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A Critical Analysis of the Uniformity of International Maritime Law and Multimodal Transport Containing a Sea Leg.

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Abstract

The need for uniformity in international maritime law has been long recognised. Each international treaty is drafted and ratified with the intention of drawing the legal rules governing the carriage of goods by sea closer together. This is not always the end result, however, with varying decisions and a plethora of interpretations creating a system of rules and judgements that are as dynamic as the area of law itself. From determining when a certain treaty will apply, to when a carrier will be able to rely on a specific defence, the outcome is not always clear and can change with a simple decision of which legal jurisdiction to issue proceedings in. The effect this has on the protection of carriers can be substantial; circumstances where a carrier may have been able to rely on a certain defence in one jurisdiction may not be sufficient in another. This article will analyse the current rules and determine whether carriers have sufficient protection, whether there is sufficient uniformity in the law governing carriage of goods by sea and what can be done to increase uniformity. The idea of whether an international court of tribunal being created in an attempt to unify and standardise interpretations of the Hague-Visby Rules will also be discussed. Multimodal transport is also an issue; with the presence of treaties governing the individual legs of the journey as well as treaties purporting to govern the whole carriage. As to which treaty is the correct one, uncertainty prevails.

Keywords: Maritime Law, Carriage of Goods, Hague-Visby Rules

Maritime law is governed internationally by a series of treaties. One such treaty is the Hague-Visby Rules which lay down a set of fundamental rules that govern the duties of a carrier and their liabilities should they breach one of those duties. It is because of this that the *Hague-Visby Rules* are, perhaps, the main instrument through which international maritime law is governed from the perspective of the carrier. The Hague-Visby Rules apply compulsorily in English Law to carriage of goods by sea under a bill of lading or other document of title.[1] On the face of it, international maritime law (the *lex maritima*) should, on a basic structural level, be predisposed to self-standardisation; by its very nature, it is a vast network of interconnectivity. Such networks of interconnectivity have often created network-effect-induced standards, and when the law codifies these pre-existing standards, clarity in the market results.[2] Indeed, a standardised body of transnational maritime law has developed through network-related effects but such standardised law can either be an obstacle or an aid in preventing maritime law become fragmented and polycentric.[3]

It is clear that the aim of the Hague-Visby Rules is to 'modernise and harmonise the rules that govern the international carriage of goods involving a sea leg, enhance legal certainty, improve efficiency and commercial predictability in international trade and reduce legal obstacles to international trade among all States'.[4] It has been argued that the Rules have had limited success in this aim, and the writer hopes that the issues which will be raised throughout this article will show that significant questions still remain regarding the interpretation of the Rules. This article will now seek to discuss and analyse the issues around the uniformity of the *lex maritima* generally as well as reaching a conclusion as to whether there can be uniformity in the interpretation and application of the Hague-Visby Rules.

Before one considers the issues that are presented in multimodal transport containing a sea leg, one must consider the issues regarding the interpretation internationally of key aspects of the Hague-Visby Rules. Take, for instance, the issue of when the Hague-Visby Rules will apply; the Rules apply in English Law to contracts of carriage that are covered by a bill of lading or similar document of title.[5] CoGSA also provides that the Rules will apply to any receipt that

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[1] Carriage of Goods by Sea Act 1971 (CoGSA 1971).
[2] Bryan Druzin, 'Towards a Theory of Spontaneous Legal Standardisation' (2017) JIDS 8(3) 403-431.
[3] Ibid.
[4] United Nations General Assembly Resolution 63/122 (2 February 2009) Preamble 4.
[5] CoGSA 1971.

is a non-negotiable document if the contract contained in it or evidenced by it is a contract for the carriage of goods by sea and it expressly or impliedly provides that the Rules shall govern that contract as if the receipt were a bill of lading.[6]

Indeed, it therefore appears that the Rules only apply compulsorily if a bill of lading or similar document of title have been issued. In common law countries, however, it is generally accepted this would be an extremely narrow reading of the Rules.[7] What appears to matter is that the shipper had the *right* to have a bill of lading issued; if he later choses, for whatever reason, to not demand a bill of lading, this is irrelevant.[8] The case of *Kyokuyo* appears to take the generally accepted principles further – not only did the shipper not insist on a bill of lading, he accepted a sea waybill instead.[9] Clearly a sea waybill is not a bill of lading, or even a similar document of title. Nevertheless, Baker J, held the Rules did compulsorily apply since the contract of carriage provided for the issue of a bill of lading – he went further to state that there was no valid reason to distinguish between a shipper who does not exercise their right to a bill of lading and a shipper who accepts another document in lieu of a bill of lading.[10]

Whilst this decision may appear to contrast starkly with Article I (b), given further analysis it may be perfectly sound. If the Rules apply as soon as the contract of carriage provides for a bill of lading, even if the right to demand is not actually exercised, then the way in which the right is not exercised should not matter at all.[11] To go further, the construction of Art.I in *Kyokuyo* has the added benefit of increasing uniformity; the Rules are unique in the family of carriage conventions in that their applicability depends on a specific document type. For example, whilst other treaties and conventions still require a transport document, the absence of such a document does not prevent the convention from applying.[12] Therefore, in applying the Rules to sea waybills issued in lieu of a bill of lading or similar document of title, the Rules move a step closer to the other carriage conventions.[13]

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[6] CoGSA 1971 s.1 (6)(b).
[7] Frank Stevens, 'Scope and Application of the Hague-Visby Rules' (2017) JIML 23 6, 392.
[8] Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402; Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger) [2002] EWCA Civ 694 [2002] 2 Lloyd's Rep 357.
[9] Kyokuyo Co Ltd v A P Moller Maersk [2017] EWHC 654 (Comm) [2017] 2 All ER (Comm) 922.
[10] Ibid at 48.
[11] See, n.7 Stevens.
[12] See, Convention for the Unification of Certain Rules for International Carriage by Air (1999); Uniform Rules concerning the Contract for International Carriage of Goods by Rail (1980).
[13] See, n.7 Stevens.

Across international boundaries, the issue becomes complicated. In the Netherlands, it is generally accepted that the Rules apply if the contract of carriage envisaged the issue of a bill of lading, even if no bill was issued.[14] Whilst the case of a sea waybill *issued instead of* a bill of lading has not yet arisen in Dutch courts, the Rotterdam Court ruled that sea waybills are not considered a bill of lading or similar document of title and the Rules do not apply to carriage under solely sea waybills.[15]

The issue is complicated even more in France, owing to the fact that the authentic French translation of the Rules is not identical to the English translation. The French version refers to 'all similar documents that are a title for the carriage of goods by sea'. The French text therefore refers to similar transport *documents*, and it has been explicitly argued that sea waybills are 'similar transport documents' and thus governed by the Rules. Furthermore, the French position states that the Rules apply even where no bill of lading has been issued.[16] Quite, as the French text is not entirely consistent with the English text, this does raise distinct issues if judges in England begin to consider the jurisprudence of French judges in attempting to increase the uniformity of the interpretation of the Rules.[17]

Internationally, Belgium occupies a unique position when addressing this question. It has been suggested academically that the intention to issue a bill of lading, even if no bill is actually issued, is sufficient to make the Rules applicable.[18] Nonetheless, the Belgian Supreme Court controversially held that that where there was only an *intention* to issue a bill of lading and no bill was issued or where a sea waybill was issued instead, the Rules do not apply, in clear contrast to the English position.[19] The position generally appears to follow thus: the shipper and carrier are entitled to agree that no bill of lading will be issued and that the shipper will not be entitled to demand one and as such the Rules will not apply. The parties can further circumvent the mandatory nature of the rules by deciding to use a different transport *document*.[20] Nevertheless, it may be arguable that the only recourse open to the

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[14] J Teunissen, *Tekst & Commentaar Burgerlijk Wetboek* (10th edn, Kluwer 2013) 4845.
[15] Rb. Rotterdam, 14-09-2016, no. C / 10/477731 / HA ZA 15-646 (14th September 2016)
[16] P Bonassies and C Scapel, *Droit Maritime* (2nd edn, LGDJ 2010) 613.
[17] Måns Jacobsson, 'To what extent do international treaties result in the uniformity of maritime law?' (2016) 22 JIML 2, 94.
[18] C Smeesters and G Winkelmolen, *Droit Maritime et Droit Fluvial, vol II* (2nd edn, Larcier 1933) 363.
[19] Cass (11 September 1970) Arr Cass (1971) 33.
[20] See, n.7 Stevens.

parties would be to issue an alternative transport document as a variation of the original contract, or as a waiver or estoppel of the shipper's rights to demand a bill of lading.[21] Whilst this has only previously been raised in passing, further clarification may be given on this issue in future.[22] This would not be without issue however; Article III(8) of the Rules provides that any clause that relives the carrier of liability will be null and void. Varying the contract in such a way where the Rules no longer apply may well mean a reduction of liability, and thus such a variation would be null and void. It therefore appears that the only absolute way in which the parties can exclude the application of the Rules would be to provide explicitly from the beginning that a bill of lading will not be issued, and the shipper will not be entitled to demand one.[23] Given the disparity of international interpretation of Article I(b), the *lex maritima* is fertile soil for legal standardisation. Subsequently, the adoption in English Law of the approach taken in France, i.e. to definitively include alternative transport *documents*, would aid the protection of carriers if their liability would be lessened by the application of the Rules.[24] However, it is arguable that it would be an unwanted and unhelpful result, if by virtue of the Rules applying to contracts of carriage under a sea waybill, the carrier was exposed to a higher level of liability.[25]

Looking specifically at the provisions of the Hague-Visby Rules, an area of international contention appears to be Article IV Rule 2. Indeed, there are divergent translations of the relevant Hague-Visby provisions, giving rise to the difficulties of domestic judicial interpretations across signatory states.[26] Judges are, after all, human beings and will naturally revert to the strong influence of the legal traditions prevailing in their respective countries.[27] It has been argued that there are similarities as well as differences in the way the provisions of the Hague-Visby Rules are interpreted and therefore if uniformity exists then the intention of the drafters of the Rules will be honoured.[28] It has been further argued that multinational

[21] Frank Stevens, 'The Scope of Application of the Hague-Visby Rules and 'Units' for Limitation Purposes' (2018) 24 JIML 3, 178.
[22] Ibid.
[23] See, n.17 Jacobsson.
[24] See, n.2 Druzin.
[25] See, n.21 Stevens.
[26] See, n.17 Jacobsson.
[27] Ibid.
[28] Comité Maritime International 'The travaux préparatoires of the Hague and of the Hague-Visby Rules'27 (available online <https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf> Accessed 16 February 2019).

conventions do result in uniformity across domestic law as conventions aim at preventing the law being regulated in a contradictory way.[29] This section will now analyse the respective circumstances of Article IV Rule 2 and their interpretation across international boundaries and evaluate whether there is adequate uniformity in the interpretations and, if there is scope for uniformity, which approach will be most beneficial for the protection of carriers.

Article IV, Rule 2 (c) provides carriers with a defence against liability for damage or loss arising from 'perils, dangers and accidents of the sea'. Under English Law, a peril of the sea includes events particular to the sea or a ship at sea, such as: accidental incursion of sea water; currents; storms; collisions; tides and stranding.[30] However, incidents which may occur 'on the sea' but which are not particular to a ship at sea (rats damaging cargo, damage owing to explosions of boilers or torrential rainfall) will not qualify as a peril of the sea.[31] Whilst it has been argued that exoneration under this provision must result from exceptional violence of the wind and waves, it has been frequently found that unexceptional force can constitute a peril of the sea.[32] The inconsistencies are not only present across international boundaries, but within English Law itself; for example, force 10 waves in the Atlantic Ocean during autumn may not be a peril of the sea – however, force 10-12 waves in the same Ocean during winter may constitute a peril.[33] Summarily, perils of the sea under English Law are occurrences particular to the sea or to a ship at sea; and although they do not need to be extraordinary in nature, they do need to be reasonably unavoidable and unforeseeable occurrences.

Under French law, *périls de la mer* (perils of the sea) are events emanating from the sea, for example: storms, fog, tides, stranding and collisions.[34] The position in France is markedly similar to that of England. French cases often refer to perils of the sea as events of exceptional force or intensity, or as unusually harsh occurrences (*anormalement pénible*).[35] In France, winds of force 10-12 and waves of 6-8 metres (*vagues monstrueuses*) have been classed as perils of the sea.[36] Again, similar to English courts, where the event in question is not

[29] Rodolfo Sacco 'Diversity and uniformity in the law' (2001) 49 AJCL 171.
[30] The Xantho (1887) 12 App Cas (HL); Canada Rice Mills v. Union Marine (1941) AC 55.
[31] The Thames and Mersey Marine Insurance Co. Ltd. v. Hamilton, Fraser & Co. (1887) 12 App.Cas. 484
[32] The Stranna [1938] P 69.
[33] The Tilia Gorthon [1985] 1 Lloyd's Rep 552; WP Wood & Co. v. Hanseatische (1930) 37 Lloyd's LR 144 (KB)
[34] The Amorique (Cour d'Appel de Paris) (1971) 23 (1971) DMF 222.
[35] The Normania (Tribunal de Commerce de Paris) (1973) 26 (1074) DMF 161; The Koudekerk (Cour d'Appel d'Aix) (1973) 25 (1972) DMF 654.
[36] The Cap Canaille (Tribunal de Commerce de Marseille) (2004) 2005 DMF 894.

necessarily extraordinary in nature, it may be considered to be a peril of the sea.[37] Differences begin to manifest in the French assimilation of perils of the sea into the domestic concept of *force majeure* (*cas fortuit ou de force majeure*). Under French law, it is usually extreme weather conditions that qualify as a peril/*force majeure*; and owing to this rigid approach, a view has developed that perils need to be an irresistible but foreseeable event.[38] This assimilation traditionally rejects the idea that a carrier may be exonerated from liability in the presence of situations which a reasonable carrier may have prevented.[39] Notwithstanding the decisions in favour of the carrier, French courts do not readily exonerate the carrier on the basis of perils of the sea.[40] Quite, this rigour is said to reflect the restrictive nature of the French *force majeure* notion.[41]

In comparison, Greek law also identifies examples of perils of the sea as: incursion of sea water into the vessel, rough seas, storms, large waves and collisions.[42] Furthermore, Greek law adopts a parallel position to English law insomuch that events occurring on the sea but not attributable to the sea's characteristics (rainwater or defective machinery damaging cargo) do not qualify as a peril of the sea.[43] It has been well established in Greece that perils of the sea are unavoidable events.[44] Two distinctly divergent schools of judicial thought have evolved in Greece; the older school tends to assimilate perils of the sea into the domestic concept of superior force and the more recent school goes in the opposite direction. The 'superior force' school requires an event, either internal or external to the carrier's control, which is reasonably unforeseeable.[45] The more recent school states that perils of the sea have a broader scope than the domestic superior force concept and that perils can be foreseeable; they simply need to manifest themselves under unusually intense and dangerous conditions.[46]

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[37] The Tolga (Cour de Cassation) (1991) 44 (1992) DMF 627.
[38] R Rodière, *E du Pontavice, Droit Maritime* (12th edn, Éditions Dalloz 1997) 348.
[39] Cap Bon (Cour de Cassation) (1973) 1073 DMF 399.
[40] The Ras Mohamed (Cour de'Appel d'Aix-en-Provence) (2001) 2001 DMF 820.
[41] C Scapel, Droit Maritime (2nd edn, LGDJ 2010).
[42] Court of Appeal of Piraeus 373/1997 (182353).
[43] A Kiantou-Pampouki, Nautiko Dikaio II (6th edn, Sakkoula 2007) 542.
[44] Court of Appeal of Piraeus 603/1988 (61220).
[45] Supreme Court 438/2013 (607127) and see, n.101 Kiantou-Pampouki.
[46] Court of Appeal of Piraeus 289/2005 (382874).

In the three jurisdictions considered above, it is clear that what will constitute a peril of the sea will be determined on a case-by-case basis; taking into account factors like the conditions of the sea and winds, location and time of the year. This leaves considerable discretion for judges and this unarguably leaves great uncertainty for a carrier as to the circumstances when they will be able to rely on this defence.[47] A striking difference between English law on the one hand and French and Greek law on the other, is the fact that English law requires that a peril of the sea cannot be foreseen or guarded against by the exercise of reasonable care. The traditional judicial stance in France and Greece is to assimilate perils of the sea into domestic concepts like *force majeure*. Greek law favours a subjective *force majeure* approach, referring to unavoidable perils by measures of utmost diligence and care; while French law favours an objective approach and applies a reasonableness standard. The differing approaches do not provide the needed certainty for carriers and this uncertainty does not correspond to the intended outcome of the Rules. Thus, it cannot be said carriers have adequate protection as a case which may revolve around the height of a wave or strength of the wind may have substantially different outcomes for a carrier depending which jurisdiction the case is heard in.[48]

Therefore, attempting to accurately reach a uniform interpretation of a peril of the sea is plainly impossible given the tendency for judges to revert back to familiar domestic concepts such as *force majeure*.[49] To go further, domestic law concepts cannot provide uniformity when applied at international level.[50] Nevertheless, it would appear that if all signatory countries followed the French and Greek interpretation of allowing foreseeable but unavoidable events to qualify as a peril of the sea, this would do much to create certainty and uniformity of international interpretation while providing the most carrier-protective solution.[51] Article IV Rule 5 (b) provides that compensation for loss or destruction of goods is to be quantified by reference to their market value; unhelpfully, European interpretations on this Article are inconsistent. The central issue surrounding this Article is whether it provides merely a vague guidance as to the assessment of damages or whether it modifies the law of

[47] Marel Katsivela, 'Perils of the sea under English, French and Greek law; a perilous venture?' (2014) 20 JIML 5, 343.
[48] Ibid.
[49] See, n.17 Jacobsson.
[50] See, n.47 Katsivela.
[51] Ibid.

damages in such a way as to prevent the shipper from claiming more than the value of the goods, even if his loss is greater. Prima facie, the answer to the question of whether Rule 5 (b) limits recovery to the market value is clearly 'no'.[52] Indeed, authority from the USA suggests that damages could be available beyond the value of the goods.[53] Furthermore, the provision reads plausibly as: first, a requirement to measure the value of the goods, where relevant, to reference to the market value; second, a *prima facie* quantification of cargo claims on this basis, but with adjustment in line with the facts of the case.[54]

Accordingly, many jurisdictions have taken this view. For example, the French *Cour de Cassation* upheld a judgement against the carriers for the shipper's *entire* loss rather than for the modest value of the goods.[55] Norway, too, has adopted this approach; the shipper was awarded sizeable damages for consequential loss.[56] The position in England has also proceeded on the basis of a lack of any such limitation, in line with the corresponding European decisions.[57] The English courts had the opportunity to decide the question of the extent of Rule 5 (b) categorically. However, this case was decided in favour of the carrier on a point of general limitation, thus leaving the question of Rule 5 (b) unhelpfully unanswered.[58]

Despite this, however, there is a large amount of academic opinion supporting Rule 5 (b) being used as a genuine limitation; this body of support comes from both civil (Spain and Italy, respectively) and common law jurisdictions.[59] According to the German Commercial Code, carrier's liability has been limited to the value of the goods.[60] To go further, this provision has consistently been interpreted as excluding any claim for consequential loss.[61] Therefore, it is

[52] F Berlingieri, *The Hamburg rules: a choice for the EEC?* (European Institute of Maritime Law 1994) 135-139.
[53] S Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) 30.24.
[54] See, n.7 Stevens.
[55] *Cour de Cassation* (15 February 1994) No 93-13, 707.
[56] Nils Blakstad & Sønner, *A/S v. A/S Dolsøy Norges Høyesterett (21 November 1987)* (Referenced in: T Falkanger et al., *Scandinavian Maritime Law* (3rd edn, Universitetsforlaget 2011) 288-289.
[57] The Subro Valour [1995] 1 Lloyd's Rep 509; Laiterie Dupont Morin Flechard v Anangel Endeavour Compaiiia (1989) (unreported).
[58] Serena Navigation Ltd and another v Dera Commercial Establishment (The Limnos) [2008] EWHC 1036 (Comm).
[59] See, F Sanz and others, *Aspectos jurídicos y econcomicos del transporte: hacia un transporte mas seguro, sostenible y eficiente* (Castello de la Plana Publicacions de la Universitat Jaume I, D.L. 2007) 625; S Carbone, *Contratto di trasporto marittimo di cose* (Giuffre 2010) 412–14; and Francis Reynolds 'Package or unit limitation and the Visby Rules' [2005] LMCLQ 1.
[60] German Commercial Code (Handelsgesetzbuch, 1900) s.502 (<http://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf> Accessed 4 March 2019.
[61] German Federal Court of Justice, 25.09.1986 - II ZR 26/86.

unsurprising that some academics have welcomed the opportunity for Rule 5 (b) to be read as a genuine limitation provision.[62] The varying interpretation of the same Hague-Visby provision is undeniably perturbing, and the overwhelming impact on the protection of carriers cannot be said to be positive.[63] However, if the approach of the German courts is adopted in English law, this additional cap on liability is far more advantageous to the carrier by giving them an extra layer of protection.[64] To sum up, the justification for giving this extra layer of protection for carriers, which seems to have originated in Germany, provides carriers with a distinct privilege. As this is denied to almost everyone else, it has been argued that this is indefensible as a matter of interpretation, law and policy.[65] On the other hand, if adopted absolutely in England, it will provide carriers with a needed additional layer of protection, and is justified given the more equal bargaining powers of the carrier and shipper, and thus less of a need to protect the shipper.[66]

An area which is, perhaps, ripe for uniformity is that of multimodal transport. Multimodal transport involves the carriage of goods utilising numerous types of transport, i.e. by road, then rail, then sea. Previously, when carriage of goods involved unimodal transport, the unimodal regime governing such modes of transport was sufficient to regulate that area.[67] A clear example of this is the Hague-Visby Rules with regard to carriage of goods by sea and the CIM Rules for carriage of goods by rail.[68] To clarify, where cargo is carried partly by sea and partly by air, a bill of lading governed by the Hague-Visby Rules and an air waybill, subject to the Warsaw Convention[69], will be issued to cover each respective part of the journey.[70] The adoption and implementation of several conventions dealing with sea carriage has inarguably made these legal regimes extremely complex.[71] Moreover, it becomes necessary to establish

[62] See, n.7 Stevens.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Gebreyesus Yimer, 'Adjudicatory jurisdiction in international carriage of goods be sea: would the Rotterdam Rules settle the controversy?' (2013) AFJIL 467.
[67] Ramandeep Chhina, 'Uniform international regime for multimodal transport: unarguable need but no general acceptance' (2013) 19 JIML 6, 516.
[68] See, n.17 Jacobsson.
[69] Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) (available online <https://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html> Accessed 4 March 2019.
[70] Samir Mankabady, 'The Multimodal Transport of Goods Convention: a challenge to unimodal transport conventions' (1983) 32 ICLQ 120, 121.
[71] Olena Bokareva, 'Carriage of goods through multimodal transportation: in search of international and regional harmonisation' (2016) 21 JIML 5, 368.

in multimodal transport where and when the damage, loss or delay occurs to confirm which of the set of Rules will apply at the point of such loss, damage or delay (e.g. if the damage occurs at sea then the Hague-Visby Rules will apply; if damage occurs in the air, then the Warsaw Convention will apply).[72]

With the increase in technology, the particular challenge of how to regulate multimodal transport arises as the use of the unimodal regimes creates significant uncertainty and unpredictability due to the overlapping disparate nature of their liability provisions. This clearly creates the need for a unified single regime governing multimodal transport.[73] There have been previous attempts to generate a new regime, with one being The UN Convention on Multimodal Transport ("the 1980 Rules").[74] However it has not yet received the requisite number of ratifications so its likelihood of coming into force seems to be remote.[75] Inarguably, the present law around multimodal transport is fragmented, a clear hallmark of deficiency in smooth trade and transportation.[76]

Indeed, it has been argued that creating a new regime for multimodal transport would bring the 1980 Rules into conflict with the existing unimodal conventions. For example, if the damage occurred during the sea leg of multimodal transport, then the Hague-Visby Rules may also apply in this situation. Mankabady argues that the strength of the 1980 Rules is their simplicity, but the weaknesses lie where the place of the damage is known, as it is hard to see why the carrier should rely on the 1980 Rules instead of the existing Conventions.[77] He further argues, supported by Fujita, that to resolve this issue the new convention should adopt the 'network liability system'.[78] The adoption of network rules would alleviate the conflict issue in practice.[79] The network system of liability states that if it can be proved that the loss, damage or delay occurred solely during the course of one particular stage of transport, the operator's liability will be determined according to the law governing the relevant mode of

[72] See, n.70 Mankabady.
[73] See, n.67 Chhina.
[74] United Nations Convention on International Multimodal Transport of Goods (1980) (available online: <https://treaties.un.org/doc/Treaties/1980/05/19800524%2006-13%20PM/Ch_XI_E_1.pdf> Accessed 4 March 2019.
[75] See, n.67 Chhina.
[76] See, n.70 Mankabady.
[77] See, n.70 Mankabady.
[78] Tomotaka Fujita, 'The comprehensive coverage of the new convention: performing parties and the unimodal implications' (2009) TXLJ 349, 359.
[79] Ibid.

transport; but if it cannot be ascertained during which leg the damage occurred, the 1980 Rules would take precedence.[80] This would do much to increase the certainty over which set of rules would apply.

Indeed, as Eleni Gologina-Economou argues, in spite of the fact that the 1980 Rules establish a unified system of liability, which could resolve a number of issues, it cannot be ignored from a practical viewpoint that the 1980 Rules' liability regime is strict, contributing to the opposition to them.[81] Furthermore, as the 1980 Rules appear to derive their liability regime from the Hamburg Rules, both produce a rigid liability scheme and therefore have suffered the same fate in gaining widespread and vehement opposition from the shipping industry and specifically from carriers.[82] Indeed, under the 1980 Rules, the transport operator's liability will be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher.[83] Clearly then, it is easy to see why carriers, specifically sea carriers, would be opposed to this regime; this liability is substantially more than what is contained in the Hague-Visby Rules.[84] As such, carriers are afforded much greater protection under the Hague-Visby Rules than under the 1980 multimodal rules. As stated previously, there appears to be no logic in why the carrier would rely on the 1980 Rules when the Hague-Visby Rules provide a much lower liability limitation.[85]

Despite the numerous advantages of the 1980 Rules, it is self-evident that, 39 years after their adoption, the 1980 Rules have failed to gain the requisite number of ratifications to come into force. This is not least due to the opposition from carriers who are unhappy with the strict and rigid liability regime that it contains.[86] Such opposition from carriers is seemingly easy to justify; they are exposed to a far greater liability limit under the 1980 Rules in comparison to the Hague-Visby Rules. Whilst it is admirable that the international community are attempting to create uniformity in the field of multimodal transport, at present such uniformity is in

[80] See, n.67 Chhina.
[81] Eleni Gologina-Economou, 'Multimodal transport: carrier liability and issues relating to the bill of lading' (1998) 51.
[82] See, n.67 Chhina.
[83] See, n.74 United Nations.
[84] See, n.12: 666.67 units of account per package or unit, or 2 units of account per kilogram of gross weight of the goods lost or damaged.
[85] See, n.70 Mankabady.
[86] Daryl Lee, 'The straight bill of lading: past, present, and future' (2012) 18 JIML 1, 39.

conflict with the protection carriers are afforded under the current unimodal carriage of goods by sea regime and unquestionably the protection of carriers must take precedence.

In light of the slow acceptance of the 1980 Rules, a further effort was made in 1992 with the UNCTAD Rules ("the 1992 Rules").[87] Unlike the 1980 Rules, the 1992 Rules have garnered relatively considerable support from the international community; they are widely incorporated in multimodal transport documents, such as the FIATA Bill of Lading, a bill of lading widely used in multimodal transport.[88] Nevertheless, an issue arises around the 1992 Rules' contractual nature; they do not have force of law and in order to apply they must be incorporated into a contract by the parties and must not conflict with the mandatory provisions of existing international conventions or national law.[89] As such, whilst the 1992 Rules do appear to have made some in-roads to uniformity in the governing regimes of multimodal transport, their restrictive application as well as limited effectiveness do not appear to have made any significant legally-binding contributions to international uniformity.

It is clear that many difficulties are faced in creating a uniform international regime. Multimodal transport is an area ripe for uniformity insomuch that it is necessary to create certainty so the parties know they are not operating in a legal vacuum should anything go wrong. However, it may not be possible to resolve all of the difficulties involved given the amount of competing interests.[90] Reiterating the disparity in the liability regimes of the 1980 Rules and the Hague-Visby Rules, it may be necessary to create a new regime which offers carriers parallel or better limitation of liability than provided at present to overcome the political divides hampering the introduction of a uniform international regime. Clearly, the past international attempts to harmonise this area have failed to achieve uniformity; not least due to their harsh liability regimes coming into conflict with existing unimodal conventions.[91]

Summing up on these findings, many conclusions can be drawn on whether there is sufficient uniformity in the international interpretations of the Hague-Visby Rules and whether the protection carriers are provided is adequate. Firstly, it can be clearly seen that the

[87] UNCTAD/ICC Rules for Multimodal Transport Documents (1992) (available online: <https://unctad.org/en/PublicationsLibrary/tradewp4inf.117_corr.1_en.pdf> Accessed 4 March 2019.
[88] Spectre International plc v Hayesoak [1997] 1 Lloyds Rep. 153.
[89] See, n.67 Chhina.
[90] See, n.71 Bokareva.
[91] See, n.67 Chhina.

international interpretations of the Hague-Visby Rules vary greatly across international legal jurisdictions. Pinpointing exactly why this is, however, is not an easy task in practice. It appears correct to say that the differing interpretation of the Hague-Visby Rules is a major barrier to the uniform application of the Rules as a judge in a complex shipping case may never before have dealt with an international statue, so he may be tempted to apply familiar domestic principles; judges are, after all, only human beings.[92]

The effect this has on the protection of carriers can clearly be seen looking at this interpretation of the substantive provisions of the Rules. As addressed above, the English courts have held that a sea waybill may constitute a similar document of title if it is issued in lieu of the original bill of lading. The fact that this decision is in contrast with the positions taken in countries like the Netherlands and Belgium, but similar to the stance in France clearly illustrates a lack of uniform interpretation of the Hague-Visby Rules. Neither can a vast scope for judicial discretion in what will class as a peril of the sea be said to be beneficial for the protection of carriers or uniformity in maritime law. It leaves gaping uncertainties. If the case is brought in one jurisdiction, and the carrier tries to rely on the Article IV Rule 2 (c) defence, it may have a totally different outcome than if it was brought in another jurisdiction.[93] It is also plainly impossible for any uniformity to be reached if judges revert back to familiar domestic principles.[94]

In regard to the Rotterdam Rules and the various multimodal transport treaties, the adoption of a new treaty may have an undesired effect; less uniformity in the *lex maritima*. Indeed, as has been stated, some states may ratify the new treaties and some may not, there will be two treaties dealing with relatively the same issues.[95] Adoption of new treaties, or indeed revisions of old treaties, is not the only way to increase uniformity, however. It has been suggested that judges who deal with cases with an international aspect, like those dealing with the interpretations of the Hague-Visby Rules could be given enhanced training in how to interpret and apply international treaties in domestic law.[96] Furthermore, an active awareness of the jurisprudence from other jurisdictions, and a willingness to consider foreign

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[92] See, n.17 Jacobsson.
[93] See, n.47 Katsivela.
[94] See, n.17 Jacobsson.
[95] Ibid.
[96] Ibid.

judgements, could help enormously in the unification of international maritime law.[97] Despite the apparent ability of the *lex maritima* to self-standardise, a supranational court or tribunal may be of assistance in creating uniformity by providing a central presiding body for the resolution of disputes arising from the Hague-Visby Rules.[98] However, this may not be a sensible solution in practice, especially considering the current environment surrounding Brexit, as a supranational body could be seen as infringing national sovereignty.[99] This, notwithstanding, it can be argued that there is a much greater level of uniformity in maritime law; given the recognised need for uniformity in such an area which impacts greatly on international trade and the world economy.[100] Finally, conferring jurisdiction over disputes under these treaties to an international court or tribunal would be the only way to ensure a high level of uniformity; giving carriers a greater level of certainty around the likely outcome of a dispute.[101]

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[97] Jolien Kruit, 'Applicability and Application of the Hague-Visby Rules in the Netherlands' (2017) 23 JoIML 1, 15-19.
[98] See, n.2 Druzin.
[99] See, n.17 Jacobsson.
[100] Ibid.
[101] Ibid.