UNIFORMITY OR UNILATERALISM IN THE LAW OF CARRIAGE OF GOODS BY SEA?

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The ideal of international uniformity has always been regarded as particularly important to maritime law. However, over the past decade or so, the uniformity of the law of international carriage of goods by sea has increasingly been undermined by the unilateral adoption by maritime jurisdictions of "hybrid carriage regimes" which depart from the established international uniform rules.

In this article Paul Myburgh argues that this trend towards adoption of divergent carriage regimes is highly problematic, not merely because of their detrimental effects on international uniformity and the coherence of maritime law and international transport law in general, but also because of more fundamental concerns about the validity of these regimes at international law, the practical conflict of laws problems that that they will generate, and their distorting effects on multimodal transport. The article concludes with some suggestions for future reform in this area.

I INTRODUCTION

The importance of achieving a harmonised or uniform system of transnational commercial law has proved to be one of the dominant legal leitmotifs of the late 19th and the 20th centuries. For over a century, global industry groups, law reform agencies, comparative institutes, governments, regional organisations and international bodies have produced a plethora of standardised industry clauses, harmonised principles, model laws, uniform statutes, restatements and international conventions, all in furtherance of this lofty ideal. Today, such instruments influence or govern almost all aspects of transnational commercial transactions, regardless of where they are concluded or performed, or where the parties to the transaction are based.

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This growth in harmonisation and unification projects has been accompanied by a considerable and ever-increasing literature on transnational commercial law. With the exception of a few dissonant voices,[1] this literature amounts to a sustained alleluia: the harmonisation and unification of transnational commercial law is said to result in increased stability and predictability of processes and results, avoidance of conflicts of laws and litigation, a reduction of legal risks and transaction costs,[2] increased opportunities for law reform (hopefully, enlightened comparative law reform that will produce rules that can be interpreted and applied in all jurisdictions), and even the enhancement of "aesthetic symmetry in the international legal order".[3] The only sour note seems to emanate from the ongoing, increasingly sterile debate between the "mercatorists" and "anti-mercatorists" over whether the harmonisation and unification efforts of the last century have resulted in a coherent body of denationalised law that may accurately be characterised as a new *lex mercatoria*.[4]

The ideal of international uniformity has always been regarded as particularly important to maritime law.[5] Due to its transnational character the maritime industry and

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1 See for example M Boodman "The Myth of Harmonization of Laws" (1991) 39 Am J Comp L 699; PB Stephan "The Futility of Unification and Harmonization in International Commercial Law" (1999) 39 Virg J Int L 743.

2 See for example AN Yiannopoulos "The Unification of Private Maritime Law by International Conventions" (1965) 30 Law and Contemporary Problems 370; MF Sturley "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 JMLC 553, 556-559 ["Uniformity in the Law"]; MA Clarke "The Transport of Goods in Europe: Patterns and Problems of Uniform Law" [1999] LMCLQ 36, 39. But see Stephan, above n 1, 747-748, who argues that there is "an optimal level of legal risk that is greater than zero", in the sense that the costs of risk reduction (loss of flexibility and the transaction costs of avoiding unsuitable harmonised or uniform rules) might outweigh the benefits of the process.

3 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528, 537; 115 S Ct 2322, 2328 ["*Sky Reefer*"].

4 A discussion of this debate falls beyond the scope of this paper: for an overview see G Baron "Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?" (1999) 15 Arb Int 115, 118-123. See also J Beguin "*Le Développement de la* Lex Mercatoria *Menace-t-il l'Orde Juridique Internationale*?" (1985) 30 McGill LJ 478; GD Delaume "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the *Lex Mercatoria*" (1989) 63 Tul LR 575; K Highet "The Enigma of the *Lex Mercatoria*" (1989) 63 Tul LR 613; CWO Stoecker "The *Lex Mercatoria*: To What Extent does it Exist?" (1990) 7 J Int Arb 101; P Kahn "*La* Lex Mercatoria: *Point de Vue Francais apres Quarante Ans de Controverses*" (1992) 37 McGill LJ 413; G Teubner "Breaking Frames: The Global Interplay of Legal and Social Systems" (1997) 45 Am J Comp L 149; KP Berger *The Creeping Codification of the* Lex Mercatoria (Kluwer, The Hague, 1998); TE Carbonneau (ed) Lex Mercatoria *and Arbitration* (rev ed, Kluwer, Boston, 1998).

5 See for example DM Collins "Admiralty – International Uniformity and the Carriage of Goods by Sea" (1985) 60 Tul LR 165; F Berlingieri "Uniformity in Maritime Law and Implementation of International Conventions" (1987) 18 JMLC 317 ["Uniformity in Maritime Law"]; Clarke, above n 2.

its transactions have historically been perceived as somewhat apart from domestic law. From the time of the *Lex Rhodia* onwards, through the Basilica, the *Roles d'Oleron*, the Laws of Wisbuy, the Hanseatic Codes, the Black Book of Admiralty, the *Consolato del Mare* and the *Guide de la Mer*, maritime activity was more or less independently governed by a series of sea codes of highly uniform flavour and transnational application. Some commentators talk optimistically about a *lex maritima*, directly derived from these sea codes and further developed (or perhaps resuscitated) by modern harmonised and uniform instruments.[6] This, I think, overstates the modern position. The historical tradition of maritime law provides a sound starting point for modern harmonisation – an internationalist perspective and a (largely) mutually intelligible conceptual vocabulary for maritime lawyers from common law and civilian jurisdictions that is perhaps not as evident in other areas of law. The historical tradition also fosters a strong expectation that uniformity in modern maritime law is both desirable and achievable. However, only a few basic principles of modern maritime law still derive directly from the old codes.[7] And, while harmonised or uniform legal instruments influence or drive a large number of maritime law issues, some areas are considerably less than uniform.[8] Maritime conflict of laws and transnational litigation strategy are growth industries. If there is a *lex maritima*, it is at best a very incomplete and uneven patchwork of treaties, laws and transnational commercial usage.[9]

Over the past decade or so the portion of this patchwork that relates to international carriage of goods by sea has increasingly begun to unravel. Several maritime jurisdictions have unilaterally promulgated national carriage regimes, commonly referred to as hybrid carriage regimes, which depart from the established international uniform rules by combining elements of different uniform regimes or by serving up "a stunning new

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6 W Tetley "The General Maritime Law – The *Lex Maritima*" (1994) 20 Syracuse J Int L & Comm 105 ["The General Maritime Law"]; GW Paulsen "An Historical Overview of the Development of Uniformity in International Maritime Law" (1983) 57 Tulane LR 1065.

7 For example, general principles of salvage and general average, the "divided damages rule" in collision cases (which gave way this century to the general principle of proportionate liability), maintenance and cure, and bottomry and *respondentia* (now obsolete): see generally "The General Maritime Law" above n 6; R Goode "Usage and its Reception in Transnational Commercial Law" (1997) 46 ICLQ 1, 16-18 for a discussion of distillation of legal principles from the *Consolato del Mare* and the *Roles d'Oleron*.

8 For an overview see PA Myburgh "The Harmonisation of New Zealand and Australian Maritime Laws" (1995) 6 Cant LR 69. For a classic illustration of the consequences of the lack of a *lex maritima*, see *The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655 (CA).

9 Assuming that international treaties and uniform statutes are elements of the *lex mercatoria*: see O Lando "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 ICLQ 747; but compare Goode, above n 7, 2-4.

cocktail, both shaken and stirred, with significant new ingredients".[10] The aim of this article is to explore the gap between the rhetoric of international uniformity, and the reality of increasing domestic unilateralism and accelerated deharmonisation or "disunification"[11] of international maritime law. I will argue that the trend towards unilateral adoption of divergent hybrid regimes is highly problematic, not merely because of their detrimental effects on international uniformity and the coherence of maritime law and international transport law in general, but also because of more fundamental concerns about the validity of these regimes at international law, the practical conflict of laws problems that that they will generate, and their distorting effects on multimodal transport. I will conclude with some suggestions for a way forward.

II ATTEMPTS AT INTERNATIONAL UNIFORMITY

The historical development of the three uniform regimes,[12] and their perceived strengths and weaknesses,[13] have been thoroughly documented elsewhere. What follows is a cursory sketch of the historical factors that have shaped the current situation, to provide the context in which the trend towards hybrid regimes has occurred.

There have been five waves of reform in this area over the past century or so. The first resulted from the activities of the International Law Association, which was then styled the Association for the Reform and Codification of the Law of Nations, in the 1880s. The

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10 Clarke's delightfully apt description (above n 2, 38) of the proposed United States COGSA; on which, see below Part IV.

11 See for example H Honka (ed) *New Carriage of Goods by Sea* (Institute of Maritime and Commercial Law, Åbo Akademi University, Åbo, 1997) 18; R Asariotis and MN Tsimplis "The Proposed United States Carriage of Goods by Sea Act" [1999] LMCLQ 126; J Ramberg "The Proposed United States COGSA – An Outsider's View" <http://forwarderlaw.com/feature/ramart.htm>.

12 See *The* Travaux Préparatoires *of the Hague Rules and of the Hague-Visby Rules* (CMI, Antwerp, 1997); MF Sturley (ed), C Boyle (tr) *The Legislative History of the Carriage of Goods by Sea Act and the* Travaux Préparatoires *of the Hague Rules* (Fred B Rothman & Co, Littleton, Colorado, 1990); DC Frederick "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules" (1991) 22 JMLC 81; MF Sturley "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1 ["History of COGSA"]; JC Sweeney "Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary" (1993) 24 JMLC 1. The historical discussion that follows is primarily based on these sources.

13 See for example AJ Waldron "The Hamburg Rules – A Boondoggle for Lawyers?" [1991] JBL 305; RG Bauer "Conflicting Liability Regimes: Hague-Visby *v* Hamburg Rules – A Case by Case Analysis" (1993) 24 JMLC 53; JO Honnold "Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?" (1993) 24 JMLC 75; MF Sturley "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 JMLC 119 ["Changing Liability Rules"]; R Force "A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)" (1996) 70 Tul LR 2051.

Association drafted a model bill of lading, which was conceived as providing a voluntary compromise between conflicting cargo and vessel interests. A few years later the Association took a different tack, proposing a uniform set of rules (the Hamburg Rules of Affreightment) which the parties could incorporate by reference in their bills of lading. While these initiatives were largely unsuccessful, they are significant for two reasons. First, some of the key provisions of the Association's model bill of lading were subsequently taken up into the Hague Rules. Secondly, the Association's Hamburg Rules seem to have provided the structural template for later unification attempts in this area, all of which have taken the form of uniform rules rather than model clauses. After these attempts at unifying the law of international carriage of goods by sea, the Association largely turned its attentions to other areas of law.

In the meanwhile, United States cargo interests, increasingly dissatisfied with (mainly British) carriers' use of oppressive exemption clauses, short limitation periods, and exclusive English forum and choice of law clauses in their bills of lading, and frustrated with the apparent breakdown of international efforts to reach a compromise, persuaded Congress to pass the Harter Act in 1893. The Harter Act prohibited the use of exemption clauses and required the carrier to exercise due diligence to make the ship seaworthy as a condition precedent to claiming a statutory exemption of liability for faults or errors in navigation or ship management. The Harter Act represented the beginning of a second wave of law reform. British Dominions in which cargo interests were powerful enough to exert their influence on the governments of the day, such as New Zealand, Australia and Canada, promulgated "Harter-style" statutes restricting carriers' use of exemption clauses and foreign forum and choice of law clauses in their bills of lading.[14] By the early 1920s, other European, African and Asian countries had either followed suit or were reportedly on the verge of doing so. The Imperial Shipping Committee in 1921 responded to pressure from the Dominions and recommended the promulgation of Imperial legislation based on the Canadian model. Carrier interests, in a weakened financial state after the First World War, and facing the prospect of further unilateral domestic regulation in many of their more important markets, could finally be persuaded that "international uniformity was necessary to ensure contractual predictability on liability issues".[15]

These pressures led directly to the third wave of reform: the negotiation of draft uniform rules at the Hague Conference of 1921, held under the auspices of the Comité Maritime International (CMI), the informal successor to the International Law Association

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14 Shipping and Seamen Act 1903 (NZ); Sea-Carriage of Goods Act 1904 (Cth); Water-Carriage of Goods Act 1910 (Can). For the modern debate regarding foreign jurisdiction and arbitration clauses in bills of lading, see below Part V B.

15 Frederick, above n 12, 85; see also "History of COGSA" above n 12, 18.

in maritime matters. Initial reaction to the draft rules was mixed. There were conflicting views on whether they should be implemented by international convention or uniform domestic legislation, adopted on a voluntary basis or ignored altogether. A year later, at the fifth International Diplomatic Conference on Maritime Law in Brussels, the text of the draft Hague Rules was re-examined to determine whether agreement could be reached on the basis of an international convention. After a third session the following year, the Hague Rules were signed in Brussels in 1924.[16]

The Hague Rules were well-received in the Anglo-Common Law world, particularly by English lawyers, who regarded them "with a mixture of pride, affection, and even slight awe as a largely English innovation and one that had achieved a remarkable success".[17] After three decades of practical experience with the Rules, however, some of the gloss had begun to wear off, and this led to a modest fourth wave of reform. In 1959, the CMI began work on limited technical amendments to the Hague Rules which sought to remedy difficulties that had surfaced in respect of, amongst other things, the package limitation, Himalaya clauses, the scope of application of the Rules, the evidential effect of bills of lading, and the effect of the time bar. A draft Protocol was drawn up and approved by the CMI at its Stockholm conference in 1963 and signed, appropriately, at Visby. The Visby recommendations were amended and formally adopted at the 12th Maritime Diplomatic Conference in Brussels in 1968.[18] The Hague Rules, as amended by the Visby Protocol, are colloquially known as the Hague-Visby Rules. They were slower to find favour with maritime jurisdictions, and could not attract the requisite number of ratifications until 1977. In 1979, the Special Drawing Rights (SDR) Protocol brought about a further technical amendment to the package limitation units in the Hague-Visby Rules, replacing the archaic and problematic gold clause with SDRs.[19]

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16 International Convention for the Unification of Certain Rules relating to Bills of Lading 1924.

17 A Diamond "The Hague-Visby Rules" [1978] LMCLQ 225, 226; Frederick, above n 12, 94. However, this view was not universally held. The Norwegian Ministry of Justice recommended that the Hague Rules be implemented by a general reference only, to avoid putting on the Norwegian statute books provisions "that do not meet the most elementary standards of legal technique, readability and good statutory language": Honnold, above n 13, 101 n 98.

18 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968.

19 Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1979; on which, see F Berlingieri "Conversion of the Gold Monetary Unit into Money of Payment" [1991] LMCLQ 97; M Davies "What Price a Gold Sovereign? Limitation of Liability under the Hague Rules" (1990) 6 Aust Bar R 49; W Tetley "Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold" (1995) 26 JMLC 133. See also WK Hastings "Living with an Archaic Treaty: Solving the Problem of the Warsaw Convention's Gold Clause" (1996) 26 VUWLR 143.

The final and most radical wave of reform took place in the 1960s and 1970s. Developing countries, increasingly dissatisfied with the existing uniform carriage rules, which they saw as outmoded, inefficient, biased in favour of carrier interests from the industrialised nations and a contributory cause of unnecessarily high insurance and transport costs, began agitating for fundamental reforms to the international transport regime. Proposals made through CMI to overhaul the Hague-Visby Rules were blocked. In 1968 the United Nations Conference on Trade and Development (UNCTAD) began work on the issue. Although the industrialised countries managed to have discussions on reforms moved away from UNCTAD to the United Nations Council on International Trade Law (UNCITRAL), which was perceived to be a less politicised forum, they were unable to thwart reform negotiations altogether. These led to the signing of the Hamburg Rules in 1978.[20] Rather than simply modernising or tinkering with the template of the Hague-Visby Rules, the Hamburg Rules represent a fundamental break with the past. The Hamburg Rules have never been widely accepted. Although they finally came into force in 1992, no major maritime jurisdictions have implemented them to date.

What general conclusions may be drawn from the history of reform efforts in this area? First, to paraphrase Voltaire's famous quip about the Holy Roman Empire, the Hague Rules have not exactly lived up to their official title. We are some considerable way off from achieving any degree of international uniformity, let alone anything approaching a *lex maritima* in this area. Of the countries for which we have data,[21] slightly over two-fifths, including the United States, are signatories to the Hague Rules or apply domestic legislation mirroring the Hague Rules; slightly under two-fifths, including New Zealand, Australia, the United Kingdom, Canada and South Africa are signatories to the Hague-Visby Rules (with or without the SDR Protocol, so package limitation levels can vary dramatically) or apply analogous domestic legislation; and roughly one-fifth, including Austria, Egypt, Hungary and the Czech Republic, are signatories to the Hamburg Rules. Some countries are not parties to any of the Conventions, but have enacted uniform rules in domestic legislation. Other countries have adopted, or are in the process of implementing hybrid domestic regimes. To further complicate the picture, the CMI and UNCITRAL have signalled preparatory work on a revision of the Hague-Visby Rules which might modernise the regime and align it more closely with the Hamburg Rules, but

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20 United Nations Convention on the Carriage of Goods by Sea 1978.

21 See GF Chandler "A Survey of the Cargo by Sea Conventions as They Apply to Certain States" <http://www.admiraltylaw.com/tetley/table.htm>; G Holliday "The Hague, Hague-Visby and Hamburg Rules – Updated List of Parties" [1998] IJSL 150. It is impossible to be overly precise about this as methods of domestic implementation vary, information on domestic implementation (as opposed to Convention status) cannot be obtained for some countries, and there are conflicting reports on some countries' Convention status.

without the political baggage perceived to be associated with the latter instrument. After a century of effort in this area this is not exactly an encouraging report card for international uniformity.[22]

This lack of uniformity is exacerbated by the divergent methods adopted by jurisdictions to give domestic effect to the uniform regimes.[23] Some countries have treated the Conventions as self-executing, or have implemented the relevant international text directly by giving it the force of law. Others have rewritten the international text in accordance with domestic legal drafting standards and usage. This is permissible in respect of the Hague and Hague-Visby Rules, because the Protocol of Signature provides that the "High Contracting Parties may give effect to the Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under the Convention". [24] And, as mentioned above, other countries which are not parties to any of the Conventions have enacted domestic legislation wholly or partially modelled on the uniform rules.

The second trite conclusion is that the whole reform process has been highly fraught and politicised. Every single reform proposal put forward in the past century has been controversial:[25]

> Some were so controversial that they were never enacted. The Hague Rules were so controversial in the United States that it took Congress twelve years to enact them. The Visby Amendments have given us a quarter century of controversy, with no end in sight. And the Hamburg Rules have been controversial practically since the United Nations first began work on them over twenty years ago.

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22 Particularly when one considers the relatively high degree of uniformity achieved in other areas of transnational commercial law: see generally M Evans "Uniform Law: A Bridge Too Far?" (1995) 3 Tul J Int & Comp L 145.

23 Not to mention divergent judicial interpretations of the Rules; on which, see CWH Goldie "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 JMLC 111; "Uniformity in Maritime Law" above n 5.

24 See "Uniformity in Maritime Law" above n 5, 318 n 1, citing Ripert:

> *Par cette formule les Etats qui ratifient la convention peuvent s'engager simplement à une modification de leur loi nationale sous la forme qu'ils jugent la plus convenable et à la condition bien entendu de ne pas violer la convention par une redaction vicieuse de la loi interne. Evidemment ce procédé offre certain dangers car la redaction d'un texte peut influer beaucoup sur son interpretation mais il a l' immense avantage de permettre à chaque pays de mettre les Règles de La Haye sous une forme qui soit accessible aux tribunaux et aux justiciables.*

25 "Changing Liability Rules" above n 13, 120.

Looking back, it seems as though all conceivable arguments, all possible permutations of compromise between carrier and cargo interests have been chewed over in the minutest detail. Any new dish served up, regardless of its ingredients, seems destined to be rejected as unpalatable by some or other interest group at the table. While a consideration of the rich history of the past reform debates undoubtedly enhances parties' understanding of the current situation, it also seems to strait-jacket future negotiations and foreclose the possibility of fresh starts or major compromises in the broader interests of the international community.

Several commentators, especially those who favour the Hague or Hague-Visby Rules, have argued that the reform process only really became politicised in negotiations leading up to the Hamburg Rules: that UNCITRAL and the developing countries conspired to wage "economic warfare" on the industrialised nations, and that this was not quite cricket.[26] However, from the perspective of the developing countries, the CMI, its processes, and the Hague and Hague-Visby Rules would have seemed equally characterised by the politics of discrimination and exclusion, involving as they did "backroom talks in which carriers, cargo owners, bankers, and insurers worked out compromises that reflected commercial, rather than political, realities".[27] Even today, there is a perception of CMI as a cosy club of shipowning interests and their lawyers from Northern Hemisphere industrialised

26 See for example the rather florid account of BW Yancey "The Carriage of Goods: Hague, COGSA, Visby and Hamburg" (1983) 57 Tul LR 1238, 1249-1250, 1257, 1259, describing the process as "belligerent" and "unattractive" and declaring: "If this is 'economic warfare', so be it."

27 Frederick, above n 12, 103

countries.[28] Both Hague and Hamburg involved highly political processes and compromises. However, the political and economic landscapes in which they were created were radically different. Although almost the entire reform process took place in the 20th century, it seems to span the full ideological breadth of the 19th and 20th centuries. Hague, in substance and style, strongly reflects the political and economic realities and concerns of the Victorian era. By contrast, Hamburg, for good or ill, is a thoroughly modern instrument.

Thirdly, the reform process has proceeded at a snail's pace. This is partly due to the use of international conventions to produce mandatory uniform rules. The process of adopting any international convention tends to be slow; amending them can be an even more protracted affair. The controversial nature of the reforms and the intransigent attitude of interest groups has also played a part in delaying or blocking the process at different stages:[29]

> The sad truth is that carriers, their insurers and the cargo insurers will not yield an inch to the Hague-Visby system, and shippers are adamantly opposed to Visby unless it surely leads to Hamburg – a classic stalemate which has produced governmental inaction until the maritime industry can solve its own problems.

The "time-tested procedure" of the CMI, which has always been strong on working groups, questionnaires, and sub-committees, but light on action, has not assisted.[30] And

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28 See AI Mendelsohn "The Public Interest and Private International Law" (1969) 10 Wm & Mry LR 783, 794-795:

> Given the general orientation of the national [maritime law] associations and the fact that carrier attorneys, having the greatest vested interests, are usually the most active participants, it is not surprising that the replies to the [CMI] questionnaires generally advocate continued protection of existing carrier benefits.

The CMI itself seems to be aware of this perception, but has done little to remedy it: see W Tetley "Plan of Action for the CMI" <http://www.admiraltylaw.com/tetley/usmlacog.htm> ["Plan of Action"], citing the latest CMI report which recommended, amongst other things, the need to avoid "the perception that the CMI is a Shipowner's Organization", to elect "younger people to the Executive Council", and to reduce "the impression that the CMI is a European-dominated organization". As Tetley wryly remarks, the Executive Council implemented its report by electing "a nominating committee, composed solely of very senior persons from northwestern Europe, whose whole careers have been spent working either for or with shipowners and P & I Clubs".

29 SR Mandelbaum "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions" (1996) 23 Transp LJ 471, 485.

30 On the process, see Frederick, above n 12, 94; Yiannopoulos, above n 2, 373-374; Mendelsohn, above n 28, 794-796: "the procedure has not been successful". For example, the relatively modest and technical amendments brought about by the Visby Protocol were nine years in the making (Rijeka Conference 1959 - adoption in 1968)!

the international maritime law community, by reason of conservatism or inertia, has failed to respond in a timely and effective fashion to the technological revolution that has occurred in the transport industry, let alone the challenges of globalisation or shifts in political and economic influence from the traditional Northern Hemisphere maritime centres to, for example, the Asia-Pacific region. It is unlikely that a swifter response to legal problems and technological developments would have assured the total dominance of the Hague-Visby regime, given developing countries' concerns about its perceived bias. Nonetheless, it would have stemmed the tide of Hague-Visby countries now adopting hybrid cargo regimes because of their dissatisfaction with the technical deficiencies of the existing uniform regime.

Fourthly, although the Hague and Hague-Visby Rules are often characterised as favouring carrier interests, and the Hamburg Rules as favouring cargo interests, this is only true as a very general stereotype. On closer analysis, each of the instruments reveals significant compromises between the competing interests, which in some instances weaken them by introducing ambiguities and internal inconsistencies.[31] This is hardly surprising, given the amount of horse-trading that accompanied their drafting. This dilution of quality by compromise is one of the criticisms which is routinely levelled at international unification efforts. Unless one is willing to accept the utilitarian response that uniformity is more important than legislative quality – that a flawed rule of world-wide application is better than a good rule opposed by a number of countries[32] – this arguably demonstrates one of the drawbacks of using international conventions and mandatory rules as a means to achieve uniformity. International conventions can produce significant and immediate uniformity where reform is uncontroversial. Where it proves to be an intractable issue, however, their mandatory status can raise the political stakes to the point where all that the parties can afford to agree on is a mediocre set of compromises that pleases nobody.

Finally, the process giving rise to the Hague, Hague-Visby and Hamburg Rules and the subsequent debates over their potential economic consequences have been characterised by a surfeit of legal discourse, voodoo economics and generalised speculation, and an almost total lack of detailed empirical economic research.[33]

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31 Frederick, above n 12, 81-82; W Tetley "The Hamburg Rules – A Commentary" [1979] LMCLQ 1, 5.

32 K Grönfors "Why Not Independent Contractors?" [1964] JBL 25, 27; Yiannopoulos, above n 2, 399.

33 On this problem, see "Changing Liability Rules" above n 13. For an isolated example of empirical economic research see ES Lee "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J Intl & Comp L 153.

III WHY HYBRID REGIMES?

What accounts for the current trend towards unilateral adoption of hybrid regimes? It has been suggested that states adopt hybrid regimes because they will actually generate the uniformity, or at least the climate for uniformity, that is currently lacking. So, for example, it has been argued that the Nordic hybrid regime actually promotes uniformity by harmonising transport law within the Nordic region. As Tiberg rightly points out, if this was the rationale for introducing the regime, it was:[34]

> a futile attempt to isolate Nordic carriage to its own rules, since, after all, every Nordic international transport has a beginning or an end outside the Nordic countries, whose laws cannot lay claim to steering all those movements of goods.

Another, rather more developed variation on this theme is the argument that aggressive unilateral adoption of hybrid cargo regimes will create the crucible in which a new international compromise is forged:[35]

> History has shown that strong national legislation in this field can ultimately produce the pressures required to bring the international community to a uniform solution. When the United States enacted the Harter Act and several British Commonwealth nations followed suit, the ultimate result was the Hague Rules. When the United States enacted COGSA, the rest of the world followed suit fairly quickly. For some time, there was a truly international uniform law to govern the carriage of goods by sea.
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> Now appears to be a likely time for history to repeat itself.

While superficially attractive, this appeal to history does not bear close scrutiny. First, the processes are quite different. Most of the Dominions used the Harter Act as a template for their legislation, with minor variations. As will be discussed below, the modern hybrid regimes diverge significantly in substance and structure, and do not seem to have been developed in a comparative, let alone uniform, frame of reference. Secondly, it was the Imperial Shipping Conference's endorsement of the Dominions' actions, rather than United States unilateralism, that ultimately forced the international compromise. Thirdly, in its historical context, the Harter Act provided an excellent model for uniform law reform. By

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34 H Tiberg "The Nordic Maritime Code" [1995] LMCLQ 527, 528 ["Nordic Maritime Code"].

35 Clarke, above n 2, 578; "History of COGSA" above n 12, 3-4, citing J Westbrook "Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business" (1990) 25 Tex Int LJ 71, 85, 92-96. A rather more chauvinistic version of this argument goes as follows: if the United States adopts a hybrid cargo regime, the international community will surely fall in line behind it; or at the very least, the United States hybrid regime will influence any resulting international consensus to a sufficient extent to allow the United States to become a party to it: see Asariotis and Tsimplis, above n 11, 126 n 4, quoting United States MLA Doc No 724, 3 May 1996, 4.

contrast, as will be discussed below, the proposed United States reforms are of dubious merit, particularly in respect of their unreasonable extra-territorial reach and restrictive approach to foreign jurisdiction and arbitration clauses. In fact, if other maritime jurisdictions were to adopt the proposed United States reforms in their entirety, this would result in an international gridlock of multiple proceedings, anti-suit injunctions, and conflicting judgments and awards. Fourthly, the international maritime community is very different today; as is the place of the United States in it. Given the credibility gap created by active United States involvement in the drafting of almost all international maritime law instruments, and its subsequent refusal to ratify almost any of them, it is rather difficult not to feel cynical about the notion of a new international uniformity being championed under the banner of *Pax Americana*.

The notion that states adopt divergent hybrid regimes to further international uniformity is counter-intuitive, to say the least. A rather more plausible explanation for the trend lies in the *Realpolitik* of accommodating the demands of national lobbying groups which insist, with justification, that the Hague-Visby Rules have become hopelessly outdated and inadequate to govern international trade in the 20th, let alone the 21st century, while avoiding the politically unpalatable alternative of adopting the Hamburg Rules.[36] The Hamburg Rules seem to have become something of the villain of the piece here too, in the sense that their very existence is said to generate the trend towards hybrid regimes: [37]

> One of the unsettling effects of the entire Hamburg project is that it may unwittingly generate, at least in the short term, an even greater lack of uniformity than presently exists. Efforts sparked by notions of integration (the Nordic approach) or compromise (the U.S. approach) may simply add two more competing regimes to the three major regimes presently in effect.

This seems to me to represent only part of the picture. If states adopting hybrid regimes are really doing so because they feel that they are sailing between Scylla and Charybdis, surely some of the responsibility for that rests with the shortcomings of the Hague-Visby regime and the failure of the international maritime community to remedy these shortcomings at an international level?

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36 I Kuusniemi "Nordic Maritime Codes 1994" <http://www.neptunjuridica.com/arc_nmc.html>.

37 Force, above n 13, 2054; and see Ramberg, above n 11:

> The Hamburg Rules came into force but on a very limited scale. Also, the 1980 UN Convention on Multimodal Transport met considerable resistance as it was based on the Hamburg Rules. It has not yet come into force and it is questionable if it ever will. So we could say that, sadly enough, the Hamburg Rules themselves triggered the disunification of the law of carriage of goods.

IV THREE HYBRID REGIMES

There are currently a number of hybrid regimes in operation.[38] I will focus on three: the Nordic Maritime Codes[39] adopted by the Nordic countries[40] in 1994; the Carriage of Goods by Sea Regulations 1998 (Cth),[41] which introduced a hybrid regime in Australia in

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38 For example, the carriage regimes of Japan, Vietnam, Korea (RS Yu and J Peck "The Revised Maritime Section of the Korean Commercial Code" [1993] LMCLQ 403) and the People's Republic of China (L Zhang "Shipping Law and Practice in China – Legal Analysis of the Draft Maritime Code and Maritime Jurisdiction" (1990) 14 Tul Mar LJ 209; L Li "The Maritime Code of the People's Republic of China" [1993] LMCLQ 204; English translation at <http://www.chinaexpo.com/laws/law01/law0104.htm>). Germany has a rather peculiar "dual" cargo regime. As a signatory to the Hague Rules, it applies the Hague Rules to trade with other parties to the Rules, but applies national rules based on the Hague-Visby Rules in its trade with parties to those Rules: see R Herber *Grundlagen und aktuelle Probleme des deutschen und internationalen Seefrachtrechts: RWS-Skript 170* (Hundt Druck, Köln, 1987); R Ashton "A Comparative Analysis of the Legal Regulation of the Carriage of Goods by Sea Under Bills of Lading in Germany" 14(2) MLAANZ Jnl 28.

39 See *New Carriage of Goods*, above n 11; "The Nordic Maritime Code" above n 34; T Solvang "The Nordic Maritime Code Again" [1996] LMCLQ 406; H Tiberg "The Nordic Maritime Code Once Again" [1996] LMCLQ 413; Nyman "The Modernisation of the Swedish Maritime Code" [1995] 3 ICCLR 103; Kuusniemi, above n 36. For the texts of the Nordic Maritime Codes, see Norway: *Lov om Sjøfarten* (*Sjøloven*) (39/1994) <http://www.lovdata.no/eng/index.html> (English translations available at <http://www.uio.no/~erikro/WWW/NMC.html> and *The Norwegian Maritime Code* (*MarIus* No 236, Sjorettsfondet, Oslo, 1997)); Denmark: *Sølov* (170/1994), <http://www.retsinfo.dk; Sweden: *Sjölag* (1009/1994)> <http://www.jit.se/juridik/lagbok.html> and <http://www.notisum.se/rnp/sls/sls.htm>; Finland: *Merilaki* (674/1994) <http://finlex.om.fi/stp.html> (available in Finnish and Swedish). Apart from section and chapter numbering, the Nordic Maritime Codes are practically identical.

40 Used here in the sense of Denmark, Finland, Norway and Sweden. Iceland has not adopted the Nordic Maritime Code template.

41 The Regulations were made under the Carriage of Goods by Sea Amendment Act 1997 (Cth). The texts of both instruments are available at <http://www.austlii.edu.au>. For a discussion of the rather tortuous and unusual reform process, and the dubious merits of introducing a hybrid regime by delegated legislation, see M Davies "Carriage of Goods by Sea: Changes to the Law in Australia" (25th MLAANZ Annual Conference, Cairns, 1998) ["Carriage of Goods by Sea"]. See also PN Prove "The Proposed Amendments to the Carriage of Goods by Sea Act 1991, and International Uniformity" <http://online.anu.edu.au/law/pub/icl/transcon/intUniformity.html>; S Hetherington "Australia Hybrid Cargo Liability Regime: The Carriage of Goods by Sea Regulations 1998" [1999] LMCLQ 12; A Paipetis & S Westgarth "Legislative Changes to the Hague-Visby Rules" [1999] IJSL 127.

1998; and the proposed hybrid regime in the COGSA Bill 1999 that is currently before the United States Senate.[42]

As one might expect of unilateral national legislation, the conceptual structure and details of the Nordic Maritime Codes, the Australian Regulations and the COGSA Bill are quite different.[43] The Australian reform is the most conservative of the three, in the sense that it still largely retains the template of the Hague-Visby Rules, incorporating ideas from the Hamburg Rules relatively sparingly. The Nordic regimes adopt a structure and style that is far closer to the Hamburg Rules. The COGSA Bill is perhaps the most radical of the three, involving a substantial rewrite of both Hague-Visby and Hamburg elements and the incorporation of radically new definitions and ideas.

That said, the three hybrid regimes share some core characteristics, in the sense that they all borrow elements from the Hamburg Rules or elsewhere to effect reforms of areas that are commonly thought to be addressed inadequately by the Hague-Visby Rules. In particular, they tend to:

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42 See "Uniformity in the Law" above n 2, 554-555; MF Sturley "Proposed Amendments to the Carriage of Goods by Sea Act" (1996) 18 Houst J Int L 609 on the 1996 Committee on the Carriage of Goods (CoCoG) proposal, which has since been significantly amended. The text of the most recent (sixth!) draft Senate Bill, dated 16 April 1999, is at <http://www.admiraltylaw.com/tetley/cogsa99.htm>. On the draft COGSA 1999 see W Tetley "The Proposed New United States COGSA (The Important International Consequences)" <http://www.admiraltylaw.com/tetley/comment.htm> ["Proposed US COGSA"]; Asariotis and Tsimplis, above n 11.

43 Areas of difference include, amongst many other details, the definition of "carrier" and "shipper", the scope of geographical application and the liability period, the extent to which charter parties and carriage of live animals are regulated by the hybrid regime, the extent to which the Hague-Visby "shopping list" of carriers' immunities has been modified, and whether loss caused by delay in delivery of goods is covered by the hybrid regime. Given these differences, an argument that the hybrid regimes display "a consistency of approach by a number of countries which should point the way to those involved in seeking to draft a further international convention which might gain widespread support" ("Carriage of Goods by Sea" <http://www.withnellhetherington.com.au/Developments/ item3.html> seems overly optimistic).

(1) extend the application of the hybrid regime beyond carriage of goods under bills of lading, to carriage of goods under non-negotiable sea waybills and other transport documents;[44]

(2) extend the regime beyond the traditional tackle-to-tackle liability period;[45]

(3) extend the regime beyond liability for damage or loss of goods to liability for delay in defined circumstances;[46]

(4) extend the regime to deck cargo;[47] and

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44 Norwegian Maritime Code 1994 ss 251, 292 (bill of lading/*konossement*), 308 (seawaybill/*sjøfraktbrev*); Carriage of Goods by Sea Act 1991 (Cth), amended Art 1 r 1(aa) (consignment note), (f) (negotiable sea carriage document), (g) (sea carriage document); draft COGSA 1999 s 2(a)(5)(A) (contract of carriage). There is no express statement about the use of electronic transport documents in the Nordic Maritime Codes, which is surprising given that EDI use is well-developed in Nordic trade: see Honka (ed), above n 11, 115-117. It is not clear whether the lack of express regulation would place electronic transport documents outside the framework of the Nordic Maritime Codes. See Carriage of Goods by Sea Act 1991 (Cth), amended Art 1 r 1(ba) (data message), (h) (writing); draft COGSA 1999 ss 2(a)(5)(A) (contract of carriage), (C) (special rules for electronic bills of lading) and 2(b) (electronic notices, claims or communications).

45 Extension of the period of carrier liability is of particular practical significance because damage and loss caused by cargo handling, weather and theft commonly occur during the pre-loading and post-discharge periods, when the carrier can contract out of liability under the Hague/Hague-Visby "tackle-to-tackle" liability period: see Clarke, above n 2, 623 n 68; Honnold, above n 13, 81-83. Norwegian Maritime Code s 274 provides that the carrier is liable while the goods are in its custody from the port of loading to the port of discharge and further defines the moments of receipt and delivery of the goods. The Carriage of Goods by Sea Act 1991 (Cth), amended Art 1 r 3, provides that the carrier is liable while it is in charge of the goods within the "limits of the port or wharf" of loading and discharge: the limits are those fixed by local law. By contrast, draft COGSA 1999 s 2(a)(8) is much broader, covering the period "from the time goods are received by a carrier to the time they are delivered by a carrier to a person authorized to receive them". The hybrid COGSA regime would therefore govern all legs of multimodal transport of goods to or from the US, provided that the transport involves a sea-carriage leg.

46 Norwegian Maritime Code 1994 s 278; Carriage of Goods by Sea Act 1991 (Cth), amended Art 4A, which sets out the circumstances in which the carrier will be liable and lists permissible excuses for delay. By contrast, draft COGSA 1999 does not discuss the issue: a surprising and "regrettable omission": see Asariotis and Tsimplis, above n 11, 137.

47 Norwegian Maritime Code 1994 ss 263, 284; Carriage of Goods by Sea Act 1991 (Cth), amended Arts 1 r 1(c), 2, 6A; draft COGSA 1999 s 2(a)(6). When the Hague Rules were originally drafted, deck cargo was considered particularly risky and it was therefore considered inequitable to apply the standard liability regime to it. Nowadays, however, deck carriage is routine for containers, yachts and certain types of large vehicles and machinery.

(5) apply, with minor variations, Hague-Visby package limitations and time bars.[48]

Many of these hybrid regimes' substantive amendments to the Hague-Visby Rules seem unremarkable in their own terms. Some changes simply amount to the incorporation of a provision, or a variation on a provision, that is already found in the Hamburg Rules. For the most part, the amendments are intended to remedy shortcomings in the Hague-Visby Rules and produce a more balanced and acceptable carriage liability regime. Nevertheless, viewed in its broader context, the trend towards unilateral adoption of national hybrid cargo regimes has several disturbing implications.

V IMPLICATIONS OF HYBRID REGIMES

A International Law

Quite apart from issues of international uniformity, the trend towards hybrid cargo regimes raises some fundamental international law questions. The Nordic countries and Australia are all parties to the Hague-Visby Rules, and the United States is a party, with some reservations, to the Hague Rules. Yet they have not formally denounced the Hague or Hague-Visby Rules,[49] and appear to still regard themselves as parties to them. How can this seemingly contradictory position be justified? Are these national hybrid regimes in conflict with the international Conventions? Does their adoption amount to a breach of these states' international obligations? If so, what are the practical consequences of this?

The response to these questions has essentially been that the Hague and Hague-Visby Rules created a minimum carriage liability regime only, and as such, states that are parties to the Conventions are free to enact national legislation that extends the scope or period of the carrier's liability, or regulates matters that are not dealt with under the existing Rules.[50] The Convention, it is argued, was only intended to unify *certain* rules of law relating to bills of lading: other aspects of the cargo-carrier relationship "were left to national law, with no expectation that every nation would take the same approach".[51] As a consequence, it is argued, the hybrid regimes such as those implemented in Australia and the Nordic countries merely supplement the existing international Conventions, and are not in conflict with them.

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48 Norwegian Maritime Code 1994 s 280, 501; Carriage of Goods by Sea Act 1991 (Cth), amended Arts 3 r 6, 4 r 5; draft COGSA 1999 ss 9(h), 13.

49 The possibility of denunciation of the Hague Rules has been raised by academic commentators in the context of the United States reform proposals: see for example Mandelbaum, above n 29, 495, 498.

50 See for example Kuusniemi, above n 36.

51 Clarke, above n 2, 573-574; see also Honka (ed), above n 11, 21-22.

While there are some throw-away lines in the *travaux préparatoires* that suggest that national regulation of carriage outside of the "tackle-to-tackle" period may have been contemplated at the time, there are still some fundamental difficulties with this argument. For a start, it does not necessarily follow from the official title of the Convention that the Hague Rules should not be treated as an exclusive code of rights and obligations in respect of matters regulated by the Convention. This will have to be determined by the courts with reference to the wording and broad purpose of the Convention. For example, the Warsaw Convention, which was also introduced to unify "Certain Rules Relating to International Carriage by Air", has been interpreted by the courts as a uniform and exclusive liability scheme for international air carriage. In *Sidhu v British Airways plc*, Lord Hope said:[52]

> The phrase "Unification of Certain Rules" tells us two things. The first, the aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved exceptions to these rules should not be permitted, except where the Convention itself provides for them. Second, the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. It does not purport to provide a code which is comprehensive of all the issues that may arise. It is a partial harmonisation, directed to the particular issues with which it deals.
>
> …
>
> I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.

Secondly, while extension of the hybrid regimes beyond the tackle-to-tackle period may be less problematic in terms of conflict with the Convention, in the sense that it at least falls outside the definition of "carriage of goods" in Article 1(e) of the Rules, extension of the hybrid regimes to deck carriage, carriage of live animals, and liability for delayed delivery of goods, and amendments to the shopping list of carrier immunities in Article

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52 *Sidhu v British Airways plc* [1997] AC 430, 444, 453 (HL); see also *Emery Air Freight v Nerine Nurseries* [1997] 3 NZLR 723, 735-737 (CA); *Western Digital Corp v British Airways plc* (28 June 1999) unreported, QBD Comm Ct; *R v Secretary of State for the Environment, Transport and Regions ex parte International Air Transport Association* [1999] 1 CMLR 1287; *R v Secretary of State for the Environment, Transport and Regions ex parte International Air Transport Association* (21 April 1999) unreported, QBD Comm Ct.

4(2) would seem to conflict directly with Article 2, the English text of which provides that:[53]

> under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and *entitled to the rights and immunities hereinafter set forth*.

The rights and immunities to which the carrier is *entitled* at international law when the Hague or Hague-Visby Rules apply cover precisely those matters which are now regulated by hybrid regimes in a manner that imposes more stringent liabilities on carriers, violating their guaranteed rights and immunities under Article 2.

Thirdly, while the Convention confirms that the *parties* to the contract of carriage may *voluntarily* agree to regulate their contractual relationship outside the "tackle-to-tackle" period (Article 7) and provides that the *carrier* may *voluntarily* surrender its rights and immunities and increase its Convention responsibilities and obligations (Article 5), there is nothing in the Convention which suggests that *states* have the right to interfere in these matters by *mandatory* regulation. Indeed, the fact that the Convention expressly highlights these issues as a matter of party autonomy suggests a contrary intention.

Fourthly, the Convention sets out three matters in respect of which parties to the Convention may make reservations.[54] These matters are technical and relatively trivial, and do not include the carrier's rights and immunities that are detrimentally affected by the hybrid regimes. Again, the fact that the Convention expressly lists certain matters in respect of which states may exercise reservations, suggests an intention that in all other respects the Convention was intended to apply mandatorily on its own terms.

Finally, the argument that amendments brought about by the hybrid regimes merely "supplement", "improve on" or "extend" existing Convention provisions, ignores the practical reality that they subvert the hard-fought liability compromise which the Convention represents. Although that liability compromise might seem in places frustratingly incomplete, imperfect or perverse, that was the bargain agreed to by the parties to the treaty. If one takes the primacy of international law at all seriously that bargain cannot, and should not, be amended by unilateral national legislation.

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53 Emphasis added. In the official text:

> *le transporteur dans tout les contrats de transport des marchandises par mer sera, quant au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des dites marchandises, soumis aux responsabilités et obligations, comme il bénéficiera des droits et exonérations ci-dessous énoncés.*

54 See the Hague Rules, Art 9 and Protocol of Signature.

In short, I do not think that these hybrid regimes can be reconciled with the Convention provisions.[55] States which adopt hybrid regimes while remaining parties to the Convention are in breach of their international law obligation of good faith in support of the Convention and the other parties to it.[56] The only legally and morally defensible course of action open to such states is to denounce the Convention and any Protocols to which they are a party.

The contention that states are not entitled at international law to amend the Hague-Visby Rules unilaterally seems to have been acknowledged obliquely by the Australian Parliament, in the sense that it was careful to state that its modifications to the Hague-Visby Rules "do not actually amend the text [of the Hague-Visby Rules] set out in Schedule 1". Instead it was provided that "the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of Modifications".[57] The aim of this rather excruciating sophistry may have been to acknowledge that, under international law, modifications to the international text cannot legitimately be made without the consent of the other parties to the convention, and that the modifications therefore apply only *qua* national regulations, standing alongside the unsullied (but deemed-to-have-been-modified) international text! However, given that it is the *modified* text which is given the force of law in Australia, the distinction appears to be merely a theoretical nicety.

If my contention that these hybrid regimes are repugnant to the Convention is correct, what are the practical consequences of this? Will carriers affected by the imposition of more stringent hybrid liability regimes be able to argue successfully that these regimes are invalid? In most cases, of course, the answer is likely to be "no". Where courts have constitutional review powers, however, the answer might be different. Alternatively, if a court were convinced that the national statute implementing the hybrid regime was incompatible with the overall scheme of the relevant international Convention, it might be

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55 See also "Nordic Maritime Code" above n 34, 530-532, which describes the compatibility of the extension of the carrier's liability under the Nordic Maritime Code with the Hague-Visby Rules as "doubtful".

56 For the expression of the principle of *pacta sunt servanda* in customary international law, see the Vienna Convention on the Law of Treaties, Art 26. See also I Sinclair *The Vienna Convention on the Law of Treaties* (2 ed, Manchester University Press, Manchester, 1984) 83-84; R Morrison "Efficient Breach of International Agreements" (1994) 23 Denv J Int L & Policy 183, 193 n 33, who points out that the principle "is doubly binding on the signatories to the Vienna Convention", which include Australia and the Nordic countries, with the exception of Norway.

57 Carriage of Goods Act 1991 (Cth), s 7(2)(e), as amended by the Carriage of Goods by Sea Amendment Act 1997 (Cth). See "Carriage of Goods by Sea" n 41, 2 n 3.

willing to construe that statute restrictively as "subject to the relevant rules of international law".[58]

B Conflict of Laws

The hybrid regimes which I have discussed above are also likely to generate a number of conflict of laws issues. First, the states applying hybrid regimes have substituted the traditional "tackle-to-tackle" liability period with "port-to-port" liability in the case of the Australian and Nordic regimes, and "door-to-door" liability in the case of the proposed United States regime. As a consequence, the hybrid regimes are far more likely to conflict with foreign carriage laws, particularly where such laws are also framed in mandatory terms or purport to be codes.[59] In the case of multimodal transport, the extended liability periods of hybrid regimes will add to the current lack of a coherent liability framework, will aggravate current demarcation problems by overlapping with the ambits of other international transport conventions,[60] and will encourage forum shopping.

Secondly, the states applying hybrid regimes have extended the scope of mandatory application of their hybrid rules by broadening out the categories of relevant connecting factors that trigger their mandatory application, thereby encouraging forum shopping by cargo interests seeking to impose a higher limit on carriers than is permissible under the Hague or Hague-Visby Rules.[61]

In this regard, the Australian Regulations are the least radical of the three hybrid regimes. Article 10 of the Hague-Visby Rules has been amended so that the hybrid regime applies mandatorily to all outward carriage. Curiously, however, the regime will not apply mandatorily in respect of inward carriage where the Hague, Hague-Visby or Hamburg Rules, or a "modification" of those Rules "by the law of a Contracting State" govern the inward carriage "by agreement or by law".[62] Australia's hybrid regime will therefore have

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58 See *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 59 (CA).

59 For example the Carriage of Goods Act 1979 (NZ), which applies mandatorily to all domestic carriage of goods in New Zealand, including cargo handling within New Zealand port limits: see *Fletcher Panel Industries Ltd v Ports of Auckland* [1992] 2 NZLR 231.

60 See Clarke, above n 2, 38-39.

61 Conversely, where hybrid regimes and foreign laws on domestic carriage overlap, as would occur with draft COGSA 1999, carriers might seek to avoid the application of the domestic carriage law where its liability regime is less attractive than that of the hybrid regime: see for example Norwegian Maritime Code s 280, which imposes a liability ceiling of 17 SDR/kg in respect of domestic carriage, as opposed to 2 SDR/kg in respect of international carriage.

62 Amended Art 10(2). The hybrid regime will also not apply to carriage under a charterparty unless a negotiable transport document which "regulates the relationship between the holder of it and

limited application in respect of inward carriage, being of relevance only where the carriage is from a country which is not a party to one of the Conventions, and does not include a clause paramount in the bill of lading applying one of those Conventions. The application of Australia's hybrid regime in respect of inward carriage from another country which is a party to one of the Conventions but has adopted a hybrid regime might also give rise to uncertainty. In the case of more extreme hybrid regimes that incorporate "bits and pieces of all three Conventions, melding them together into a genuine hybrid of all three" or rewrite the Rules so fundamentally "that one can properly ask to what extent they are still recognisably the Hague Rules at all", is one still dealing with a "modification" of one of the Conventions, or *sui generis* legislation?[63]

The hybrid regime of the Nordic Maritime Codes goes further than the Australian version, applying as the mandatory *lex fori* to proceedings brought in any Nordic country in respect of: (a) all carriage of goods between Nordic countries; (b) all inward and outward carriage of goods between third world countries and Nordic countries; and (c) all non-Nordic carriage to which the Hague-Visby Rules mandatorily apply. Foreign choice of law clauses are permissible in category (c) carriage, but only where they specify the law of a country that is a party to the Hague-Visby Rules.[64]

The draft COGSA 1999 goes further still. The existing COGSA 1936 applies mandatorily to all ocean carriage to and from the US. In the draft COGSA 1999, it is proposed that the mandatory application of COGSA be extended to cover all multimodal carriage of goods to or from the United States, provided that some part of the carriage is by sea, and apply "from the time goods are received by a carrier to the time they are delivered by a carrier to a person authorized to receive them".[65] The contracting carrier, who is defined as the party who enters into the contract of carriage with the shipper, would be made liable throughout the entire period, regardless of who is actually performing the carriage. The proposed regime would also impose liability on "performing carriers", which are defined as including stevedores, terminal operators, consolidators, packers, warehousers, and other parties who facilitate the carriage of goods by performing, or procuring performance of, incidental carriage services.[66] Performing carriers are liable for loss or damage while the goods are in their custody. The extra-territorial reach proposed in the draft COGSA 1999 is

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the carrier of the relevant goods" has been issued: see amended Art 10(7); "Carriage of Goods by Sea" above n 41, 4-10.

63 See "Carriage of Goods by Sea" above n 41, 9.

64 Norwegian Maritime Code s 252; Honka (ed), above n 11, 24.

65 Draft COGSA 1999 ss 2(a)(8); 2(a)(5)(A)(i); 5(b),(c).

66 Draft COGSA 1999 s 2(a)(3)(C).

extraordinary, even by United States standards. For example, in respect of a contract of carriage of machinery from an inland New Zealand factory via Auckland to Los Angeles by road and sea, the draft COGSA 1999 purports to impose mandatory liability not only on the ocean carrier, but also on the New Zealand freight forwarder, road carrier, Ports of Auckland, stevedores, warehousers, and anyone else who had custody of the goods or handled them while they were in New Zealand.[67]

Thirdly, the states applying hybrid regimes restrict the use of foreign arbitration and jurisdiction clauses in bills of lading and other transport documents. The net effect of these restrictions is to protect the application of the hybrid regimes, subvert the principle of party autonomy and further encourage inappropriate forum shopping. The Nordic countries at least permit a limited choice of forum or arbitral seat along the lines of Article 21 of the Hamburg Rules. Because they are not parties to the Hamburg Rules, however, their domestic restrictions on foreign jurisdiction clauses are subject to the general Brussels/Lugano Convention framework.[68] In Australia, foreign jurisdiction and arbitration clauses in sea carriage documents are invalid. The Act allows for litigation or arbitration to take place in Australia only.[69] The position in the United States under the draft COGSA 1999 would be similar. Any foreign forum provisions in carriage to or from the United States are "null and void and of no effect".[70] Instead, the United States court "shall order that arbitration shall proceed in the United States".[71] The invalidation of foreign arbitration clauses clearly breaches these states' international obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 to give effect to foreign arbitration clauses.[72] Foreign courts and arbitrators are

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67 This might not be of practical significance where New Zealand parties do not submit to the jurisdiction of the United States courts and there are no assets in the United States against which a United States judgment can be enforced. A further potential difficulty is the cost and inconvenience to New Zealand parties of having to defend claims brought in both New Zealand (under for example the Carriage of Goods Act 1979) and in the United States (under COGSA).

68 Norwegian Maritime Code ss 310, 311; Honka (ed), above n 11, 24.

69 See the Carriage of Goods by Sea Act 1991 (Cth), s 11 as amended; *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* [1998] FCA 1622; L Barnard and PA Myburgh "Foreign Forum Clauses in Bills of Lading: Australia and New Zealand" (International Conference on Arbitration and Maritime Law, Barcelona, June 1998) 6-9, 18-21 for a critique of the Australian position.

70 Draft COGSA 1999 s 7(i)(2), overturning the United States Supreme Court decision in *Sky Reefer* above n 3.

71 Draft COGSA 1999 s 7(i)(3).

72 See SSJ Lee "Is *Sky Reefer* in Jeopardy? The MLA's Proposed Changes to Maritime Foreign Arbitration Clauses" (1997) 72 Wash LR 625, 645; "Proposed US COGSA" above n 42; Ramberg, above n 11; but see Asariotis and Tsimplis, above n 11, 135, who state without further elaboration that the wording of s 7(h), (i) "may ensure that there would be no obvious conflict" with the US's

unlikely to defer to the United States and Australian position, however, and will probably allow arbitration to proceed in parallel in their jurisdictions. This raises the spectre of multiple conflicting arbitration awards in different jurisdictions, multiple anti-suit injunctions, and further conflicts of recognition and enforcement of awards. Carriage claims will inevitably "become even more complicated than they already are, as they become overlaid with increasingly complex conflicts of laws issues".[73]

Finally, it might be of interest to consider how foreign hybrid regimes will impact on future carriage claims brought in New Zealand courts. Where proceedings are brought in New Zealand in respect of outward carriage to a foreign hybrid regime country, the New Zealand courts will apply the Hague-Visby Rules rather than the foreign hybrid regime, even if the bill of lading contains a choice of law clause or clause paramount selecting that foreign hybrid regime. This is because all outward carriage from New Zealand, as a party to the Hague-Visby Rules, is mandatorily governed by those Rules, which have the force of law in New Zealand.[74] However, if the courts of the foreign hybrid regime country of destination were seised of the matter (which would be the more usual course of events), they would typically apply the relevant foreign hybrid regime as the mandatorily applicable *lex fori* to determine the claim.[75]

As to proceedings brought in New Zealand in respect of inward carriage from a foreign hybrid regime country, the outcome would largely turn on the country of origin: where the carriage is from a foreign hybrid regime country which is still a party to the Hague-Visby Rules, such as Australia or the Nordic countries, the New Zealand court will also apply the Hague-Visby Rules rather than the Australian or Nordic hybrid regimes, because the carriage is mandatorily governed by the Hague-Visby Rules.[76] The Hague-Visby Rules will govern such inward carriage even where the bill of lading contains a choice of law clause

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obligations to give effect to arbitration clauses under the New York Convention. It is not clear, however, how compulsory court-directed arbitration which does not respect the parties' choice of arbitral seat or arbitrators can be regarded as "giving effect" to the foreign arbitration clause.

73 "Carriage of Goods by Sea" above n 41, 21.

74 Maritime Transport Act 1994, s 209; sch 5, art 10: "The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if … the Bill of Lading is issued in a Contracting State, or … the carriage is from a port in a Contracting State… ."

75 The United States and Nordic courts are required to do so by their hybrid regimes. The Australian courts, however, would apply the Hague-Visby Rules to carriage from New Zealand: see text at n 62 above.

76 As the carriage is "from a port in a Contracting State": see Art 10, above n 74. The result would, of course, be different if Australia or the Nordic countries denounced the Hague-Visby Rules.

or clause paramount referring to the relevant Australian or Nordic hybrid regime.[77] However, a different result would be reached in respect of inward carriage of goods from a foreign hybrid regime country that is not a party to the Hague-Visby Rules, for example, the US. In such cases, the Hague-Visby Rules would not have mandatory application, and the outcome would turn on general conflicts rules as applied to the terms of the bill of lading. In the example given, the bill of lading would probably include a paramount clause incorporating the COGSA 1999 hybrid regime, as this would be mandatory under United States law. If so, the claim would be governed by the COGSA hybrid regime, rather than the Hague-Visby Rules.[78]

VI A WAY FORWARD

In 1994 the CMI established an international sub-committee to investigate the issue of uniformity of carriage of goods by sea law. The sub-committee met four times and reported back to the CMI at its 1997 Antwerp Centenary Conference. Its findings were less than incendiary, and have resulted in another general questionnaire, but no draft text or concrete recommendations. Since then, the idea of drafting a new carriage liability regime in co-operation with UNCITRAL appears to have been put on the back-burner.

Given the current impasse, where to from here? One possibility is to do nothing, in which case the current trend towards deharmonisation will undoubtedly continue, and international carriage of goods by sea will increasingly be governed by divergent national regimes. Not all commentators would be dismayed by this outcome. Stephan, for example, argues that we ought to spend less time drafting uniform rules: [79]

> and more on devising ways to encourage states to facilitate contractual choices made by parties in the course of transactions and in encouraging states to reveal how they propose to deal with private disputes arising out of international commerce.

This argument, however, exaggerates the level of certainty and transparency that can be achieved through traditional choice of law and jurisdiction avenues. Even if parties to a transnational commercial transaction are in a position to predict accurately the

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77 But see "Carriage of Goods by Sea" above n 41, 5 n 7 which argues that a foreign court should apply the Australian hybrid regime in these circumstances, citing *Furness Withy (Aust) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 236 as authority for this proposition. *The Amazonia* is, however, not in point. At the time the case was decided, Australia was still a party to the Hague Rules and carriage from Australia to the United Kingdom was therefore not mandatorily governed by the Hague-Visby Rules.

78 If the New Zealand court held that the proper law of the contract of carriage was not United States law, however, the effect of the COGSA paramount clause might be somewhat moderated.

79 Stephan, above n 1, 743.

implications of the procedural, conflict of laws and substantive rules that foreign states will apply to that transaction (which seems highly unlikely indeed), the fact remains that "resort to choice of law is conducive to certainty only after the forum itself [is] known".[80] Moreover, if the parties have not had the foresight to include a choice of law clause in their contract, certainty may be further compromised by the need to resort to judicial divination of the objective proper law of the contract of carriage.[81] The status quo is not an acceptable option.

Another possible solution takes the form of regional initiatives. In particular, some commentators pin their hopes on a current European Union Commission DG-VII initiative to draft a harmonised multimodal transport liability regime, which would serve as the basis for an European Union Directive, and also perhaps as a model for future international uniformity.[82] Regional initiatives are, of course, a double-edged sword, in the sense that, while harmonising the carriage liability regime in one region, they might exacerbate divergence and conflict of laws in relation to others.

On balance, I believe that an appropriate and lasting solution to the current dilemma can only be achieved through an international initiative to draft a new uniform carriage liability standard. For such an initiative to succeed, however, I would suggest that attention needs to be paid to three important issues.

First, any new uniform regime will have to cut across the current "confused jigsaw of international Conventions designed to regulate unimodal carriage, diverse national laws and standard term contracts"[83] to accommodate the worldwide explosion in multimodal transport. The reform will have to involve broader transport interest groups, rather than solely shipping interests, and will have to be drafted in a way that not only harmonises international sea transport, but can also be integrated seamlessly into liability regimes governing other modes of international transport.[84]

Secondly, the entire reform debate needs to be refocused. Rather than endlessly bickering over substantive compromises, the parties should invest more time and effort in devising an appropriate process to negotiate, implement and update a new uniform carriage regime. There will have to be agreement on which international body is to be

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80 Yiannopoulos, above n 2, 371.

81 See L Barnard "Choice of Law in International Contracts – The Objective Proper Law Reconsidered" (1996) 2 NZBLQ 27.

82 See "Plan of Action" above n 28; Ramberg, above n 11 for a discussion of this initiative.

83 Asariotis and Tsimplis, above n 11, 140.

84 Clarke, above n 2, 39.

responsible for the initiative. I would submit that the CMI is not sufficiently representative of the international transport community, and has neither the international mandate nor the internal political will to accomplish this task. To be successful, the initiative will have to come from UNCITRAL, with the co-operation and assistance of not only the CMI but also the full range of international transport organisations. Careful attention should be paid to the drafting of any new uniform instrument, to ensure that the instrument will be implemented uniformly in different jurisdictions. Case law on the uniform instrument from different jurisdictions should be widely publicised and easily available to enhance uniformity of interpretation.[85] A body of independent experts might be set up to offer guidance on questions of uniform interpretation.[86] Most importantly, any new instrument that is adopted must allow for timely, straightforward, flexible and frequent review and amendment procedures,[87] which cannot be derailed by minority interest groups.

Thirdly, some thought needs to be given to whether the traditional model of mandatory rules embodied in an international convention is the most effective way to achieve international uniformity in this area. As discussed above, the mandatory status of international conventions can raise the political stakes to the point where all that the parties can agree on is a mediocre instrument hedged about with problematic compromises. By contrast, the use of model laws or voluntary principles, industry clauses or guidelines can be considerably less threatening and achieve more effective harmonisation in the long term.[88] Moreover, as the history of amendment of the Hague Rules illustrates, international conventions are not particularly adaptable or flexible instruments. Some serious thought

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85 See for example the Case Law On UNCITRAL Texts (CLOUT) database at <http://www.uncitral.org/english/clout/index.htm>.

86 Clarke, above n 2, 65 n 189; compare the ICC Banking Commission, which delivers opinions on the interpretation of the Uniform Customs and Practice (UCP) for documentary credits: see for example G Collyer (ed) *More Queries and Responses on UCP 500, 1997: Opinions of the ICC Banking Commission 1997* (ICC Publishing, Paris, 1998).

87 See Clarke, above n 2, 65: "there are advantages of adaptability in setting up a procedure for amendment of the text without the full circus of a diplomatic conference"; and Evans, above n 22, 152-153: "the Warsaw system exposes one of the principal weaknesses of uniform law – the inability of the international community to respond to changing circumstances by adopting and implementing updated versions of existing instruments in a timely manner."

88 H Honka "Harmonization of Contract Law through International Trade: A Nordic Perspective" (1996) 11 Tul Eur & Civ LF 111, 130; Evans, above n 22, 152, 158.

needs to be given to whether international carriage liability regimes need to be mandatory at all, or whether some degree of contracting out by the parties ought to be permitted.[89]

A realistic and ultimately workable solution might involve the development of a new model law for international multimodal transport by a committee of technical experts, along the lines of the UNCITRAL Model Laws on Arbitration, Electronic Commerce and Cross-Border Insolvency, which would provide a general standard framework liability regime for adoption by jurisdictions. Within this general framework, provision should be made for regular updating of the detailed substantive provisions to ensure that the regime does not fall behind technological and industry developments. This model of reform, if properly executed, could achieve the practical advantages sought in adopting hybrid carriage regimes, without sacrificing international uniformity or coherence.

UNIFORMITÉ OU UNILATÉRALISME DANS LE DROIT DES TRANSPORTS DE MARCHANDISES PAR VOIE MARITIME?

La recherche du recours à un système juridique uniforme, a toujours été l'un des objectifs, si ce n'est un idéal, que les différents acteurs du commerce maritime international s'efforcent d'atteindre. L'efficacité et la sécurité des transactions dans ce secteur d'activité ne sont en effet, guère conciliables avec une multiplicité de régimes juridiques potentiellement applicables.

Cependant, on assiste depuis maintenant un peu plus de dix ans, à une tendance de plus en plus répandue, au recours par les juridictions spécialisées, à des règles spécifiques qui pour beaucoup d'entre elles s'écartent des principes d'uniformité traditionnels retenues dans ce domaine du droit international.

Fort de ce constat, l'auteur considère que cette tendance nouvelle est surtout une source de problèmes non seulement parce qu'elle sape les fondements mêmes du droit international des transports maritimes internationaux, mais aussi parce qu'à l'analyse, elle engendre plus de difficultés qu'elle n'apporte de solutions.

L'auteur, à l'appui de son raisonnement, propose également, un certain nombre de reformes envisageables dans ce domaine.

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89 See Ramberg, above n 11, who argues that it is anomalous to insist on a mandatory liability regime for carriage contracts when "the main contract – namely the contract of sale – which sets the ball rolling and triggers the ancillary contracts of carriage, insurance and finance" is likely to be governed by the UN Convention on Contracts for International Sale of Goods 1980 (CISG), which is largely non-mandatory.