically to carriage of goods by sea, and generally to other subjects. Most of these continual attempts create nothing but total unpredictability and uncertainty, and therefore, they are far away from reaching substantive uniformity. Many are unworkable and unrealistic. They do little to avoid conflicts of interpretations, and even some may create more conflicts. In sum, most of these solutions are hardly convincing or adequate.

With proper intention given to how the national courts of the various countries interpret international conventions that relate to carriage of goods by sea, the consideration of comparative law is a significant factor in reducing conflicts of interpretations of such conventions. At present and at least for the near future, the consideration of foreign decisions by the national courts is convincing and adequate in reducing conflicts of interpretations significantly. When the national courts of the various countries interpret international conventions, they should investigate the international understanding of such conventions. In doing so, they should consider the interpretation of these conventions by other foreign decisions. Such consideration, indeed, brings many advantages for the national courts in reaching their decisions. The consideration of foreign decisions assists the national courts to formulate questions regarding the reasons behind the divergence between domestic interpretations and foreign interpretations of the issue in question. In addition,

this consideration gives the national courts source of possible solutions to the issue in question. When the national courts evaluate these solutions, they may decide to follow the domestic interpretations or the foreign interpretations in relation to the issue before them. The consideration of foreign decisions may also helps the national courts to use such decisions in justifying their own decisions.

The consideration of foreign decisions, on the other hand, requires more than a brief citation of foreign decisions. The brief and the careless examination and evaluation of foreign decisions may, in many cases, create a new round of conflicts of interpretations, and in consequence, inconsistent decisions among the various national courts. In considering foreign decisions, therefore, the national courts should put an effort in examining and evaluating these decisions carefully. The use of foreign decisions as a ready-made solution for solving the issue before the national courts also may, in many cases, lead to inconsistent decisions. This adds little or perhaps nothing to the recognition of the international understanding of the international conventions. The detailed, the careful, and the sensible examination and evaluation of foreign decisions, therefore, are the key point in helping the national courts of the various countries to reach international uniform interpretations of international conventions. The probability of reaching such uniform interpretations can be increase if the national courts examine and evaluate more than one country's decisions. The more examination and evaluation of other countries' decisions the better international uniformity would be served. In other words, many conflicts of interpretations of international conventions

can undoubtedly be avoided when the national courts examine and evaluate several countries' decisions.

The idea of considering comparative law by the national courts is realistic. Access to foreign decisions nowadays can be obtained by various methods. Several international organisations, for example, are at present collecting the decisions of the various countries in relation to international conventions in order to be accessed by the Internet. The capability of accessing foreign decisions, however, is not enough for encouraging the national courts of the various countries to examine and evaluate such decisions when dealing with the interpretation of international conventions. In fact, the publications of foreign decisions to date have been useful, but the national courts have not referred to such decisions in many cases. Therefore, there should be an obligation on the national courts to consider foreign decisions. The rational solution would be that if in the future a new convention on the subject of carriage of goods by sea occurred, the drafters could add a provision stating that every Contracting State must consider the other decisions of other Contracting States.

The cooperation among the CMI, UNCITRAL, and other international organisations may result in producing a comprehensive new convention that relate to carriage of goods by sea. In fact, this should be done specifically by the CMI and UNCITRAL since the CMI created the Hague and Hague-Visby Rules, while UNCITRAL created the Hamburg Rules. This, in consequence, may avoid the appearance of several conventions in the future that relate to the law of carriage of goods by sea. It is probable, however, that such new

convention would be ignored and only adopted by few countries, where this would lead to the creation of a fourth convention beside the Hague, Hague-Visby and Hamburg Rules. Nevertheless, the present position of the unification of the law of carriage of goods by sea is not satisfactory. Each of the Hague, Hague-Visby and Hamburg Rules is at present implemented by different countries. This situation represents partial uniformity to the law of carriage of goods by sea so that such law, to a certain degree, is neither uniform nor universal.

At present, the CMI and UNCITRAL gave up the proposition of creating a new convention that relate to the law of carriage of goods by sea. Instead, they decided to create a broadly based convention on aspects of marine transport. It is worthwhile, on the other hand, to mention that, at present, there is in the United States a proposed Senate Carriage of Goods by Sea Act 1999 (USCOGSA 1999)[1]. This proposed Act is a combination of Hague-Visby, Hamburg, and new rules. It is an attempt to harmonise the Hague-Visby and Hamburg Rules, although primarily based on the Hague-Visby Rules[2]. It deals with the subject of containerisation in a very similar way to the Hague-Visby and Hamburg Rules, but adds new provisions on

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[1] See William Tetley, "Law Conventions Trampled: US COGSA Sails Its Own Quirky Course", (From Fairplay Magazine, October 15, (1998)) from the Internet: http://www.admiraltylaw.com/tetley/fairplay.htm (accessed: 22/11/1999).

[2] This proposal represents a commercial compromise in which shippers and carriers made real concessions to achieve such an agreement. No one was entirely happy with the results, but everyone agreed that the proposal represents the only reasonable solution for the foreseeable future. See Michael F. Sturley, "Proposed Amendments to the US Carriage of Goods by Sea Act: A Response to English Criticisms", [1999] L.M.C.L.Q. 519 at 520-21.

containerisation. In addition, this proposed Act, unlike the present situation under the USCOGSA 1936, does not consider the "fair opportunity" doctrine and the "customary freight unit" concept. In this context, McDaniel observes that:

> Just this one provision [Section (9) of the new proposed COGSA] will save considerable claims expense since the cargo interests will no longer be able to defeat the carrier damage limitation with technical arguments such as a claim that there was "no fair opportunity to declare full value" on the carrier bill of lading[3].

Many American commentators[4] agree with the adoption of this new proposal and argue that this proposal will be the leading part for a new international uniform convention on the subject of carriage of goods by sea that will make the world community follow, as it was the case of the Harter Act. The United States' Maritime Law Association (USMLA) created the proposed USCOGSA 1999. It is interesting to note that on May 1996, during the debate of drafting this proposal, Mr Healy observed that:

> I think if the contents of the proposed bill are approved by the Association, it should be submitted to the CMI as a draft convention. Then let the CMI work over it and take what they want, disregard what they do not want, and come up with a convention that we can recommend for ratification by our government[5].

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[3] Michael S. McDaniel, "Emerging U.S. Liability Trends for Freight Forwarders" (21/10/1998) from the Internet: (The Journal of Commerce Online) http://www.joc.com (accessed: 22/11/1999).

[4] See Sturley, *supra* note 2; Charles S. Haight, "Babel Afloat: Some Reflections on Uniformity in Maritime Law", (1997) 28 J.M.L.C. 189; Samuel Robert Mandelbaum, "Creating Uniform World-wide Liability Standards for Sea Carriage Under the Hague, COGSA, Visby and Hamburg Conventions", (1996) 23 Trans. L.J. 471; Chester D. Hooper, "Carriage of Goods and Charter Parties", (1999) 73 Tul. L. Rev. 1697 at 1730.

[5] MLA Doc. No. 723 (May, 3, 1996), at 10885.

While this observation may contribute in encouraging the world community to create a new convention on the subject of carriage of goods by sea, some commentators argue that if the United States' new proposal ever come into force, this will put the United States isolated from the whole world community. Tetley, for example, argues that:

> Of major importance, the different wording of the proposed Senate COGSA'99 will make most American jurisprudence under COGSA 1936 up to the present time redundant. American carriage of goods by sea jurisprudence will no longer be relevant in the rest of the world. Similarly, America will no longer look outward to the jurisprudence of the rest of the world...Internationally, Senate COGSA'99 contains some useful Hague/Visby and Hamburg Rules provisions, but the other particular provisions, apparently adopted in the negotiations with various interests, would seem to put the proposed statute far out of the mainstream of international law on carriage of goods by sea. May one not therefore question whether Senate COGSA'99 fulfils its original purpose which was: " The proposal to amend COGSA is intended to bring the United States into unity with the rest of the maritime nations"...The advantages of Senate COGSA'99 can also be found for the most part in the Hague/Visby Rules and almost completely in the Hamburg Rules. Would it not have been better, had one or other of those Conventions been promoted for adoption by the U.S. Congress, rather than Senate COGSA'99?[6].

In another short article by Tetley[7], he states that he has elicited many letters, faxes, phones and e-mails, from American, British, Belgian, German, Italian, and others lawyers and professors specialized in maritime law, in relation to

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[6] William Tetley, "The Proposed New U.S. COGSA (The important International Consequences)", from the Internet: http://www.admiraltylaw.com/tetley/comment.htm (accessed: 22/11/1999) (quoting MLA Doc. No. 724 of May 3, 1996 at p. 3). See also Allan I. Mendelsohn and Edward Schmeltzer, "U.S. Should Join Trade Partners on Cargo-Damage Limits, from the Internet: (The Journal of Commerce Online) http://www.joc.com (17/11/1998) (accessed: 14/12/1998).

[7] William Tetley, "Comments on the U.S. Senate COGSA' 99", from the Internet: http://www.admiraltylaw.com/tetley/cogsacom.htm (accessed: 22/11/1999).

his various lectures that commented on the United States' new proposal. He explains that all of them agreed and support his criticism to the new proposal.

The amendment of the United States Carriage of Goods by Sea Act (USCOGSA) in the manner the MLA proposed would force the United States government to denounce the widely ratified international convention, known as the Hague Rules 1924, on which the present United States COGSA is based. In doing so, it could be argued that the United States government would close a chapter on one of the very few reasonably successful efforts at bringing some uniformity into the law of carriage of goods by sea. In supporting this argument, in 1995, during the debate between shippers and carriers in drafting the MLA proposal, one criticism had united the opponents on both sides of shippers and carriers. The opponents claimed that since the MLA proposal would only amend the United States COGSA, this would breakdown international uniformity, where such uniformity is essential to the efficient operation of the shipping industry[8]. This leads us to argue that in the interests of efficient global commerce and international uniformity of law, the United States should work with other countries and international organisations to create an effective and uniform international convention on the subject of carriage of goods by sea into the twenty-first century.

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[8] See for example, Dissenting Report of Members of the Committee on Carriage of Goods About Revising the Carriage of Goods by Sea Act (3 April, 1995), reprinted in MLA doc. No. 716, at 10749-50 (5 May, 1995); Letter of Peter D. Fenzel (4 April, 1995), reprinted in MLA doc. No. 716, at 10764-65 (5 May, 1995); and Letter of Prof. Joseph C. Sweeney (3 April, 1995), reprinted in MLA doc. No. 716, at 10766 (5 May, 1995).

The need for uniformity in the law of carriage of goods by sea, and the desire for harmony between the various national courts of the various countries in the interpretation of international conventions regarding carriage of goods by sea, remains persuasive and viable goals. Such goals can certainly be expanded beyond the limits of the law of carriage of goods by sea to many other issues in maritime law and even other subjects. To finish on an optimistic note, comparative law is now available in many countries. We are becoming better informed on foreign law, and more often, we see the national courts considering foreign decisions when they have to interpret international conventions. We will probably never achieve full uniformity, but we must continue to try, by whatever legal or political means seem most promising at that time. There is surely much to be done, but the writer looks forward to see how well we will achieve international uniformity in the law of carriage of goods by sea.

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