

**INSTRUMENTS OF INTERNATIONAL COMMERCIAL
HARMONISATION
IN ENGLAND AND WALES:
How 'International' is International Commercial Law?**

**Submitted in respect of the Degree Doctor of Philosophy
University of East Anglia Law School**

99,747 words

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ABSTRACT

The object of this thesis was to establish whether a culture has developed in England and Wales towards international instruments of commercial harmonisation. In doing so, the thesis has examined the approach of five main institutions and groups, who represent the structures and mechanisms responsible for the functioning and on-going development of international commercial law, namely Universities; Practitioners; Cargo Owners, Freight Forwarder and Carriers; the Judiciary and Government / Parliament. The interaction of these institutions and groups with international commercial conventions, protocols and practices was analysed and the research has shown that although these institutions and groups generally display an outward sense of internationality, there is an underlying sense that international commercial laws are used as a means of better fitting English law to the transaction at hand, rather than as a means of applying another body of rules in preference to the governing national law.

The research provides evidence that the approach of the institutions and groups to international commercial instruments is informed by complex and frequently inter-related factors, and that this generally results in a continued reliance on English law as the primary law for cross-border commercial transactions. Whilst there is support for the process of harmonising international commercial law, it is clear that the systems and processes for putting such laws into practice are at best incomplete.

The research provides significant new data as to the current attitudes and approaches to international commercial instruments that are held by some of the main commercial sectors in England and Wales. The thesis further documents how these attitudes and approaches have been informed and this may help support a platform from which the use and implementation of harmonised commercial laws in England and Wales may be better enabled in the future.

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CONTENTS

<i>List of Tables</i>	<i>vii</i>
<i>List of Figures</i>	<i>viii</i>
<i>Table of Cases</i>	<i>ix</i>
<i>Statutes & Statutory Instruments</i>	<i>xv</i>
<i>Table of Conventions, Model Laws and Protocols</i>	<i>xvii</i>
<i>Table of Customs & Practice, Principles and Rules</i>	<i>xix</i>
<i>Abbreviations</i>	<i>xx</i>

Chapter 1 - Introduction & Background

1.0 INTRODUCTION.....	1
1.1 Background.....	2
2.0 OVERALL METHODOLOGY.....	4
2.1 Who is it about?	4
2.2 Why these Institutions and Organisational Groups were selected?	4
2.2.1 Universities.....	4
2.2.2 Practitioners.....	5
2.2.3 Cargo Owners, Freight Forwarders & Carriers.....	5
2.2.4 The Judiciary.....	6
2.2.5 Government & Parliament.....	6
2.3 How the Study has been conducted.....	6
2.4 Definitions.....	8
3.0 LIMITATIONS OF THE STUDY.....	9
4.0 RELATED WORK & CONTEXT OF RESEARCH.....	10
4.1 Universities.....	11
4.2 Practitioners.....	12
4.3 Cargo Owners, Freight Forwarders & Carriers.....	13
4.4 The Judiciary.....	14
4.5 Government & Parliament.....	15

Chapter 2 - The Universities

1.0 INTRODUCTION.....	17
2.0 METHODOLOGY.....	18
2.1 Who and Why?	18
2.2 How the Study was conducted?	19
2.3 Which Universities were selected?	19
2.4 Limitations of the study.....	21
3.0 UNIVERSITIES AND UNDERGRADUATE COMMERCIAL LAW.....	22
3.1 The Golden Triangle.....	22
3.2 The Russell Group.....	24
3.3 The 1994 Group.....	26

CONTENTS

3.4	The Million+ Group.....	28
3.5	The University Alliance.....	30
3.6	The Unaffiliated Universities.....	34
4.0	SUMMARY COMPARISON OF GROUPS.....	36
4.1	Comparison of 'In depth' Study.....	37
4.2	Comparison of Universities having NO International Commercial Content.....	38
5.0	POSTGRADUATE INTERNATIONAL COMMERCIAL LAW.....	39
5.1	Postgraduate Commercial Law Courses.....	40
5.2	Why Post Graduate level?	41
6.0	WHAT HAS INFORMED UNDERGRADUATE COMMERCIAL LAW.....	43
6.1	The influence of the Profession on Legal Education.....	43
6.1.1	The Effect of the Foundation Subjects.....	43
6.1.2	The Effect of Conversion Courses.....	46
6.1.3	The Gate-Keeping influence of the Profession.....	48
6.1.4	The influence of the Legal firms.....	48
6.2	The influence of English Law.....	50
6.3	The influence of the universities themselves.....	53
6.3.1	Universities' International perspective.....	55
6.3.2	Commercial law as an optional subject.....	57
7.0	CONCLUSION.....	60

Chapter 3 - The Practitioners

1.0	INTRODUCTION.....	63
2.0	METHODOLOGY.....	64
2.1	Which Practitioners were selected?	64
2.2	How the Study was conducted.....	64
2.2.1	How 'International Practices' were identified.....	65
2.2.2	The Questionnaire.....	66
2.3	Limitations of the Study.....	66
3.0	INTERNATIONAL RULES AND PRACTICES.....	68
3.1	Incoterms.....	68
3.2	The UCP and Other International Bank Payment Undertakings.....	70
3.3	International Commercial Arbitration Rules.....	71
3.4	The York Antwerp Rules of General Average.....	72
4.0	INTERNATIONAL COMMERCIAL CONVENTIONS – RATIFIED BY THE UK.....	73
4.1	The International Carriage Conventions.....	74
4.2	International Secured Transactions.....	75
4.3	International Arbitration.....	75
4.4	International Civil Procedures.....	76
4.5	Cross Border Insolvency.....	77
5.0	INTERNATIONAL CONVENTIONS – NOT RATIFIED BY THE UK.....	77
5.1	The CISG 1980.....	78
5.2	The Cape Town Convention 2001.....	79

CONTENTS

5.3	Carriage of Goods by Sea Conventions.....	81
5.3.1	The Hamburg Rules 1978.....	81
5.3.2	The Rotterdam Rules 2008.....	82
5.4	Securities Conventions.....	84
5.4.1	The Hague Securities Conventions 2002.....	84
5.4.2	The Geneva Securities Convention 2009.....	84
6.0	WHAT HAS INFORMED THE PRACTITIONERS' APPROACH?	85
6.1	Ignorance.....	86
6.2	Reluctance to Change from English Law.....	87
6.3	Fear.....	88
7.0	CONCLUSION.....	90

Chapter 4 - The Cargo Owners, Freight Forwarders & Carriers

1.0	INTRODUCTION.....	94
2.0	METHODOLOGY.....	95
2.1	Who was selected?	95
2.1.1	Cargo Owners.....	95
2.1.2	Freight Forwarders.....	96
2.1.3	Carriers.....	96
2.2	How the Study was conducted.....	97
2.2.1	The Questionnaire.....	98
2.2.2	Interviews.....	98
2.3	Limitations of the Study.....	99
3.0	CARGO OWNERS' APPROACH TO INTERNATIONAL INSTRUMENTS.....	100
3.1	Use of Rules and Practices.....	100
3.1.1	Incoterms.....	100
3.1.2	The UCP.....	101
3.1.3	Arbitration Rules.....	102
3.2	Use of Conventions - Ratified by the UK.....	103
3.2.1	The Carriage Conventions.....	103
3.2.2	Other Ratified Conventions.....	104
3.3	Use of Conventions - NOT Ratified by the UK.....	105
4.0	FREIGHT FORWARDERS' APPROACH TO INTERNATIONAL INSTRUMENTS.....	106
4.1	Use of Rules and Practices.....	106
4.1.1	BIFA Standard Trading Conditions.....	107
4.2	Use of Conventions - Ratified by the UK.....	108
4.2.1	The Carriage Conventions.....	108
4.2.2	Comparison of Liability Limits.....	110
4.3	Use of Conventions – NOT Ratified by the UK.....	112
5.0	THE CARRIERS' APPROACH TO INTERNATIONAL INSTRUMENTS.....	113
5.1	Use of Rules and Practices.....	113
5.2	Use of Conventions - Ratified by UK.....	115
5.3	Use/Awareness of Conventions - NOT Ratified by the UK.....	117

CONTENTS

6.0	WHAT HAS INFORMED THESE APPROACHES.....	120
6.1	Ignorance.....	121
6.2	Advisers.....	122
6.2.1	Freight Forwarders.....	122
6.2.2	Legal Practitioners.....	123
6.3	Government Information.....	124
7.0	CONCLUSION.....	127

Chapter 5 - The Judiciary

1.0	INTRODUCTION.....	130
2.0	METHODOLOGY.....	131
2.1	What Conventions were selected?	131
2.2	How the study was conducted.....	132
2.3	Limitations of the study.....	133
3.0	JUDICIAL RECOURSE TO SOURCES PRE-DATING CONVENTION.....	134
3.1	Legislation pre-dating Convention.....	134
3.2	Common Law Precedents pre-dating Convention.....	136
3.2.1	Hague Rules.....	136
3.2.2	Warsaw Convention.....	138
3.2.3	The CMR.....	139
4.0	JUDICIAL RECOURSE TO THE TRAVAUX PRÉPARATOIRES.....	141
4.1	Public Accessibility to the Travaux Préparatoires.....	142
4.2	Legislative Intention.....	143
4.3	Few 'Bulls-Eyes'	144
4.4	Inferences when the Travaux Préparatoire is Silent.....	145
5.0	JUDICIAL RECOURSE TO CONVENTION INTERPRETATION PROVISIONS.....	146
5.1	Vienna Convention on the Law of Treaties.....	147
5.2	Hague & Hague-Visby Rules Interpretation Provisions.....	148
5.3	Warsaw Interpretation Provisions.....	151
5.4	CMR Interpretation Provisions.....	152
6.0	JUDICIAL RECOURSE TO FOREIGN LANGUAGE TEXT OF CONVENTIONS.....	154
6.1	French Text of the Hague Rules / HVR.....	155
6.2	French Text of the Warsaw Convention.....	157
6.3	USA Version of the Warsaw Convention.....	159
6.4	French Text of the CMR.....	160
7.0	JUDICIAL RECOURSE TO COMPARATIVE JURISPRUDENCE.....	162
7.1	The Hague / HVR Rules	
7.1.1	Use of Foreign Judgments 1925 - 1949.....	163
7.1.2	Use of Foreign Judgments 1950 - 1979.....	165
7.1.3	Use of Foreign Judgments 1980 - 2005.....	168
7.2	The Warsaw Convention	
7.2.1	Use of Foreign Judgments 1950 - 1979.....	172
7.2.2	Use of Foreign Judgments 1980 - 2005.....	174

CONTENTS

7.3	The CMR	
7.3.1	Use of Foreign Judgments 1970 - 1979.....	179
7.3.2	Use of Foreign Judgments 1980 – 2005.....	180
7.4	Civil Law v Common Law.....	183
8.0	JUDICIAL USE OF COMMENTARIES & TEXTS.....	184
8.1	The Hague / HVR Rules.....	184
8.2	The Warsaw Convention.....	189
8.3	The CMR.....	192
9.0	JUDICIAL RULES OF CONSTRUCTION.....	193
9.1	The Purposive Approach.....	193
9.2	The ‘English Approach’.....	197
9.2.1	Identifiably different.....	197
9.2.2	Uniform Interpretation ‘so far as it is possible’.....	198
9.2.3	English Judicial History.....	200
9.2.4	Plain or Ordinary Meaning of the Words.....	201
10.0	CONCLUSION.....	204

Chapter 6 - Parliament and the Government

1.0	INTRODUCTION.....	208
2.0	METHODOLOGY.....	209
2.1	What Conventions were selected?	209
2.2	Reasons why these Conventions were selected.....	210
2.3	How the Study has been conducted.....	211
2.4	Limitations of the Study.....	211
3.0	THE CARRIAGE OF GOODS BY SEA.....	212
3.1	The Need for Legislation.....	212
3.2	The UK Role in the Development of The Hague Rules.....	213
3.2.1	The Imperial Shipping Committee.....	213
3.2.2	The Draft Hague Rules.....	214
3.3	Enacting The Hague Rules into English Law.....	216
3.3.1	Bill Introduced in House of Lords.....	216
3.3.2	Consideration by Joint Select Committee.....	217
3.3.3	Reintroduction in the House of Lords.....	218
3.3.4	Entry into Force.....	219
3.4	The Visby Protocol.....	219
3.4.1	Enacting the Hague-Visby Rules into English Law.....	220
3.5	The S.D.R. Protocol.....	222
3.6	The Hamburg Rules.....	224
3.6.1	UK Opposition to the Hamburg Rules.....	225
3.6.2	Hamburg - Entry into Force or Disharmonisation?	227
3.7	The Rotterdam Rules.....	228
3.7.1	Rotterdam - Entry into Force or Further Disharmonisation?	230
3.7.2	The UK Government Position.....	231

CONTENTS

4.0	THE CARRIAGE OF GOODS BY AIR.....	233
4.1	The Need for Legislation.....	233
4.2	The UK Role in the Development of the Warsaw Convention.....	235
4.3	Enacting the Warsaw Convention into English Law.....	237
4.4	The Hague Protocol 1955.....	239
4.5	The Guadalajara Convention 1961.....	242
4.6	The Guatemala City Protocol 1971.....	243
4.7	The Montreal Additional Protocols 1975.....	244
4.8	The Montreal Convention 1999.....	248
5.0	INTERNATIONAL SECURITY INTERESTS IN MOBILE EQUIPMENT.....	251
5.1	The Need for Legislation.....	251
5.2	The UK Role in the Development of the Mobile Equipment Convention.....	253
5.3	The Consultation Process I.....	255
5.4	Giving Effect to the Cape Town Convention.....	256
5.5	The Consultation Process II.....	259
6.0	INTERNATIONAL SALE OF GOODS.....	262
6.1	The Need for Legislation.....	262
6.2	The ULIS and ULFIS Conventions.....	263
6.3	The UK Role in the Development of the CISG.....	265
6.4	The Consultation Process I.....	267
6.5	Giving Effect to the CISG.....	268
6.6	The Consultation Process II.....	269
7.0	SIGNATURE, RATIFICATION & ENTRY INTO FORCE DATES.....	274
8.0	CONCLUSION.....	277

Chapter 7 : Conclusion

1.0	OVERALL CONCLUSION.....	280
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APPENDICES

Appendix 1	- Post Graduate International Commercial LLM Courses.....	290
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Appendix 2	- Legal Firms Practitioners Selected from.....	294
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BIBLIOGRAPHY	297
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LIST OF TABLES

TABLE 1 : The Golden Triangle - International commercial content	22
TABLE 2 : Russell Group – International commercial content	24
TABLE 3 : 1994 Group – International commercial content	26
TABLE 4 : Million+ - International commercial content	29
TABLE 5 : Alliance Group – International commercial content	32
TABLE 6 : Unaffiliated – International commercial content	34
TABLE 7 : Summary Comparison of Groups	36
TABLE 8 : Signature, Ratification and Entry into Force Date	275

LIST OF FIGURES

FIGURE 1 : % of Universities including IN DEPTH study of International commercial instruments	37
FIGURE 2 : % of Universities having NO study of international commercial instruments	38
FIGURE 3 : Indepth Study of international commercial instruments Undergraduate v Postgraduate	40
FIGURE 4 : What international commercial instruments Practitioners advise on	85
FIGURE 5 : Merchant & carriers use / awareness of International commercial instruments	120
FIGURE 6 : Interpretation cases as a % of Total Air, Sea & Road Carriage cases	132
FIGURE 7 : Recourse to Common Law predating Convention	137
FIGURE 8 : Recourse to the Travaux Préparatoires	141
FIGURE 9 : Recourse to the French text of the Convention	155
FIGURE 10 : Recourse to Foreign Judgments	163
FIGURE 11 : Hague Rules / HVR – Nationality of Cases Referred to	169
FIGURE 12 : Warsaw Convention – Nationality of Cases Referred to	174
FIGURE 13 : CMR – Nationality of Cases Referred to	182
FIGURE 14 : Civil v Common Law Decisions Referred to	183
FIGURE 15 : Hague Rules / HVR – Use of Academic Works	185
FIGURE 16 : Hague Rules / HVR – Types of Academic Works Referred to	187
FIGURE 17 : Warsaw Convention – Use of Academic Works	189
FIGURE 18 : Warsaw Convention – Types of Academic Works Referred to	192
FIGURE 19 : CMR – Use of Academic Works	193
FIGURE 20 : Express Reference to ‘Broad Principles’ or Purposive Approach	196

TABLE OF CASES

Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1958] 1 All ER 725 (HL)
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TABLE OF CASES

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ABBREVIATIONS

CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CMR	Convention on the Contract for the International Carriage of Goods by Road (Convention Relative au Contrat de Transport International de Marchandises par Route)
CTC	Cape Town Convention on International Interests Mobile Equipment 2001
HVR	The Hague-Visby Rules
ICC	International Chamber of Commerce
PICC	UNIDROIT Principles of International Commercial Contracts
PECL	Principles of European Contract Law
SDR	Special Drawing Rights
UCP	Uniform Customs and Practice for Documentary Credits (Latest version UCP600)
UNCITRAL	United Nations Commission on International Trade
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law

Chapter 1 : Introduction & Background

1.0 INTRODUCTION

International commercial rules, practices and conventions endeavour to bring uniformity and certainty to cross-border transactions, by providing a neutral legal regime which can assist in overcoming the difficulties associated with national legal systems, nuances of culture and language. Such international commercial instruments have become increasingly important to those engaged in international commerce, as they have spread across jurisdictions and across various aspects of commercial law. In response to this, a growing body of academic work has developed on the application and efficacy of particular instruments and the inherent benefits of harmonising international commercial laws.

Whilst this thesis also looks at instruments which harmonise international commercial law, it does so from a somewhat different perspective than other work in this area, as the focus of this research is on *how* institutions and organisations approach international commercial instruments and *how* that approach has been informed. Therefore, this research examines how various institutions and organisational bodies in England and Wales view and work with international commercial instruments rather than the more usual research on how different international commercial instruments work in various parts of the world.

The study is structured around five institutions or organisational groups involved with private international commercial laws in England and Wales - namely the Universities; the Practitioners; the Cargo Owners, Freight Forwarders and Carriers; the Judiciary and Government/Parliament - each of which will form a separate chapter within the thesis. The chapters all comprise a detailed examination of that particular group's attitudes and approach to international commercial instruments, with analysis as to how that approach has developed or been informed. This work will then assist in establishing whether a particular culture or ethos has developed in England and Wales in response to private international commercial law.

Such a study is of fundamental importance as it will not only provide evidence as to the actual use or levels of awareness and therefore success of specific types of international commercial instruments; but it will also provide evidence as to the success of harmonisation and unification projects – evidence which may contribute to the way in which private international commercial laws are further developed and/or implemented in England and Wales.

1.1 Background

The business of buying and selling across national borders has existed for centuries. In medieval times a common body of mercantile rules, customs and practices was developed by merchants to regulate their trade throughout Europe. The *lex mercatoria*¹, as it was known, functioned as a transnational commercial law which was distinct from any local, feudal, royal or ecclesiastical laws². Although it is debatable as to whether the *lex mercatoria* was uniform in nature or was applied equally in the Merchant courts where it was enforced, it was nonetheless an international body of rules, principles and laws³.

The *lex mercatoria* became fragmented during the 18th and 19th centuries, as individual merchants needed customs and practices to be more clearly defined and individual nations needed to develop their laws officially rather than informally through commercial experience⁴. Consequently, commercial laws became the province of nations as each developed their own legal systems and methods of enforcement. The fragmentation of the *lex mercatoria* contrasting with other sciences such as medicine, chemistry or physics – where the respective international bodies of knowledge that had developed remained as such and

¹ I.e. the Law Merchant; see generally, L.E. Trakman, 'The Evolution of the Law Merchant: Our Commercial Heritage' Part 1 (1980-1981) 12 J. Mar. L. & Com. 1; Part II (1980-1981) 12 J. Mar. L. & Com. 153; C.M. Schmitthoff, 'The Unification of the Law of International Trade' (1968) J. Bus. L. 105

² H.J. Berman & C. Kaufmann, 'The Law of International Commercial Transactions' (1978) 19 Harv. Intl. L. J. 225

³ See generally e.g. L. Sealy & R.J.A. Hooley, 'Commercial Law: Text, Cases and Materials' (3rd Edn., OUP, Oxford, 2005) p.14-17

⁴ n(2) p.226

did not devolve into national sciences such as German medicine, French physics or English chemistry⁵ for instance.

From the early 20th century there have been attempts by various international organisations⁶ to return to a form of international commercial unity, through the development of new international uniform rules, practices, model laws and conventions in such areas of commerce as carriage of goods⁷, international sales⁸, payment undertakings⁹, high value asset financing¹⁰ and dispute resolution¹¹. These new instruments also reflecting and responding to increasingly sophisticated financial and commercial processes, and widespread improvements in communication methods and technology.

Nevertheless, despite the increasing number of international commercial instruments, which the UK has frequently participated in developing; the UK has not ratified many conventions outside those pertaining to the international carriage of goods. In fact, it was said in 1990 that it would be foolish to abandon the known and internationally respected virtues of English law, and replace it with international conventions which can produce unfamiliar results¹². This tended to suggest that English law was seen as better suited to international trade than any harmonised or unified laws; but as the 21st century dawned, Professor Sir Roy Goode questioned whether it was adequate or indeed acceptable to say that English law governs international trade transactions?¹³. This thesis will examine whether this is actually the case and whether the 'English law culture' still exists within the institutions and organisations in England and Wales that are involved in international private commercial law.

⁵ R. Zimmerman, 'Civil Code and Civil Law: The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science' (1994-1995) 1 Colum. J. Eur. L. 65

⁶ Such as the International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDRIOT)

⁷ E.g. the Convention for the Unification of Certain Rules relating to Bills of Lading 1924

⁸ E.g. the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980

⁹ E.g. the Uniform Customs and Practice for Documentary Credits (UCP)

¹⁰ E.g. the Convention on International Interests in Mobile Equipment 2001

¹¹ E.g. the ICC Arbitration Rules

¹² I.e. Derek Wheatley QC, *The Times* 27/03/90 in B. Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' available at: <http://www.cnr.it/CRDCS/nicholas.htm>; accessed 20/10/11

¹³ R. M. Goode, *Commercial Law* (3rd Edn., Penguin, London, 2004) p.18

2.0 OVERALL METHODOLOGY

2.1 Who is it about?

The institutions and organisations selected for this study are the Universities; the Practitioners; the Cargo Owners, Freight Forwarders and Carriers; the Judiciary and the Government / Parliament. These groups have been selected as they represent a broad cross section of users, potential users, advisers or policy makers and as such they also represent some of the structures responsible for the functioning and on-going development of international commercial laws and instruments in England and Wales.

Whilst acknowledging that other institutions and/or organisations, such as banks, have an involvement with international commercial instruments, they have been omitted from this study in the interests of producing a work that is within time and word limitations. Such groups may however form the basis of further similar research work.

2.2 Why these Institutions and Organisational Groups were selected?

2.2.1 Universities

Universities were selected for the study as they educate intending practitioners and academics.

Although the subjects learnt at law school do not inevitably link to the practice areas of practitioners or the interest areas of researchers, study of international commercial rules, practices and conventions can provide students with an understanding or at least an awareness of, the instruments that harmonise aspects of cross-border transactions, and this may inform future attitudes towards international commercial laws in future careers.

However, such study is only possible where universities offer commercial law subjects which include coverage of international instruments. Therefore examination of the international content that universities offer in commercial subjects will establish whether students have the opportunity to gain an appreciation for such instruments.

2.2.2 Practitioners

Commercial practitioners were selected for the study, because they are increasingly called upon to advise parties in relation to cross-border transactions.

This may involve providing advice as to the rights and obligations arising in respect of specific international commercial instruments, or advising as to the most suitable instrument in for a particular commercial transaction. Therefore, examination of commercial practitioners and the degree to which they advise on international instruments will provide an indication as to whether international commercial instruments are used and/or recommended. This will help to assess whether a particular culture has developed amongst practitioners towards non-English commercial law instruments.

Practitioners are important to the study as their approach and attitudes to international commercial instruments, also impacts on the approach and attitudes of those whom they advise.

2.2.3 Cargo Owners, Freight Forwarders & Carriers

These groups form an important part of this study as they are some of the major parties involved in cross border transactions, and many of the international commercial instruments apply, either mandatorily or voluntarily, to the sales and carriage contracts to which they are party. Moreover, much time and effort has been invested in developing international rules, practices and conventions to facilitate trade between buyers and sellers in different jurisdictions; and this research will establish to what extent these instruments are used by those they were intended to benefit and what attitudes have developed towards their use.

2.2.4 The Judiciary

The judiciary in England and Wales has been selected for the study because the provisions of international conventions must be interpreted by the domestic courts of contracting states.

However, conventions are not always uniformly interpreted, as each country's judiciary can put different interpretations upon the same enacted words¹⁴. This study will therefore examine how the English judiciary approaches international conventions and the resources it uses to aid in interpreting provisions, in order to determine whether a particular culture has developed towards the interpretation of commercial conventions.

2.2.5 Government & Parliament

Both the Executive and the Legislature have been included in the study, as it is Government (and its representatives) who are initiators of the harmonisation process in that they are involved in the diplomatic discussions and drafting of an international convention; and it is Parliament who must enact legislation to give a convention the force of law within England and Wales.

However, one process does not necessarily follow the other, as Government has participated in harmonisation projects and many conventions have been signed but Parliament has not always enacted the enabling legislation. This study will therefore seek to establish whether a prevailing attitude or culture exists in the executive and/or legislature towards the adoption of international commercial conventions.

2.3 How the Study has been conducted

In order to establish whether, and to what extent, **university** law schools in England and Wales include study of international instruments in their undergraduate commercial law subjects; all 88 law schools offering a Qualifying Law Degree in England and Wales, were

¹⁴ R. J. C Munday, 'The Uniform Interpretation of International Conventions' (1978) 27 Int'l. Comp. L. Q. 450

surveyed as to their coverage of international commercial instruments at undergraduate level.

Information as to the extent to which **commercial practitioners** in England and Wales use or advise on international instruments and to what degree they recommend such instruments in applicable circumstances, was attained by questionnaire, from a cohort of 100 randomly selected commercial practitioners from a wide range of practices types and sizes. In doing so, attention is drawn to the fact that the research was not primarily concerned with the level of usage of specific instruments; rather its main objective was to establish the overall use that commercial practitioners make of international instruments.

To ascertain the approach of **cargo owners, freight forwarders and carriers** and the extent to which they use or are aware of international commercial instruments; a randomly selected cohort of 60 cargo owners, 30 freight forwarders and 30 carriers was surveyed by questionnaire and subsequent interview.

The approach of the **judiciary** to international commercial instruments was established by examining all the cases where provisions of the international carriage conventions fell to be construed and analysing what recourse the English judiciary have made to domestic, convention and foreign sources.

Government and Parliament's approach has been ascertained by analysing governmental and parliamentary papers for a number of ratified and unratified conventions, as this will assist in establishing, firstly whether a process exists for ratifying international commercial conventions and secondly, what factors influence the decision as to whether a convention is given the force of law in the UK.

It is to be noted that further details as to *how* and *why* the various studies have been conducted are provided at the beginning of each chapter.

2.4 Definitions

As the following terms may be subject to different interpretations, they are defined here for the avoidance of any confusion:

- **International Commercial Instruments** - Those instruments which have been developed by international institutions, rather than laws created by a national legislature and therefore include treaties and conventions which require ratification by a country's government before they take force; as well as rules and practices which are usually developed by specialist global organisations, which can be voluntarily incorporated into transnational contractual arrangements.
- **Treaty or Convention** - According to Article 2 (1)(a) of the Vienna Convention on the Law of Treaties 1969, 'treaty' means "an international agreement concluded between States in written form and governed by international law". A convention is defined by the Foreign and Commonwealth office as "a term frequently employed for agreements to which a large number of countries are parties"¹⁵. As both refer to an agreement between different states which establishes rules expressly recognised by the consenting states, and as the distinction does not make a material difference to this research; the terms treaty and convention will be used interchangeably in this research.

¹⁵ 'Treaties, Practice and Procedure: Glossary of Terms'; available at <http://www.fco.gov.uk/en/publications-and-documents/treaties/practice-procedures/glossary-treaty-terms>; accessed 10/12/2010

3.0 LIMITATIONS OF THE STUDY

This research is concerned solely with private international commercial laws and as such excludes public international trade laws and its related instruments and institutions. Furthermore, it concerns only institutions and organisational groups in England and Wales, so it does not include, for example, universities in Scotland or Northern Ireland or the decisions of Scottish or Irish courts.

This work is primarily concerned with the approach that each of the selected institutions or groups has taken to instruments which harmonise international commercial law and as such it does not examine the merits of specific international rules, practices and conventions or the actual application of their provisions. Moreover, the research does not consider any arguments nor draw any conclusions on harmonising as opposed to unifying commercial laws.

The study is restricted to five particular institutions or organisations in the interests of producing a work that is indicative but is within time and word limitations, therefore other institutions and/or organisations, such as banks, have been omitted from this study; although these institutions or organisations may form the basis of further research.

Additional specific limitations are noted in each chapter, but attention is particularly drawn to the fact, that in the Practitioners' chapter, the research does not aim to identify the actual conventions used by practitioners as this would require more detailed and extensive surveys, rather its aim is to simply identify the extent to which commercial practitioners advise on or recommend international commercial instruments.

Despite the limitations noted here and within each chapter, the study will still provide important information as to the approaches and attitudes of the selected groups, and the overall trends that emerge in relation to the use and awareness of international commercial instruments in England and Wales.

4.0 RELATED WORK & CONTEXT OF RESEARCH

The concept of transnational commercial law has been developed by such notable academics as Professor Sir Roy Goode¹⁶, Professor Ernst Rabel¹⁷, Professor Rene David¹⁸, Berthold Goldman¹⁹, Clive Schmitthoff²⁰ and Professor Aleksander Goldštajn²¹; and their scholarly work establishes the overall context for this thesis.

Vast volumes of research also exist on the process of harmonisation²² and the success²³ or otherwise of specific instruments²⁴, indeed collective databases²⁵ of articles and cases for specific conventions exist. Much research has also centred on the application of various international commercial rules, principles and conventions in particular situations and/or locations. For example, the CMR in Malcolm Clarke's 'International Carriage of Goods by Road'²⁶, the Hague/Hague-Visby Rules in 'Carver on Bills of Lading'²⁷ and 'Scrutton on

¹⁶ E.g. R. Goode et al, *'Transnational Commercial Law: Text, Cases and Materials'* (2007, OUP, Oxford)

¹⁷ E.g. E. Rabel, *'The Conflict of Law: A Comparative Study'* (2nd Ed, University of Michigan Press, Ann Arbor, 1958)

¹⁸ E.g. R. David, *'Les Grands Systemes de Droits Contemporains'* (Librairie Dalloz, Paris, 1964) and 'The International Unification of Private Law' in the *'International Encyclopaedia of Comparative Law II'* (JCB Mohr Tubingen, 1971)

¹⁹ E.g. B. Goldman, 'Frontières du droit et lex mercatoria', (1964) 9 Archives de philosophie du droit 177; and 'Lex Mercatoria' (1983) 3 Forum internationale

²⁰ E.g. C. Schmitthoff, 'Nature and Evolution of the Transnational Law of Commercial Transactions' in N. Horn & C. Schmitthoff (Eds.) *'The Transnational Law of International Commercial Transactions'*, (1982); *'Commercial Law in a Changing Economic Climate'* (2nd Ed. London, 1981); and 'The Law of International Trade - Its Growth, Formulation and Operation', in Schmitthoff (Ed.), *'The Sources of the Law of International Trade'* (1964)

²¹ E.g. A. Goldštajn, 'The New Law Merchant', (1961) J. Bus. L. 12; and 'Uniform Laws of International Purchase, Sale and Autonomous Mercantile Law' in *'Collection of Studies on Foreign and Comparative Law'* (Beograd, 1966)

²² See generally, R.M. Goode, 'Contract and Commercial Law: The Logic and Limits of Harmonisation', (2003) 74 E.J.C.L.; H. Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages and Criteria for Choice' (2000) 5 Unif. L. Rev. 13; H. Kronke, 'Unidroit 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions' (2003) 8 Unif. L. Rev. n.s. 10; J. Goldring, 'Globalisation, National Sovereignty and the Harmonisation of Laws' (1998) 3 Unif. L. Rev. 435

²³ E.g. A. von Ziegler, 'The Liability of the Contracting Carrier' (2008-2009) 44 Tex. Int. L. J. 330 in respect of the Hague Rules; for the CISG see for e.g. Bruno Zeller, *'CISG and the Unification of International Trade Law'*, (2007) Routledge, p.94 and Ingeborg Schwenzer & Pascal Hachem, 'The CISG – A Story of Worldwide Success' in Jan Kleinemann (ed.), 'CISG Part II Conference', Stockholm 2009, p. 119

²⁴ E.g., James E. Bailey 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an obstacle to a Uniform Law on international sales' (1999) 32 Cornell Int'l. L. J. 273; Paul B Stephan, 'The Futility of Unification and Harmonisation in International Commercial Law' (1998-1999) 39 Va. J. Int'l. L. 743

²⁵ E.g. PACE University Institute of International Commercial Law database on CISG; and for the Cape Town Convention on International Interests in Mobile Equipment 2000; see <http://www.law.washington.edu/Programs/CTCproject/>

²⁶ Latest edition 5th Ed, 2009, Informa Publishing

²⁷ Latest edition 2nd Ed 2005, Sweet and Maxwell

Charterparties and Bills of Lading’; and the Warsaw Convention in ‘Shawcross & Beaumont on Air Law’²⁸.

This thesis takes a different approach to previous academic work in this area, as it is not looking at the application of rules and conventions or the inherent advantages and/or disadvantages of harmonising commercial laws; rather it looks at how institutions and organisational groups approach international commercial laws and how that approach has been informed. However, whilst noting that this approach is new it does, in certain instances, build on or extend ideas raised in the following related works:

4.1 Universities

Anna Rogowska’s 2009 survey on the *‘Implications of teaching the CISG, UNIDROIT Principles and European Principles at UK universities’*²⁹, sought to “measure the attitude of academics involved in the teaching of contract law, commercial law, international trade law etc., with regard to their knowledge and teaching of the CISG, UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law”³⁰. The survey consisted of an online questionnaire via the Society of Legal Scholars (SLS) in order to assess:

“the level of knowledge of these instruments among academics in the UK; what courses incorporate these instruments; what aspects are taught; whether or not such instruments were considered necessary for First Year Undergraduate Student courses on contract law; whether they should be taught at undergraduate or postgraduate level; do students have sufficient knowledge of such instruments and what suggestions can be made for increasing awareness”³¹.

This thesis differs from the survey undertaken by Rogowska in that all undergraduate commercial law subjects have been examined in universities within England and Wales

²⁸ Latest edition (4th Edn. 2007, Butterworths)

²⁹ Data from survey was reported in A. Rogowska, ‘Teaching the CISG at UK Universities – An Empirical Study of Frequency and Method of Introducing the CISG to UK Students in the Light of the Desirability of the Adoption of the CISG in the UK’. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908506; accessed 01/09/11

³⁰ n(29) at p.4

³¹ n(29) at p.4

in order to identify what international commercial instruments, if any, were studied. Therefore, this research is somewhat broader as it is not limited to the CISG, PICC and PECL and responses were obtained from the 74 law schools offering commercial law subjects, rather than just from interested academics via the SLS. However, this research did not specifically ask for the opinions and suggestions of those responding.

In other works, Peter Birks in his article '*Compulsory Subjects: Will the Seven Foundations ever Crumble*'³² considered the effect of the compulsory foundation subjects on the study of commercial law; and Roy Goode in the chapter '*Reflections on the Harmonisation of Commercial Law*'³³ considered the preoccupation of law schools solely with English law to the detriment of the harmonisation process. This thesis seeks to extend such works by quantifying the approach taken to international commercial law in all law schools across England and Wales offering a Qualifying Law Degree; and examining what has informed this approach.

Further articles on the vocational and/or academic functions of universities, such as William Twining's '*Pericles and the Plumber*'³⁴ and Brenda Barrett's '*What is the function of a university: Ivory tower or trade school for plumbers?*'³⁵, have also been used as a basis in examining what has informed the universities approach to international commercial law.

4.2 Practitioners

There is evidence which supports the notion that practitioners favour their own domestic law whatever their nationality³⁶. Jeremy Carver in his late 1980s work³⁷ suggested that the legal profession in England and Wales viewed the process of

³² (1995) 1 Web J.C.L.I. 4

³³ in R. Cranston & R.M. Goode (Eds) '*Commercial and Consumer Law – National and International Dimensions*' (1993) Clarendon, p.26

³⁴ (1967) 83 L.Q.R. 404

³⁵ (1998) 6 Quality Assurance in Education 145-151

³⁶ E.g. I. Schwenger and P. Hachem, 'Successes and Pitfalls' (2009) 57 Am. J. Comp. L. 461

³⁷ 'The Experience of the Legal Profession' in 'International Uniform Law in Practice, Acts and Proceedings of the Third Congress on Private Law held by the International Institute for the Unification of Private Law' (1988) 13 UNIDROIT 411

international unification or harmonisation of laws with suspicion, if not with open hostility. More recent work has been carried out but this appears to relate only to the German practitioners' approach to the CISG³⁸. No UK academic work appears to have been carried as to English practitioners' approach to international conventions since Carver's work.

This thesis, in examining the current approach of practitioners to international commercial instruments, will therefore provide new information as to whether the views and attitudes of practitioners in England and Wales have changed since the 1980s.

4.3 Cargo Owners, Freight Forwarders & Carriers

Although many books and articles have been written as to the application of many international commercial instruments³⁹, including comparison studies between old and new editions of rules⁴⁰ and conventions⁴¹; there is limited anecdotal evidence as to the use of specific instruments by cargo owners, freight forwarders and carriers and this in the main amounts to analysis of cases where disputes have arisen⁴².

This study will therefore provide useful and important empirical data as to the use of specific international commercial instruments by merchants, shippers and carriers in England and Wales.

³⁸ E. Brodermann, 'The Practice of Excluding the CISG: Time for Change? Comment on the Limited Use of the CISG in Practice (and on why this will increasingly change)' Modern Law for Global Commerce Congress to Celebrate the fortieth annual session of UNCITRAL Vienna 9-12 July 2007; available at <http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf>; accessed 01/07/11

³⁹ E.g. J. Ramberg, 'The Law of Carriage of Goods – Attempts at Harmonization' (1973) 17 Scandinavian Stud. L. 211-252

⁴⁰ E.g. D. Doise, 'The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP600)' (2007) Int'l. Bus. L.J. 106-123

⁴¹ E.g. J.C. Moore, 'The Hamburg Rules' (1978-1979) 10 J. Mar. L. & Com. 1-12

⁴² E.g. M. Isaacs & M. Barnett, 'International Trade Finance – Letters of Credit, UCP600 and Examination of Documents' (2007) J.I.B.L.R. 660

4.4 The Judiciary

Of all the institutions and organisation groups selected for this study, more appears to have been written about the judicial approach to international conventions – particularly in regard to the methods the judiciary have employed for interpreting international conventions. These have either tended to concentrate on one particular convention or the recourse the judiciary have made to one or two particular sources.

In *'The Uniform Interpretation of International Conventions'*⁴³ for example, R.J.C Munday examined the approach of the judiciary to the interpretation of the CMR, and in particular the English courts and European legal method; and in *'Carriage Conventions and their Interpretation in English Courts'* Charles Debattista⁴⁴ looked briefly at the attitudes taken by the English courts to the interpretation of the international carriage conventions incorporated into English law, and concluded that English courts have tended to treat these conventions in the same way as English statutes.

Other previous work has examined the judiciary's use of different reference sources when interpreting conventions. For example, in *'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation'*⁴⁵ Michael Sturley raised the issue of using the travaux préparatoires and foreign judgments in domestic courts in relation to the Hague Rules; and suggested that "interpretations will tend to be random when courts lack relevant material to interpret a convention"⁴⁶; and in *'Treaty Interpretation in the English Courts since Fothergill v Monarch Airlines (1980)'*⁴⁷ Richard Gardiner examined whether or not the judiciary have made use of the rules for interpretation contained within the Vienna Convention on the Law of Treaties, and concluded that *Fothergill* "provided only a glimpse or part of the picture for the speeches do not adequately reveal the complete scheme for treaty interpretation"⁴⁸.

⁴³ (1978) 27 Int'l. Comp. L. Q. 450-459

⁴⁴ (1997) J.B.L. Mar, 130-142

⁴⁵ (1986-1987) 27 Va. J. Int'l. L. 729-802

⁴⁶ n(45) at 740

⁴⁷ (1995) 44 I.C.L.Q. 620-628

⁴⁸ n(47) at 628

This thesis will examine the question posed in Richard Gardiner's article in more detail and in relation to the interpretation of all the carriage conventions. It also extends the work done by Charles Debattista by providing current empirical data as to the extent of the judiciaries' recourse to convention and external sources when interpreting the international carriage conventions and the circumstances which give rise to this.

4.5 Government & Parliament

The Government's role in the negotiation and drafting of international commercial conventions is well documented in the reports and commentaries of various international organisations⁴⁹ and publications on the legislative history of particular conventions⁵⁰.

In terms of the Government's own publications, some provide explanations as to the procedures that must be followed in order to adopt international conventions into English law⁵¹; whilst other report on public consultations that have taken place as to whether the UK should ratify specific conventions⁵².

⁴⁹ E.g. the UNCITRAL website for Reports of the working groups that developed and drafted the CISG and the travaux préparatoires http://www.uncitral.org/uncitral/en/commission/working_groups/2Sale_of_Good.html; and the UNIDROIT website for 'Documents issued by Unidroit in Connection with the Development of the Convention on International Interests in Mobile Equipment (Cape Town 2001)' <http://www.unidroit.org/english/conventions/mobile-equipment/preparatorywork-convention/study72-archive-e.htm>

⁵⁰ E.g. 'The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules Volumes 1-3', Compiled and Edited by Michael F. Sturley, (1990 Fred B. Rothman & Co, Colorado); and R.M. Goode, 'Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary', (Rev Ed 2008, Unidroit)

⁵¹ E.g. Treaty Section, Information Management Department, Foreign and Commonwealth Office 'Treaties and MOUs: Guidance on Practice and Procedures' 2nd Ed April 2000 Revised May 2004; see also ss.20-25 of the Constitutional Reform and Governance Act 2010 for the statutory requirements for Parliamentary scrutiny of treaties prior to ratification

⁵² E.g. Department of Trade & Industry, 'United Nation Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention): A Consultation Document' 97/875 (September 1997); and Department for Business, Innovation & Skills, 'Call for Evidence: Full List of Responses: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment' (July 2010)

There have also been numerous articles written on why the Government should⁵³ or should not⁵⁴ ratify particular conventions; but few Government papers have been issued as to the reasons why conventions have not been ratified, with one of the most commonly referred to being, 'Why the United Kingdom has not ratified the CISG'⁵⁵ by Sally Moss. Even less appears to have been written on the reasons why, after taking an active role in the development of international instruments, the UK has a somewhat passive response to their implementation. In one of the most notable articles, Professor Sir Roy Goode⁵⁶ discusses reasons why the UK is actively committed to the work of the harmonisation organisations such as UNIDROIT and UNCITRAL, but its "record of implementation has so far been rather dismal"⁵⁷.

This study picks up on some of the points raised by Professor Goode and examines the circumstances and approach of Government to the development of specific international conventions and Parliament's subsequent approach to enacting the requisite legislation to bring such conventions into force in England and Wales.

⁵³ E.g. A. Forte, 'The UN CISG: Reason or Unreason in the UK' (1997) 26 U. Balt. L. Rev. 51-66; V. Linetsky, 'Accession to the Cape Town Convention by the UK: An Economic Impact Assessment', December 2010; Available at <http://www.awg.aero/assets/docs/UKCTC%20Econ%20Impact%20Final%20Version.pdf>; accessed 15/07/11

⁵⁴ E.g. In *Benjamin's Sale of Goods* (Sweet & Maxwell, 4th edition) at [ix]. Professor Guest commented that the CISG "is not well adapted to sales on c.i.f., f.o.b. and other terms common in overseas sales, and its often vague or open-textured terminology would, if it were to displace the present relatively settled English judge-made rules governing contracts on such terms, be a source of considerable (and regrettable) uncertainty."

⁵⁵ (2005-2006) 25 J. L. & Com. 483-485

⁵⁶ 'Insularity or Leadership: The Role of the UK in the Harmonisation of Commercial Law' (2001) 50 Int'l. Comp. L. Q. 755-758

⁵⁷ n(56) 755

Chapter 2 : The Universities

1.0 INTRODUCTION

The study of law in a particular nation will undoubtedly focus on its own domestic laws and for subjects such as Criminal Law, Constitutional Law, Land Law, Trusts and Tort where rules and laws reflect and influence the way people live in a particular society, the study of national law is understandable. But in the international commercial arena where transactions are made across national borders, does the study solely of domestic law suffice?

English rules are not the only laws that are potentially applicable to international commercial transactions. But how have universities in England and Wales reacted to the emergence of transnational commercial laws? In such subjects as 'Public International Law' or 'Human Rights Law', where international agreements, treaties and conventions govern actions or events, this internationality is reflected in the content of the relevant legal courses. But can the same be said about the study of commercial law?

As England has some of the world's leading universities⁵⁸ at the cutting edge of new technologies and thinking; it might be expected that at least some English universities would be at the forefront of the movement towards the internationalisation of commercial law and that their law courses would reflect these trends. Although the majority of law schools in England and Wales offer some kind of commercial variant within their degree courses, it is unclear how many include study of international commercial instruments. Therefore, this chapter seeks to determine the extent to which commercial law subjects include study of international commercial instruments, if at all, and whether there is any relationship between the type of university and the content of the commercial subjects offered. It then examines the factors that have potentially informed the approach taken to international commercial instruments by universities.

⁵⁸ "Top 200 World Universities" published by *Times Higher Education Supplement* (THES) & Quacquarelli Symonds (QS), available at http://www.topuniversities.com/worlduniversityrankings/results/2008/overall_rankings/fullrankings; accessed 01/07/09

2.0 METHODOLOGY

2.1 Who and Why?

This research work primarily focuses on undergraduate study because it is from this level that students can, and frequently do, go on to practice or further research. It is also the level that students develop their initial awareness of a particular subject matter. That is not to suggest that the subjects learnt at law school inevitably link to the practice areas of practitioners or the interest areas of researchers, it is more that understandings and attitudes begin to be laid down at undergraduate level.

In the case of commercial law, undergraduate study of international instruments may provide students with an understanding of or an appreciation for, the instruments that harmonise aspects cross-border transactions; instruments which they may potentially apply in their future client or research work. Furthermore, the knowledge of international commercial instruments that students gain at university, can inform the response they develop to non-English commercial laws and consequently universities can potentially be the birth place of a particular culture toward or against international commercial instruments.

Moreover, a lack of knowledge or understanding of international commercial instruments by a future practitioner may result in a reluctance to use international instruments *or* even lead to their explicit exclusion (when they are not mandatorily applicable) as the effect of provisions is not known or understood. Likewise, where an academic career is chosen, knowledge of international commercial instruments, or indeed lack of it, can influence further research projects and attitudes to the teaching such rules and conventions. That is not to say, however, that all those who research in the field were taught international commercial law as undergraduates, it is just perhaps more likely that experience of a subject will impact on a student's attitude towards it. It is also the case, that with understanding, graduates in both career paths, have the potential to advance the process of harmonisation of international commercial laws.

2.2 How the Study was conducted

The initial examination of the 2009-10 course descriptions⁵⁹ of the 88 universities⁶⁰ in England and Wales offering a Qualifying Law Degree course, revealed that 74 law schools offered 'Commercial Law' or some similar variant at undergraduate level.

These 74 law schools were then contacted in order to establish to what extent, if any, their commercial law course included study of international commercial instruments; with information being obtained from online module descriptions and/or direct from the university staff responsible, either for the module or the teaching of it⁶¹.

In ascertaining whether coverage of a particular instrument amounts to a brief introduction or an in depth study, this study has been guided by the responses of module organizers and lecturers.

With the exception of three commercial subjects⁶², data was provided by relevant personnel for the commercial law variants in all 74 law schools offering commercial law subjects; so the data gathered will provide important empirical evidence as to the approach that universities in England and Wales have to international commercial instruments.

2.3 Which Universities were Selected

Universities in the UK are a diverse group of establishments. They differ from one another in the range of degree programmes they offer; their character and reputation for those subjects and whether they are considered a teaching or research university. Therefore it was important to obtain data from *all* universities offering a Qualifying Law Degree course in England and Wales.

⁵⁹ Obtained from University and Law School websites, online module outlines, prospectuses and student handbooks

⁶⁰ From the Solicitors Regulation Authority list of institutions providing Qualifying Law Degrees in England and Wales <http://www.sra.org.uk/students/courses/qualifying-law-degree-providers.page>; accessed 01/10/09

⁶¹ via telephone or email request

⁶² i.e. Birkbeck – 'Commercial Law' module organiser on leave; No responses were received in respect of Hull University's 'Foundations of Commercial & Corporate Law' and Swansea University's 'E-Commerce'

Various groupings of universities have been established over the years which to some extent reflect similarities in their educational ethos, and these groupings (listed below) will therefore be used to ascertain whether there is any correlation between the type of university and the international commercial law content of courses offered at undergraduate level. The universities within each group are given in Section 3.0 and it is to be noted that the groups reflect the members in each as at 2009. Since this research was conducted four members⁶³ of the 1994 group have joined the Russell Group.

- (i) **Golden Triangle** – the internationally renowned research universities in the geographical triangle London-Oxford-Cambridge.
- (ii) **The Russell Group**⁶⁴ - represents 20 of “the leading research universities in the UK [which have] unrivalled links with business and the public sector”⁶⁵.
- (iii) **The 1994 Group**⁶⁶ – “brings together nineteen internationally renowned, research-intensive universities”⁶⁷.
- (iv) **Million+**⁶⁸ - a group of 26 universities which aim to “enable people from every walk of life to benefit from access to universities that excel in teaching, research and knowledge transfer”⁶⁹.
- (v) **The University Alliance**⁷⁰ – “a group of 23 major, business-engaged universities committed to delivering world-class research and a quality student experience around the UK”⁷¹.
- (vi) **Unaffiliated** – An unofficial grouping of the 16 remaining universities in England and Wales that offer a qualifying law degree course. The term ‘unaffiliated’ used only to denote those universities not affiliated to one of the aforementioned collectives.

⁶³ I.e. Durham, Exeter, Queen Mary and York

⁶⁴ In this study Russell Group excludes the Golden Triangle universities which are treated as a separate group and does not include the four 1994 Group universities which joined it in 2012

⁶⁵ <http://russellgroup.ac.uk/about-russell-group.aspx>; accessed 16/06/09

⁶⁶ In this study the 1994 Group includes the four members that subsequently joined the Russell Group in 2012

⁶⁷ <http://www.1994group.ac.uk/aboutus>; accessed 15/06/09

⁶⁸ Named Million+ in November 2007, but originally formed in 1997 as the Coalition of Modern Universities. Changed its name in 2004 to the Campaign for Mainstream Universities (CMU)

⁶⁹ <http://www.millionplus.ac.uk/index.htm> , accessed 07/05/09

⁷⁰ formally established in 2006 but existed informally as the Alliance of Non-Aligned Universities

⁷¹ <http://www.university-alliance.ac.uk/about>; accessed 09/07/09

2.4 Limitations of the study

Whilst endeavoring to obtain accurate information from the relevant publications and persons within each of the universities examined, it is perhaps inevitable that the some rules, practices and/or conventions have been overlooked or inadvertently omitted. Furthermore, as the data was obtained in 2009 it is likely that some changes or modifications have been made to curriculums in the intervening years.

Although the Hague-Visby Rules form part of English law under the Carriage of Goods Act 1971, they have been included in the study as an international convention so that data may be gathered and comparisons made between ratified and non-ratified conventions. Likewise, the Incoterms have been included in the study as international commercial rules although from the responses it was not possible to distinguish between 'true' Incoterms as produced by the ICC and those which were simply common law cif /fob variants.

Notwithstanding these possible shortcomings, the information gathered does give an overall indication as to the types of international commercial instruments taught within all English and Welsh universities offering Qualifying Law Degrees.

3.0 UNIVERSITIES AND UNDERGRADUATE COMMERCIAL LAW

This section details the commercial subjects offered at undergraduate level and whether they include study of any international commercial instruments. It also examines whether there is any correlation between types of universities and the content offered.

3.1 The Golden Triangle *

(* Excludes Imperial College London as it does not offer law degree studies)

The Universities of Oxford, Cambridge, the London School of Economics (LSE) and UCL are amongst the most prestigious universities in the United Kingdom, and consistently rank amongst the world's top ten universities⁷². They also have amongst the highest research incomes of all UK universities⁷³ and their law schools comprise some of the largest in the United Kingdom - Cambridge University Law Faculty for example, has some 740 undergraduates⁷⁴; with graduates prominent in academia, the judiciary and in the legal profession.

University	Subject	English Law	International Instruments
Cambridge	Commercial Law	✓	UCP*/ CISG*
Oxford	International Trade	✓	Incoterms* / UCP* / HVR
	Principles of Commercial Law	✓	-
King's College ⁷⁵	Commercial Law	✓	Incoterms*
LSE	Commercial Contracts	✓	CISG*
UCL	Commercial Law (content varies year to year)	✓	UCP

*brief introduction only

TABLE 1

⁷² n(58)

⁷³ 2009/10 Research incomes - Oxford (£367m), UCL (£275m) and Cambridge (£267.7m) had respectively the highest, 3rd highest and 4th highest research incomes in the UK, with King's the 7th highest (£144m), the smaller and more specialist LSE (£23.8m). Source Times Higher Education "Wealth and Health: Financial data for UK higher education institutions, 2009-10". Available at <http://www.timeshighereducation.co.uk/story.asp?Sectioncode=26&storycode=415728&c=2>; Accessed 09/04/11

⁷⁴ From <http://www.law.cam.ac.uk/about-the-faculty/history-of-the-faculty.php>; accessed 21/09/09

⁷⁵ Also offers 'Principles of International Trade Law' but comprises public international law so not within limits of study

Table 1 shows that all the Golden Triangle university law schools offer commercial law variants as optional subjects for undergraduate law students, reflecting both the importance and demand for such subjects. All of these universities also offer study of one or more international instruments within most of their commercial law subjects. However, this in the main amounts to a brief introduction to rules (Incoterms and the UCP600); with one university providing a brief introduction to the ratified Hague-Visby Rules. Only Cambridge and the LSE deal with a non-ratified convention (the CISG) but only in the “briefest of terms”⁷⁶.

Oxford University is the only Golden Triangle University to offer in depth study an international commercial convention as its course ‘*International Trade*’ includes a detailed look at the Hague-Visby Rules, but as this convention is incorporated into the Carriage of Goods by Sea Act 1971 it is domestic law which is studied; and like the other Golden Triangle universities it is English sale of goods law which is also studied as the governing law for commercial sales transactions, regardless of whether the sale is domestic or cross-border. In fact, the course description of ‘*International Trade*’ in the Oxford University Undergraduate Student Handbook draws attention to the fact that:

“Although its name might suggest something different, the course is about a branch of English domestic law. Our concern is with the English rules governing international transactions”⁷⁷.

Therefore, the perspective of the Golden Triangle universities is firmly on English law in relation to commercial law modules.

⁷⁶ Emails from Ms Louise Merrett, Cambridge University, 26/03/09 and Professor Hugh Collins, LSE, 16/04/09

⁷⁷ 2008-09, p.53; available at <http://denning.law.ox.ac.uk/published/ughandbook.pdf>; accessed 07/04/09

3.2 The Russell Group*

(*excludes the Golden Triangle universities, and the universities of Edinburgh, Glasgow and Queen's Belfast are not considered as outside the geographical area of the study).

The Russell Groups comprises many of the long established 'red brick' universities⁷⁸ and together with the Golden Triangle universities receives two-thirds of all research grants funding in the United Kingdom. It is said that the majority of law firms recruit from the top 20 UK universities⁷⁹ so if the potential top lawyers of tomorrow are graduates from these Universities, this must surely increase the importance of the options offered by these law schools and the topics covered therein.

University	Subject	English Law	International Instruments
Birmingham	International Sale of Goods	✓	CISG
Bristol	Commercial Law	✓	Incoterms* / UCP*
Cardiff	Sale of Goods & Agency	✓	-
Leeds	Business Law	✓	-
Liverpool	Commercial Law	✓	-
Manchester	Sale & Supply of Goods	✓	-
Newcastle	-		-
Nottingham	Principles of Commercial Law International Trade Law	✓ ✓	- Incoterms* / HVR
Sheffield	Sale of Goods International Trade Law	✓ ✓	- UCP / HVR / CISG
Southampton	Commercial Sales Carriage of Goods by Sea	✓ ✓	Incoterms* /UCP* / CISG* Hague / HVR/ Hamburg Rules
Warwick ⁸⁰	Commercial & Consumer Contracting	✓	-

* Brief introduction only

TABLE 2

⁷⁸ First coined by Liverpool Professor Edgar Peers to describe the civic universities built mostly in industrial cities (i.e. Birmingham, Bristol, Liverpool, Leeds, Manchester and Sheffield) in the latter part of the 19th century and characterised by Victorian buildings of red brick

⁷⁹ City Solicitors' Educational Trust (CSET), Press Release 27 November 2007

⁸⁰ Also offers 'Law and the International Business Environment' which includes an introduction to Incoterms, CISG and "discusses some other elements of international contracting" (Email from Tony Cole, Assistant Professor Warwick University dated 27/04/09), as part of a joint Law & Business Studies Degree but this, depending on options, is not a Qualifying Law Degree and is therefore not within the limits of this study.

Table 2 shows that 91% of Russell Group universities offer a commercial law variant, again reflecting the importance and demand for such subjects by law schools and students. Only Newcastle University does not offer a commercial law variant at undergraduate level although their postgraduate taught courses include an 'International Commercial Law' LLM and an 'International Trade Law' LLM.

Nevertheless, only half of the Russell Group law schools include any 'international' content, with 30% including a brief introduction to Incoterms and the UCP; and 10% providing a brief introduction to the unratified CISG convention. In terms of in depth study, 10% of the Russell Group universities provide detailed coverage of rules (again Incoterms and UCP) and 30% provide detailed coverage of the Hague-Visby Rules. Interestingly, 30% of law schools in the Russell Group include extensive examination of unratified conventions, such as the Hamburg Rules and the CISG, which is the highest amongst all university groups examined, and Sheffield University's subject '*International Trade Law*' also includes study of harmonisation issues⁸¹.

Table 2 also shows that the approach taken by universities to international commercial law does not appear to be informed by the city in which it is located. Although Bristol, Cardiff, Liverpool, Newcastle and Southampton universities are all located in cities with major global trading ports; only Southampton's commercial subjects reflect this internationalism at undergraduate level. Similarly, Birmingham, Manchester, Nottingham and Sheffield were all historically important manufacturing cities exporting products all over the world, but only Sheffield University and perhaps Nottingham University to a lesser extent, reflect this in the international commercial content offered.

⁸¹ Email from Professor Robert Bradgate, Sheffield University, 28/04/09

3.3 The 1994 Group*

(*excludes the Universities of Bath, Loughborough, Goldsmiths and Royal Holloway which do not offer law degree courses; and St Andrews which is not within the geographical area of the study).

The 1994 Group was established in order to “promote excellence in research and teaching . . . and to set the agenda for higher education”⁸² and comprises many of the so-called ‘plate-glass’ universities⁸³. Consequently, this group provides a comparison to the older universities in the Golden Triangle and Russell Group.

University	Subject	English Law	International Instruments
Birkbeck	Commercial Law ⁸⁴ Law & Commercial Relationships	? ✓	? -
Durham	Commercial Law	✓	-
UEA	Commercial Law	✓	CISG*
Essex	International Trade Law	✓	Incoterms*/ CISG*
Exeter	Commercial Law (Exeter) Commercial Law (Cornwall)	✓ ✓	Incoterms*/UCP* UCC*/ CISG*/ Incoterms*/UCP*
Lancaster	Introduction to Business Law & Practice	✓	Incoterms*
Leicester	Commercial Law	✓	CISG*
Queen Mary	Commercial & Consumer Law International Commercial Transactions	✓ ✓*	- UCP/ HVR / CISG
Reading	-	-	-
SOAS	-	-	-
Surrey	Commercial Law (from 2009)	✓	PICC/ MLEC ¹ /Corruption Rules/CISG/CUEC ²
Sussex	Commercial Law	✓	Incoterms*/CISG*
York	Commercial Transactions ³	✓	UCP* / PICC*/ CISG*

*Brief introduction only

¹ UNCITRAL Model Law on Electronic Commerce 1996

²UN Convention on the Use of Electronic Communications in International Contracts 2005

³problem-based approach so content varies

TABLE 3

⁸² See generally, <http://www.1994group.ac.uk/aboutus.php>; accessed 15/06/09

⁸³ the term being used to describe the architectural design of the 1960s ‘new’ universities specifically Sussex, York, East Anglia, Essex, Lancaster, Kent and Warwick; See M. Beloff, *The Plate Glass Universities* (Betascript Publishing, 1967)

⁸⁴ Course content unable to be determined as not offered in 2009

As Table 3 details, 85% of the 1994 Group offer commercial law variants as optional subjects within a Qualifying Law Degree. Only Reading University and the School of Oriental and African Studies (SOAS) do not offer any commercial law subjects at undergraduate level - although SOAS does offer a postgraduate LLM course in International and Comparative Commercial Law. This relatively high percentage of universities offering commercial subjects at undergraduate level is relatively similar to that of the Russell Group. This demand for commercial subjects also exists amid competition from newer legal options such as *'Race Equality Law'* (Essex); *'Film: Law & Society'* (Lancaster); *'Forensic Science & the Legal Process'* (Sussex).

As with commercial subjects offered by the Golden Triangle and Russell Group universities, the predominant focus of 1994 Group universities, is on English law. For example, the module description of Essex University's *'International Trade Law'* states it "will examine English law as applied to international trade since a large number of international transactions continue to be subject to English law"⁸⁵. However, the approach of the 1994 Group, as with the previous groups, overlooks the fact that a large number of international transactions are not subject to English law.

Despite primarily focussing on English law, 82% of 1994 Group universities include *some* international content in their commercial law subjects, which is the highest of all the university groups and is some 30% higher than the Russell Group. In examining what this international content comprises, it was found that 45% of 1994 Group universities include a general introduction to international rules – usually either Incoterms and/or the UCP but it also included an introduction to the Unidroit Principles of International Commercial Contracts (PICC) and the USA's Uniform Commercial Code (UCC); and 55% included a brief introduction to the unratified CISG.

⁸⁵ 'Module Directory Detail: LW327-6-FY International Trade Law' 2008/09; available at <http://www.essex.ac.uk/courses/Default.aspx?coursecode=LW327&level=6&period=FY>; accessed 14/02/09

There are two exceptions to this purely basic introduction to international commercial instruments - Queen Mary University of London and Surrey University. Queen Mary's '*International Commercial Transactions*' which not only includes detailed coverage of the UCP and the ratified Hague Visby Rules, but also provides instruction on the CISG. In contrast to most other institutions, the emphasis in this subject is international commercial law with the English Sale of Goods Act given only brief mention⁸⁶, SOGA being covered in detail in Queen Mary's subject 'Commercial and Consumer Law'. Queen Mary's approach may in part be due to its dedicated 'Centre for Commercial Law Studies' which seeks to "combine excellence in teaching and research, be at the forefront of legal scholarship and law reform, and influence the development and application of commercial law in practice"⁸⁷.

Surrey University have just redesigned their commercial law course for commencement in the 2009-2010 year⁸⁸ and this will include detailed:

"Examination of CISG and the UNIDROIT Principles for International Commercial Contracts . . . the model laws on e-commerce and the UNCITRAL Convention on Electronic Transactions . . . [and] include an examination of the various conventions relating to corruption and the rules on extortion and bribery from the ICC"⁸⁹.

3.4 The Million+ Group*

*(*excludes the Universities of Abertay Dundee, Glasgow Caledonian, Edinburgh Napier, and the University of West of Scotland as they are not within the geographical area of the study; and Roehampton and Bath Spa University do not offer law degree courses).*

The Million+ group comprises post-1992 universities, many of which are former colleges and polytechnics⁹⁰; so this group provides a comparison to the older Golden Triangle and Russell Group universities and the 1994 group of universities established in the 1960's and 70's.

⁸⁶ Email from Dr A. Raymond, Queen Mary University, 28/04/09

⁸⁷ Refer <http://www.ccls.qmul.ac.uk>; accessed 30/09/09

⁸⁸ Refer <https://sits.surrey.ac.uk/live/ipo/LAW3032-0002.htm>; accessed 22/06/09

⁸⁹ Email from Professor Indira Carr, Surrey University, 03/07/09

⁹⁰ E.g. Birmingham City University was formerly Birmingham Polytechnic and the University of Greenwich formerly Thames Polytechnic

University	Subject	English Law	International Instruments
Anglia Ruskin	International Business Law	✓	UCP/HVR/CISG*
Bedfordshire	Commercial Law (from 10/09) e-Commerce Law	✓ -	- ?
Birmingham City	Commercial Law	✓	-
Bolton	-	-	-
Buckinghamshire New	Commercial Law	✓	-
Central Lancashire	-	-	-
Coventry	Sales Transactions Law	✓	-
Derby ⁹¹	International Business Transactions	✓	UCP/HVR/ CISG
East London	Commercial Law	✓ & EU	-
Greenwich	Consumer & Commercial Law	✓	-
Kingston	International Trade Law	✓	CISG*
Leeds Metropolitan	-	-	-
London Metropolitan	Law of Sale & Supply of Goods International Carriage of Goods by Sea	✓ ✓	- Hague/HVR Hamburg Rules
London South Bank	-	-	-
Middlesex	-	-	-
Northampton	Sale of Goods & Agency	✓	-
Southampton Solent	Commercial Law	✓	Incoterms*/UCP*/ HVR
Staffordshire	Commercial Law – Law of Sale Export & International Trade Law	✓ -	- UCP / Hague/HVR/ Hamburg Rules/CISG*
Sunderland	Commercial Law	✓	CISG*
Teesside	-	-	-
Thames Valley	Commercial & Consumer Law	✓	-
Wolverhampton	Commercial Law Sale of Goods (Consumer)	- ✓	Incoterms/HVR -

*Brief introduction only

TABLE 4

As Table 4 details, 73% of the Million+ Law Schools offer commercial law variants as optional subjects within their Qualifying Law Degree courses, which is the lowest of all

⁹¹ Also offers 'International Trade' but comprises public international law so not within limits of study

the groups, and this may suggest that student demand for commercial subjects is lower in the so-called post-1992 and 'modern' universities, especially where more contemporary subjects are offered. This is demonstrated by Bolton, Central Lancashire and Leeds Metropolitan universities where commercial law was *not* offered but arguably newer options such as '*Law & Computing*'; '*Sports Law*' and '*Medicine & the Law*'; and '*Law & Literature*', were offered respectively. However, in contrast to this, Bedfordshire Law School offered a new '*Commercial Law*' module from October 2009 and are looking at introducing a new '*International Trade*' course at undergraduate level in 2010.

Even though fewer universities offer commercial law subjects in the Million+ Group, it is noticeable that 30% of the institutions that do, offer more than one Commercial law variant. For example, London Metropolitan University offers '*Law of Sale and Supply of Goods*' as well as '*International Carriage of Goods by Sea*'. However, it appears that most of these are considered 'half' options (15 credits) as opposed to 'full' options (30 credits).

As with the other groups, the Million+ law schools predominately focus on English law in their commercial subjects, with only half offering *some* international content. But in contrast to the other groups, Million+ universities were more inclined to include in depth coverage of international instruments, rather than brief introductions, with 25% providing detailed study of Incoterms and the UCP and 38% ratified shipping conventions. Some 20% also included in depth teaching of the non-ratified CISG and Hamburg Rules.

3.5 The University Alliance*

(* Excludes the Institute of Education University of London; the University of Wales Institute, Cardiff; Wales, and the University of Wales, Newport as they do not offer a Qualifying Law Degree course.)

Chapter 2 - The Universities

The University Alliance group comprises mostly post-1992 universities⁹² (many of which were previously polytechnics⁹³) with a few plate-glass 1960s universities⁹⁴; and will therefore provide a comparison, to not only to the similar Million+ Group, but also to the other older university groups.

University	Subject	English Law	International Instruments
Aberystwyth	Commercial Law	✓	-
Bournemouth	Commercial Law & Transactions Law of International Trade	✓ -	CISG* Hague*/HVR* Hamburg Rules*
Bradford	Commercial Law	✓	Incoterms*/HVR*/ CISG*
De Montfort	Commercial Law	✓	CISG*
Glamorgan	Elements of Commercial Law	✓	-
Gloucestershire	Commercial Law	✓/EU	-
Hertfordshire	Commercial Law International Commercial Law	✓ -	- Incoterms*/UCP/ HVR/Hamburg Rules/ CISG*
Huddersfield	Commercial Law Law of International Trade	✓ ✓	- Incoterms*/UCP*/HVR* /CISG*
Kent	International Business Transactions	✓	UCP*/HVR*/CISG*
Lincoln	Sale of Goods	✓	-
Liverpool John Moore's	Commercial Law	✓	-
Manchester Metropolitan	-	-	-
Northumbria	Commercial Contracts Law of International Trade Sale of Goods	✓/EU - ✓	CISG* Incoterms*/UCP*/HVR -

Table continued over page

⁹² I.e. those acquiring 'university' status as a result of the provisions of the Further and Higher Education Act 1992

⁹³ E.g. Liverpool John Moores University was formerly Liverpool Polytechnic and Nottingham Trent University was previously Trent Polytechnic then Nottingham Polytechnic

⁹⁴ I.e. the Universities of Bradford, Kent, Salford and the Open University

Nottingham Trent	Contract Law International Trade Law ⁹⁵	✓ -	Incoterms*/UCP*/HVR*
Open	Business & Consumer Transactions	✓	-
Oxford Brookes	Commercial Law International Trade Law	✓ ✓/EU	- Incoterms*/UCP*/HVR*
Plymouth	Carriage of Goods by Sea Commercial Law	✓ ✓	HVR/Hamburg Rules* -
Portsmouth ⁹⁶	Commercial Law	✓/EU	-
Salford	Commercial & Consumer Law International Trade Law	✓ ✓	- -
Sheffield Hallam	Commercial Law	✓	-
West of England	Commercial Law International Trade (<i>content varies year to year</i>)	✓ ✓	- Incoterms*/UCP*/HVR*/ CISG*

* Brief introduction only

TABLE 5

From the data in Table 5, 95% of the Alliance Group Law Schools offer commercial law variants as optional subjects within their Qualifying Law Degree courses – with only Manchester Metropolitan University not offering any commercial law subjects. This demand equates with similar percentages in the Golden Triangle and Russell Group, and interestingly, it is a significantly higher percentage than the Million+ Group even though it has comparable types of universities; which tends to suggest the demand for commercial law variants at undergraduate level is relatively widespread and is not limited to a specific type of university.

45% of the University Alliance institutions offer more than one Commercial law variant. For example, Bournemouth, Huddersfield, Northumbria, Oxford Brookes, Plymouth,

⁹⁵ Although 'International Trade Law' offered in 2007-08 and 2008-09 as a final year option, it has not yet run due to staffing reasons and student take-up, as per email from Mrs T. Launchbury, Senior Lecturer, 15/07/09

⁹⁶ Also offers a BA (Hons) Languages & International Trade⁹⁶ with options of 'International Trade Law' and 'International Trade & Payments'; which include study of the UCP and a comparison of the CISG with English Sale of Goods Law, but as this course is not a Qualifying Law Degree, it is not included in this study

Salford and the West of England universities all offer '*Commercial Law*' as well as '*International Trade*' or '*Carriage of Goods*'; but as with the Million+ Group, it appears that most of these subjects are considered 'half' options, rather than full optional modules.

As with the other groups in the study, the focus of commercial subjects at undergraduate level within University Alliance is predominantly on English law. However, in a somewhat unique approach, students at Hertfordshire law school have the opportunity to "reflect on the shortcomings of the [English] law relating to the sale of goods"⁹⁷ and to "examine the wider implications of English commercial law with particular reference to codification and the emergence of international commercial law"⁹⁸.

60% of the University Alliance includes some study of international commercial conventions, which is 10% higher than the Russell, Million+ and Unaffiliated Groups. This international content in the main amounts to basic introductions to rules (Incoterms and the UCP) and unratified CISG, and this is comparable to the other groups. However, in contrast to the other groups where ratified conventions such as the Hague-Visby Rules, were only covered in detail, 35% of the University Alliance gave a brief introduction to these Rules.

In terms of more in depth study of international commercial instruments, Hertfordshire University's '*Commercial Law & Transactions*' includes detailed tuition on the UCP as well as the ratified Hague-Visby and unratified Hamburg shipping conventions. Northumbria and Plymouth also provide detailed coverage of the ratified Hague-Visby Rules, in their respective subjects '*Law of International Trade*' and '*Carriage of Goods by Sea*'.

⁹⁷ From Module description available at http://www.herts.ac.uk/courses/Bachelor-of-Law_year2.cfm; accessed 14/02/09

⁹⁸ n(97)

3.6 The Unaffiliated Universities

Sixteen universities are not members of the above groupings and are therefore included as an 'Unaffiliated Group'.

University	Subject	English Law	International Instruments
Aston	Aspects of Business Law International Business Law	✓ -	- Incoterms/UCP/ PICC/PECL/ HVR/Warsaw/CMR/ CISG
Bangor	Commercial Law	✓	-
Brighton	Law of International Trade	✓	CISG*
Brunel	-	-	-
Buckingham	Commercial Law	✓	-
Canterbury Christ Church	-	-	-
Chester	Commercial Law	✓	-
City, London	Commercial Law Domestic & International Banking International Arbitration	✓ ✓ ✓	- UCP Various Arb Rules/ NY Convention
Cumbria	-	-	-
Edge Hill	International Business Law	-	UCP* /CISG*
Hull	Carriage of Goods by Sea Commercial Law – Sale of Goods Foundations of Commercial & Corporate Law	✓ ✓/EU ?	Hague/HVR/Hamburg DCFR* ² / CISG* ?
Keele	-	-	-
London, External	Commercial Law	✓	Incoterms*/UCP* CISG*
Swansea	Commercial Law E-Commerce	✓ ?	- ?
Westminster	Commercial Law Law of International Trade	✓ ✓	- Incoterms*/UCP/HVR/ ICC Arb Rules/ CISG*
Winchester	Commercial Law (from 2010)	✓	-

* Brief introduction only

*² Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)

TABLE 6

As Table 6 details, 75% of this remaining group of universities offer commercial subjects⁹⁹. This is a similar percentage to the Million+ universities but some 20% lower than the Russell Group and University Alliance and 10% lower than the 1994 Group.

Table 6 also shows that, as with other groups, it is predominantly English law which is taught in Commercial subjects. For example, the specialist Commercial Law LLB offered by Hull University Law School is described as: “an exciting opportunity for anyone seeking to explore and understand English Law through a wide range of modules”¹⁰⁰.

Nevertheless, 50% of Unaffiliated Universities include some study of international commercial instruments – which is a similar percentage to the Russell and Million+ Groups. Of these, 33% offer a basic introduction to international rules such as Incoterms, the UCP; and 42% include a brief summary of the unratified CISG. In terms of more detailed study, 25% of Unaffiliated universities include in depth study of rules/model laws - including PICC / PECL and various international arbitration rules; 33% include detailed study of conventions ratified by the UK, such as the Hague-Visby Rules, Warsaw Convention and CMR; and 16% include in depth coverage of the unratified conventions CISG and Hamburg Rules.

It is interesting to note that Aston Business School covered the wide range of rules, model laws and conventions in its subject ‘*International Business Law*’, with the module description perhaps reflecting the school’s approach to international commercial law:

“The major objective of this module is to study the international dimensions of International Business Law. . . Students will also gain a detailed understanding of the need for and difficulties in harmonisation of national laws to create a corpus of international law in this area”¹⁰¹.

⁹⁹ This includes Winchester University who began offering a Qualifying Law Degree Course in 2008-09; although the Year 3 option ‘*Commercial Law*’ will not be offered until 2010-11

¹⁰⁰ See <http://www.law.hull.ac.uk/courses/ug/lawcommercial.html>; accessed 31/07/09

¹⁰¹ Module BL3371 pp 1-4 available at <http://www.abs.aston.ac.uk/newwe/programmes /undergraduate/modules.asp>; accessed 02/02/09

4.0 SUMMARY COMPARISON OF GROUPS

		Golden Triangle	Russell Group	1994	Million+	University Alliance	Unaffiliated Universities	TOTAL
1.	No. in Group Offering QLD in England or Wales	5	11	13	22	21	16	88
2.	No. of QLD universities offering Commercial Law subjects	5 100%	10 91%	11 85%	16 73%	20 95%	12 75%	74 84%
3.	No. of QLD universities offering Commercial Law subjects which includes some international content	5 100%	5 50%	9 82%	8 50%	12 60%	6 50%	44 61%
Analysis of the International Content:								
4.	No. of universities offering- Basic intro to Rules / Practices % of No.2 above	4 80%	3 30%	5 45%	1 6%	8 40%	4 33%	25 34%
5.	Basic intro to Ratified Conventions % of No.2 above	0	0	0	0	7 35%	0	7 9%
6.	Basic intro to Unratified Conventions % of No.2 above	2 40%	1 10%	6 55%	4 25%	9 45%	5 42%	27 36%
7.	In depth study of Rules / Practices % of No.2 above	0	1 10%	2 18%	4 25%	1 5%	3 25%	11 15%
8.	In depth study of Ratified Conventions % of No.2 above	1 20%	3 30%	1 9%	6 38%	3 15%	4 33%	18 24%
9.	In depth study of Unratified Conventions % of No.2 above	0	3 30%	2 18%	3 19%	1 5%	2 16%	11 15%
10.	No. of QLD universities offering Commercial Law subjects but having NO international content	0	5 50%	2 18%	8 50%	8 40%	6 50%	29 39%

Note: Rows 4 – 9 do not total row 3 as different types of instruments often given different levels of coverage within a university.

TABLE 7

4.1 Comparison of 'In depth' Study

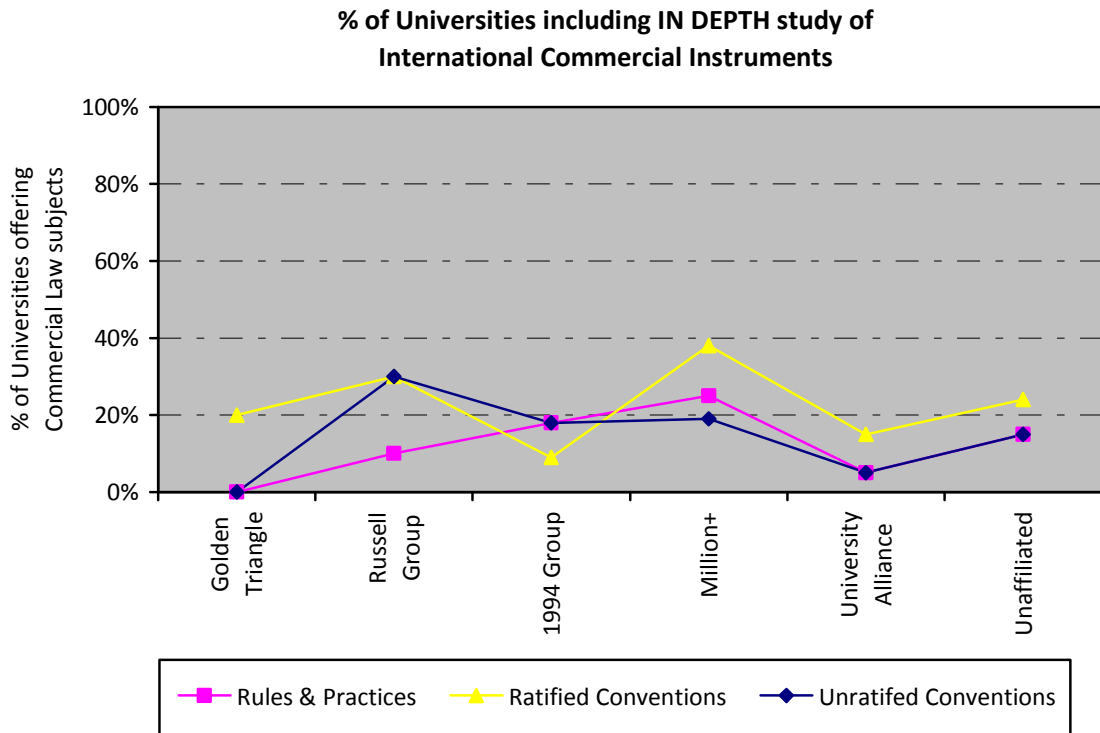


FIGURE 1

Figure 1 shows the inclusion of international commercial instruments in undergraduate subjects beyond merely a brief introduction, in most university groups is relatively limited. In the Golden Triangle universities, the most elite in the UK, the *only* detailed study of international commercial instruments comprises the Hague-Visby Rules – which are of course, part of English law.

By comparison, a similar number of Russell Group universities provide in depth study of ratified and unratified conventions. In fact, more of the Russell Group universities include in depth coverage of unratified conventions than any other group in the study, focussing particularly on the CISG and the Hamburg Rules.

Although the 1994 group coverage of unratified conventions is some 10% lower than the Russell Group, it is the only group to give more detailed study to unratified conventions than those already incorporated into English law; and it is also the only group to give more coverage to rules and model laws, than ratified conventions.

In contrast to the 1994 Group universities, the Million+ universities give more in depth attention to the ratified carriage conventions, than other types of instruments. A trend also demonstrated by the University Alliance and the Unaffiliated University groups, and which reflects a tendency to favour the teaching of English law.

4.2 Comparison of Universities having NO International Commercial Content

Figure 2 illustrates the number of universities within each group who do not include *any* study of international commercial instruments within their commercial law subjects.

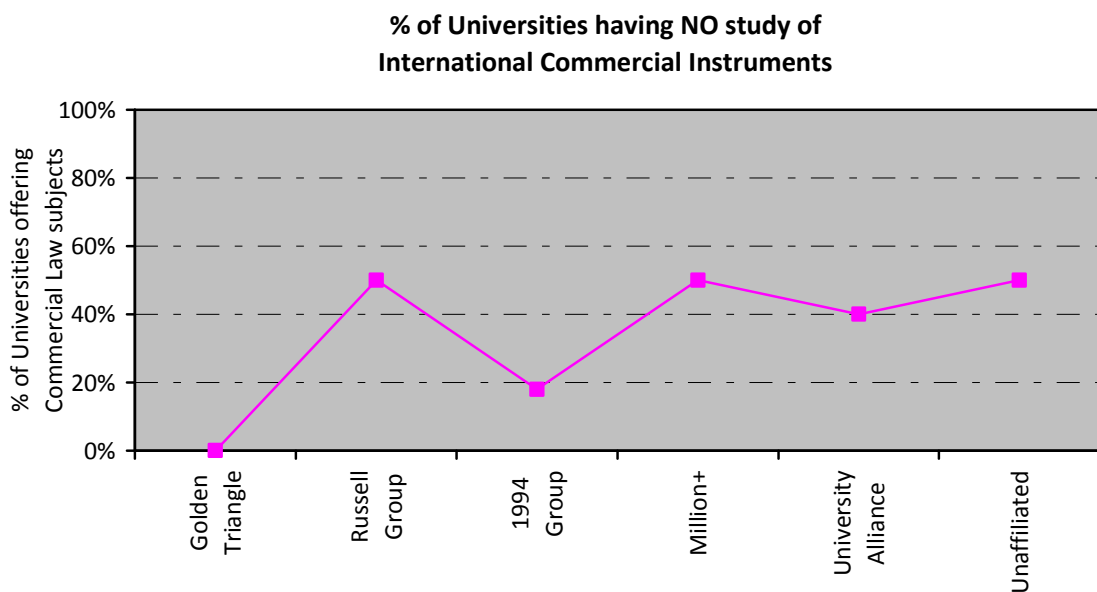


FIGURE 2

From Figure 2 it can be seen that 50% of the Russell Group universities and 50% of the Million + universities do not offer any international content within their commercial law variants. This effectively means that half of the graduates from these universities, who have taken commercial law modules will have no knowledge of international instruments that could potentially impact on their client's business transactions, if they go into practice or potentially impact on their attitudes to further research and/or teaching such instruments if students choose an academic career. Furthermore, it shows that there is no significant difference in international perspective, in undergraduate level commercial law, between the 'red brick' so called leading universities in England and Wales, and the more modern universities.

This trend is also followed by the University Alliance, as 40% of the group do not include any teaching of international commercial instruments. However, against this trend are the 1994 Group where 18% of the group do not include international study and the Golden Triangle where all of the group include some international content.

Overall, it is a somewhat telling statistic that some 40% of all universities in England and Wales include no international content in their commercial law subjects, this is despite international business transactions increasing year on year.

5.0 POSTGRADUATE INTERNATIONAL COMMERCIAL LAW

Whilst this study is primarily concerned with the approach taken by universities at undergraduate level, it is perhaps useful to briefly examine the commercial law offered at postgraduate level in order to provide a contrast to undergraduate study and to thus further ascertain how universities approach instruments that harmonise international commercial law.

5.1 Postgraduate Commercial Law Courses

Although detailed study of international commercial instruments is only offered at undergraduate level in 18¹⁰² of the 88 law schools who offer a qualifying law degree; research has shown that 68 of these law schools offer taught LLM courses, which expressly include detailed study of international commercial instruments. Therefore, there is a significant difference in the numbers of universities offering in depth study of international commercial instruments between undergraduate and postgraduate level as Figure 3 illustrates.

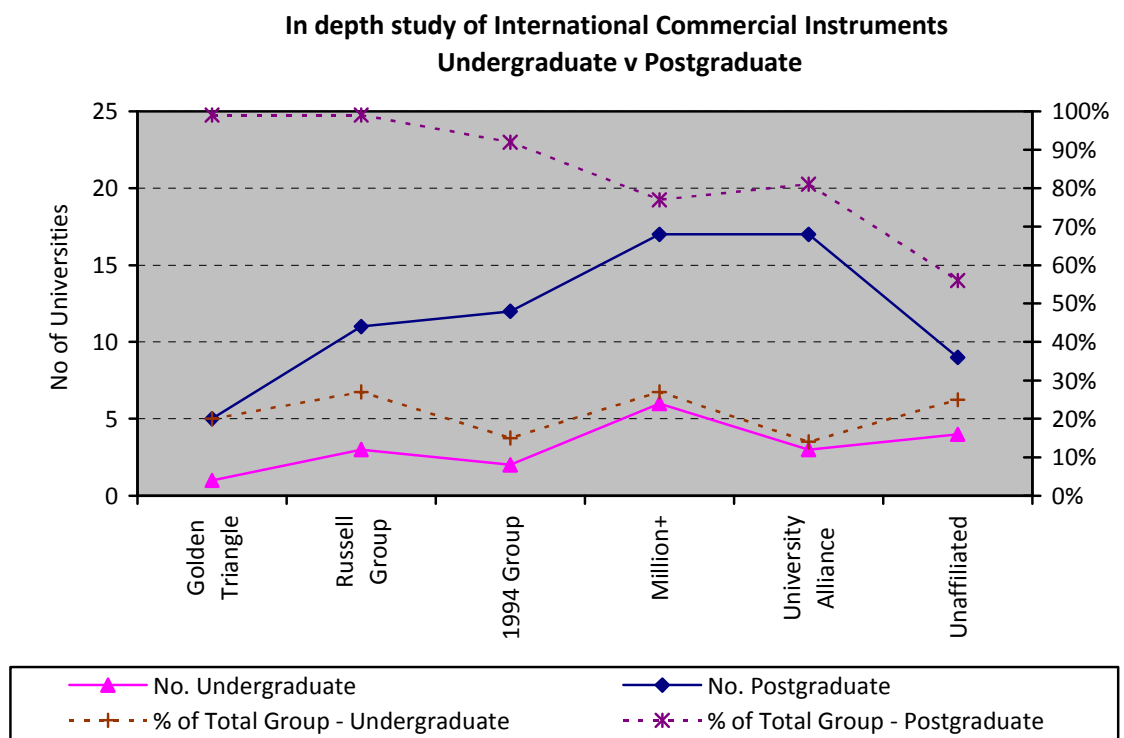


FIGURE 3

Figure 3 also shows that 100% of the Golden Triangle and Russell Group universities offer a taught LLM international commercial law courses¹⁰³ which include many private international commercial modules¹⁰⁴, as well as some modules which focus on public

¹⁰² This includes study of ratified conventions such as the international carriage conventions; if these are excluded only 11 universities in England & Wales offer in depth coverage of international commercial instruments

¹⁰³ See Appendix 1 for details

¹⁰⁴ E.g. Birmingham University offers the module 'The Vienna Sales Convention'; King's College London's 'International Commercial Arbitration' includes NY Convention; and LSE's 'International Sale of Goods' also includes CISG and UCP600

international law issues. It is nevertheless, interesting to note that Newcastle University, although not offering any undergraduate commercial law variants - offers an international Commercial LLM course.

Of the 1994 Group Law Schools, over 90% offer a taught International Commercial LLM, with only Birkbeck Law School not offering such a course. Even SOAS and Reading who do not offer commercial law at undergraduate level offer a Postgraduate degree in international commercial law. But post graduate international commercial law courses are not restricted to 'red-brick' or 'plate-glass' universities, as 73% of the post-1992 and 'modern' universities in the Million+ Group offer similar courses. In fact, the Million+ universities Central Lancashire and Middlesex, who do not offer any commercial law at undergraduate level, venture into international commercial law at postgraduate level with both, having LLM courses in 'International Business Law'. Similarly, 81% of the University Alliance offer taught LLM courses in International Commercial Law. Against this trend for high numbers of law schools offering commercial LLM courses are the Unaffiliated Universities, where only 56% offer such postgraduate courses, which is the lowest across all groups in the study - although the possible reasons for this are beyond the scope of this study.

5.2 Why Post Graduate level?

The fact that so many universities offer 'International Commercial Law' variants as postgraduate courses rather than at undergraduate level tends to suggest that students need previous knowledge of specific legal concepts and/or principles before attempting these subjects. Indeed, some lecturers did note that study of international commercial instruments was more appropriate for a Masters course. But whilst some understanding of contract law may be of benefit, the basic concepts and laws relating to international transactions are perhaps no more onerous for students to grasp than, the concepts introduced in '*Trusts*' or '*Property Law*' for example, which are frequently second year subjects.

Moreover, if students can understand the obligations of buyer and seller and the remedies available in domestic law; then it would seem reasonable to assume they have the ability to understand the same in other sales laws and even distinguish the advantages and disadvantages of each. Furthermore, given the scant international content within Commercial Law subjects at undergraduate level, prior knowledge cannot be seen as a prerequisite, especially as some universities offering postgraduate international commercial law do not offer any international content at undergraduate level.

In fact, the attitudes of university law schools to international commercial instruments appears to differ between undergraduate and post graduate study, as some universities give little or no mention of international instruments at undergraduate level yet include in depth coverage within their LLM courses; and in some universities study of the CISG is not included in the undergraduate courses because it had not been adopted by the UK, but include it in postgraduate modules. It is also the case that some universities with recognised experts in international commercial law appear to 'reserve' them solely for postgraduate teaching. This therefore raises the question as to whether universities are using the study of international commercial law simply to tap into the lucrative postgraduate market. As such law is obviously applicable in many jurisdictions these courses are particularly attractive to international students, who are keen to pursue legal studies at a UK university. This is extremely advantageous to universities, as the fees from international students far exceed those of home students¹⁰⁵. This position is likely to change however, with the impending change to home university fees¹⁰⁶.

¹⁰⁵ Average fees for international students (outside EU) for 2009/2010 are approximately £10,000 compared to approximately £4,000 for home students

¹⁰⁶ From 2012 tuition fees for full-time undergraduate courses in England will increase to up to £9,000 a year, See 'University Guide 2012: Fees in the UK 2011-12 and 2012-13'; available at <http://www.guardian.co.uk/education/2011/may/17/>

It is worth noting though, that as postgraduate study of law is outside the reach of the influence of the profession (see section 6.1); postgraduate commercial law may more readily reflect the true universities approach to international commercial law.

6.0 WHAT HAS INFORMED UNDERGRADUATE COMMERCIAL LAW

This section examines the factors which appear to have contributed to or influenced the approach taken by universities to undergraduate commercial law. Its main focus being the potential reasons why most university law faculties have not 'internationalised' the commercial options offered to undergraduates and the likely effects of this.

6.1 The influence of the Profession on Legal Education

The legal profession and its regulating authorities have a vested interest in the study of law, given its trainees inevitably come from university educated students, but the question arises as to whether the profession has a wider role than simply being an interested bystander?

6.1.1 The Effect of the Foundation Subjects

Under the Courts and Legal Services Act 1990 (as amended) authority has been vested in the Law Society and the General Council of the Bar, for prescribing the qualification requirements for a Qualifying Law Degree¹⁰⁷; and as such these bodies are responsible for the regulations in respect of students seeking to qualify as solicitors or barristers. The Bar Council and the Law Society have jointly agreed¹⁰⁸ that students must pass the 'Foundations of Legal Knowledge Subjects' in order to satisfy the Academic Stage of

¹⁰⁷ A course of study which the Law Society and Bar Council recognise as satisfying the requirements of the initial or academic stage of training

¹⁰⁸ See generally 'A Joint Statement issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training'; available at <http://www.sra.org.uk/documents/students/academic-stage/academicjointstate.pdf>

Training to qualify as a barrister or solicitor. Under Schedule 2 of the Joint Statement the six foundation subjects¹⁰⁹ are:-

- (i) Public Law (including Constitutional & Administrative Law and Human Rights);
- (ii) Law of the European Union;
- (iii) Criminal Law;
- (iv) Obligations, including Contract, Restitution and Tort;
- (v) Property Law; and
- (vi) Equity and the Law of Trusts.

The Law Society website stating that “these subjects will equip those who wish to go on to join the legal profession with the background knowledge necessary for practise as a solicitor or a barrister”¹¹⁰

By fixing the subjects a student must complete some claim the Law Society and Bar Council have effectively tied the hands of the Law Schools and prevented students from studying the legal subjects of their choice. Professor Peter Birks for example, claimed that the professions' systematic indifference to the well-being of all but seven subjects is not only myopic but bewildering, and illustrated the apparent perversity of the requirement, thus:

“A candidate with a strong interest in international law might have done twelve units such as (1) General Principles of Public International Law, (2) The United Nations, (3) a dissertation entitled ‘Legal Regime of the Continental Shelf’, (4) The Law of Armed Conflict, (5) Jurisprudence, (6) Private International Law, (7) Carriage of Goods by Sea, (8) Legal History, (9) Sale of Goods (10) Jurisprudence of the European Court of Human Rights, (11) Monopolies and Competition, (12) Commercial Law. . . [but] this candidate cannot go on. He must stop to make up the deficiencies in his compulsory list. We might add he was the best candidate in his year. It would make no difference. He has not got enough of the only things the Law Society cares about . . . the compulsory subjects”¹¹¹.

¹⁰⁹ these are often quoted by universities as the seven foundation subjects with Tort and Contract being treated as separate subjects

¹¹⁰ <http://www.lawsociety.org.uk/currentissues/educationtraining.page>

¹¹¹ Peter Birks, ‘Compulsory Subjects: Will the Seven Foundations ever Crumble’ [1995] 1 Web J.C.L.I. 4

Professor Birk's article suggests that under the Law Society rules, if the compulsory subjects have been completed, it does not matter how little other law has been done, and conversely if the compulsory subjects have not been completed, it does not matter how much other law has been studied. The position may not however, be as simplistic as this. Whilst the Law Society and Bar Council have decreed that the foundation subjects must involve not less than 180 credits (i.e. not less than one and half years study)¹¹²; the Joint Statement is silent as to what these subjects must include beyond "key elements and general principles"¹¹³ but "courses involving the study of aspects of the English Legal System will be allowed to count towards these 180 credits"¹¹⁴.

Despite the generality of the Joint Statement, most, if not all, law schools appear to be under the innate understanding that the foundation subjects are core or compulsory subjects of a qualifying law degree and thus what is taught is driven by Law Society and Bar Council requirements. In actuality though, it would appear that university law schools have the freedom as to how these foundation subjects are offered - a law school could theoretically include '*Contract Law*' for example, within other modules such as '*Commercial Law*' leaving further credits available for the study of '*International Commercial Law*'. This may indeed be allowable, but it may run contrary to assessment criteria as all foundation subjects are required to have a formal examination as part of their assessment.

In addition to the Foundation Subjects (totalling 180 credits), the Law Society and Bar Council in their Joint Statement, have further decreed that a further 60 credits for a Qualifying Law Degree must be legal subjects – although this can be "broadly interpreted", so study of criminology and other socio-legal subjects can be included¹¹⁵.

¹¹² n(108) para v, p.2

¹¹³ n(108) schedule 2, p.6

¹¹⁴ n(108) para v, p.2

¹¹⁵ n(108) para 2(v), p.2

Typically an LLB (Hons) degree requires a total of 360 credits or CATS points¹¹⁶, so the professional regulatory bodies are effectively prescribing the content of two-thirds of it.

6.1.2 The Effect of Conversion Courses

A Qualifying Law Degree is not however, the only route to qualification for potential solicitors and barristers. Under the 'Supplement to the Joint Statement'¹¹⁷ a graduate in England and Wales with a non-law degree can 'convert' to law and satisfy the Academic Stage of Training by completing a year long conversion course¹¹⁸. These courses are variously known as the Graduate Diploma Course (GDL) or Common Profession Examination (CPE) and provide study "equivalent to the Foundations of Legal Knowledge"¹¹⁹

However, due to the time constraints and the amount of basic information that must be covered in what is effectively a nine or ten month course, as opposed to what is covered by an undergraduate in a year and a half on an LLB degree course; there is less opportunity for academic understanding or discussion of law subjects and there is no opportunity to learn about specialist areas of law. Therefore, under the conversion course 'system' a student can complete the Academic Stage of Training but have little actual knowledge of substantive law, beyond the basic legal principles obtained from the Foundation subjects – so a student can potentially arrive in commercial practice with little, if any knowledge of commercial law.

At present, some forty institutions offer the GDL conversion course¹²⁰ for non-law graduates. This is clearly testament to the popularity of this particular route to legal education, but perhaps more importantly it demonstrates a willing acceptance by the

¹¹⁶ Credit Accumulation and Transfer Scheme (CATS)

¹¹⁷ n(108) p.7

¹¹⁸ However, the Joint Academic Stage Board (JASB) comprising the Solicitors Regulation Authority and the Bar Standards Board are responsible for setting the rules and the requirements that must be satisfied in respect of admitting students onto a CPE/GDL course

¹¹⁹ n(108) p.7

¹²⁰ See <http://www.sra.org.uk/students/courses/CPE-GDL-course-providers.page>; accessed 02/01/11

wider profession of its graduates, even though they have no detailed knowledge of specific areas of law. Many universities also appear to actively encourage the conversion course route and support the legal firms' acceptance of non-law graduates. Professor Gary Slapper, Director of the Open University's Centre for Law, for instance claims "if you perform well on a conversion course and the LPC, not having a law degree will not be seen as a disadvantage"¹²¹. Similarly, London Metropolitan University's website states that:

"non-law graduates are in some ways more in demand from the profession than their law counterparts, because they can bring a fresh perspective on law problems, where law graduates are sometime perceived as being 'too academic'. A language background is particularly appealing for international work, but backgrounds in the arts, science or engineering are also welcomed"¹²².

Not surprisingly, the London Metropolitan offers the CPE course and the Open University has an affiliation with the College of Law which offers the GDL. So support and/or acceptance of law conversion courses may be linked to financial considerations. This may also be the case for some institutions that provide vocational training courses such as the Legal Practice Course (LPC) and the Bar Vocational Course (BVC) as well as offering the CPE or GDL. For instance, Peter Crisp, Chief Executive of BPP Law School has claimed that "the good candidate will get a training contract regardless of his or her first degree"¹²³ and Professor Scott Slorach of the College of Law has stated that:

"the GDL covers the core subjects required by the professional bodies and that feature as one-third of a law degree . . . The remaining two years of a law degree are, strictly speaking, not significant professionally"¹²⁴.

Professor Peter Birks, however, expressed a contrary view and claimed that, "[w]e will never have strong law schools in this country while the professions continue to disavow them, repeatedly declaring their preference for non-law graduates"¹²⁵.

¹²¹ Included in <http://juniorlawyers.lawsociety.org.uk/node/529>; accessed 02/01/11

¹²² <https://intranet.londonmet.ac.uk/student-services/careers/experience-matters/training-and-qualifications/common-professional-examination.cfm>; accessed 06/04/09

¹²³ In Edward Fennell, 'Do you stand a better chance as a law or non-law graduate', *The Times* May 7, 2009

¹²⁴ n(123)

¹²⁵ n(111) p.4

6.1.3 The Gate-Keeping influence of the Profession

In setting the foundation subjects that must be studied for a Qualifying Law Degree or via the 'conversion route', the Law Society and the Bar Council have effectively become stakeholders in legal education.

However, the impact of the professional bodies is more far reaching than simply setting curriculum regulations and/or the routes to completing the so-called 'Academic Stage of Training'; as a more important consequence of these regulations is the fact that the regulatory bodies have become gate-keepers to legal education. By stipulating the subjects that are required to be studied and the conditions that must be satisfied, the legal profession indirectly sets the length of courses, which is then reflected in course fees, which thus impacts on the ability of students to enter into legal education, and consequently, a student's ability to enter into the legal profession itself.

It is to be noted that in June 2011, the 'Legal Education and Training Review' (LETR) was commenced by the Solicitors Regulation Authority, the Bar Standards Board and the Institute of Legal Executives Professional Standards¹²⁶. This study will include *inter alia* a review of the academic stages of training and is due for completion by late 2012.

6.1.4 The influence of the Legal firms

Arguably, the greatest impact firms have on undergraduate law, is their willingness to recruit trainees who are non-law graduates with limited legal knowledge. This has now reached an extent where training contracts with major city commercial firms are now apparently being equally given to graduates from law and non-law backgrounds¹²⁷. For example: "approximately 45% of Clifford Chance trainees graduate from non-law

¹²⁶ See generally <http://letr.org.uk/about/>

¹²⁷ See generally <http://www.allaboutlaw.co.uk/started.aspx?section=4>; accessed 05/10/09

subjects”¹²⁸; at Linklaters, “almost half of our trainees have studied something other than law”¹²⁹; at Pinsent Masons “around 50% of our trainees each year have studied subjects other than law”¹³⁰; and at SJ Berwin, “a very large number of our current trainees have done non-law degrees”¹³¹.

Therefore, approximately half of the trainee commercial lawyers in major city firms apparently enter the legal profession armed only with basic legal principles gained from the foundation subjects and vocational skills training. This lack of specialist legal knowledge does not appear to dissuade employers though. In fact, there is a general acceptance of it by commercial firms, as analysis of the graduate recruitment information from the large city commercial firms shows that most are concerned with a candidate’s potential to become a lawyer, rather than their knowledge of law. Linklaters, for instance claim that “Your potential as a lawyer has less to do with what you know right now – and everything to do with what you can do”¹³².

Consequently, study of any commercial law options does not appear to be expected or indeed encouraged by the major commercial firms as they do not appear to be that interested in what students have or have not studied; preferring to give students full training in their practice area. Therefore, from a purely employment perspective there is no incentive for students to study commercial law. This is borne out by a cursory survey of student chat rooms, where ‘discussions’ as to what choice of options future employers prefer often resulted in comments such as “they didn’t care”¹³³.

Despite an apparent ambivalence towards study of commercial law, most legal firms and chambers want evidence of a candidate’s commercial awareness when recruiting potential trainees. Both professions report that lack of commercial awareness is often a

¹²⁸ <http://www.independent.co.uk/student/magazines/law-careers-choose-the-right-firm-419958.html>; accessed 01/10/09

¹²⁹ http://www.linklatersgraduates.co.uk/join/non-law_students.aspx; accessed 01/10/09

¹³⁰ <http://www.pinsentmasons.com/default.aspx?page=294>; accessed 02/10/09

¹³¹ http://www.sjberwin.com/plum_english_careers.html; accessed 02/10/09

¹³² n(129)

¹³³ E.g. <http://www.thestudentroom.co.uk/showthread.php?t=811136>; accessed 07/10/09

reason for rejecting many otherwise able students. A fact which is not lost on course providers - given the abundance of courses, seminars and publications now available to potential trainees. Private firms¹³⁴, universities¹³⁵ and legal firms¹³⁶ all run courses, workshops or produce information booklets on what commercial awareness is and how candidates can demonstrate it to future employers. But this perhaps demonstrates that law firms are endorsing the teaching of skill sets rather than the academic study of domestic and international laws.

For universities, the acceptance by legal firms of 'simple' legal study has a threefold effect. Firstly, it may potentially limit the demand for commercial law options as more students complete the conversion course rather than a law degree and this will further limit the number of students studying international laws. Secondly, law schools may fail to attract academically-minded students and law will be the weaker for the lack of research, and thirdly, the professional acceptance of this 'simplified' legal education may signal to the wider community a simplification of the legal profession, especially if the study of law is not seen as an academic discipline but rather a trade largely 'learnt on the job'.

6.2 The influence of English Law

It can be clearly seen from the Tables 1-6 in Section 3 of this Chapter, that Law Schools in England and Wales favour the teaching of English law in virtually all commercial law variants, and that the majority of law schools include little if any, true international commercial law¹³⁷. This section therefore examines what influence English law has had on the approach taken by universities to instruments that harmonise international commercial law.

¹³⁴ E.g. the Ultimate Law Guide; refer <http://www.ultimatelawguide.com/CA-workshops.html>; accessed 09/10/09

¹³⁵ E.g. Leeds University offers Commercial Awareness modules

¹³⁶ E.g. Mayer Brown International LLP runs a workshop on Commercial Awareness at City University London

¹³⁷ I.e. that which has *not* been incorporated into English law

English commercial law is widely renowned for its predictability of outcome, legal certainty, transparency and flexibility; and according to many, it is the choice of law for governing international contracts¹³⁸. This general perception is reflected in the module descriptions of undergraduate '*Commercial Law*' subjects in most university law schools in England and Wales; and was particularly noticeable where law schools offered courses variously entitled '*International Commercial Law*' or '*International Trade Law*' - only to describe them as being solely concerned with English law. The 'Oxford University Student Handbook' for example, describes '*International Trade*' in the following terms:

“Although its name might suggest something different, the course is about a branch of English domestic law. Our concern is with the English rules governing international transactions.”¹³⁹

Furthermore, text books used by students often uphold the notion that as the UK has an established and sophisticated system of international commercial law, the introduction of something alien – such as the CISG – would simply cause uncertainty for international traders who have long relied on the established system¹⁴⁰. Equally most English texts on Contract Law make no mention of international restatements such as PICC or PECL, which Professor Sir Roy Goode has noted is part of a wider problem of inadequate attention to comparative law in English law schools¹⁴¹. However, it must be said that this appears to be changing as some more recent text books do promote private international commercial law and the process of harmonisation¹⁴².

This focus on English law has an important impact, as it suggests to undergraduate students that English law is '*the*' governing law of choice for international trade transactions and this may potentially inform the attitudes and understandings that

¹³⁸ E.g. The Law Society of England and Wales, 'England and Wales: The Jurisdiction of Choice' (2008); available at http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf

¹³⁹ (2008-09) p.53

¹⁴⁰ E.g. J. Chuah, '*Law of International Trade*', (3rd Edn, Sweet & Maxwell, 2005), p.15

¹⁴¹ R.M. Goode, 'Insularity or Leadership: The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 Int'l. & Comp. L.Q. 764

¹⁴² E.g. I. Carr, '*International Trade Law*' (4th Edn, Routledge-Cavendish, 2010) ; R. Bradgate, '*Commercial Law*' (3rd Edn, OUP, 2005)

students are beginning to form and develop towards sales laws. The danger of this stance is that it potentially produces lawyers and academics with knowledge solely of English law, who in turn practice or teach only English law, thus perpetuating the notion or attitude that English law is the only law that can possibly apply to international transactions and/or that English law is superior to any international alternatives.

Moreover, it also produces academics and practitioners with no appreciation or understanding for the process of harmonising international commercial laws. Professor Sir Roy Goode has claimed that:

“If the harmonisation process is to have any hope of acceleration it is essential for law schools to reduce their preoccupation with national law and their assumption of its superiority over other legal systems and to revert at least in some degree to the internationalism of medieval law teaching. It is primarily by the spreading of awareness of foreign legal systems amongst our students that we can hope to accelerate the process of harmonisation and to produce practitioners and judges of the future prepared to look beyond the horizon of their own legal system”¹⁴³

Whilst it is without question that English law should be taught in English universities, other international laws are potentially and equally applicable to sales transactions - especially given “that for every international sale contract governed by English law there will be another one governed by a foreign law with which the English party may not be familiar”¹⁴⁴. Therefore, in light of increasing globalisation and the internationalisation of commercial law, the perceived superiority of English sales law is perhaps misplaced in the university environment. It is arguably the role of a university to provide students with a wider legal education than simply English law, even at undergraduate level, as the study of different types of instruments and legal systems exposes students to different ways of thinking and this may help students understand the characteristics of the English legal system more clearly¹⁴⁵.

¹⁴³ R.M. Goode, ‘Reflections on the Harmonisation of Commercial Law’ in R. Cranston & R.M. Goode (Eds) *Commercial and Consumer Law – National and International Dimensions* (Clarendon, 1993) p.26

¹⁴⁴ R.M. Goode, *Commercial Law*, (3rd Edn., Penguin, London 2004) p.914

¹⁴⁵ n(141) p.764

But is it simply the case that older universities are entrenched in traditional English law and newer universities are more receptive to international laws? The evidence suggests not. Although the Oxbridge universities and some of the ‘redbrick’ universities of the late 19th century (Liverpool, Leeds, Bristol and Manchester) all focus primarily on English law; so to do the ‘plate-glass’ universities of the 1960s¹⁴⁶ and most of the ‘Post-1992’¹⁴⁷ universities. By contrast, the red-brick universities of Birmingham and Sheffield and the ‘Post-1992’ universities of London Metropolitan, Staffordshire and Derby Universities include in depth study of international commercial instruments. Therefore, the age of the university law school does not appear to have any bearing on the international content of the commercial courses offered.

6.3 The influence of the universities themselves

This section explores how the law schools have responded to outside influences and what influence the law schools themselves have on the undergraduate study of international commercial law.

The role of university law schools has been much contested and centres on whether law schools should provide an academic education or provide vocational skills for practice¹⁴⁸. This conflict in roles also reflects the “tension between the universities and the legal profession”¹⁴⁹. On one hand, some academics see the role of the university law school as providing a scholastic education, similar to that of other university degrees such as arts or sciences, especially given that not all students go on to professional practice. Professor Twining for instance claimed that “a university is not a trade school for the production of plumbers”¹⁵⁰ and nor is it a place for “training students to become

¹⁴⁶ n(83)

¹⁴⁷ n(92)

¹⁴⁸ The problems of achieving a balance between the practical and the academic have also been addressed in such publications as the Dearing Committee Report

¹⁴⁹ B. Barrett, ‘What is the function of a university: Ivory tower or trade school for plumbers’ (1998) 6 *Quality Assurance in Education* 145-151

¹⁵⁰ W.Twining, ‘Pericles and the Plumber’, (1967) 83 *L.Q.R.* 404

lawyers”¹⁵¹ according to Tracey Varnava the Associate Director of the UK Centre for Legal Education. But on the other hand, the professional bodies and others believe that law schools should provide a vocational training that is appropriate for professional practice in law, and subjects should accordingly be skills and practice based. After all universities are educating students for future careers¹⁵².

It could be argued that a purely scholarly study of law would provide students interested in commercial law with an understanding of law and laws, both domestic and international; how and why commercial laws are developed; the advantages and disadvantages of their application; the extent of their validity and the role that ethics and politics play in the development of private international laws. But equally there is no reason why study of international commercial instruments could not form part of a vocational-based LLB; as a commercial lawyer with knowledge of such international instruments must surely be better placed for advising clients on international transactions, then one who does not even know of their existence.

These two views of educating students arguably demonstrate the tension that universities face between what they can supply in terms of academic knowledge through teaching and research and what society demands for professionals in law¹⁵³. So what is being demanded in the way of international commercial law? The increasing number of law schools in England and Wales offering the GDL one year conversion course, tends to suggest that this is what is now being demanded. Although, it remains to be seen whether the offering of such courses has more to do with financial considerations than academic support for them (see also para 6.1.2). But conversion courses provide little or no commercial law and certainly no exposure to international instruments so perhaps by offering such courses of study, university law schools are

¹⁵¹ In H. Fearn, ‘Laying down the law’ *The Times Higher Education* 10 April 2008

¹⁵² E.g. Liam Burns, president of the National Union of Students, “For the vast majority [of students], it is about getting a better job and having a successful career” in H. Swain “What are Universities For?” *Guardian* 10/10/11

¹⁵³ Professor C. Brink, ‘What are universities for?’ (2007) Newcastle University, p.7; available at <http://www.ncl.ac.uk/executive/assets/documents/whatareuniversitiesfor.pdf>; accessed 24/05/09

effectively closing the door, on the study of international commercial instruments for many future commercial lawyers.

6.3.1 Universities' International perspective

This research has shown an apparent lack of internationality in commercial law subjects, so the question arises as to whether this stems from the universities own international perspective.

The Golden Triangle Law Schools appear to have embraced a strong sense of internationalism with several having established specialist international centres; such as the 'Institute of Global Law'¹⁵⁴ and 'Commercial Law Centre'¹⁵⁵ at UCL; the 'Lauterpacht Centre for International Law'¹⁵⁶ at Cambridge University's and the 'Centre for Transnational Legal Studies (CTLS)'¹⁵⁷ at King's College London. The Institute at UCL, for instance "acknowledges the impact of law across national boundaries and the need to deepen inquiry into comparative approaches to law and legal study"¹⁵⁸ and similarly the principal objective of UCL's Commercial Law Centre is:

"to promote excellence in the research and teaching of international commercial law. . . The Faculty's commercial law research strength embraces both civilian and common law perspectives, as well as the transnational nature of commercial enterprise in the global economy."¹⁵⁹

It is also worth noting that both Cambridge and Oxford law schools have historical backgrounds in international laws¹⁶⁰, but this does not appear to have influenced the type of commercial law which is studied at undergraduate level at these universities.

¹⁵⁴ See generally http://www.ucl.ac.uk/laws/global_law; accessed 21/09/09

¹⁵⁵ See generally <http://www.ucl.ac.uk/about-ucl/laws/commercial/>; accessed 21/09/09

¹⁵⁶ See generally <http://www.lcil.cam.ac.uk>; accessed 09/04/09

¹⁵⁷ see generally <http://www.kcl.ac.uk/content/1/c6/01/93/58/SchoolofLaw.pdf>; accessed 15/06/09

¹⁵⁸ n(154) 'About the Institute'

¹⁵⁹ n(155) 'About the Centre'

¹⁶⁰ See <http://www.law.cam.ac.uk/about-the-faculty/history-of-the-faculty.php>; accessed 09/04/09; and <http://denning.law.ox.ac.uk/members/about.shtml>; accessed 09/04/09

Most Golden Triangle universities simply give brief mention to international instruments in the commercial arena and even where a law school's website highlights the fact that "Staff and students . . . come from all over the world, and bring to the Department an unparalleled international and interdisciplinary outlook in teaching and research"¹⁶¹; it does not lead to the detailed inclusion of international instruments in its commercial subjects.

However, this international perspective is not restricted to Golden Triangle universities; nearly all the University groups demonstrate a collective sense of internationality. The Russell Group, for example, has a commitment to training professionals to serve UK society and an appreciation of "the strategic importance of meaningful ties across international boundaries"¹⁶²; whilst the Alliance Universities claim to be "growing graduates and researchers that will drive our future international competitiveness"¹⁶³. This 'international outlook' is also promoted by almost all universities on their websites¹⁶⁴, with some universities even having specific international centres¹⁶⁵. An increasing number of the law schools are offering more 'international law' options, for example, within Joint Honours Law Degree programmes - with one of the most common being Law with another jurisdiction's law and/or language, for example 'Law with American Law' or 'Law with French Law and Language'. But this apparent internationality does not necessarily transfer to the content of their commercial law subjects as 50% of the Russell Group, Million+ and Unaffiliated groups and 40% of the Alliance Group do not offer any international content in their commercial subjects.

¹⁶¹ From <http://www.lse.ac.uk/collections/law/aboutus/aboutus-firstpage.htm>; accessed 09/04/09

¹⁶² See <http://www.russellgroup.ac.uk/about.html>; accessed 16/06/09

¹⁶³ See <http://www.university-alliance.ac.uk>; accessed 09/07/09

¹⁶⁴ See e.g. Swansea University law school offers programmes which "focus on legal regimen beyond national boundaries and [that] have been developed with a view to providing students with a sound and relevant body of information with practical value in the legal world and beyond" ; available <http://www.swan.ac.uk/media/Swansea-LLB-programmes.pdf>

¹⁶⁵ E.g. Bournemouth University's Centre for Global Perspectives which endeavours to "embed global perspectives in the curricula and to provide students with an international perspective" see http://www.bournemouth.ac.uk/about/the_global_dimension/centre_for_global_perspectives/centre_for_global_perspectives.html; accessed 18/07/09 and Swansea Law School's 'Institute of International Shipping and Trade Law' which promotes "research and teaching of the highest standard in the fields of international shipping and trade law" see <http://www.swan.ac.uk/law/ist/>

Against this trend, is the 1994 Group of universities¹⁶⁶ where the international perspective of the universities is frequently reflected in their commercial law subjects, as 82% of the 1994 Group universities include some international content.

The inward focus of many universities, in relation to Commercial Law subjects was also evident in a number of law schools where unit organisers or lecturers commented that until the UK ratified a particular convention, such as the CISG; there was no need to give more the passing mention to it. This approach seemingly overlooks the value to students of understanding the concept of harmonisation and the fact that other laws can potentially apply to international transactions involving English parties. However, it is interesting to note that some of the universities that do not include undergraduate coverage of the CISG because it has not been adopted by the UK; actually offer in depth coverage of it within their LLM courses. So whilst the internationality light does not appear to be shining very brightly at undergraduate level, it does appear to fully illuminate postgraduate study - with 85% of law schools offering a taught post-graduate course which includes study of international commercial instruments (See Section 5.0).

6.3.2 Commercial law as an optional subject

As commercial law is an optional module within a law degree course, the question arises as to whether this is linked in any way to the lack of international content.

Whilst university law schools have some degree of choice as to what optional subjects they offer, they clearly will want to offer options that are attractive to fee paying students. This effectively means that commercial law must 'compete' for students against subjects which are not only reflect more contemporary legal issues but are arguably more appealing to undergraduates, such as '*Media Law*', '*Sports Law*', '*Forensic Science and the Legal Process*', '*Medical Law*' and '*Environmental Law*'.

¹⁶⁶ E.g. Leicester and Sussex Universities both offer study "with an international outlook; available and Surrey University offers "study of international legal systems"; See <http://www2.le.ac.uk/about> and <http://www.sussex.ac.uk/aboutus/> and <http://www.surrey.ac.uk/law/about/index.htm>; accessed 11/05/09 respectively

Commercial law subjects must also vie for students against such subjects as criminology and other socio-legal subjects, as “broadly legal subjects”¹⁶⁷ are able to count for 60 of the 240 credits of legal subjects required for a Qualifying Law Degree. Furthermore, law subjects need only make up 240 credits of a 360 credit law degree course, so non-law variations are now also offered such as ‘Law with Chemistry’¹⁶⁸ or ‘Law with Anthropology’¹⁶⁹.

But the research has shown that despite the inclusion of modules reflecting modern trends in law and the range of alternative legal, quasi-legal and even non-law subjects on offer to law undergraduates; 84% of law schools in England and Wales still offer commercial law variants to undergraduates, which suggests that a high demand exists as students are still opting for traditional commercial law subjects such as ‘*Commercial Law*’, ‘*International Trade Law*’ or ‘*Carriage of Goods by Sea Law*’.

So what is fuelling this demand for commercial law? According to some academics the demand for commercial law subjects is generated by law firms as potential employers and by undergraduate students themselves. Professor Avrom Sherr from the University of London’s Institute of Advanced Legal Studies, for instance, claims that as:

“More than 70% of training contract[s] in England and Wales are within commercial law firms. [So] The pressure, even at undergraduate level, to provide third year options in the commercial area stems not just from employers but also from students wishing to impress prospective employers ... so that they may be hired for training contracts”¹⁷⁰.

Likewise some universities claim in their student careers information that law modules are useful to illustrate commitment and an interest in law, so taking Commercial Law subjects demonstrates a commitment and interest in commercial law. This is reiterated on some student advice websites and in some student chat rooms, for example:

¹⁶⁷ n(108) para v, p.2

¹⁶⁸ E.g. Bristol University <http://www.bris.ac.uk/law/ugdegrees/ugproginfo/llb-lawchem.html>

¹⁶⁹ E.g. Sussex University <http://www.sussex.ac.uk/studywithus/ug/degrees/subjects/Law/21155>

¹⁷⁰ A. Sherr, ‘Tabula Rasa and other Fairytales’, p.5; available at <http://sas-space.sas.ac.uk/267/1/Tabular%20Rasa.pdf>

“I am doing a module in commercial sales this year and it seems to be a real talking point of the interviews with some commercial law firms I have had so you can't really say that firms do not care about module choices otherwise they wouldn't have asked about them in interviews”¹⁷¹.

However, as the research has shown (see Section 6.1.3) legal firms appear to be primarily focussed on a candidate's potential and their commercial awareness rather than the legal subjects studied, so the demand for commercial law options appears to be largely in response to the universities and the students themselves. But from the research this demand for commercial law has not translated into a demand for international commercial law. Despite increasing cross-border trade and efforts over the last 25 years by various organisations to internationally harmonise aspects of commercial law, this is not reflected in the content of commercial law courses on offer by most university law schools in England and Wales. From the analysis only half of law schools providing a Qualifying Law Degree course offer *some* international commercial content. But this in the main amounts to brief mention of such instruments as the Incoterms, the UCP, the Hague Rules or the CISG, as only 11 law schools offer in depth coverage of international commercial instruments not already incorporated into English Law.

So although Law Schools have generally tended towards modern issues given the modules now offered and have whole heartedly embraced international aspects in other areas of law, such as human rights and public law, (which include detailed analysis of various international treaties); commercial law, by comparison, has not been afforded the same treatment with the inclusion of 'modern' trends such as efforts to harmonise aspects of international commercial law, and as such commercial law at undergraduate level is very much the poor cousin.

¹⁷¹ <http://www.thestudentroom.co.uk/showthread.php?t=811136>

7.0 CONCLUSION

This study has established that 84% of universities in England and Wales providing a Qualifying Law Degree course, offer commercial law variants as optional subjects; which reflects both the importance and demand for such study, even as newer aspects of law are being offered such as *'Media Law'* and *'Sports Law'*.

However, whilst 60% of these law schools include some international content within their commercial law subjects, this in the main amounts to no more than a brief introduction to international rules such as Incoterms, the UCP and/or unratified conventions such as the CISG or the Hamburg Rules. In terms of more in depth study - 24% of universities offering commercial law subjects include detailed study of ratified conventions; only 15% include in depth study of international rules or model laws and nearly this same 15% also include detailed study of conventions not ratified by the UK. Therefore, only some 15% of schools in England and Wales offering commercial law subjects at undergraduate level provide detailed coverage of international commercial instruments, not already English law.

If the role of universities is to educate and inform, to challenge accustomed attitudes and notions; it appears that part of this process is missing in relation to undergraduate commercial law subjects in the majority of universities in England and Wales – especially given that nearly 40% do not offer *any* coverage of international instruments. International law has changed the contours of English law by creating new legal standards and institutions, and whilst this internationalization has permeated certain aspects of legal education, such as *'Human Rights Law'* or *'Public Law'*; the study of commercial law at undergraduate level in universities in England and Wales, has largely remained the domain of domestic law, despite the increase in cross-border trade and the development of international instruments to harmonise the laws surrounding such trade. This was particularly noticeable where subjects were variously entitled *'International Trade Law'* or *'International Business / Commercial Law'*, but actually teach the application of English law to international transactions.

In any other subject, the omission of international aspects would deem it woefully inadequate – imagine the study of medicine or engineering if only the English advancements or techniques were studied. But this is the approach taken by most law schools to undergraduate commercial law. The majority of universities appear to hold with the ideal that English law is the predominant law for cross-border transactions; and some hold that until the UK ratifies international conventions such as the CISG, the Cape Town Convention or the Hamburg Rules then there is no need to study them. But what most seem to overlook the fact that as the UK's major trading partners have ratified conventions such as these, they are potentially applicable to cross-border transactions, and this is reason in itself to study them. Paradoxically though, 80% of all universities in England and Wales offer post-graduate study of international commercial law which includes detailed study of international instruments of harmonisation, this tends to suggest that there may be financial considerations at play.

It has also been suggested that there is simply not enough time within commercial law courses to study international instruments. This appears to stem in part from the compulsory Foundation subjects decreed by the Law Society and Bar Council that must be included in such a course of study. But rather than being integrated “within study of aspects of the English Legal System”¹⁷², these subjects appear to have become the fundamental basis for Qualifying Law Degrees. ‘Contract Law’ for example could be included within a module on commercial law, which would then allow further opportunity for study of international instruments of commercial harmonisation. What is arguably of more concern is the increasing acceptance by legal firms of non-law graduates equipped only with the basic foundation subjects. Research has shown that major city commercial firms are now equally willing to recruit non-law graduates with no knowledge of commercial law, let alone knowledge of any international instruments. Yet many universities appear to endorse the ‘conversion route’ to practice by providing such courses – but again this may have more to do with financial considerations than support of it *per se*.

¹⁷² n(108) para v p.2

Consequently, it appears that the universities overall approach to international commercial instruments certainly at undergraduate level, is informed by the professional regulating authorities, by financial considerations and by a need to impart all that is good about English Sales law. But what is the effect of this approach? Firstly, graduates entering commercial practice with knowledge solely of English law which will not only inform the rest of their professional careers unless they have training in international alternatives; but it also means that clients may not have the benefit of instruments which have been specifically developed for the benefit of parties to cross-border transactions or they may not be comprehensively advised as to their rights and obligations when such an instrument applies. Secondly, teaching solely English law may subconsciously prejudice students in their future careers either against international commercial laws or to the process of harmonisation. Consequently, the science of law will be the weaker for academics and practitioners who have not studied international commercial instruments.

Moreover, this lack of understanding of international commercial instruments will surely impact on the UK's overall support and commitment to the on-going process of harmonising international commercial law.

Chapter 3 : The Practitioners

1.0 INTRODUCTION

Professor Sir Roy Goode has stated that “for every international sale contract governed by English law there will be another one governed by a foreign law with which the English party may not be familiar”¹⁷³ and it has been said that “90% of commercial cases handled by London law firms now involve an international party”¹⁷⁴. This would tend to suggest that commercial practitioners, especially those in London given its legal and financial prominence in international business¹⁷⁵, may not be able to rely solely on knowledge of English legal law.

The websites of many commercial legal firms proclaim they have specialised International Trade practitioners who can advise clients as to how to conduct or facilitate business in a globalised and international marketplace, thereby ensuring their transactions comply with applicable laws and to enable traders to take advantage of the rights such laws can offer and to understand their obligations. But whilst practitioners may be highly skilled in the domestic laws which may apply to cross border transactions, can the same be said in relation to the international rules, practices and conventions that may equally apply or that may be more advantageous to use for international trade agreements.

The primary aim of this chapter is therefore to establish the approach that practitioners in England and Wales have to international commercial instruments, by ascertaining the extent to which practitioners use or advise on international instruments. However, in so doing its focus is not on the actual conventions that practitioners advise on, rather the focus is on the extent to which they refer to and advise on international rules, practices and conventions.

¹⁷³ R.M. Goode, *Commercial Law* (3rd Edn, Penguin, London, 2004) p.914

¹⁷⁴ Ministry of Justice & UK Trade and Investment, ‘Plan for Growth: Promoting the UK’s Legal Service Sector’ (2011)

¹⁷⁵ in the 2008 ‘Worldwide Centres of Commerce Index’, produced by Mastercard, London secured the top spot as it has amongst other advantages “a legal and political framework that supports high levels of international trade

2.0 METHODOLOGY

2.1 Which Practitioners were selected

In order to determine the approach of practitioners to international commercial instruments, it was necessary to examine the approach of practitioners from a wide cross section of practices. Therefore practitioners were selected from Major City firms¹⁷⁶, Mid-Sized City, London offices of US-headquartered firms¹⁷⁷ as well as National, Regional, and niche firms offering specialised practice areas such as commercial contract, shipping or international trade. To further ensure diversity within the study, practitioners from firms outside 'The UK Top 200'¹⁷⁸ were also selected.

The diverse practice types was also deemed necessary as each potentially deals with different types of clients seeking international commercial advice; for example, traders often approach a legal practice within the area they are geographically based.

It should also be noted that many of the firms from which practitioners have been selected feature in Tiers 1, 2 and 3 of the Legal 500 directory for commercial contracts; or transport (aviation and shipping).

2.2 How the Study was conducted

It is clearly impossible to examine the approach of all practitioners in England and Wales to international commercial instruments. Therefore a questionnaire was emailed to a cohort of 100 commercial practitioners selected from the following cross-section of different types of firms¹⁷⁹:

¹⁷⁶ In terms of turnover and rank in the top twenty law firms

¹⁷⁷ Although operating as affiliate offices of major US law firms, the London offices are often separately constituted and regulated legal and financial entities, but share a single management board

¹⁷⁸ I.e. Firms not listed in <http://www.thelawyer.com/directory/uk-200-table-top-100/>; accessed 05/12/2011

¹⁷⁹ Some firms may potentially be part of more than one type of practice, but have only been included in one group

- i. 10 practitioners from different leading major London firms (including the Magic Circle¹⁸⁰) with multiple offices throughout the world;
- ii. 10 practitioners from different leading medium sized London firms with offices also in several different jurisdictions;
- iii. 10 practitioners from different London offices of US-headquartered firms;
- iv. 20 practitioners from different leading national firms with offices in a number of commercial centres throughout England and Wales;
- v. 20 practitioners from different leading regional firms with several offices in a particular geographic region;
- vi. 10 practitioners from niche firms specialising in practice areas such as international trade or contracts, shipping or logistics;
- vii. 10 practitioners from firms in major exporting port cities; and
- viii. 10 practitioners from firms outside 'The UK Top 200'.

2.2.1 How 'International Practices' were identified

Commercial firms were firstly identified from the Legal 500 Directory United Kingdom 2011¹⁸¹ and the Law Society lists¹⁸²; then internet web sites of individual companies were then examined in order to identify those having *international* commercial practice areas¹⁸³ or those firms undertaking work which either involves cross border transactions or has a cross border dimension.

10 practices (or 20 in the case of national and regional firms) were subsequently selected at random from each of the different firm types (Appendix Two details the firms in each of the 'type' groups). Individual practitioners were then chosen for the study from the profile pages of the selected firms' websites, as being the contact for one

¹⁸⁰ I.e. Generally regarded as the five leading UK-headquartered firms, who consistently have the highest earnings per-partner and earnings per-lawyer

¹⁸¹ <http://www.legal500.com>; especially 'Commercial Contracts' and 'Transport' tables accessed 15/09/2011

¹⁸² <http://www.lawsociety.org.uk/choosingandusing/findasolicitor.law>; particularly 'Commercial practices' listing accessed 15/09/2011

¹⁸³ E.g. international arbitration, commercial contracts, international trade

or more international commercial practice areas. Where more than one practitioner was listed, the most senior was selected and where this was not apparent, an appropriate selection was made from the profile details given.

2.2.2 The Questionnaire

After informal discussions with several practitioners, it was decided in the interests of brevity and simplicity to ask three basic questions as to the types of international commercial instruments advised on, rather than sending a 'tick box' survey or similar, which would require long lists of rules and conventions. It was also concluded that this approach would enhance the potential response rate, and thereby allow greater accuracy in the results obtained.

The following is the questionnaire as it was sent to practitioners selected for the study:

1. **Have you advised or been asked to advise on any international commercial rules/practices (eg. Incoterms, UCP600, ICC Arbitration Rules)? *If yes, please specify which.***

2. **Have you advised or been asked to advise on any international commercial conventions (eg Hague-Visby Rules, the Cape Town Convention, CISG 1980)? *If yes, please specify which.***

3. **Would you advise or recommend the use of an international convention to a client which had *not* been ratified by the UK, but which would be applicable to the situation (eg CISG in the case of cross border trade or the Cape Town Convention in the case of aircraft financing)? *If yes, please specify which conventions.***

All replies will be treated as confidential.

As all responses are confidential, the individual replies of practitioners are not identifiable.

2.3 Limitations of the Study

Although practitioners were selected with international commercial practice areas, it is clearly dependent upon the type of expertise or practice area of a particular practitioner

as to the types of instruments on which they may be called upon to advise on. The use of the Hague-Visby Rules, for instance, being potentially limited to shipping law practice areas. Therefore, the study is *not* about the use made of specific instruments and any attempt any use the data for that purpose is cautioned; rather its aim is to establish and examine the trend of practitioners to use international instruments.

It should also be noted that this particular research is *not* about the types of firms and whether they use particular international commercial instruments it is more to do with whether practitioners, from a wide cross-section of the profession, use or advise on instruments of international commercial harmonisation. As the research reflects only the responses of one practitioner from each firm, it would make any conclusions as to the use of various international instruments by different types of firms, extremely tenuous. The questionnaire does not draw any distinction between advice given as to the application of an instruments or its inclusion in a contract for instance; and advice given on instruments as a result of a dispute which has arisen, but as both scenarios point to use of a particular instrument, important empirical data will be obtained.

Moreover, whilst endeavoring to obtain information by use of a questionnaire it is perhaps inevitable that by providing examples, some of those responding may be under the impression that instruments not specifically listed on the questionnaire were not relevant. Equally, it is perhaps inevitable that some responses will be too general to be meaningful – such as ‘I use whatever convention is appropriate’. Therefore, the information obtained may be incomplete, although such occurrences are somewhat limited by requesting that instruments were specified.

Notwithstanding these shortcomings, the information collected does give an overall indication as to the approach that practitioners have to different types of international commercial instruments.

3.0 INTERNATIONAL RULES AND PRACTICES

50% of the practitioners selected responded to the questionnaire and of these 92% had either advised or been asked to advise on some form of international commercial rules or practices. Unlike conventions which can apply to contracts without being specifically incorporated, rules and practices require voluntary incorporation in contracts in order to be effective; and this section will therefore examine the different types of instruments that practitioners deal with based on their responses to the questionnaire. For confidentiality reasons the individual replies of practitioners have not been identified.

3.1 Incoterms

The Incoterms are a series of predefined commercial terms that are widely used in relation to international sales transactions. First published by the ICC in 1936, the Incoterms 'rules' are intended primarily to clearly communicate the tasks, costs and risks associated with the transportation and delivery of goods. According to the ICC, the Incoterms:

“have been developed and maintained by experts and practitioners brought together by ICC [and] are accepted by governments, legal authorities and practitioners worldwide for the interpretation of the most commonly used terms in international trade”¹⁸⁴.

This acceptance of the Incoterms by practitioners was reflected in the responses to the questionnaire as 86% of the practitioners responding either provided advice or had been asked for advice on the Incoterms; and amongst practitioners, the Incoterms were by far the most commonly used or applied of the international commercial rules or practices. It should however be noted that the Incoterms can be applied to both domestic and international sales contracts, and from the responses it was not possible to distinguish between advice given as to 'true' Incoterms as produced by the ICC and that related to common law cif /fob variants.

¹⁸⁴ See generally ICC Website <http://www.iccwbo.org/incoterms/id3038/index.html>; accessed 01/10/10

Although the practitioner responses did not note in detail as to what context advice had been sought or given most practitioners stated that ‘they advised Incoterms inclusion’, which indicates a high level of satisfaction with the Incoterms and also suggests a high level of usage amongst those they advise such exporting businesses¹⁸⁵.

Furthermore, 6% of practitioners also noted that they advised clients in regard to the terms of delivery in standard form contracts produced by such trade associations as the Grain and Feed Trade Association (GAFTA), the Federation of Oils, Seeds and Fats Associations (FOSFA), and timber contracts such as Norsof 2005¹⁸⁶ and Pan Pro 2006¹⁸⁷. These standard terms were similar to various Incoterms, and have therefore been included in the overall percentage of practitioners advising on Incoterms.

Question 3 of the questionnaire asked whether the practitioner would recommend a *non-ratified convention* to a client where it would be applicable to the situation; many practitioners noted they would recommend Incoterms for sales contracts. Whilst, this undoubtedly suggests the importance and use of these terms, it does tend to also suggest that some confusion exists as to which commercial instruments are rules as produced by international bodies and which are conventions which require ratification if they are to be incorporated into English law – although it must be said both unratified conventions and rules must be voluntarily incorporated into contracts.

However, it was interesting to note that the websites of several international firms’ (both those headquartered in London with global offices and those headquartered in USA with London offices); contained articles on the Incoterms but the ‘Key Contact’ personnel were all based in overseas offices. In fact, on most of these firms’ websites where ‘International Trade’ was listed as a Practice Area, the contacts were invariably within foreign offices.

¹⁸⁵ which is examined in Chapter 4 Section 3

¹⁸⁶ Softwood Contract Form adopted by the Timber Trade Federation of the UK from Norwegian Sawmill Industries Association *et al.*

¹⁸⁷ Timber Panel Products Standard Contract Form

3.2 The UCP and Other International Bank Payment Undertakings

The Uniform Customs and Practice for Documentary Credits (UCP) are a set of uniform rules developed by the ICC in order to establish uniformity in letters of credit practice and thus alleviate the confusion caused by the often conflicting national laws of different countries. The universal acceptance of the UCP by practitioners in countries with widely divergent economic and judicial systems is a testament to the Rules' success. In fact, the UCP have become the most successful private rules for trade ever developed and they are the essential ground rules for billions of dollars in trade transactions every year¹⁸⁸.

This success was not necessarily evident in the numbers of practitioners giving advice on the UCP, as only 32% of practitioners who responded to the questionnaire stated that they had advised or been asked to advise on either the UCP500 or the current version UCP600. However, this may simply indicate that traders were either content to enter into letters of credit with banks without seeking legal advice or that litigation in respect of letters of credit is minimal.

In terms of other international banking rules, 4% of practitioners who responded stated that they had advised or been asked to advise on the:

- ICC Uniform Rules on Demand Guarantees (URDG)
- ICC Uniform Rules for Contract Bonds (URCB);

and 2% of practitioners who responded stated that had advised or been asked to advise on each of the following international banking rules:

- The ICC Uniform Rules for Collection, URC 522
- ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits, URR 725
- The International Standby Practices, ISP98 as developed by the Institute of International Banking Law and Practice but endorsed and published by the ICC.

¹⁸⁸ From ICC website <http://www.iccwbo.org/iccjcde/index.html>; accessed 12/12/10

This was surprisingly low, given London's prominence as a global financial centre and many City practitioners listing banking and finance as Practice Areas. Furthermore, the websites of several international firms' (both those headquartered in London with global offices and those headquartered in USA with London offices); contained articles on various banking rules¹⁸⁹ and publicised their expertise, but the 'Key Contact' personnel were all based in overseas offices.

3.3 International Commercial Arbitration Rules

The further use of voluntarily incorporated international rules was also demonstrated by the research findings in regard to arbitration rules. 24% of the practitioners responding to the questionnaire had advised or been asked to advise on the ICC Rules of Arbitration 1998, with several of the responses noting that the ICC Arbitration Rules 'were not uncommon in dispute resolution clauses'.

Although this was less than a quarter of those responding, it did nevertheless indicate the popularity of the ICC Arbitration Rules, as only 10% of those responding had advised or been asked to advise on the UNCITRAL Arbitration Rules 1976, and only 8% in respect of the London Court of International Arbitration (LCIA) Rules 1998. It should also be noted that those responding to advising on UNCITRAL and LCIA also advised on the ICC Rules.

In addition to these arbitral rules, various international trade organisations have developed industry specific arbitration rules, which several practitioners advised on. For example, 4% of practitioners, in addition to the ICC Arbitration Rules, advised on the Grain and Feed Trade Association (GAFTA) Arbitration Rules. The GAFTA arbitration rules being incorporated in all GAFTA standard form contracts and are frequently used for maritime disputes arising under GAFTA charterparty agreements. Similarly, 4% of practitioners advised on the Federation of Oils, Seeds and Fats Associations (FOSFA)

¹⁸⁹ E.g. Clyde & Co, Robert Parsons, 'UCP600 – A New lease of life for Documentary Credits?'; accessed 24/10/11 (not now available online)

Arbitration Rules, which were incorporated into many of FOSFA's standard forms of contract.

2% of practitioners noted the Stockholm Arbitration Rules – being the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999¹⁹⁰. The Arbitration Institute assists in the settlement of domestic and international disputes in accordance with the Rules of the Institute. It also assists in the settlement of disputes in accordance with other rules adopted by the Institute, such as the UNCITRAL Arbitration Rules. Advising on such Rules demonstrates that English practitioners are not restricted to the main arbitration rules or London Court of International Arbitration Rules.

Interestingly some practitioners, who had listed 'International Arbitration' as one of their practice areas on firms' websites, did not correspondingly note any of the arbitration rules on their responses to the questionnaire, which suggests the percentages could in reality be higher.

Whilst not wholly within the arbitration ambit, it was noted by several practitioners that although some clients were very alive to ensuring there is a workable method of dispute resolution, others do not give it any thought at all and sign up to anything that is put in front of them without realising the potential shortcomings of such action until it is too late.

3.4 The York Antwerp Rules of General Average

General average is a concept peculiar to maritime transport whereby any sacrifice of property or extraordinary or expenditure that is made for the common safety of the ship and cargo is contributed to by the surviving cargo interests on a pro rata basis. In most cases general average is governed by the York Antwerp Rules which establish how general average is to be applied in particular situations. In the UK the Rules must be

¹⁹⁰ See <http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html>; accessed 01/11/10.

expressly incorporated into a contract in order to be enforceable; but in other countries they are enforced by law¹⁹¹.

Although requiring voluntary inclusion in contracts, only 4% of practitioners responding to the questionnaire provided advice on the York Antwerp Rules, which was somewhat surprisingly given that 30% more advised on the carriage of goods by sea convention (see section 4.1).

4.0 INTERNATIONAL COMMERCIAL CONVENTIONS – RATIFIED BY THE UK

Question 2 of the questionnaire asked whether the practitioner had advised or been asked to advise on international commercial conventions. This section will therefore examine the responses in respect of conventions that have already been adopted by the UK and therefore incorporated into English law.

It was clear from some responses that the commercial aspect had perhaps been overlooked and several practitioners listed public international law conventions that they advised on such as the UN Convention on the Law of the Sea; the Paris Convention on Nuclear Third Party Liability 1960 and the Brussels Supplementary Convention 1963; the Vienna Convention on Civil Liability for Nuclear Damage 1963, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997; the International Convention for the Protection of New Varieties of Plants 1961;

It is also important to note that several practitioners, from leading commercial firms, responded to the questionnaire stating that ‘conventions were rarely used’ or ‘they never come up’, yet all listed on their respective firm’s websites, ‘international procurement’ and ‘international contracts’ as specialist areas of interest. In the case of ratified conventions, this may simply indicate they are now simply seen as English law rather than international conventions; but in the case of unratified it tends to suggest that not all practitioners are

¹⁹¹ See generally, Simon Baughen, *‘Shipping Law’*, (3rd Edn, Cavendish, 2004) pp.321-326.

familiar with the international commercial conventions which are used or may potentially be applicable to business transactions.

4.1 The International Carriage Conventions

Rather predictably many practitioners had advised or been asked to advise on the international carriage conventions – that is, the Hague-Visby Rules, the Warsaw or Montreal Convention and the CMR. These conventions have all been incorporated into English law via respective sea, air and road carriage acts, so they will be mandatorily applicable without being specifically incorporated into any contract - in relation to the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom; in relation to carriage by air, irrespective of the nationality of the aircraft performing that carriage; and in relation to carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries. Nevertheless, it is interesting to note the extent to which practitioners advise on them in comparison to international rules and other conventions.

Of the 50% of practitioners responding to the questionnaire, 34% had either advised or been asked to advise on the Hague-Visby Rules; 28% as to the Warsaw / Montreal Conventions and 16% as to the CMR. Interestingly, 12% advised on all three modes of carriage and of these, half also advised on the Convention concerning International Carriage by Rail (COTIF¹⁹²).

Although carriers can limit their liability to cargo owners under the Hague-Visby Rules, a shipowner can also limit his liability under the International Convention on Limitation of Liability for Maritime Claims (LLMC) of 19 November 1976¹⁹³. 8% of practitioners responded stating they advised shipowners in respect of both conventions. These conventions perhaps demonstrating the importance of practitioner knowledge of

¹⁹² An acronym for 'Convention Relative aux Transports Internationaux Ferroviaires'

¹⁹³ Currently given effect in the UK by Schedule 7 of the Merchant Shipping Act 1995 as amended by the 1996 Protocol

applicable international conventions, as in practice, shipowner's will rely on the Hague-Visby limits per package or kilogram where the total of the separate limits for the cargo lost or damaged is less than the global limit under the 1976 Convention; but the shipowner will rely on the 1976 Convention if the total of the Hague-Visby limits per package or kilogram is higher¹⁹⁴.

Furthermore, in another departure from commercial conventions which was the focus of the questionnaire, 6% of practitioners also noted advising as to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.

4.2 International Secured Transactions

2% of practitioners responding to the questionnaire noted that advice had been given in respect of the International Convention Relating to the Arrest of Sea-Going Ships (Brussels 1952)¹⁹⁵. This somewhat low figure may reflect the fact that claims by cargo claimants are being settled by insurers or by arbitration rather than as Admiralty claims.

In terms of other conventions regarding secured transactions – the so called Cape Town Convention and its related protocols¹⁹⁶ have not been ratified by the UK and are therefore covered in section 5.2 of this chapter.

4.3 International Arbitration

The New York Convention, formally known as the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958'; was produced by UNCITRAL in order to provide common legislative standards for the recognition of arbitration agreements, and court recognition and enforcement of foreign and non-domestic arbitral awards. The

¹⁹⁴ See also Stephen Girvin, *The Carriage of Goods by Sea* (OUP, 2007) pp.383-400

¹⁹⁵ Formally the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships; which is currently given effect in the UK by the Supreme Court Act 1981

¹⁹⁶ Formally the Convention on International Interests in Mobile Equipment 2001; and its associated Protocol on Matters Specific to the Aircraft Equipment 2001

New York Convention was ratified by the UK on 24 September 1975 and it is given effect in English law by the Arbitration Act 1996.

Only 8% of the practitioners responding had either advised or been asked to provide advice in regard to the New York Convention. This is 16% lower than the number of practitioners who responded stating they had advised in relation to one or more of the arbitration rules; which may suggest that traders are reasonably satisfied with the arbitration process and therefore do not require legal assistance in obtaining recognition or enforcement of arbitral awards in the UK; and/or that practitioners have overlooked it when listing conventions.

4.4 International Civil Procedures

4% of practitioners responding to the questionnaire provided advice on The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹⁹⁷. A further 2% of practitioners listed The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters¹⁹⁸

2% of responding practitioners advised on the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters¹⁹⁹. But it was noted as being prior to the Convention being replaced by EC Regulation No. 44/2001, the so-called Brussels 1 Regulation²⁰⁰. The Convention sought *inter alia* to simplify the recognition and enforcement of judgments and to strengthen the legal protection afforded to citizens of the Member States; and was extended by the

¹⁹⁷ Ratified by the UK in November 1967 and entered into force February 1969

¹⁹⁸ Ratified by the UK in July 1976 and entered into force September 1976

¹⁹⁹ Agreed on 27 September 1968 it was given effect in the UK by the Civil Jurisdiction and Judgments Act 1982, which came into force on 1 January 1987

²⁰⁰ Which became directly applicable in the UK on 1 March 2002 (the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) after the UK notified the EU it was 'opting-in' (under a Protocol annexed to the EU Treaty, the UK does not participate in European Community measures which focus on judicial operation in civil and commercial matters unless it notifies the Community)

Lugano Convention²⁰¹. However, this group of conventions demonstrates the complexity and mixture of regimes that practitioners must face in regard to specific area of law, as the original Brussels 1 Regulation did not apply to Denmark, but an amended Lugano Convention (which included Denmark and three European Free Trade Association states) was agreed by the European Community on 27 November 2008²⁰².

6% of practitioners responding to the questionnaire, also advised as to the Rome Convention on the Law Applicable to Contractual Obligations 1980 (80/934/EEC)²⁰³ which aimed to create a unified, choice of law system in contracts within the European Union.

4.5 Cross Border Insolvency

Surprisingly, only 2% of practitioners who responded to the questionnaire listed the UNCITRAL Model Law on Cross-Border Insolvency 1997, which has the force of law in the UK in the form set out in Schedule 1 of the Cross Border Insolvency Regulations 2006. This is despite several responding practitioners listing 'Cross Border Insolvencies' as a practice area on firm's websites.

5.0 INTERNATIONAL CONVENTIONS – *NOT* RATIFIED BY THE UK

Question 2 of the questionnaire asked whether the practitioner had advised or been asked to advise on international commercial conventions. This section will therefore examine the responses in respect of conventions that have *not* been ratified by the UK.

This section also addresses the responses to Question 3, which was an attempt to obtain information as to practitioner's recommendations in respect of unratified conventions that may however be applicable for the situation or circumstances.

²⁰¹ given effect in the United Kingdom in 1991

²⁰² I.e. the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2009/430/EC)

²⁰³ Enacted into English law by the Contracts (Applicable Law) Act 1990

Two responses advised that as their business was to advise on trade globally not just in the UK, they needed to advise on ‘things’ which were already in effect in other places and/or expected to come into effect in the UK; but unfortunately they did not list any such instruments so the percentages for each of the unratified conventions may potentially be slightly higher.

5.1 The CISG 1980

Developed by UNCITRAL, the UN Convention on Contracts for the International Sale of Goods (CISG) 1980 establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods. The CISG has been ratified by some 77 countries, representing a significant proportion of world trade and “every geographical region, every stage of economic development and every major legal, social and economic system”²⁰⁴. Consequently, the convention has been described as one of the most successful international uniform laws²⁰⁵. But is this reflected in the practitioners’ responses?

Of the 50% of practitioners who responded to the questionnaire, 34% had advised or been asked to advise on the CISG. This was relatively high considering the CISG has not been ratified by the UK, but perhaps demonstrates the Convention’s popularity for international sales transactions, as traders must be seeking advice in relation to international contracts made with buyers or sellers familiar with the CISG or based in countries that have ratified it.

Approximately half of those responding just listed the CISG with no additional comments, but 47% of those who had provided advice on the CISG, went on in relation

²⁰⁴ J. Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation (CISG)’ in *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*, Kluwer Law International (2002) p.115; Available at: <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>

²⁰⁵ E.g. B. Zeller, *CISG and the Unification of International Trade Law*, (Routledge, 2007) p.94; I. Schwenzer & P. Hachem, ‘The CISG – A Story of Worldwide Success’ in Jan Kleinemann (ed.), *CISG Part II Conference*, (Stockholm 2009), p. 119

to Question 3 of the questionnaire, to state that they would *not* recommend clients incorporate this convention in sales contracts. Some claimed that inclusion of the CISG would create the risk of conflict between the governing law of the contract and the law set out in the convention, so the CISG should be expressly excluded. This tends to overlook the fact that a well-drafted choice of law clause can effectively ensure the application of the Convention to an international sale of goods contract and perhaps demonstrates a lack of understanding on the part of practitioners of the CISG's applicability and/or provisions.

The superiority of English law was also given by practitioners as a reason to routinely recommend the CISG's exclusion from contracts as English law was 'the accepted basis for international sales contracts'. Further practitioners responded that they would not recommend the CISG as it was routinely disapplied even by companies based in countries which had ratified the CISG.

Only 6% of practitioners providing advice on the CISG would recommend its use to clients if it were applicable to the situation. The somewhat negative comments regarding the CISG's application and relatively low recommendation rates, suggest that many practitioners still generally prefer to have the international sales contracts of their clients covered by domestic law. This may in part stem from the fact that the CISG has created concepts which may be unfamiliar to practitioners trained in England and Wales²⁰⁶, and therefore practitioners do not feel confident to advise on such areas of law.

5.2 The Cape Town Convention 2001

The Cape Town Convention (CTC) prepared by UNIDROIT aims to facilitate asset based financing in relation to high value mobile assets, such as aircraft, rolling railway stock and space assets. The CTC together with a separate Protocol for each type of asset²⁰⁷ creates international standards for registration of ownership, security interests, leases

²⁰⁶ Such as the concept of 'good faith'

²⁰⁷ E.g. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2001 and the Luxembourg Protocol on Matters specific to Railway Rolling Stock 2007

and conditional sales contracts; and as such the Convention and its Protocols are designed to overcome the problem of obtaining secure and readily enforceable rights, by providing a system for the recognition of international interests in relevant aircraft equipment which is ultimately intended to override domestic law.

Although the Convention has been ratified by 51 countries and the Protocol by 44 countries; to date the UK has not ratified either the Convention or the Aircraft Protocol²⁰⁸. This may be reflected in the fact that only 4% of practitioners responding to Question 2 of the questionnaire noted that they had been instructed to consider the CTC and its associated aircraft protocol. This appears relatively low even though the UK has not ratified the CTC, as several practitioners listed aviation and aerospace as sectors of involvement and numerous companies in London specialise in various aspects of large asset financing.

In regard to Question 3 - only 2% of practitioners replied that they would recommend the CTC. The BIS 2010 Call for Evidence²⁰⁹ in respect of whether the UK should *inter alia* ratify the CTC²¹⁰, also provides further evidence of the approach of practitioners to the CTC, albeit it is somewhat limited as only two major London firms²¹¹ and a practitioner from a Luton firm²¹² were the only UK practitioners who responded. The responses highlighted somewhat different approaches, as Norton Rose suggested that ratification would bring significant benefits to the UK²¹³, whilst Mr David Baggott of Machins Solicitors²¹⁴ held that there was no need for the UK to ratify the CTC as there was a sophisticated and well experienced aviation industry within the UK which had operated due to the benefits of the UK legal system, for some 30 years without the need for such

²⁰⁸ The UK has signed both and was involved in the development of both

²⁰⁹ 'BIS Call for Evidence: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment' available at <http://www.bis.gov.uk/assets/biscore/corporate/docs/c/call-full-responses-mobile-aircraft-equipment.pdf>

²¹⁰ Question 3.9 of the Questionnaire in the 'BIS Call for Evidence'

²¹¹ I.e. Norton Rose LLP and Clifford Chance LLP

²¹² I.e. Machins Solicitors

²¹³ n(209) p.104

²¹⁴ Although it is noted that he responded to the Call for Evidence "as an individual with 30 years experience in transactions involving the purchase of new and used commercial aircraft"

a convention. Mr Baggott also stated that the Convention would impose unnecessary red tape and administrative burden on those selling, purchasing, financing and leasing aircraft in the UK for no real purpose or benefit²¹⁵. In the only other UK practitioner response, Clifford Chance simply stated they would not be submitting a response to the questions posed in the Call for Evidence²¹⁶.

A further submission was made by Mr Jeffrey Wool, (Head of Aerospace Law and Policy at Freshfields Bruckhaus Deringer LLP) in his capacity as Secretary General of the Aviation Working Group (AWG). Mr Wool was involved in the development of the CTC and chaired the group that prepared the Aircraft Protocol to that Convention²¹⁷ and the AWG submission strongly supported the UK's ratification as it would "ensure that English law remains a preferred governing law of choice in aviation finance and leasing, and London remains central in the aviation financing and leasing industry"²¹⁸.

But it would appear this assurance has not prompted much support for the Convention and its associated protocol amongst practitioners who responded to the research questionnaire. Although it is noted that the websites of several major London firms contain detailed bulletins on the CTC and the associated Aircraft Equipment Protocol as to its application and some of the practical considerations which it gives rise to²¹⁹.

5.3 Carriage of Goods by Sea Conventions

5.3.1 The Hamburg Rules 1978

In the UK contracts for the carriage of goods by sea are governed by the Hague-Visby Rules, where the port of shipment is a port in the UK, but many nations, especially "developing countries, believe that these rules are out of touch with technology and

²¹⁵ n(209) p.92

²¹⁶ n(209) p.59

²¹⁷ See generally <http://www.freshfields.com/people/profile/11/63111>; accessed 16/11/11.

²¹⁸ n(209) p.27 This submission being the basis of many others

²¹⁹ E.g. 'Cape Town Convention & Aircraft Equipment Protocol' by DLA Piper (Available at <http://www.dlapiper.com/files/Publication/d28c3f66-e423-46ab-9121-9fa3c769a/Presentation/PublicationAttachment/174636d2-612e-4505-9271-95adf58060fa/AircraftBulletin.pdf>) and 'Cape Town Convention: A Lender's Perspective: June 2008' by Field Fisher Waterhouse

favour the powerful shipowning nations”²²⁰. Consequently, the Hamburg Rules²²¹ were introduced in 1978 mainly due to the extensive involvement of the United Nations and their desire to create a more equitable set of rules to govern the carriage of goods by sea²²².

The Hamburg Rules came into force on 1 November 1992 and to date the Rules have been ratified by 34 countries but not by the UK or any of the major trading nations, which may account for the fact that only 10% of practitioners responding to the questionnaire had advised or been asked to advise on the Hamburg Rules. This was 24% fewer than those advising as to the Hague-Visby Rules, but it is feasible that traders in England and Wales may seek advice from practitioners in relation to cargo claims arising out of a voyage where the State of loading is a Contracting Party to the Hamburg Rules.

Furthermore, the Hamburg Rules can be voluntarily incorporated by the parties via a ‘clause paramount’, which may be advantageous for cargo owners as the Hamburg Rules are generally more onerous on carriers than the Hague-Visby Rules; but only 4% of practitioners noted that their recommendation would depend on who they were acting for – if a cargo interest, the Hamburg Rules; but if a shipowner than the Hague-Visby Rules.

5.3.2 The Rotterdam Rules 2008

The advent of the Hague-Visby and Hamburg Rules meant that rather than harmonised carriage of goods by sea legislation there was in fact ‘dis-unification’, and so UNCITRAL in preparing the Rotterdam Rules²²³ aimed to achieve uniformity by replacing all the other international rules, with extended and modernised provisions²²⁴. Although 23 states have signed the Convention (including the USA), the UK has not; but as the

²²⁰ Scott M. Thompson, ‘The Hamburg Rules: Should they be Implemented in Australia and New Zealand?’, *Bond Law Review*, Vol. 4 Issue 2, p.169

²²¹ Formally the ‘United Nations Convention on the Carriage of Goods by Sea’ adopted in Hamburg on 31 March 1978

²²² n(220) p.169

²²³ Formally ‘United Nations Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea’

²²⁴ E.g. Rotterdam Rules govern carriage of goods by sea and connecting or previous transport by land

Convention will not come into force until one year after ratification by the 20th UN Member state²²⁵ it is expected that it may be some time before the Rotterdam Rules enter into force.

Nevertheless, 8% of practitioners responding to the questionnaire, provided advice on the Rotterdam Rules which is only 2% lower than for the Hamburg Rules, yet the Hamburg Rules are in force. It is also noted that several practitioners have been involved in the preparation of the Rules. Mr Stuart Beare (formerly a partner in the City firm Richards Butler) was the Chairman of the CMI International Sub-committee which prepared the CMI draft instrument and as a CMI observer attended all the UNCITRAL working group sessions from 2002-2008 at which the Draft Convention was produced²²⁶.

Similarly, the web site of Hill Dickinson LLP states that Mr Michael Harakis²²⁷ represented and advised the United Kingdom in the final stages of the negotiation of the Rotterdam Rules and he continues to advise the Department for Transport on the Rotterdam Rules; and Mr Craig Neame of Holman Fenwick Willan is a member of the UK Government's Committee considering whether the UK should adopt the Rotterdam Rules²²⁸.

It was also interesting to note that several firms had articles on their websites²²⁹ concerning the implications of the Rotterdam Rules and some have provided presentations for interested parties on the Rules²³⁰.

²²⁵ To date only Spain has ratified the Rules

²²⁶ See http://www.gre.ac.uk/_data/assets/file/0012/411501/Seminar-Notice.pdf; accessed 07/07/11.

²²⁷ See http://www.hilldickinson.com/our_people/PersonDetails.aspx?personid=190222&personsname=&keywords=&office=0§or=0&p=4; accessed 01/09/11

²²⁸ See <http://www.hfw.com/profiles/craig.neame@hfw.com>; accessed 07/07/11.

²²⁹ E.g. http://www.pysdens.com/v2/press_show.asp?id=64&menu=; <http://www.hfw.com/publications/client-briefings/the-rotterdam-rules-new-liabilities-for-port-operators> and <http://www.fisherslondon.com/pages/news/index.asp?NewsID=38>; all accessed 10/07/11

²³⁰ E.g. <http://www.hfw.com/press-releases/the-rotterdam-rules-whats-happening2>; accessed 07/07/11

5.4 Securities Conventions

5.4.1 The Hague Securities Conventions 2002

Formally the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary 2002²³¹, The Hague Securities Convention aims to achieve global certainty and predictability in relation to the holding and transferring of securities held with an intermediary. The UK has not signed the Hague Convention and to date only 2 states have ratified it, so it unsurprising that only 2% of practitioners responding to the questionnaire have given advice on it.

5.4.2 The Geneva Securities Convention 2009

The Geneva Securities Convention is formally known as the UNIDROIT Convention on Substantive Rules for Intermediated Securities, and was adopted at Geneva in September 2009. The main objective of the Convention is to offer harmonised transnational rules for the purpose of reducing the legal risks associated with the holding of securities through intermediaries. Again, the UK has not signed this Convention and to date it has only been ratified by one state; so it is perhaps not surprising that only 2% of practitioners have given advice on it.

But given that the Geneva Convention also forms the basis for the EU Securities Law Directive (SLD)²³², more practitioners might have been expected to advise on it - especially as the SLD is anticipated to be finalised at the beginning of 2012 with Member States implementing the Directive at the end of 2013. To this end various London firms are carrying articles on the SLD on their websites²³³.

²³¹ Although adopted on 13 December 2002 at the Diplomatic Conference in The Hague, it was the practice of the Hague Conference not to open convention for signatures, but to leave them undated till the first signature, so convention also bears the date 5 July 2006

²³² although the SLD does include a number of extra features, some arguably conflict with the Convention

²³³ E.g. <http://www.linklaters.com/Publications/Year-Come-Luxembourg-EU-Laws-2012/Pages/Index.aspx>; accessed 10/02/12

6.0 WHAT HAS INFORMED THE PRACTITIONERS' APPROACH

Figure 4 shows that the practitioners in the study advised on a range of rules, practices and conventions. Whilst caution is advised in interpreting this data, as responses from different practitioners may have produced different usage patterns, the data does provide an indication as to the extent to which commercial practitioners advise on or are aware of international commercial instruments.

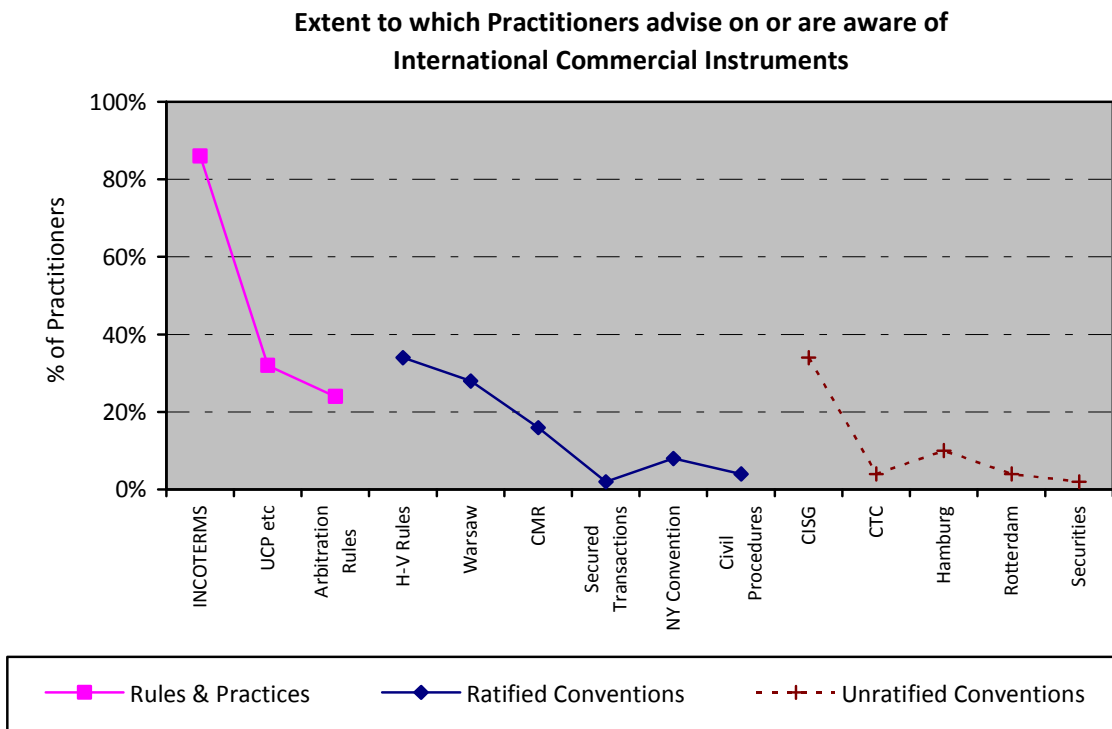


FIGURE 4

Consequently, the question arises as to *why* practitioners have formed these particular approaches to international instruments, and *why* they are more inclined to give advice or recommend certain rules and conventions, than others? The research tends to suggest that there may be several reasons for this: ignorance, reluctance to change from English law and fear.

6.1 Ignorance

From the responses received to Question 2 of the questionnaire, which asked whether the practitioner had advised or been asked to advise on any international commercial conventions, it was apparent that some practitioners were unaware of the application of international commercial conventions. Some practitioners, who listed 'International Trade' as a specialist practice area, responded with comments such as:

- 'conventions have simply not been of relevance in practice';
- 'conventions never come up even on international sales';
- 'we don't suggest clients fall back on conventions'; and
- 'conventions are rarely, if ever, used'.

Furthermore, in response to Question 3,

Would you advise or recommend the use of an international convention to a client which had *not* been ratified by the UK, but which would be applicable to the situation (eg CISG 1980 in the case of cross border trade or the Cape Town Convention in the case of aircraft financing)? *If yes, please specify which conventions.*

it was striking as to the number of practitioners who were of the opinion that unratified conventions 'could not be recommended as they were not law', or that 'such conventions would not be recognised as law in the UK' or 'that they must be ratified in the place of actual performance of the contract'. However, these practitioners appear to have overlooked the fact that, in certain instances, the provisions of unratified conventions can be voluntarily incorporated into contracts. For example, whilst a convention may not be an applicable law under the Rome I Regulation, it may be the applicable law for an arbitral reference under s.46 of the Arbitration Act 1996. Nevertheless, where a convention deals with issues of property, as does the Cape Town Convention for instance, it falls outside the autonomy accorded to contracting parties when selecting an applicable law for the contract.

Some practitioners stated that they 'would not recommend relying on untested law'. Although some conventions may be unratified in the UK, they can have extensive

international collective bodies of knowledge and case law which can be referred to. For example, PACE University has a database containing judgments and scholarly articles on the CISG²³⁴, and in respect of the CTC, the Washington University Law School and the University of Oxford are jointly undertaking a project “to facilitate the academic study and assessment of the Convention on International Interests in Mobile Equipment together with its Protocols, for the benefit of scholars, practising lawyers, courts and governments”²³⁵. Again, some practitioners were clearly unaware of such resources. It was also evident from the questionnaire responses that several practitioners were not aware of what instruments were rules or practices and which were ‘ratified’ or ‘unratified’ conventions.

6.2 Reluctance to Change from English Law

From the responses to the questionnaire it is apparent that practitioners are in the English law ‘comfort zone’. The reasons for this included:

- ‘costs are lower if we use English law, as we are not so familiar with the Conventions’;
- ‘English contract law is the accepted basis for international sales contracts’;
- ‘Our precedents are set up around English law’; and
- ‘a properly drafted agreement under English law will cover as many eventualities as one can envisage so referring to other conventions complicates matters’.

This attitude appears to have pervaded the English legal profession for some time. In the late 1980s Jeremy Carver²³⁶ (at the time a partner in a leading City of London law firm), suggested that the legal profession viewed the process of international unification or harmonisation of laws with suspicion, if not with open hostility. Carver cited several

²³⁴ See generally <http://www.cisg.law.pace.edu/>

²³⁵ See generally <http://www.law.washington.edu/Programs/CTCproject/>

²³⁶ J. Carver, ‘The Experience of the Legal Profession’ in ‘International Uniform Law in Practice, Acts and Proceedings of the Third Congress on Private Law held by the International Institute for the Unification of Private Law’ (1988) 13 UNIDROIT 411

reasons for this - legal practitioners have a general aversion to innovations (as they require constant updating and adaptation); and they have a particular distrust of legal texts which are not only drafted in a style and with terms that are unfamiliar, but which also have practical implications which are often unclear. Therefore, Carver claimed that faced with the choice of continuing to rely on familiar domestic legal instruments or venturing into the uncharted waters of uniform law, a legal practitioner acting for a client operating at an international level, would unhesitatingly opt for domestic law²³⁷.

From the research undertaken for this thesis, it appears that this attitude still prevails today – nearly 25 years after Carver’s observations, at least in respect to international conventions. For example, although 34% of practitioners had advised or been asked to advise on the CISG, all but 6% were advocating its *exclusion* in sales contracts; with the reason given by some practitioners being that ‘English law was the accepted basis for international sales contracts’.

It must be noted that this ‘pro-English law’ attitude is not found in relation to uniform rules such as Incoterms or the UCP - 86% of practitioners for example provided advice as to the Incoterms with most stating they recommended their inclusion of specific terms. However, whilst these rules have been established in response to commercial needs, they are not dealt with in English law.

6.3 Fear

In addition to the above comments, a number of practitioners noted in their responses to the questionnaire, that they were not familiar enough with the rights and obligations that conventions gave rise to, so did not want to advise clients. Many practitioners stated that they would be cautious about recommending the CISG without knowing how the English courts would apply and interpret it. But as there is an ever increasing database on the CISG which includes case law from civil and common law jurisdictions, this is perhaps English practitioners being overly cautious.

²³⁷ n(236) at 411

Several practitioners, despite being listed on company websites as having practice areas which included international commercial law, stated that ‘conventions would require specialist legal input’ or ‘we’d direct our clients elsewhere if conventions were involved’. Therefore, there was an apparent reluctance to either advise on or to recommend international conventions, especially those unratified in the UK, as they were in ‘unfamiliar territory’ with ‘unfamiliar outcomes’. This unfamiliarity must surely stem from the fact that unless specific training is undertaken, practitioners who have trained in the UK have little or no knowledge of international commercial instruments (see Chapter 2), or indeed knowledge of the resources and databases that exist to support application and understanding of such conventions as the CISG.

Jeremy Carver claimed that as a consequence of practitioners’ preference for English law they will, from the very outset of negotiations, do everything possible to exclude the application of uniform law to the particular transaction, in case of later litigation²³⁸, and this attitude was also apparent from the responses to the questionnaire.

Moreover, it is a known fact that a great deal of international commercial litigation occurs in London and according to English law; and equally there is “a significant case load of international commercial arbitration occurs in London”²³⁹ and as such the legal profession as a whole fear anything which will dilute London’s prominence as a centre of litigation. This was particularly evident when the Department of Trade and Industry (DTI) were conducting consultations on ratification of the CISG. In 1990 shortly after the DTI’s first consultation, a senior practitioner claimed it would be “foolish to abandon the known and internationally respected virtues of English law in favour of the uncertainties of the CISG”²⁴⁰ – although it should be noted that the Law Commission

²³⁸ See generally n(236)

²³⁹ J. Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*: Wayne L. Rev. 48 (2003) 1387; also available online at: http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=384180

²⁴⁰ I.e. Mr Derek Wheatley Q.C., *The Times* 27 March 1990 in B. Nicholas, ‘The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?’ available at: <http://www.cnr.it/CRDCS/nicholas.htm>; accessed 20/10/11

and the Commercial Law Sub-Committee of the City of London Law Society²⁴¹ recommended that the UK Kingdom should accede. But in 1997 the Law Society of England and Wales and the Commercial Bar Association responded negatively to the DTI's second consultation on ratification of the CISG.

Over a decade later, the concern was clear in the Financial Markets Law Committee report on 'Implementation of the Vienna Convention'²⁴² which stated:

"The UK legal system is viewed with high regard and holds a unique position throughout the world. There is, therefore, a view that accession to the Convention could jeopardise this special position and thus be undesirable for the UK. Such a change could bring with it a risk that London would lose its edge in international arbitration and litigation. This, in turn, could have a negative impact upon the attractiveness of London to a number of businesses, most notably in the financial markets, that position themselves in the UK to take advantage of the strength of the legal and commercial infrastructure available"²⁴³.

Therefore it appears the fear remains.

7.0 CONCLUSION

This research involved practitioners listed on legal firms' websites as having international commercial practice areas – many had 'a wealth of experience handling a broad range of trade issues on behalf of diverse clients, including governments, manufacturers, exporters, importers and end users'. Therefore, it was expected that most practitioners would be advising on and/or recommending clients use the international commercial instruments specifically developed to overcome the problems inherent in cross-border transactions. The results obtained from the questionnaire however paint a somewhat different scenario.

²⁴¹The City of London Law Society (CLLS) is one of the largest local Law Societies in the United Kingdom. There are 17,000 solicitors practising in the Square Mile, who make up 15% of the profession in England and Wales and the CLLS represents over 14,000 of these solicitors through individual and corporate membership; i.e. a body representing the constituency most likely to be affected by ratification

²⁴² Issue 130 'Legal Assessment of various financial markets aspects of the question whether the UK should implement the Vienna Sales Convention', July 2008

²⁴³ n(242) para 3.5

The overall response rate to the questionnaire was 50%, so it provides a reasonable indication as to the trends of practitioners, and whilst the majority of responses demonstrated that practitioners did provide advice on international commercial instruments, albeit to varying degrees; it was remarkable that some practitioners responded stating that conventions 'were rarely used' or 'not relevant in practice'. Clearly it depends on a practitioner's type of practice as to the type of conventions they will be advising on, but approximately half of those responding were familiar with the international carriage conventions that had been ratified by the UK and which potentially mandatorily apply to contracts - 34% of the practitioners responding advised on the Hague-Visby Rules; 28% the Warsaw / Montreal Conventions and 16% the CMR. But in terms of other conventions incorporated into English law, only 8% advised on the New York Convention on the Recognition and Enforcement of Arbitral Awards, for example, which may be somewhat low considering 16% more practitioners provide advice on arbitration rules.

In terms of international commercial rules and practices, the study showed that 86% of the practitioners responding to the questionnaire provided advice on the Incoterms, with many adding that they recommended inclusion of Incoterms to clients. Similarly, 32% of practitioners advised on the UCP and 24% in respect of the ICC Arbitration Rules. This tends to suggest that rules which have been developed out of commercial needs and practices have a high usage amongst traders, which is backed up in the following chapter. In fact rules and practices were the only commercial instruments, outside English law, that most practitioners would advise voluntarily incorporating into contracts.

The research clearly demonstrated that when it came to conventions not ratified in the UK and therefore not forming part of English law, there was little support from practitioners. Although 34% of practitioners provided advice as to the CISG, 28% of practitioners stated they would *not* recommend clients incorporate this convention in sales contracts. The responses to the questionnaire also showed that a few practitioners advised on other unratified conventions – for example, 4% provided advice on the Cape Town Convention with 2%

recommending it to clients and 10% advised on the Hamburg Rules but interestingly 4% would recommend it but only to cargo owners.

It is evident that the practitioners approach to international commercial instruments is one of paradox. On one hand, practitioners (and their clients) are initiators of the harmonisation process by incorporating rules and practices, such as Incoterms and the UCP into contracts; and by doing so they are furthering the use of unified laws in international transactions. But on the other hand, practitioners and their regulatory authorities do not appear to support conventions which also aim to harmonise international commercial law, as this would effectively mean a move away English law.

It is apparent that this approach is borne from a complex mixture of ignorance, fear and a seeming reluctance to turn back the security blanket that is English law. Not only were some practitioners with international trade practices unaware that conventions were relevant or even existed in relation to international sales; but some were under the impression that use of unratified conventions was not legal. It was also apparent from the responses to the questionnaire that some practitioners were not confident in their knowledge or application of international conventions such as the CISG, and that they would not want to recommend incorporating such a convention into client contracts. Moreover, although various reasons were given, there was an overall pervading sense that English law was 'the accepted basis for international sales contracts'. Allied to this is the fact that a great deal of international commercial litigation and arbitration occurs in London and according to English law²⁴⁴, and this brings large amounts of money into the UK, so there is perhaps a natural reticence to embrace international commercial laws which may change this situation.

Despite this somewhat insular perspective, there appeared to be overwhelming support amongst the profession for 'the international', with many London firms now having global

²⁴⁴ In at least 50% of the cases before it, one party is not British and in 30% neither is, See B. Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?', available at: <http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>; accessed 18/11/11, See also J. Linarelli, 'The Economics of Uniform Laws and Uniform Lawmaking' (2003) 48 Wayne L. Rev. 1387

offices or affiliate international practices and on the websites of many, it was apparent that they pride themselves on their ability to 'advise on international matters'. Even the Law Society holds that the most successful law firms will need to look beyond their national horizons. But this latent sense of internationalism does not appear to extend to international commercial conventions.

However, history has shown that unification of laws is inevitable and it has been said, largely unstoppable²⁴⁵. Therefore, "legal advisors need to be pulled 'screaming and kicking' into the 21st globalized century where unified international laws are the dominant feature"²⁴⁶. Although practitioners might like to work with English law, it is perhaps no longer the case that this can be done exclusively and practitioners may no longer be able to fix their professional horizons on national boundaries.

²⁴⁵ B. Zeller, 'The Development of Uniform Laws – A Historical Perspective' (2001) para 3; Available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller5.html>; accessed 17/11/11

²⁴⁶ n(245)

Chapter 4 : The Cargo Owners, Freight Forwarders & Carriers

1.0 INTRODUCTION

Trade to a large degree is founded on the principles of freedom of contract, where the parties are free to contract on whatever terms both agree to. However, there can be inherent difficulties in this, particularly in relation to cross-border trade, where the contracting parties frequently have different legal systems and languages. Consequently, international organisations such as UNIDROIT, UNCITRAL and the ICC have developed unified or harmonized rules, model laws and conventions as a response to these impediments to international trade in such areas as the international sale of goods, carriage of goods, payments, finance and commercial arbitration.

Furthermore, differences in bargaining strength can produce unfair contract terms - the onerous exclusion clauses of shipowners for example were the impetus for the development of the Hague Rules in the early 1920s in order to redress the balance between cargo owners and ship owners. Conversely, the Warsaw Convention resulted from the need to limit the liability of early air carriers in the event of loss or damage to cargo and/or passengers, so as to protect them from bankruptcy and prevent the demise of the fledgling civil air industry.

Thus, it has been said that commercial law has evolved from the needs and practices of merchants²⁴⁷, but whilst traders and carriers may have initiated the harmonisation process and the development of international instruments, which have been produced to overcome specific problems in cross border trade, it does not necessarily follow that those involved in international trade today are aware of them or will necessarily incorporate them in their sales and carriage agreements²⁴⁸.

This chapter will therefore examine the approach that traders, shippers and carriers in England and Wales have to international commercial instruments; and look at the factors that have both informed and influenced their approach.

²⁴⁷ R.M. Goode *et al* 'Transnational Commercial Law: Text, cases and Materials' (OUP, 2007) p.7

²⁴⁸ Although ratified conventions will apply mandatorily in specific circumstances, rules, model laws and unratified conventions can be voluntarily incorporated in contracts

2.0 METHODOLOGY

2.1 Who was selected

2.1.1 Cargo Owners

60 manufacturing companies were chosen from one of the largest UK exporting sectors - that of 'Advanced Engineering'²⁴⁹. This sector was selected as it accounts for one third of the total UK exports, with its exports generating £109 billion in 2007. Therefore, the data collected will be representative, or at least indicative, of UK exporters.

The Advanced Engineering companies selected are all registered in England, and were chosen at random from information contained within the Government's UK Trade & Investment website for Advanced Engineering²⁵⁰ or from information contained on various trade association websites, such as The West of England Aerospace Forum²⁵¹.

To insure the approach of a wide cross section of cargo owners was examined, the companies selected ranged in size from small niche market manufacturers to large corporations exporting large volumes to multiple markets. The companies selected exported to a range of countries, and included both the export of specialised components to foreign manufacturers and the export of finished products to distributors or end customers. Therefore, the selected cohort did not comprise one particular type of exporter or market²⁵².

²⁴⁹ which encompasses aerospace, automotive, design and advanced materials engineering as well as the manufacture of engineering products (for the chemical, construction, food, oil and gas, pharmaceutical, power, and steel industries)

²⁵⁰ From <http://www.ukadvancedengineering.com>; accessed 05/09/11 or

<http://www.ukti.gov.uk/uktihome/aboutukti.html>; accessed 05/09/11. More detailed company information was found on their respective websites.

²⁵¹ "The West of England Aerospace Forum (WEAF) is a membership trade association that champions and supports the interests of the aerospace, defence and advanced manufacturing industries in the South West of England" from <http://www.weaf.co.uk/about-us.html>; accessed 05/09/11

²⁵² Information being obtained from individual company websites

2.1.2 Freight Forwarders

The initial research revealed that 90% of cargo owners surveyed engaged freight forwarding companies to arrange the international transportation of their goods. But forwarding services are not solely restricted to the carriage, storage, handling and packing of goods, as other services are also frequently offered such as arranging insurance, customs documents and letters of credit. Therefore, the approach of freight forwarders to international commercial instruments was important as their approach often informs others.

30 freight forwarding companies registered in England were selected for the study from a UK internet search of 'international freight forwarders'. To ensure viable data was obtained a cross-section of companies was selected from different regions across England and Wales which ranged in size and transport modes offered; with some also being actual carriers.

2.1.3 Carriers

Carriers have been selected for this study not only because of their role in international trade, but also because the international carriage of goods was one of the first areas of commercial law to be harmonised and the carriage conventions impose minimum obligations upon carriers in the various transport modes. Consequently, their approach to international commercial instruments may differ to that of cargo owners and freight forwarders.

30 carriers were selected for the study at random from separate internet searches of UK sea/air/road carriers. Carriers from different modes of transport were chosen as this allows the approach of each mode to be examined as well as comparisons to be made.

The 30 carriers comprised:

- 10 air freight carriers operating cargo flights from English airports. 8 of the companies were registered in England and 2 are UK subsidiaries of US air freight companies. They range in size from large airlines with cargo divisions to smaller companies operating air freight charter services;

- 10 sea freight carriers providing cargo services from English ports. All the companies selected are registered in England, with 7 forming part of larger international groups. They range in size from large corporations operating cargo vessels on many of the world's trading routes to small shipping companies operating on short European routes; and
- 10 road hauliers providing international freight delivery by road. All the companies selected are registered in England, with one being part of an international group. They range in size from a courier company offering international delivery to large road haulage companies with scheduled European services

Rail freight carriers were specifically excluded from the study as there are limited international rail freight companies operating services out of England and as such would not add further to the study.

2.2 How the Study was conducted

In order to determine cargo owners, freight forwarders and carriers use and/or awareness of international commercial instruments, a combination of methods was used.

Company websites provided some information as to their terms and conditions of contract but these were largely inconclusive in respect of manufacturers and freight forwarders as most stated simply 'that were subject to any compulsorily applicable legislation', but no details were given as to what international conventions this may include. By comparison, most Carrier companies expressly referenced the applicable international carriage convention(s), and displayed copies or partial copies of the Incoterms on their websites.

However, in order to obtain specific information a questionnaire was used for all cargo owners, freight forwarders and carriers, selected for the study.

2.2.1 The Questionnaire

Following informal discussions with traders, it became clear that most were not familiar with the terms 'conventions', 'rules' or 'practices' in the legal sense so examples of each were included in the questionnaire, for the avoidance of confusion. But to ensure those selected were not under the impression that they were only being asked as to their awareness of the named instruments, they were additionally asked whether they were aware or used any other rules, practices or conventions.

The following is the questionnaire sent to cargo owners, freight forwarders and carriers selected for the study:

- 1. Which, if any, of the international commercial legal rules (such as INCOTERMS or the UCP600) are you or your Company aware of and/or use? *Please specify which***

- 2. Which, if any, of the international commercial conventions (such as the Hague-Visby Rules, the Warsaw Convention or the UN Convention on Contracts for International Sale of Goods (CISG) 1980) are you or your Company aware of and/or use? *Please specify which***

- 3. Do you use or are you aware of any other international commercial rules, practices or conventions? *If yes, please specify which***

All replies will be treated as confidential.

This questionnaire was emailed to the named contact given for sales or contracts on the company websites for the selected manufacturers, freight forwarders and carriers. As all responses are confidential, the individual replies within each group are not identifiable.

2.2.2 Interviews

Where questionnaire responses required greater clarity, the responder was approached either by telephone or by email; and a subsequent short telephone interview was carried out to obtain the relevant information.

2.3 Limitations of the Study

It was clearly impossible to question all types of traders, so cargo owners in one particular exporting sector - the Advanced Engineering sector - were selected for the study, but it is perhaps inevitable that cargo owners from another exporting sector may have returned differing survey results. The approach of bulk commodity exporters to international commercial instruments, for instance, may be influenced by membership of an international trade association, such as GAFTA and the fact they frequently have long-standing agreements, with carriage contracts often made directly with carriers rather than freight forwarders.

Moreover, exporters could have been selected for the survey on a purely random basis from different exporting sectors or industry types, but this may have produced somewhat arbitrary and inconclusive results.

Exporters were chosen for this study, as they were more readily identifiable from internet searches. However, it is possible that importers, as buyers from foreign sellers, may have returned different responses as they may be more familiar with international rules and conventions, especially where the seller's country has ratified a particular convention which is then applicable to the contract between the two parties.

Whilst the questionnaire was sent to the point of contact given on Company websites (usually a named person in the Sales or Contracts Department) it is possible that that the person replying to the questionnaire was not familiar with the actual terms of the sales and/or carriage contracts, in which case the data supplied may not accurately correspond with the actual knowledge or conduct of the company. Therefore, there may be further international instruments which traders, shippers or carriers either use or are familiar with but they did not (a) think they were international rules or conventions; (b) were not reminded of an instrument's existence because it was not specifically listed on the questionnaire; or (c) the person responding to the questionnaire is not the same person actually working with the particular law, rules or

practice. However, most who responded appeared knowledgeable as to the terms and conditions on which their company contracted on, which tends to suggest that the survey responses give a reasonable indication as to the use and/or awareness that traders, forwarders and carriers make or have of different types of international commercial instruments.

3.0 CARGO OWNERS' APPROACH TO INTERNATIONAL INSTRUMENTS

There was a 42% response from cargo owners to the questionnaire, with the majority of companies who responded also providing copies of their sales and carriage contracts, but for confidentiality reasons the individual replies of companies are not identified.

Over two-thirds of the exporters who responded to the questionnaire were not only aware of international commercial instruments but actively used one or more in the course of their cross border trading as the following sections detail.

3.1 Use of Rules and Practices

3.1.1 Incoterms

Some 70% of the manufacturers responding to the questionnaire incorporated Incoterms in their sales contracts with foreign buyers, in markets such as the Middle East, China, USA, and Australasia; with consignments including both finished products being shipped to end users or distributors, and components being shipped to foreign manufacturers. This demonstrates to some degree, the widespread use and popularity of rules which after all have been “developed [to] help traders avoid costly misunderstandings by clarifying the tasks, costs and risks involved in the delivery of goods from sellers to buyers”²⁵³.

²⁵³ <http://www.iccwbo.org/incoterms/>; accessed 05/10/2011

Given that most exporters stated in the interviews conducted subsequent to the questionnaire, that 'they were more concerned with delivery terms, when contracting with foreign parties, rather than whether offer and acceptance matched perfectly, as that was a job for the lawyers'; it was somewhat surprising that 30% of exporters surveyed did not list use of Incoterms (or some other sales instrument) on their questionnaire responses. However, it became apparent during the interviews that this third of exporters were in the main selling components to finished-product manufacturers and as such tended to contract on the standard contracting terms of the larger manufacturer; all of these standard contracts included terms which required the seller to arrange the carriage (and insurance) of goods by sea to a port of destination, in wording similar to CIF Incoterms. Therefore, use of Incoterm 'type' rules amongst the selected cohort of cargo owners is perhaps more accurately 100%.

It is also interesting to note during the subsequent interviews, that most manufacturers using standard Incoterms in their sales contracts were under the impression that these trade terms were part of an international convention and as such formed part of English law. When questioned as to the reasons for this, all replied that 'everyone (being forwarders, lawyers and government websites and publications) referred to them as international trade law' and this reference appeared to perpetuate the misunderstanding that the Incoterms were 'parliamentary law'.

3.1.2 The UCP

8% of cargo owners responded that they used or were aware of the UCP, although this does not reflect usage of documentary credits as a payment mechanism, as during subsequent telephone interviews with questionnaire responders, a further 24% stated their terms of payment was by 'letter of credit'. However, when asked as to whether they used or were aware of the UCP or the UCP600²⁵⁴ all replied 'no' and this appears to be supported by payments clauses in their sales contracts with none including any reference to the UCP.

²⁵⁴ Being the latest version of the UCP

Nevertheless, although awareness of the UCP would appear to be low from the responses, it is important to note that the majority of these exporters had banks advising as to the letters of credit and freight forwarding companies dealing with the associated documentation, so it is possible that their letters of credit are subject to the UCP, in which case that the actual usage of the UCP is much higher than is immediately apparent.

3.1.3 Arbitration Rules

60% of the exporters who responded to the questionnaire provided their Terms and Conditions of Sale and of these approximately 25% contained a clause to the effect that all disputes arising shall be determined by arbitration with most agreeing to arbitration with an arbitrator appointed by their respective trade bodies - although it was noted that no actual international arbitration rules were stipulated.

However, the arbitration clause in one company's Conditions of Sale dated 2007, provided that "all disputes shall be finally settled under Rule of Conciliation and Arbitration of the International Chamber of Commerce, London". But it is unclear whether this refers to the ICC Rules of Conciliation and Arbitration (in force from January 1 1988 to December 31 1997) or whether it refers to the ICC Rules of Conciliation 1988, the ICC Rules of Arbitration 1998 or the ICC ADR Rules 2001.

40% of exporters who responded to the questionnaire declined in the follow-up interviews to give details as to whether their dispute resolution provisions included reference to any arbitration rules.

The overriding impression gained from many of the exporting manufacturers concerning dispute provisions was that they were important but in practice it was more important to keep a good working relationship with long-term buyers and that 'problems arose from time to time with buyers, but generally these were mutually sorted out without the need for lawyers. More often disputes arose due to damage to cargo, but then

exporters generally used forwarding companies to submit the necessary documents for insurance claims on their behalf, as 'that's what they do and it was more efficient'.

3.2 Use of Conventions - Ratified by the UK

This section examines the use or awareness by manufacturers of international conventions that have been ratified by the UK.

3.2.1 The Carriage Conventions

None of the manufacturers responding to the questionnaire listed use or awareness of the Hague-Visby Rules or the Warsaw / Montreal Conventions. This was an unexpected finding as the basis of these conventions was to protect cargo owners from onerous exclusion clauses and now some 80 years after their inception, exporters were seemingly unaware of their existence.

When questioned further during interviews as to the air and sea carriage conventions most were completely oblivious to their potential application – with 30% of exporters thinking that the Warsaw Convention applied only to passenger air travel and 15% were of the opinion that the Hague-Visby Rules did not apply when shipping by containers. This situation appears to be largely due to the fact that 90% of the exporters studied engage freight forwarders to organize international shipments and as such contracted on standard terms and conditions established by The British International Freight Association (BIFA)²⁵⁵ see section 4.1.1. As a result the companies questioned were under the impression that international carriage conventions would not apply despite the fact that Clause 2B of the BIFA standard terms and conditions (STCs) states that if any legislation is compulsorily applicable, these conditions shall be read as subject to such legislation.

²⁵⁵ BIFA is a trade association providing representation and support to some 1400 UK-registered companies engaged in international movement of freight to and from the United Kingdom by all modes of transport, air, road, rail and sea

Some manufacturers who export by air freight expressed surprise that the limits of liability were higher in the Warsaw and Montreal Conventions than in the BIFA terms and conditions, especially as they regularly purchased insurance to increase the levels of cover given under BIFA. This also perhaps focuses attention on those providing advice to these exporters and the approach these institutions or organisations have to such international conventions.

Nevertheless, all cargo owners who responded to the questionnaire were aware of the CMR although not all exported goods by road to Europe. Of the companies that used the CMR, it was either via freight forwarders or under separate contracts with road hauliers. When asked as to their awareness of the CMR, in comparison to the other carriage conventions, exporters stated it was much clearer as to when the CMR applied and that it was also expressly stated in carriage contracts for European road deliveries.

3.2.2 Other Ratified Conventions

It was noted that although some 25% of responding manufacturers' used contracts which referred disputes to arbitration, there was no awareness of the New York Convention on Recognition and Enforcement of Arbitral Awards. This is perhaps not surprising given the comments of exporters to dispute provisions – see section 3.1.3.

Several manufacturers did note they used the Wassenaar Arrangement²⁵⁶ which is given effect in English law - whilst not strictly commercial in nature this agreement effectively controls the transfer of conventional military arms and dual-use goods and technologies in order to contribute to regional and international security and stability²⁵⁷.

²⁵⁶ Being 'The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods & Technologies', which is implemented in the UK through the Export Control Order 2008

²⁵⁷ See <http://www.wassenaar.org/introduction/index.html>; accessed 23/09/2011

3.3 Use of Conventions - *NOT* Ratified by the UK

12% of manufacturers responding to the questionnaire professed to have a knowledge of the CISG. However, following interviews²⁵⁸ it was apparent that this was somewhat higher than the actual situation, as several manufacturers were under the impression that the CISG was actually the earlier name for the Incoterms. Consequently, with the data corrected for this anomaly, only 4% were aware of the CISG and they routinely excluded its provisions in their sales contract, although it was actually cited incorrectly as the “1989 Convention on International Sale of Products (the Vienna Convention)”.

This means that 96% of the exporting companies responding to the questionnaire were unaware of the CISG. During subsequent interviews, most expressed surprise that such a convention existed, with the majority stating that the ‘international contract provisions’ of the CISG were ‘a good idea’. 15% stated that, had they been aware of such conventions as the CISG, they may have voluntarily contracted on its terms, as they had experienced difficulties establishing international sales contracts especially with new buyers in new markets areas, due to differences in legal regimes. Most exporters claimed that they had been told by their advisers that ‘if you buy or sell goods internationally then you will be using Incoterms’, which suggested that there was no alternative.

Therefore, the manufacturers were somewhat surprised that *no* export information – either governmental or some other export / manufacturing organization - mentioned or supported using the CISG. Some were also more than a little skeptical that a convention that was not in force in English law could still be incorporated into their contracts and were going to obtain ‘further legal advice’.

It is also interesting to note that even companies having in-house legal advisers – were unaware of the existence of the CISG, although one of these companies subsequently asked as to where they could obtain a copy.

²⁵⁸ See Chapter 2 section 2.2.2

4.0 FREIGHT FORWARDERS' APPROACH TO INTERNATIONAL INSTRUMENTS

There was a 100% response from the selected freight forwarders to the questionnaire as to their approach to international commercial rules and conventions, which appears to suggest that there is, at least, an awareness of international commercial instruments. It should be noted however, that the freight forwarders selected may or may not be the freight forwarders used by or advising the manufacturers in section 3.0

As freight forwarders can act in a variety of capacities - as agents of the shipper or cargo owner²⁵⁹; as carriers for the whole carriage or for one stage of multi-modal carriage²⁶⁰; or as principal to the contract of carriage²⁶¹, it was expected that they would have a good understanding and working knowledge of the international carriage contracts, and the questionnaire response did show that some 75% of freight forwarders used or were aware of one or more international commercial instruments.

4.1 Use of Rules and Practices

From the responses received from forwarding companies, 100% 'used or were aware of' Incoterms and 60% were aware of the UCP. This is perhaps surprising given these rules and practices do not relate directly to carriage contracts. In fact, all the freight forwarders surveyed have the Incoterms or parts thereof, prominently displayed on their websites. Therefore, it appears that freight forwarders are providing general information and/or awareness of the terms for their customers benefit.

²⁵⁹ I.e. organising a single contract of carriage or a series of separate contracts for sea, road, rail or air carriage with different individual carriers

²⁶⁰ E.g. A freight forwarder may arrange and provide transport for a container from a warehouse to a port of loading and then sub-contract the sea carriage and delivery from the port of discharge as separate contracts of carriage, with each carrier being responsible for their own stage of the carriage with each contract subject to its own relevant terms and conventions

²⁶¹ The freight forwarder negotiates one carriage contract with the cargo owner on a door-to-door basis and further separate contracts for the different stages of carriage with the actual carrier(s). Alternatively, the freight forwarder acts as the legal carrier and enters a contract of carriage with the actual carrier. In both situations the cargo owner does not have any contractual relationship with the actual carrier and his rights and liabilities are solely those within the agreement with the freight forwarder

It is also awareness rather than use in the case of the UCP600, as freight forwarders are not themselves party to documentary credits, so they become aware of the UCP either because their transport documents are regularly used under documentary credits, or because they are arranging documentary credits as a service offered to customers.

4.1.1 BIFA Standard Trading Conditions

Most freight forwarders in England and Wales contract with cargo owners in respect of international carriage using standard terms and conditions. These standard trading conditions (STCs) are produced by the British International Freight Association (BIFA)²⁶², and they *inter alia* limit or exclude the freight forwarder's liability and require in certain circumstances, the customer indemnify the forwarding company from loss and damage to their goods.

The use of the STCs²⁶³ is a mandatory requirement for registered trading membership and in fact all business transacted by 97% of the forwarding companies surveyed, is subject to the Standard Trading Conditions. Most of the freight forwarding companies display the BIFA STCs on their websites as their own Terms and Conditions. Therefore, there is a degree of harmonisation within the freight forwarding industry but as a result cargo owners lack awareness of the international carriage conventions, as following sections demonstrate.

Some forwarding companies refer to the BIFA standard conditions as 'used for most air, sea and global forwarding' which, in the absence of reference to any further legislation, tends to imply to customers that these standard conditions govern all carriage including international air and sea carriage. But, the application of the STCs is subject to other

²⁶² In the UK freight forwarders are not licensed, but most are members of BIFA – a trade association for UK-registered companies engaged in the international movement of freight. BIFA aims "To provide effective representation and support for Britain's freight services industry in the UK and overseas; to promote Best Practice and Total Quality in the provision of freight services by all members, and to encourage and regulate the membership to observe the highest standards of professional competence." from <http://www.bifa.org/content/About.aspx>; accessed 11/08/11

²⁶³ See generally <http://www.bifa.org/Content/Trading.aspx>

legislation where such legislation is compulsorily applicable as Clause 2B of the Standard Conditions provides that:

“If any legislation, to include regulations and directives, is compulsorily applicable to any business undertaken, these conditions shall, as regards such business, be read as subject to such legislation, and nothing in these conditions shall be construed as a surrender by the Company of any of its rights or immunities or as an increase of any of its responsibilities or liabilities under such legislation . . .”²⁶⁴.

This means that international conventions, such as the Hague-Visby Rules, the CMR and the Warsaw Convention which have been enacted into English law by various Acts of Parliament, are compulsorily applicable and can therefore override the BIFA STCs. Yet a third of the forwarding companies who responded to the questionnaire were not aware of the applicability of the sea and air carriage conventions despite advising exporting companies on such international carriage and insurance.

4.2 Use of Conventions - Ratified by the UK

4.2.1 The Carriage Conventions

Despite Clause 2B of the BIFA STCs, some 25% of the freight forwarders were unaware that international conventions could take precedence over the STCs with most of the opinion that they could voluntarily opt-out of any international conventions by mutual agreement with cargo owners in preference for BIFA’s standard trading conditions.

Moreover, 75% professed to know that the BIFA STCs were subject to international carriage conventions, although less than 50% named the Hague-Visby Rules and Warsaw/Montreal Conventions, and perhaps more importantly, only 20% of freight forwarders actually made express reference in their terms and conditions to potentially applicable carriage conventions. Whilst two companies included additions to their BIFA STCs stating that the international carriage conventions compulsorily applied, the names of the conventions were only given in one with the statement ‘These are all long and

²⁶⁴ n(263)

complex terms, available in full on the internet if required'. It is noted that the most detailed reference to the Hague-Visby Rules was incorporated within a set of independent²⁶⁵ standard trading terms and conditions.

Therefore, 80% of freight forwarders do not expressly make known to cargo owners the circumstances in which international air and sea carriage conventions apply to consignments. Although, interestingly, a further 6% of companies include definitions of the Hague and Hague-Visby Rules in their website 'glossary of terms' (but not the Warsaw or Montreal Conventions despite offering air freight forwarding services); they do not include information as to the actual use or application of the Rules. In fact it is apparent from the research that very few of the freight forwarding companies examined appeared to know in what circumstances the international sea and air conventions apply. Many were unaware, for example that in the case of multi-modal carriage by container, the Hague Visby Rules can apply to the sea leg²⁶⁶ and in respect of air carriage, many forwarders were unaware that where the country of destination has adopted a different version of the international air conventions²⁶⁷ to that of the UK as the country of departure, the convention previously common to both countries will apply²⁶⁸.

In respect of international carriage by road, 37% of freight forwarders used or were aware of the CMR and notably this mostly comprised forwarders who also operated road haulage companies as well. But despite most of these companies knowing that the CMR applies to every contract for the international "carriage of goods by road in vehicles for reward"; very few forwarders were aware that the CMR can apply to local collections and deliveries, if the local journey forms part of a contract for international carriage.

²⁶⁵ i.e. non-BIFA

²⁶⁶ Under s.1 of the Carriage of Goods Act 1971, the Hague-Visby Rules compulsorily apply to sea carriage from a UK port from loading until discharge provided a bill of lading or equivalent document is issued by the carrier

²⁶⁷ i.e. the Warsaw Convention, the Warsaw Conventions as amended by the Hague Protocol; the Guadalajara Amendment; the Guatemala City Protocol; the Montreal Additional Protocols.

²⁶⁸ Article 55

4.2.2 Comparison of Liability Limits

The BIFA STCs apply to all and any activities of the freight forwarding company in the course of business and under Section 26(A) of the BIFA STCs²⁶⁹, the Company's liability howsoever arising is limited to 2 SDR per kilogram of the gross weight of any goods lost or damaged. Clause 26(A) of the BIFA STCs provides that the freight forwarding company's liability "howsoever arising and, notwithstanding that the cause of loss or damage shall be unexplained, shall not exceed 2 SDR²⁷⁰ per kilogram", but how does this compare with the international carriage conventions?

- Article IV (5)(a) of the Hague-Visby Rules provides that "unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account [being SDR] per kilogram of gross weight of the goods lost or damaged, whichever is the higher".
- Article 22(3) of the Montreal Convention provides that "In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum". In the UK this was revised under the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009 to 19 SDR. Liability under the Warsaw Convention remains at 17 SDR per kg.
- Article 23 of the CMR provides that compensation shall not exceed 8.33 units of account per kilogram of gross weight. The liability is limited to 8.33 SDR per kilogram of the lost or damaged cargo.

Clearly, by sea the limitation of liability is similar to that of the BIFA STCs but shipments by road and air are subject to much higher levels of liability under the respective international conventions; but given that many freight forwarding companies do not

²⁶⁹ Subject to clause 2(B) and 11(B) and sub-clause (D)

²⁷⁰ Being 'Special Drawing Rights' as defined by the International Monetary Fund

make cargo owners aware of these international conventions, the question arises as to what effect this approach has. However, according to the freight forwarders examined the convention limits are almost disregarded as cargo owners take out insurance for their consignment, which effectively means cargoes often have double insurance.

It is nevertheless, interesting to note that on the same BIFA web page as the downloadable Standard Terms and Conditions, it also has downloadable copies of the current comparison of liability limits between the transport conventions which is updated each month²⁷¹. However, whilst all freight forwarders displayed copies of the BIFA STCs not one displayed the limits of liability.

The reason for this may lie in the fact that freight forwarding companies like to promote the importance of cargo insurance, with statements such as the following being typical:

‘ . . . inevitably, from time to time, there is loss or damage during transit. The liability of carriers engaged by us (whether by road, air, sea or rail) for loss of or damage to cargo is always limited in monetary terms by standard contract terms or by legislation and, in some cases, liability is excluded absolutely. It is also a fact of life that claims against carriers are very time consuming and difficult. For this reason, it is vital that cargo insurance is arranged to cover goods in transit’.

This appears to suggest that carriers have little or no liability to cargo owners and even where they do, a cargo claim may be fraught with difficulties; hence the need for insurance – especially given that very few forwarding companies mention the liability limits fixed by the various carriage conventions. But then many freight forwarders offer their customers ‘complete peace of mind’ by arranging cargo insurance through subsidiary or associated companies. There does appear to be some confusion amongst freight forwarders as to whether they are able, under the Financial Services Authority Regulations, to recommend a cargo insurance company or to comment on the suitability of a marine cargo policy. Whilst some freight forwarders offered on their websites to arrange insurance with a subsidiary company or recommended an insurance

²⁷¹ See http://www.bifa.org/_attachments/Resources/1126_S4.pdf; accessed 01/09/11

company²⁷²; other forwarding companies noted they were unable to arrange insurance under the FSA regulations.

It was also interesting to note that on several freight forwarders' websites they offered 'Full CMR Insurance', but when questioned further, this is simply just reference to the Convention.

4.3 Use of Conventions – *NOT* Ratified by the UK

From the survey results none of the freight forwarders noted use or awareness of any unratified conventions. However, 10% of the forwarders stated during subsequent interviews that they were aware of 'new Rotterdam carriage by sea regulations'. When asked as to how they had been made aware of these Rules, all referred to an article on the Rotterdam Rules by BIFA²⁷³. This article stated that "BIFA has been taking a strong interest in this process . . . and BIFA is currently lobbying the UK Government not to sign the convention"

The BIFA approach appears to emanate from the approach of their international counterpart²⁷⁴, the International Federation of Freight Forwarders Association (FIATA)²⁷⁵. Although FIATA aims to "unite the freight forwarding industry worldwide . . . developing and promoting uniform forwarding documents, [and] standard trading conditions"²⁷⁶; it has recommended that Association Members should advise their governments not to accept the Rotterdam Rules²⁷⁷ holding *inter alia* that the:

²⁷² Since this chapter was written, reference has been modified to arranging insurance with 'FSA Regulated Partners'

²⁷³ 'So what are the Rotterdam Rules', available at http://www.bifa.org/_attachments/Resources/1003_S4.pdf; accessed 04/08/11

²⁷⁴ Especially as membership of BIFA has included automatic membership of FIATA since 2005

²⁷⁵ I.e. Fédération Internationale des Associations de Transitaires et Assimilés - is the world's largest non-governmental organisation in the field of transportation - representing approximately 40,000 forwarding and logistics firms in 150 countries. FIATA has consultative status with organisations such as UNCTAD and UNCITRAL and recognized by organisations such as ICC and IATA as representing the freight forwarding industry

²⁷⁶ <http://www.fiata.com/index.php?id=30>; accessed 11/08/11

²⁷⁷ See generally http://www.fiata.com/uploads/media/FIATA_Position_Paper_-_UN_Convention_on_Contracts_for_the_International_Carriage_of_Goods_wholly_or_partly_by_Sea__the_Rotterdam_Rules_-_March_2009_02.pdf; accessed 11/08/11

“Convention is fair too complicated ... at worst, the Convention states may end up with different interpretations, so that the Rotterdam Rules will fail in reaching their main objective to unify the law of carriage of goods by sea . . . [and that] as shippers, freight forwarders will be liable without any right to limit liability for incorrect information to the carriers (Art. 79.2(b)), although the carriers enjoy the right to limit their liability for incorrect information to the shippers”.²⁷⁸

From FIATA’s position paper and the objectives of the Association it is apparent that the International Association of Freight Forwarders supports the general aim of harmonization of international carriage laws, with trading conditions clearly defined so as to produce uniform interpretation. Moreover, FIATA are keen to ensure that international carriage rules provide uniform rights in respect of similar obligations for both shipper and carrier.

5.0 THE CARRIERS’ APPROACH TO INTERNATIONAL INSTRUMENTS

The final group of traders to be surveyed in this chapter are those that operate international carrying companies which transport goods globally for cargo owners. As the international carriage conventions limit the liability of carriers in regard to the goods carried and in what circumstances, it stands to reason that carriers would be fully conversant with the applicable carriage convention(s), but the question arises as to whether there are differences in approach between the various modes of transport and whether carriers use any other international commercial instruments.

All of the air and sea carriers selected for the survey responded as to their use and awareness of international commercial instruments, and also provided copies of their terms and conditions of carriage. By comparison, there was a 70% response to the questionnaire from the international road haulage companies selected.

5.1 Use of Rules and Practices

All the carriers who responded to the questionnaire were familiar with the Incoterms - although it is to be noted that these terms do not form part of carriage contracts.

²⁷⁸n(277) para 3

For air carriers this awareness appears to be largely due to terms having a named place of delivery which can be a carrier's cargo centre, such as 'FCA British Airways Cargo Terminal London Heathrow'. In the case of sea carriers, Incoterms are used for the purpose of determining the extent of the carrier's liability for loss or damage to the Goods, and this value is often agreed to be the FOB/FCA invoice value plus freight and insurance if paid²⁷⁹. Some of the sea carriers also publish terms of payment for freight types such as ex-Works, FOB, CIF. Similarly, most sea carriers noted an awareness of 'documentary credits' but did not specifically list the UCP on their questionnaire responses. All of the international road haulage companies who responded were also familiar with the Incoterms, with this being attributed in most cases to 'industry experience'.

All of the carriers who responded also cited the use of many industry standard rules and recommended practices. However, many of these regulate safety, security, navigation and the shipping of dangerous goods rather than private commercial aspects, so are beyond the scope of this study. For example, all air carriers listed rules and practices developed by international organisations such as the International Air Transport Association (IATA)²⁸⁰ and the International Civil Aviation Organisation (ICAO)²⁸¹.

Similarly, all sea carriers made reference to the York Antwerp Rules²⁸² of General Average in their Terms and Conditions of Carriage – although there was some variance amongst the carriers as to the version of the York Antwerp Rules adopted²⁸³. 50% also incorporated the Baltic and International Maritime Council (BIMCO) 'Both to Blame

²⁷⁹ i.e. the value of the goods at the place and time they were delivered or should have been delivered to the merchant

²⁸⁰ i.e. a "global trade organization . . . [which for] over 60 years, has developed the commercial standards that built a global industry", from <http://www.iata.co.uk/>; accessed 12/08/11

²⁸¹ "A specialized agency of the United Nations . . . created in 1944 to promote the safe and orderly development of the international development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection", from <http://www.icao.int/Pages/icao-in-brief.aspx>; accessed 12/08/11.

²⁸² Developed by the Comité Maritime International (CMI)

²⁸³ 40% of carriers adopted the 1994 version; 30% the 1990 version and 10% the 1974 version, only 20% of sea carriers had adopted the latest 2004 version

Collision Clause' into the terms and conditions of their contracts of carriage, but as this not a commercial clause as such, it is outside the scope of this study.

The international road haulage companies also referred to many industry rules and practices, with 80% listing the Road Haulage Association's (RHA) Conditions of Carriage as 'international rules and practices', but as these only apply to haulage in the UK they are not within the scope of this study. 20% of the road haulers who responded also listed the United Nations Recommendations on the Transport of Dangerous Goods (UNRTDG) - Model Regulations; the International Air Transport Association (IATA) Dangerous Goods Regulations; the International Maritime Dangerous Goods Code (IMDG); and the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR)²⁸⁴; but again as these are not commercial in nature, they are not within the scope of the study – although they do go to show a level of use and awareness of international rules and practices.

Overall, the carriers demonstrated a high level of usage and awareness of international rules and practices applicable to the carriage of goods, with no apparent difference in approach between companies registered in England and those operating in England but with parent companies in other countries. However, it was noted from the research conducted, that sea carriers were the only 'group' amongst all the traders surveyed in this chapter who were, in the main, aware of the difference between private law instruments which could be voluntarily incorporated into carriage contracts and the international maritime conventions which required State ratification.

5.2 Use of Conventions - Ratified by UK

Rather predictably, given international carriage conventions limit a carrier's liability, all the carriers who responded to the questionnaire, noted use of the convention(s) applicable to their mode of transport. All included reference to the applicable carriage convention(s) in the terms and conditions of their contracts of carriage.

²⁸⁴ Which was ratified by the UK on 29 June 1968

Whilst this is perhaps not surprising given that the international carriage conventions have the force of law in the UK, it was also noted that most carriers were fully aware of which version and in what circumstances the various conventions applied. Air carriers, for instance, were fully aware that the Montreal Convention applies to the air carriage of passengers, baggage and cargo for reward, from the UK where the country of destination has also adopted the Convention, irrespective of the nationality of the aircraft performing that carriage. But where the country of destination has not adopted the Montreal Convention, the most recent applicable version of the Warsaw Convention common to both countries will apply²⁸⁵. Accordingly, all the air carriers surveyed included express reference to the Montreal Convention and/or the Warsaw Convention in their Terms and Conditions of carriage, with some detailing the exact amendments applicable to the Warsaw Convention. It was also interesting to note that 30% of road hauliers responding noted use or awareness of the Warsaw Convention in addition to the CMR, although in most cases this was attributed to the fact that they had subsidiary companies operating air cargo carriage.

In contrast to this thorough knowledge of the requisite carriage conventions, one English shipping company offering cargo services from UK ports, referred to any carrier liability for loss of or damage to the goods as being “determined in accordance with national law making the Hague Rules compulsorily applicable to this Bill of Lading”, but it is actually the Hague-Visby Rules which have effect from UK ports. Nevertheless, the carriers’ knowledge of the international conventions is in marked contrast to the freight forwarders surveyed who, although frequently contracting with ocean, air and road carriers on behalf of exporters, were largely unaware of if and when the various international carriage conventions applied.

Furthermore, there was no discernible difference in approach between carriers registered in England and the 2 UK subsidiaries of US freight companies.

²⁸⁵ Under s.1(4) of the Carriage by Air Act 1961

In respect of other ratified international conventions, 20% of sea carriers included reference in their contracts of carriage to the carrier being a person entitled to limit liability under the Convention on the Limitation of Liability for Maritime Claims (LLMC)²⁸⁶; and 90% also noted use or awareness of other *non-commercial* international maritime conventions including the International Convention for the Prevention of Pollution from Ships (MARPOL) and the International Convention for the Control and Management of Ships' Ballast Water and Sediments. Likewise, several air carriers cited the Chicago Convention²⁸⁷ which was ratified by the UK on 1 March 1947 and the majority of road haulage companies stated that they used the '*Transports Internationaux Routiers*' (TIR) Convention²⁸⁸ which the UK ratified on 8 October 1982.

5.3 Use/Awareness of Conventions - *NOT* Ratified by the UK

The research showed that carriers as well as having a detailed understanding of ratified conventions, generally also had an awareness of international conventions in their particular transportation mode, which have *not* been ratified by the UK.

90% of the air cargo carriers who responded were aware of the Cape Town Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment, despite the fact that it has not been ratified in the UK.

It is interesting to note that in July 2010 when the Government sought the views of the aviation industry on whether it would benefit the UK to move towards ratification of the Cape Town Convention²⁸⁹; two UK based airlines British Airways and Virgin Atlantic (both of whom operate passenger and cargo services), were amongst those who

²⁸⁶ Given effect in the UK by the Merchant Shipping Act 1995

²⁸⁷ Formally the 'Convention on International Civil Aviation' 1944

²⁸⁸ Formally, the 'United Nations Customs Convention on the International Transport of Goods under Cover of TIR Carnets 1975', TIR being a harmonised system of Customs control that allows customs-sealed vehicles and freight containers to transit countries without border checks See generally, http://www.iru.org/en_iru_about_tir; accessed 11/09/11

²⁸⁹ See Department for Business, Innovation & Skills, 'Call for Evidence: Full List of Responses: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment' (July 2010)

responded, although both had distinctly contrasting approaches. British Airways was in favour of ratification, predicating that the:

“financial markets will increasingly consider the Cape Town Treaty to be the market standard legal framework and will add a risk premium to other countries [which have not ratified] . . . Ratification of the Cape Town Treaty will lead to a lower cost of financing”²⁹⁰

Whereas Virgin Atlantic was of the opinion that:

“The availability of financing and leasing facilities is not generally a problem for UK airlines because the UK Register and legal system is probably the most highly respected in the world . . . these instruments will burden airlines with extra costs, duplication, bureaucracy and administration with very little, if any, benefit. What will effectively happen is that there will be a levelling down effect at great cost to the UK. By its ratification, the UK economy will therefore end up subsidising the implementation of the Convention across the world.”²⁹¹

Whilst accepting that cross border transactions can be complex Virgin Atlantic suggest that “where the UK and its laws apply, there is little or no complexity involved. The predictability of the legal outcome is usually quite clear under UK law. Problems are more likely when the legal system used is not English”²⁹².

The majority of sea carriers examined also noted an awareness of the Hamburg Rules²⁹³ and the Rotterdam Rules²⁹⁴. All sea carriers stated that currently there was no requirement for them to use the Hamburg Rules, and the Rotterdam Rules would not come into force until one year after ratification by the 20th UN Member state and to date only Spain has ratified. It was outside the scope of this study to ask whether the companies who responded to the questionnaire were in favour of ratification of the Hamburg Rules or the Rotterdam Rules – and in any case the person responding may not necessarily know the company’s stance on the matter. Nevertheless, industry support for the UK ratification of the Rotterdam Rules has been demonstrated by the

²⁹⁰ British Airways response dated 7 October 2010 in n(289) p.50

²⁹¹ Virgin Atlantic Airways response dated 7 October 2010 in n(289) p. 140

²⁹² n(291)

²⁹³ Formally, the ‘United Nations International Convention on the Carriage of Goods by Sea’ 1978

²⁹⁴ Formally, the ‘United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea’ 2008

British Chamber of Shipping²⁹⁵; the International Chamber of Commerce (ICC)²⁹⁶; the National Industrial Transportation League (NITL)²⁹⁷; the UK P&I Club²⁹⁸ and transport insurer, the TT Club²⁹⁹. Moreover, the European Community Shipowners' Association (ECSA); the International Chamber of Shipping (ICS); the World Shipping Council (WSC) and Baltic and International Maritime Council (BIMCO) have all supported the European Parliament recommendation that Member States should move "speedily to sign, ratify and implement" the Rotterdam Rules³⁰⁰.

Support from carrier groups is perhaps initially surprising as it appears that cargo owners are those most likely to benefit from the Rotterdam Rules - as the carrier's obligations to provide a seaworthy ship and, to carry and care for goods, are extended to 'throughout the voyage' (Article 14) and cargo owners will also have a choice of jurisdictions in which to bring a claim. However, of significance to carriers is the inclusion of the new 'volume contract'³⁰¹, under which carriers in the liner trade will have greater freedom of contract to derogate from the Rules, and thus some of the sea carriers surveyed mentioned a potential return to mutually agreed contracts if and when the Rules became applicable³⁰².

Some 70% of the haulage companies who responded to the questionnaire also stated that they were aware of the Rotterdam Rules, because of the impact the rules could potentially have on the road transport industry. Several noted that most of their information on the Rules came from the International Group of the Road Haulage Association.

²⁹⁵ See the British Chamber of Shipping website, <http://www.british-shipping.org/British%20Shipping/legal/>; accessed 14/11/11

²⁹⁶ See ICC website, http://www.iccwbo.org/uploadedFiles/ICC/policy/transport/Statements/UNCITRAL_5_09.pdf; accessed 15/11/11

²⁹⁷ See NITL website, http://www.nitl.org/NITL_RRule.pdf; accessed 15/11/11

²⁹⁸ See UK P&I Club website, http://www.ukpandi.com/fileadmin/uploads/uk-pi/Knowledge_Base_-_International_Conventions/Rotterdam%20Rules.pdf; accessed 10/11/11

²⁹⁹ See TT Club Mutual Insurance Ltd website, <http://www.ttclub.com/knowledge-store/article/tt-club-welcomes-attempts-to-harmonise-transport-liability-framework-on-carriage-of-goods-740/>; accessed 09/11/11

³⁰⁰ International Chamber of Shipping International Shipping Federation, Press Release 17 /5/10 'Shipowner Associations Welcome EP Support for Rotterdam Rules'; available at <http://www.marisec.org/2010.html#17/5/2010>

³⁰¹ Under Article 1(2) carriage of a specified quantity of goods in a series of shipments during an agreed period of time

³⁰² Article 80

Furthermore, some 30% of haulage companies were aware of moves within the European Union to develop a Single Uniform Transport Document, with a standard liability clause³⁰³. Interestingly, it was only road hauliers who noted an awareness of such efforts by the EU.

6.0 WHAT HAS INFORMED THESE APPROACHES

As Figure 5 shows there is a range of use and/or awareness amongst cargo owners, freight forwarders and carriers of international commercial instruments, with some rules and conventions used but not others. It is also apparent that cargo owners and freight forwarders do not have the same level of awareness of international instruments as actual carriers. This section will therefore examine how these various approaches have been informed and what factors have contributed to or influenced them.

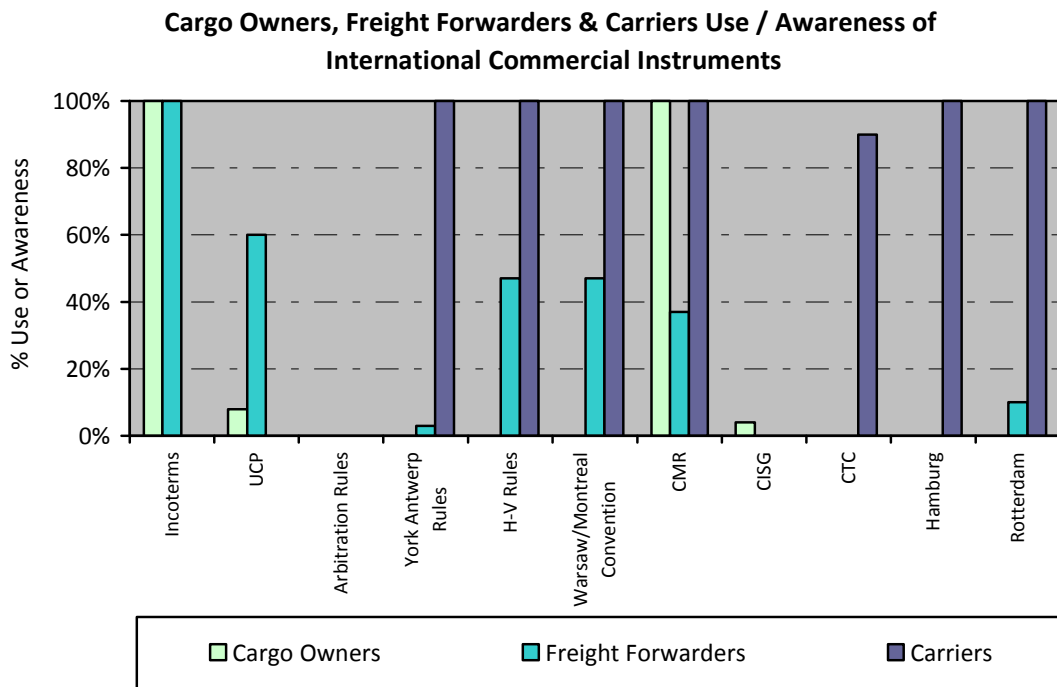


FIGURE 5

³⁰³ See generally European Commission Report; available at http://ec.europa.eu/transport/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf; accessed 02/11/11

6.1 Ignorance

The research showed that one of the over riding factors influencing the approach of cargo owners and freight forwarders to international commercial instruments is ignorance. This is perhaps somewhat surprising given that most international rules, practices and conventions are produced for the benefit of international traders. Although two-thirds of the cargo owners who responded to the questionnaire were not only aware of international commercial instruments but actively used one or more in the course of their overseas trading, it effectively means that a third of exporters did not use or were not aware of any international commercial instruments despite exporting products on a regular basis; and this perhaps brings into question who, if anyone, is advising them – an issue which is addressed in section 6.2.

Furthermore 25% of freight forwarders who responded stated that they did not use any international rules, practices or conventions as they contracted on their own standard terms and conditions, that is those compiled by BIFA (see section 4.1.1), but they were largely unaware that these terms and conditions were subject to compulsorily applicable legislation such as the international carriage conventions. This apparent lack of knowledge, or at best incomplete knowledge, has a twofold effect - not only does it inform the approach that forwarding companies have to these conventions but perhaps more importantly it also informs the approach of those whom they advise, the cargo owners (see section 6.2.1).

The research also showed that in addition to ignorance as to when conventions may apply, there was widespread ignorance amongst cargo owners and freight forwarders as to what conventions may apply. For instance, nearly all cargo owners in the study were completely unaware of the potential application of the CISG – with some even commenting that had they known or been made aware of such a convention they may have incorporated it in their sales contracts. Cargo owners were also unaware of the application of the international air/sea carriage conventions or were misguided in their knowledge. 30% of cargo owners had heard of the Warsaw Convention, but understood

this Convention to be solely related to passengers and luggage during air travel. Likewise, 15% of cargo owners had heard of the Hague-Visby Rules but appeared convinced this convention did not apply to container shipping. When asked as to how or where such information had been attained, most stated it had been gleaned from one or more of the following - freight forwarding companies, lawyers and internet websites.

6.2 Advisers

6.2.1 Freight Forwarders

The research showed that 90% of the cargo owners engaged freight forwarders to organise contracts of carriage on their behalf, the majority of which stated during telephone interviews that they got most of their information on international carriage from 'the forwarding companies they had used for years for all their carrying needs'. However, virtually all the cargo owners that used freight forwarders contracted with them using the BIFA standard trading conditions, and although these conditions state they are subject to 'other legislation where such legislation is compulsorily applicable'; 92% of these cargo owners stated that the freight forwarding companies did not make it expressly known as to what conventions took precedence over the BIFA conditions. Thus cargo owners were unaware, for instance, that the limits of liability for cargo claims for carriage by air were higher than those under the BIFA standard trading conditions³⁰⁴.

The freight forwarders who responded to the questionnaire (who may or may not be the forwarders used by the cargo owners in the study), confirmed that this misunderstanding as to the application of international carriage conventions was relatively common amongst freight forwarders - as 25% of the freight forwarders responding to the questionnaire were unaware that such international conventions could take precedence over the BIFA STCs. Only 20% of the freight forwarders who

³⁰⁴ See section 4.2.2

responded actually made express reference in their terms and conditions to potentially applicable international carriage conventions.

The position regarding international carriage of goods by road was slightly different in that 37% of the freight forwarders who responded to the questionnaire used or were aware of the CMR and its application but this in the main comprised forwarders who also operated road haulage companies. However, most were unaware that the CMR can also apply to local collections and deliveries, if the local journey forms part of an international carriage contract.

It appears that freight forwarding companies are instrumental in informing the approach of cargo owners to international carriage conventions and as freight forwarders are in the business of organising and in some cases the actual carriage of cargo, it may seem reasonable for cargo owners to obtain and/or rely on information provided by freight forwarders as to applicable international conventions. But the research has shown that forwarding companies appear to have limited knowledge as to the application of the such conventions and given that forwarders are frequently only acting as agents for the cargo owners, this reliance on forwarding companies as experts in international cargoes, may be somewhat misplaced.

6.2.2 Legal Practitioners

Chapter 3 of this study concluded that the practitioners approach to international commercial instruments was informed by conditions such as ignorance and fear; and this will also have a consequential bearing on the approach of traders to such instruments, as legal practitioners provide advice and recommendations to cargo owners and carriers, on international commercial instruments³⁰⁵.

From the cargo owners' perspective, this advice is mainly in conjunction with sales contracts, as carriage contracts tend to be seen as the domain of freight forwarders until

³⁰⁵ See Chapter 3 Section 3.0, 4.0 and 5.0

disputes arise – and even then, whilst many cargo owners cited instances of goods damaged in transit, goods lost, late or wrongful deliveries and other such problems, they claimed that these were generally sorted out between the parties without resorting to litigation as ‘it was not worth it – not in time, cost and damage to their relationship with buyers or freight companies’.

Where legal advice is sought, evidence suggests that it will be English sales law which is recommended for sales contracts rather than an international convention such as the CISG³⁰⁶; and although it is not clear as to how many cargo owners in this study actually sought legal advice, it is apparent from the questionnaire responses that 96% of cargo owners were unaware of alternative sales laws such as the CISG, which tends to suggest that practitioners generally do not recommend the CISG. Furthermore, it seems reasonable to conclude, that this effective exclusion of the CISG by legal practitioners, has adversely affected the approach of cargo owners’ to this sales convention, as an exporter would not be inclined to include a sales convention in a contract, which had not been endorsed by their legal adviser.

In terms of other unratified conventions, the websites of several legal firms included articles on the Rotterdam Rules and the Cape Town Convention, with some large firms even offering training seminars on the implications of the Rotterdam Rules. Such information resources must assist in helping potential users develop a greater understanding of these conventions.

6.3 Government Information

The cargo owners surveyed stated that government international trade websites were a source of information on the legislation used in cross border trade, and therefore these resources must inform the approach that traders have to such legislation. It is beyond the scope of this research to study all sources of information, but the data contained in

³⁰⁶ See Chapter 3 Section 5.1

the 'International Trade' section of Business Link³⁰⁷ - one of the main Government information websites for exporters, is briefly examined here as this site was expressly mentioned by many cargo owners as a source of reference.

The 'International Trade' section of the Business Link website reveals information on 'Getting Started' in importing and exporting; customs; licensing; logistics and tax, with the sub-section 'Getting paid internationally' not only including 'Letters of credit' and the advantages of using the UCP³⁰⁸, but also 'International Commercial Contracts and Incoterms'³⁰⁹. However, whilst it is beneficial for traders to be made aware of such rules, the section on 'International Commercial Contracts' tends to suggest that Incoterms are the only international instrument for cross border sales transactions, as there is no information on other potentially applicable international sales of goods conventions, such as the CISG which could be incorporated into contracts. Therefore, in seeking to inform exporters, the Government is perhaps selective in the information on international instruments that it makes available.

Furthermore, the sub-section on 'Transport Options' includes information on 'insurance' and states that "different guidelines apply to different transportation"³¹⁰, and lists the various international carriage conventions. But rather than informing UK exporters as to the scope and application of the various international carriage conventions, the site merely provides a link to the actual convention texts for each of the different transport modes. This must be somewhat confusing for an exporter as no information is given as to how and when each convention takes effect in regard to carriage by sea, air and road from a UK port. Therefore, given that few cargo owners were aware of the application

³⁰⁷ See generally <http://www.businesslink.gov.uk/bdotg/action/layer?r.s=tl&topicId=1079717544>

³⁰⁸ See <http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1079717544&r.l2=1087335890&r.l3=1087336556&r.s=tl&topicId=1084535824>

³⁰⁹ See <http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1079717544&r.l2=1087335890&r.l3=1087336556&r.s=tl&topicId=1077994541>

³¹⁰ See <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1078150864&r.l1=1079717544&r.l2=1077717216&r.l3=1078150804&r.s=sc&type=RESOURCES>

of the carriage conventions, perhaps a more informative link for exporters would be to the respective carriage acts on the Government's own legislation website³¹¹.

The Business Link website also states that for cargo insurance for goods at sea -

“[s]hipping companies' liability . . . is set by various international conventions and does not always equate to the full value of the goods. The level of protection this offers varies from market to market, so you should check what the position is”³¹²

This tends to suggest there are different rates for different markets or different goods, rather than a rate per unit of account or kilogram of gross weight under Article IV (5)(a) of the Hague-Visby Rules, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. The website also states that under “the transport modal conventions, you automatically have basic insurance cover (limited liability) as laid out in the Hague-Visby and Hamburg rules”³¹³. This implies that a UK trader exporting goods would be covered under the Hamburg Rules in the same manner as the Hague-Visby Rules, but as the Hamburg Rules have not been ratified by the UK, they are not compulsorily applicable and would only apply if they were voluntarily agreed to by the cargo owner and carrier.

Although information for exporters on the use of freight forwarders is also provided, some of the statements could cause misunderstandings. For example, the website states that “Freight forwarders, by applying their Standard Trading Conditions (STC) [³¹⁴], usually have limited liability for any claim for loss or damage to goods while in their care”³¹⁵, but it does not add that STCs are subject to applicable legislation such as the international carriage conventions, which tends to support the misconception that many

³¹¹ For e.g. <http://www.legislation.gov.uk/ukpga/1971/19> for the Carriage of Goods by Sea Act 1971

³¹² <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1078045375&r.l1=1079717544&r.l2=1077717218&r.l3=1078045202&r.s=sc&type=RESOURCES>

³¹³ See: <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1078164350&type=RESOURCES>

³¹⁴ i.e. the British International Freight Forwarders Association (BIFA) STCs; see Section 4.1.1

³¹⁵ See <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1078151054&r.i=1078150864&r.l1=1079717544&r.l2=1077717216&r.l3=1078150804&r.s=sc&r.t=RESOURCES&type=RESOURCES>

cargo owners appeared to have that if they used freight forwarders and contracted on the BIFA STCs the international carriage conventions did not apply.

Consequently, although the Business Link website is one which the Government recommends exporters use and it does provide important information on international trade, it does not appear to inform cargo owners as to which, when and how international commercial conventions applied.

7.0 CONCLUSION

International commercial instruments such as rules, model laws and conventions, have primarily been developed to facilitate trade between merchants in different jurisdictions, and this chapter examined the approach of the traders and carriers they were intended to assist. To this end, 60 cargo owners, 30 freight forwarders and 30 carriers were surveyed and as there was a 67% response rate to the questionnaire, the results obtained provide a good indication as to the approach of both traders and carriers to international commercial instruments.

In terms of international rules, all the cargo owners, freight forwarders and carriers who responded to the questionnaire used or were at least aware of the Incoterms. Given that the Incoterms were created in response to the needs of international traders by the ICC and the fact that 100% of cargo owners voluntarily incorporated the relevant Incoterms into their sales contracts, suggests that exporters (and perhaps their legal practitioners) can be the actual initiators of the harmonisation process. Most cargo owners alluded to the predictability and certainty that the Incoterms provide, with several stating that the adoption of such universal terms enabled them to be more cost efficient as they did not require individual negotiation.

However, the popularity of the Incoterm rules was not matched by awareness of other international rules and practices. Although 40% of cargo owners used letters of credit for

payments, there was very limited awareness of the UCP with only 8% of cargo owners including its provisions in contracts. This figure may not accurately represent the use of the UCP though, as many of the cargo owners in the study used banks or freight forwarders to organise their documentary credits and were therefore unsure as to exactly what terms were incorporated.

In terms of ratified conventions, the Hague-Visby Rules, the Warsaw/Montreal Convention and the CMR – were predictably incorporated into all contracts of carriage by the respective sea, air and road carriers; and there was a general awareness of the carriage conventions by the forwarding companies in the study. However, it was apparent that many of the freight forwarders who responded were unaware of when and how the sea and air conventions applied. This lack of knowledge was also reflected in the responses of the cargo owners, 90% of whom used freight forwarders to organise their carriage of goods.

A situation which appears to be exacerbated by the fact that all business transacted by 97% of the forwarding companies and 90% of the cargo owners surveyed, is subject to the 'Standard Trading Conditions' of the British Institute of Freight Forwarding Association (BIFA)³¹⁶. Although Clause 2B of these Standard Conditions states that the conditions are subject to any legislation which is compulsorily applicable, no carriage conventions are expressly incorporated, and as a result cargo owners are seemingly unaware of the protection afforded by the carriage conventions which usually apply to cargoes departing UK ports. Some cargo owners stated that they regularly purchased insurance cover, usually through freight forwarders' affiliated companies, for air freight which equated to the levels offered by the Montreal Convention - a convention which applies mandatorily to international air cargo from the UK. This situation clearly demonstrating how the approach of cargo owners, is informed by freight forwarders.

From the cargo owners interviewed, carriage contracts are arranged by freight forwarders and it is usually only advice in conjunction with sales contracts which is sought from legal

³¹⁶ See section 4.1.1. Use of the STCs is a mandatory requirement for registered trading membership of BIFA

practitioners. But from the preceding chapter, it was apparent the most practitioners in that particular study recommended English law as the governing law of sales contracts when advising exporters; and this must surely influence the approach taken by the cargo owners. Although it is unclear as to how many cargo owners had sought legal advice, it was a telling statistic that 96% of the exporting companies responding to the questionnaire, were unaware of the CISG and during interviews, most manufacturers expressed surprise that such a convention existed. The majority of manufacturers stated that the 'international contract provisions' of the CISG were 'a good idea' and 15% stated that, had they been aware of such conventions as the CISG, they may have voluntarily contracted on its terms, as they had experienced difficulties establishing international sales contracts especially with new buyers in new markets areas, due to differences in legal regimes. Bruno Zeller has suggested that "it is unrealistic to expect a business to familiarize itself with the legal systems of all of its trading partners" especially when there is a convention such as the CISG, which solves the problem³¹⁷ "by providing the parties with a common sales code which will apply regardless of whether action is brought in the country of the seller's or the buyer's place of business"³¹⁸. Yet despite its acknowledged benefits, it is apparent that traders are not aware and are not made aware by those advising them that such a convention exists as an alternative to the application of English law.

The study has shown that the approach of cargo owners to international commercial instruments is very much informed by those they rely upon in the course of business - such as freight forwarders, legal practitioners and government information websites. However, reliance on such groups has meant that some of the rules, practices and conventions which were developed to overcome impediments to international trade are perhaps not being used by the very merchants they were intended to benefit.

³¹⁷B. Zeller, 'The UN Convention on Contracts for the International Sale of Goods (CISG) – A leap forward towards unified international sales law', (Spring 2000) 12 Pace International Law Review 79

³¹⁸J.S. Ziegel, 'Canada's First Decision on the International Sales Convention' (1999) 32 Can. Bus. L.J. 325

Chapter 5 : The Judiciary

1.0 INTRODUCTION

The objective of an international convention is to achieve uniformity and certainty in a particular area of law across the contracting states. However, it is counter-productive for countries to be party to the development of uniform legislation only for the courts of each to construe provisions of such conventions differently.

As early as 1927 the English courts recognised the commercial importance of uniformity of construction, when it was held that decisions concerning the Hague Rules should “correspond with the decisions given by the courts of the highest authority in the United States”³¹⁹. This necessitated a shift in the way the courts of England and Wales construed legislation, as international conventions could not “be rigidly controlled by domestic precedents of antecedent date” rather such conventions needed to be “construed on broad principles of general acceptance”³²⁰. Further landmark cases such as *Fothergill v Monarch Airlines Ltd*³²¹ sanctioned the use of the travaux préparatoires to interpret convention provisions and *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*³²² where recourse to the French text of the Convention was held to be legitimate. Such recourse was also reinforced by the British Government’s ratification of the Vienna Convention on the Law of Treaties³²³ which provides general rules for interpreting international conventions and establishes in what circumstances recourse to supplementary means is acceptable.

This chapter will therefore examine the extent to which the judiciary have adopted an international approach to interpretation.

³¹⁹ *Brown & Co Ltd v Harrison, Hourani v Harrison* [1927] All ER Rep 195 (CA) per Atkin LJ at 202

³²⁰ *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (HL) per Lord MacMillan at 350

³²¹ [1981] AC 251 (HL)

³²² [1978] AC 141 (HL)

³²³ (Cmnd. 4140) although dated May 23, 1969 it had not received sufficient ratifications to come into force by the date of the Buchanan or Fothergill House of Lords appeal cases

2.0 METHODOLOGY

2.1 What Conventions were selected

The international carriage conventions by air, sea and road were selected for study as they provide examples of legislation which has been developed as international law, but which has been applied and interpreted by the domestic courts of numerous countries, in both civil and common law jurisdictions.

The Hague/Hague-Visby Rules and the Warsaw Convention were some of the first private international law conventions that the UK ratified, and as such they provide some 80 years of data. In the case of the Hague Rules, for example, it is apparent that the judiciary have had four, potentially conflicting, categories of authorities to refer to, i.e.:

- (1) Decisions of the English Courts on bills of lading;
- (2) Decisions on the United States Harter Act 1893 either by the American Courts construing their own legislation or by the English Courts construing the words of the US Statute as incorporated in a bill of lading made in the US;
- (3) Decisions on the English Carriage of Goods Act 1924; and
- (4) Decisions of Courts in Contracting States construing the provisions of the Hague Rules.

The Carriage by Road Convention, CMR has also been selected to allow comparisons to be made between modes of transport; whether interpretations concluded in early years have carried forth and whether there have been any changes in the sources or the manner to which the judiciary has recourse, in order to construe convention provisions. As Figure 6 details, an average of 45% of carriage cases either turn upon or involve interpreting the meaning of words or provision within a carriage convention which has been incorporated into statute.

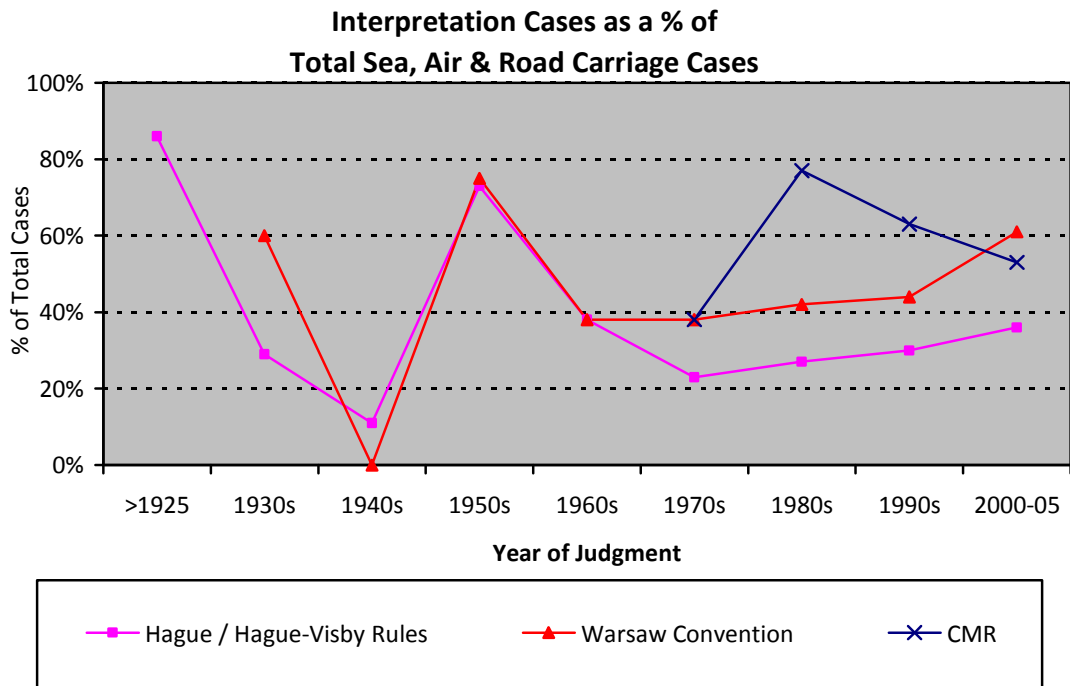


FIGURE 6

2.2 How the study was conducted

The study involved analysis of *all* judgments reported³²⁴ between 1925 and 2005 in the House of Lords, the Court of Appeal and the Kings/Queens Bench Division, where the interpretation of provisions within the selected international conventions was at issue.

The judgments were used to establish how the judiciary's approach to commercial conventions has been informed by the use of the following sources when interpreting the conventions:

I. Sources pre-dating the Conventions

- *Legislation predating the convention (foreign & domestic)*
- *Common law as precedent*

³²⁴ Using the Law Reports and Official Transcripts contained in the Lexis-Nexis and Westlaw databases

II. Convention Sources

- *Use of the travaux préparatoires*
- *Interpretation provisions within conventions*
- *Reference to foreign language text of convention*

III. Comparative Jurisprudence

- *Use of Foreign Decisions (both civil & common law)*

IV. Other

- *Recourse to Commentaries and textbooks*
- *Rules of statutory construction*

2.3 Limitations of the study

It was not feasible in the context of the overall study to examine all cases concerning the interpretation of international conventions, thus an informed selection of conventions was made (as detailed above). Nonetheless, it is debatable whether the same results would have been obtained if other conventions had been examined. A different convention or group of conventions may have, for instance, contained greater interpretation provisions, had a more detailed travaux préparatoires or had a weight of similar foreign judgments which unanimously agreed with one another, and recourse to such may have returned differing results. However, it would be difficult, if not impossible, to find private international commercial conventions that would have such resources.

Moreover, as the carriage conventions have provided several landmark House of Lords decisions, on the sources and methods for interpreting international conventions, these dicta have been used in the interpretation of other conventions, so arguably, the study of other conventions would not have provided dissimilar results.

3.0 JUDICIAL RECOURSE TO SOURCES PRE-DATING CONVENTION

This section examines the extent to which the judiciary have construed words or phrases in a convention provision in terms of previous English legislation or common law. This is an important consideration because if contracting states interpret the provisions of a convention in terms of pre-existing laws it can result not only in diverse interpretations, but also meanings attached to provisions which were not intended by the creators of the convention – both of which are contrary to the objective of uniform rules.

3.1 Legislation pre-dating Convention

This section concerns only the Hague Rules, as carriage by sea is the only mode of transport to have had legislation existing prior to the advent of the international convention.

The United States Harter Act of 1893 was introduced in an endeavour to reach a compromise between the conflicting interests of shippers and carriers, by preventing onerous exclusion clauses in bills of lading that lessened the obligations of the master ‘to carefully handle and stow her cargo and to care for and properly deliver the same’. Similar legislation was subsequently adopted in New Zealand’s Shipping and Seamen Act 1903; the Australian Sea Carriage of Goods Act 1904; and the Canadian Water Carriage of Goods Act 1910. As these Acts were all considered when the Hague Rules were developed, the Rules contain similar phrasing and provisions, so this section will examine in what instances, if any, the judiciary have made recourse to legislation which predates the Hague Rules when interpreting its provisions.

Between 1926 and 1940, the judiciary referred to the Harter Act in 35% of cases concerning interpretation of Hague Rule provisions. For example, in *Brown & Co, Ltd v Harrison; Hourani v Harrison*³²⁵ it was held that as the words ‘management of the ship’ in Article IV r.2(a) were found in the Harter Act, the meaning attributed to them in cases concerning this Act should be followed as it was “very important in commercial interests

³²⁵ [1927] All ER Rep 195 (CA) at 203

that there should be uniformity of construction adopted by courts in dealing with words in statutes dealing with the same subject matter”.

Similarly, in *Gosse Millerd Ltd v Canadian Government Merchant Marine, 'The Canadian Highlander'*³²⁶ the House of Lords held that as the phrases 'management of the ship' and 'shall properly and carefully stow' did not materially differ from that found in the Harter Act, so it had been commonly adopted in bills of lading which had been the subject of judicial consideration in English Courts³²⁷ as well as the US; and therefore by using the same phrase in the Hague Rules, the drafters had “shown a clear intention to continue and enforce the old clause as it was previously understood”³²⁸ and there was no “reason for supposing that the words . . . have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date”³²⁹.

From the 1940s the judiciary referred to legislation which was passed subsequent to the Hague Rules such as the United States Carriage by Sea Act 1936. But in 1961 Viscount Simonds in *Riverstone Meats Co Pty Ltd v Lancashire Shipping Co Ltd*³³⁰ held that reference to earlier legislation was necessary in order to pay particular regard to their history, origin and context - as such phrases in the Hague Rules as 'exercise due diligence to make the ship seaworthy' had been adopted from the US Harter Act, the Australian Sea Carriage of Goods Act, 1904 and the Canadian Water Carriage of Goods Act, 1910. The *Riverstone* case was nonetheless the last to interpret a provision of the Hague Rules in terms of its legislative forerunners, so the judiciary's recourse to such legislation has been very limited.

³²⁶ [1929] AC 223 (HL)

³²⁷ See for e.g. *The Ferro* [1893] P.38,44,46 and *The Glenochil* [1896] P.10,15,16,19

³²⁸ n(326) at 238 per Viscount Sumner

³²⁹ n(326) at 231 per Lord Hailsham

³³⁰ [1961] 1 All ER 495 (HL) at 500

3.2 Common Law Precedents pre-dating Convention

3.2.1 Hague Rules

From the first cases where provisions of the Hague Rules fell to be interpreted, it is clear that the judiciary adopted meanings that had been judicially assigned in common law prior to the incorporation of the Rules into English law. In *Brown & Co. Ltd. v T. & J. Harrison*³³¹ MacKinnon J used the 1906 case *Walker v York Corporation*³³² as authority for holding that a provision in the Hague Rules³³³ which contained two apparently contradictory parts, could be construed by reading ‘and’ rather than ‘or’ so as to make the whole clause intelligible. Likewise, in *W. Angliss & Co (Australia) Proprietary v Peninsular & Oriental Steam Navigation Co*³³⁴ and *Goodwin, Ferreira & Co Ltd v Lamport and Holt Ltd*³³⁵ Wright J and Roche J respectively, adopted meanings applied in previous English cases, when interpreting the obligation to ‘exercise due diligence to make the ship seaworthy’³³⁶ and deciding whether the ingress of water was a ‘peril of the sea’³³⁷.

However, some three years later in *Stag Line Ltd v Foscolo Mango & Co Ltd*³³⁸, the House of Lords demonstrated a willingness to depart from pre-existing English law³³⁹ when deciding whether a deviation was reasonable or not. Lord Macmillan stated that as the Hague Rules were the result of an international conference:

“the rules have an international currency [and] it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance”³⁴⁰.

Lord Atkin similarly held that it was “important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former

³³¹ (1926) 25 Ll L Rep 437

³³² [1906] 1 KB 719

³³³ I.e. Article IV r.2(q)

³³⁴ [1927] 2 KB 456

³³⁵ [1929] All ER Rep 623

³³⁶ I.e. Article III r.1; See *E. Dobell & Co. v Steamship Rossmore Co* [1895] 2 QB 408

³³⁷ I.e. Article IV r.2(c); See *The Glendaroch* [1894] P226

³³⁸ [1932] AC 328 (HL) when deciding whether a deviation was reasonable or not under Article IV r 4 of the Hague Rules

³³⁹ Previously in *The Teutonic* (1872) LR 4 PC 171 it had been held that it was necessary to show that the deviation was to save life or to show that the cargo would otherwise be exposed to imminent risk

³⁴⁰ n(338) at 350

law”³⁴¹. However, Lord Atkin carefully qualified such departure from English law by further holding that where there was no express wording in the Convention *or* where words in a particular context had already been interpreted by the English Courts; the Courts should presume “the sense already judicially imputed to them”³⁴² as it was not Parliament’s intention to alter pre-existing English law - otherwise such changes would have been enacted in the legislation.

Figure 7 shows that between the 1930s and the 1950s cases involving interpretation of the Hague Rules were frequently decided using precedents predating the Rules. But from the 1970s the judiciary appear to have heeded the *Stag Line* dicta of Lord MacMillan as there has been no further recourse to such precedents in respect of the carriage by sea conventions.

Recourse to Common Law predating Convention

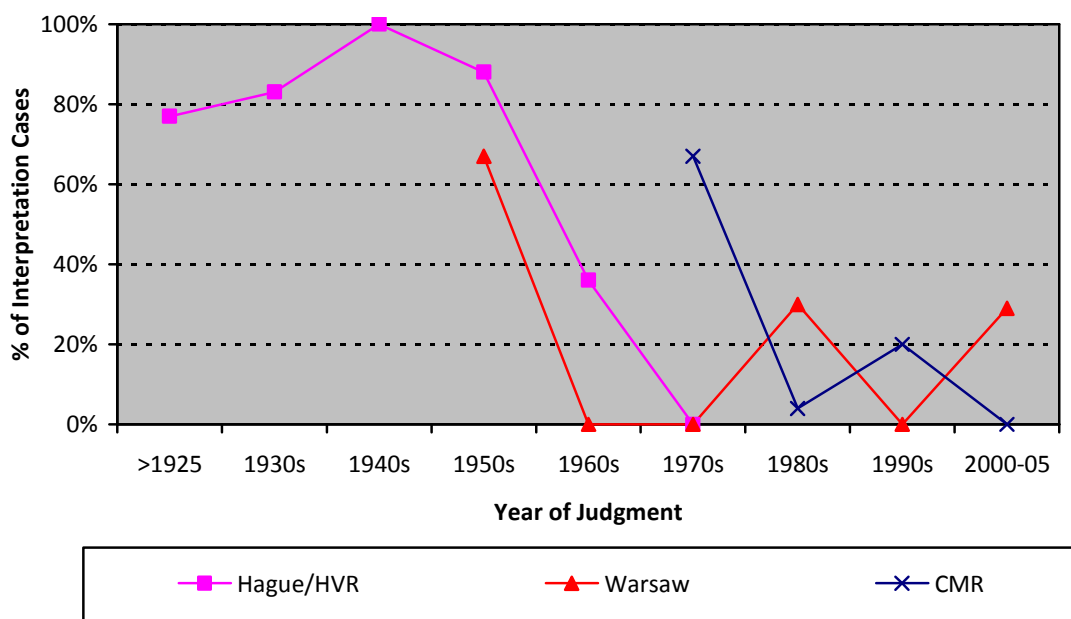


FIGURE 7

³⁴¹ n(338) at 343

³⁴² n(338) at 344

3.2.2 Warsaw Convention

Figure 7 shows that since the 1950s sporadic reference has been made to common law precedents predating the Warsaw Convention when interpreting its provisions.

In *Rotterdamsche Bank NV & another v British Overseas Airways Corporation & another*³⁴³ Pilcher J referred to an earlier English case³⁴⁴ but held *inter alia* that mis-carriage of the goods was not a deviation which operated to exclude the provisions of the Warsaw Convention. In another 1950s case *Horabin v British Overseas Airways Corporation*³⁴⁵ where 'wilful misconduct' in Article 25 of the Warsaw Convention fell to be construed in a jury trial, Barry J stated that such misconduct was not established if there was equal degrees of probability as to whether the act is mere negligence or wilful misconduct, as had been held in an earlier English case³⁴⁶; and when the jury sought further clarification Barry J provided "the best and shortest and most complete definition [of wilful misconduct] in English law, not an original definition, but one which has been used more than once in these courts"³⁴⁷.

In *Rothmans of Pall Mall (Overseas) Ltd and others v Saudi Arabian Airlines Corporation*³⁴⁸ Mustill J held that the Warsaw Convention was to be construed without reference to the technical rules of English law or of English legal precedent and that on the true construction of Article 28(1) of the convention, a foreign corporation was not 'ordinarily resident' within the jurisdiction if it merely had a branch office there. Reference was nevertheless made by Mustill J and in the subsequent Court of Appeal case³⁴⁹ to a group of early English cases dealing with problems of service on foreign corporations³⁵⁰.

³⁴³ [1953] 1 All ER 675

³⁴⁴ *Cunard Steamship Co v Buerger* [1927] AC 1 (HL)

³⁴⁵ [1952] 2 All ER 1016

³⁴⁶ *Lancaster v Blackwell Colliery Co Ltd* (1919) 89 LJKB 611

³⁴⁷ n(345)

³⁴⁸ [1980] 3 All ER 359

³⁴⁹ [1981] Q.B. 368 at 385

³⁵⁰ See *Newby v von Oppen and Colt's Patent Firearms Manufacturing Co* (1872) LR 7 QB 293, *Haggin v Comptoir d'Escompte de Paris* (1889) 23 QBD 519 (CA), *Compagnie Générale Transatlantique v Thomas Law & Co, La Bourgogne* [1899] AC 431 (HL), *Logan v Bank of Scotland* [1904] 2 KB 495 (CA)

It is noted that whereas the judiciary have stopped referring to precedents predating the convention in relation to the Hague/Hague-Visby Rules in the 1970s, they have continued to use cases predating the Warsaw Convention on a limited basis. For example, in *Re Deep Vein Thrombosis and Air Travel Group Litigation*, the judgments of the Queens Bench³⁵¹, the Court of Appeal³⁵² and the House of Lords³⁵³ all referred, amongst other authorities, to the meaning of ‘accident’ given in 1903 by Lord Lindley in *Fenton v J Thorley & Co Ltd*³⁵⁴, in order to determine that deep vein thrombosis was not an ‘unusual or unexpected event’ in terms of Article 17 of the Convention.

3.2.3 The CMR

The judicial use of the common law precedents predating the CMR when interpreting its provisions is very limited and only occurred between the mid-1970s and the mid-1990s.

In *James Buchanan & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd*³⁵⁵ Lord Wilberforce held that the language of an international convention should be interpreted “unconstrained by technical rules of English Law or by English legal precedent but on broad principles of general acceptance”³⁵⁶; yet in construing the phrase ‘the current market price’ in Article 23(2) of the Warsaw Convention Lord Wilberforce held that it “must depend in the first place upon what is the relevant market, for it is obvious that there may well be more than one market for a commodity, or for goods [as held in] *Charrington & Co. Ltd. v. Wooder* [1914] A.C. 71”³⁵⁷.

In *Impex Transport Aktieselskabet v AG Thames Holdings Ltd*³⁵⁸ Robert Goff J considered the period of limitation for an action and counterclaim under Article 32 of the CMR. In

³⁵¹ [2003] 1 All ER 935

³⁵² [2003] EWCA Civ 1005 (CA)

³⁵³ [2005] UKHL 72 (HL)

³⁵⁴ [1903] AC 443 (HL) at 453 i.e. that ‘accident’ was not a technical legal term with a clearly defined meaning, and generally, an accident meant any unintended and unexpected occurrence which produced hurt or loss

³⁵⁵ [1978] AC 141 (HL)

³⁵⁶ n(355) at 153

³⁵⁷ n(355) at 151

³⁵⁸ [1982] 1 All ER 897

holding that the defendants right of action by way of a counterclaim was time-barred by Article 32(1) and (4) as the counterclaim had not been set-up prior to the expiration of the limitation period he applied the dicta of Sargant LJ in *The Saxicava*³⁵⁹ and Merriman P in *The Fairplay XIV*³⁶⁰.

In *M. Bardiger Ltd and others v Halberg Spedition Aps and others*³⁶¹ one of the issues was whether the defendant contracted as forwarding agent or as carrier under Article 34 of the CMR. Evans J referred to *Ireland v Livingstone*³⁶², where a similar case of dual capacity was discussed, but held that it was misleading to consider whether the contracting party acted as principal or as agent, because the forwarder, like all agents, is a principal to the contract made with his employer.

A dictum predating the CMR convention was also used in *Laceys Footwear (Wholesale) Ltd v Bowler International*³⁶³ when 'wilful misconduct' in Article 29 of the CMR fell to be construed. Thompson J stated that "long before the Convention came into being the phrase 'wilful misconduct' was considered by the court in the case of *Hoare v Great Western Railway*³⁶⁴ where delivery to the wrong person constituted wilful misconduct and he therefore held that delivery to the wrong premises which resulted in the theft of the goods also constituted wilful misconduct and that as a consequence the defendants could avail themselves of the limitation of liability provisions in Article 23.

³⁵⁹ [1924] P 131 (CA)

³⁶⁰ [1939] P57

³⁶¹ (unreported) 26 October 1990

³⁶² (1872) 5 LRHL 395 (HL)

³⁶³ (unreported) 17 March 1995

³⁶⁴ (1877) 37 LT 186

4.0 JUDICIAL RECOURSE TO THE TRAVAUX PRÉPARATOIRES

Although authorities have existed since 1915³⁶⁵ for the use of the travaux préparatoires³⁶⁶ of an international convention in construing its provisions, it was not considered in regard to the interpretation of a carriage convention provision until the late 1970s (as Figure 8 demonstrates) when the word ‘damage’ in Article 26 of the Warsaw Convention fell to be interpreted in *Fothergill v Monarch Airlines Ltd*³⁶⁷.

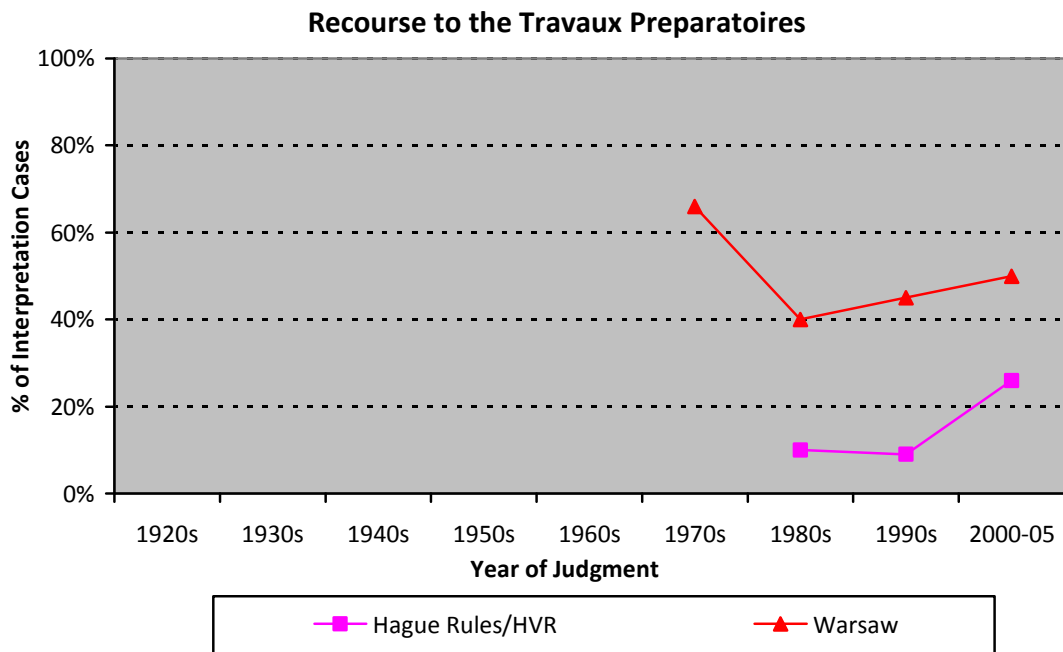


FIGURE 8

In *Fothergill v Monarch Airlines Ltd*³⁶⁸, Lord Wilberforce stated that use of travaux préparatoires was cautiously endorsed by Parliament’s ratification of the Vienna Convention on the Law of Treaties³⁶⁹ Article 32 of which provides that in the

³⁶⁵ See *Porter v Freudenberg* [1915] 1 KB 857 (CA) which referred to statements made in a committee of the conference which prepared the Hague Convention of 1907; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA) which concerned the ‘Convention on the Territorial Sea and Contiguous Zone, 1958’ per Diplock L.J. at 761; *Salomon v CEC* [1967] “if the statutory provisions are obscure or ambiguous etc”. See also *Black Clawson International Ltd v Papierwerke Walhof-Aschaffenburg A.G* [1975] AC 591 (HL) “[it] may be legitimate for English courts . . . to make cautious use of the *travaux préparatoires* for the purpose of resolving any ambiguity in the treaty”.

³⁶⁶ I.e. the documented proceedings of an international conference which leads to the adoption of a particular convention, protocol or agreement

³⁶⁷ [1978] QB 108 at 8

³⁶⁸ [1981] AC 251 (HL)

³⁶⁹ (1969) Cmdn 4140 although the Convention had not received sufficient ratifications for it to be in force at the time

interpretation of an international convention where a meaning was ambiguous or obscure “[r]ecourse may be had to supplementary means of interpretation including the preparatory work of the treaty” (see following section for more detail); and furthermore, the US Court of Appeals³⁷⁰ and the French Cour de Cassation³⁷¹ supported prudent and cautious use of the travaux.

But it was held that recourse to the travaux should be limited “to cases where the material involved is public and accessible [and] where the travaux clearly and indisputably points to a definite legislative intention”³⁷². To this Lord Diplock added that an English court should have regard to the travaux where the text of a convention is ambiguous or obscure³⁷³. Matching these three conditions of ambiguity, public accessibility and definite legislative intention, was later graphically referred to by Lord Steyn³⁷⁴ as hitting a “bull’s-eye”.

4.1 Public Accessibility to the Travaux Préparatoires

In *Fothergill*, Lord Fraser held that judicial notice should *not* be taken of the travaux préparatoires “because it had been sufficiently published to persons whose rights would be affected by it”³⁷⁵. But the public availability of the travaux of the Warsaw Convention was confirmed by Lord Hope in *Sidhu & Others v British Airways plc; Abnett v British Airways plc*³⁷⁶ and any doubts as to the public accessibility of the Hague Rules’ preparatory papers was removed by the works of Michael F. Sturley³⁷⁷ and Francesco Berlingieri³⁷⁸ in the 1990s. In respect of the CMR however, no travaux préparatoires have been publicly accessible³⁷⁹ only a commentary based on conference papers is

³⁷⁰ *Day v Trans World Airlines Inc* (1975) 528 F.2d 31 (US Court of Appeals 2nd Circuit)

³⁷¹ *Consorts Lorans v Air France* January 14 1977 (French Cour de Cassation)

³⁷² n(368) at 279

³⁷³ n(368) at 284

³⁷⁴ *Effort Shipping Company Limited v Linden Management SA & Another; The Giannis NK* [1998] 1 All ER 495 (HL) at 510

³⁷⁵ n(368) at 288

³⁷⁶ [1997] AC 430 (HL) at 442

³⁷⁷ M. F. Sturley (Ed), *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules Volumes 1-3*, (Fred B. Rothman & Co, Littleton, Colorado, 1990)

³⁷⁸ *The Travaux Préparatoires of the Hague and Hague-Visby Rules* (CMI, Antwerp, 1997)

³⁷⁹ in *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] 1 All ER 883 (CA) at 21; citing both Hill & Messent’s *CMR: Contracts for the International Carriage of Goods by Road* and a Dutch case

available³⁸⁰. Nevertheless, research has shown³⁸¹ that availability of the travaux préparatoires has not greatly increased the judiciary's recourse to it when interpreting convention provisions.

4.2 Legislative Intention

Although the judiciary have stated in an average of 35% of interpretation cases³⁸² since the 1970s that the travaux may be used to interpret a convention provision (see Figure 8); the travaux has not often been used as it seldom provides "a clear and indisputable indication of definite legislative intention"³⁸³.

This is demonstrated in regard to the construction of the word 'damage' in Article 26(2) of the Warsaw Convention, when it fell to be construed in *Fothergill*³⁸⁴. At the Hague Conference which discussed the 1955 Protocol, the minutes show that some delegates expressed the view that 'damage' clearly included 'partial loss', but others (including the British) expressed the opposite view. At a meeting on September 27, 1955, the Netherlands delegate proposed that the words 'or partial loss' be added after the word 'damage'. The minutes record that their proposal was withdrawn on the understanding that the word 'damage' was to be understood as including the words 'partial loss', although the minutes do not show that this understanding was generally accepted, or that it was given official recognition by the President. This is in contrast with an understanding relating to Article 19 of which the minutes record:

"The President stated that, in the event of a negative vote on the proposal, the conference would be understood as having stated that the word 'unreasonable' was not necessary because it was a ready implied in Article 19 as at present drafted."³⁸⁵

De Venootschap naar Zweeds recht Nilsson & Noll Speditionaktiebolag v Delta Lloyd Schadeverzekering NV (1990) 25 ETL 589 (Dutch Supreme Court) "it is not possible to have regard to the drafting history of the CMR since no travaux préparatoires have been published or made available for public consultation"

³⁸⁰ Professor R. Loewe, 'Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)' (1976) ETL 311; available at <http://www.unece.org/fileadmin/DAM/trans/doc/2006/sc1cmr/commentary.pdf>; accessed 01/07/09

³⁸¹ See also for e.g. '*Carver on Bills of Lading*', 2nd Ed. (2005) Sweet and Maxwell at para 9-098

³⁸² although in one case a claimed reference to the travaux préparatoires, was to the unamended Warsaw Convention *Antwerp United Diamond BVBA & Another v Air Europe* [1993] 4 All ER 469 at 474

³⁸³ n(368) at 278 per Lord Wilberforce

³⁸⁴ n(368)

³⁸⁵ See 'Minutes and Documents Relating to the Question of the Revision of the Warsaw Convention of 1929 as Amended by the Hague Protocol of 1955 and Other Matters: Seventeenth Session', (ICAO, Montreal, 1970)

Consequently, it was held by Lord Fraser in *Fothergill*³⁸⁶ that the alleged agreement or understanding relating to ‘damage’ in Article 26 (2) has not been established and Lord Hope held that “the minutes had not shown that the understanding was generally accepted or that it was given official recognition”³⁸⁷.

Bingham J also held in *Data Card Corp & Others v Air Express International Corp*³⁸⁸ that the travaux préparatoires provided “an excellent example of materials which may not be relied on . . . they leave one altogether unclear what was to be intended”; and in *Sidhu v British Airways*³⁸⁹ Lord Hope held that the travaux préparatoires “will only be helpful, if after proper analysis, it clearly points to a definite intention on the part of the delegates as to how the point at issue should be resolved”.

Similarly, in respect of the Hague Rules, in *Effort Shipping Co Ltd v Linden Management SA, ‘The Giannis K’*³⁹⁰ Lord Steyn held that “resort to the travaux préparatoires provided nothing worthy of consideration in the process of the interpretation of art IV, r 3 and art IV, r 6. [as] the chairman's statement can be seen to be weasel words”; and in *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA, ‘The Rafaela S’*³⁹¹ Rix LJ held that “the travaux préparatoires are rich in ambiguity . . . [and] it was impossible to find any clear statement of an intention”.

4.3 Few ‘Bulls-Eyes’

Two main reasons emerge as to why so few cases have actually hit the ‘bulls-eye’ in terms of using the travaux préparatoires to interpret a convention provision. Firstly, the travaux is unclear as to what weight should be applied to the discussions and statements of delegates. This was first identified in *Fothergill*³⁹², as detailed above and subsequently in *Re Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd*³⁹³

³⁸⁶ n(368) at 280

³⁸⁷ n(368) at 290

³⁸⁸ [1983] 2 All ER 369

³⁸⁹ [1997] AC 430 (HL) at 442

³⁹⁰ [1998] 1 All ER 495 (HL) at 510

³⁹¹ [2003] 3 All ER 369 (CA) at 59

³⁹² n(368)

³⁹³ [2002] UKHL 7 (HL) at 148

Lord Hobhouse held that “the views of one delegate, however distinguished, articulate and well-published, may not represent the views of others”; and in *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA*³⁹⁴ Lord Bingham noted that in “protracted negotiations ... there are many participants, with differing and often competing objects, interests and concerns. It is potentially misleading to attach weight to points made in the course of discussion, even if they appear, at the time to be accepted”.

Secondly, the issue that has arisen was not contemplated at the time of the travaux préparatoires. In *Swiss Bank Corp & Others v Brink's MAT Ltd & Others*³⁹⁵ Bingham J held that where the travaux contained no reference to a particular issue, little could be gained from speculating as to the reason for the omission.

4.4 Inferences when the Travaux Préparatoire is Silent

In more recent cases the judiciary have considered what inferences could be drawn when the travaux is silent. In the 2002 case *Re Morris v KLM Dutch Airlines; King v Bristow Helicopters Ltd*³⁹⁶, Lord Steyn considered the omission of ‘mental injury’ from the travaux préparatoires as revealing, because if the idea of including such claims had been under consideration it would have demanded discussion and therefore it was not a case of ‘mere silence’. Lord Hope similarly held that:

“it seems reasonable to conclude from their silence that the delegates did not feel it necessary to discuss what is meant by the words ‘*lesion corporelle*’. None of them appears to have anticipated that there would be any difficulty in applying the wording of Article 17 to the facts in practice . . . this suggests that the meaning they gave to the words was the simplest and least troublesome meaning that they would ordinarily bear”³⁹⁷.

In contrast however, Lord Hobhouse held that considering the omission from the travaux préparatoires of any reference to mental injury as significant, was to speculate about the subjective intentions of the delegates and a “descent into unprincipled

³⁹⁴ [2005] UKHL 11 (HL) at 19

³⁹⁵ [1986] 2 All ER 188 at 192

³⁹⁶ [2002] UKHL 7 (HL) at 17

³⁹⁷ n(396) at 96

subjectivism . . . Likewise it was erroneous, in the absence of cogent travaux, to infer that a particular interpretation of a provision is intended because the Convention was later amended without making any change to the provision in question”³⁹⁸. The view of Lord Hobhouse was reaffirmed in *Re Deep Vein Thrombosis and Air Travel Group Litigation*³⁹⁹ and in the 2004 Hague-Visby Rules case *Jindal Iron and Steel Co Ltd and Others v Islamic Solidarity Shipping Company Jordan Inc*⁴⁰⁰, where use of the travaux préparatoires was held to be based on the notion of ‘definite indication of intention’.

Consequently, the research has shown that since *Fothergill* the English judiciary have maintained a cautious approach to the use of the travaux préparatoires⁴⁰¹. This appears to be consistent with other Commonwealth jurisdictions⁴⁰² and the French judiciary⁴⁰³ but not it would seem with the United States, where courts have interpreted convention provisions in light of comments made during the legislative debates leading to their adoption⁴⁰⁴.

5.0 JUDICIAL RECOURSE TO CONVENTION INTERPRETATION PROVISIONS

It is often the case that conventions contain definitions which establish the meaning that is to be attributed to a particular word, phrase or term as used within the legislation. Such interpretation provisions can direct courts as to how to construe a phrase or word within that legislation if and when issues subsequently arise.

³⁹⁸ n(396) at 148

³⁹⁹ [2003] 1 All ER 935 at 32 where Nelson J held that “mere silence cannot point clearly and indisputably to a definite intention on the part of the delegates as to how an issue should be resolved”

⁴⁰⁰ [2004] UKHL 49 (HL) at 20

⁴⁰¹ reaffirmed for e.g. in *Sidhu & Others v British Airways plc* [1997] AC 430 (HL) and *Re Morris v KLM Dutch Airlines; King v Bristow Helicopters Ltd* [2002] UKHL 7 (HL) at 79

⁴⁰² William Tetley, ‘Interpretation and Construction of The Hague, The Hague/Visby and Hamburg Rules’ (2004) 10 J.I.M.L. 30-70

⁴⁰³ H. Capitant, ‘Les Travaux Préparatoires et l’interprétation de lois’ in Kahn-Freund, Levy and Rudden, (Eds) ‘A source book on French Law’ (2nd Edn, Clarendon Press, Oxford, 1979) at pp.100-106 and Philippe Gerard, ‘Le recours aux travaux préparatoires et la volonté du législateur’ in M. van de Kerchove (Ed) ‘L’Interpretation en droit’ (Bruxelles 1978) at pp.51-95. See also *Consorts Lorans v Cie Air France* January 14 1977 Cour de Cassation (Assemblée Plénière) at 268 “the travaux préparatoires for an international convention there may be special reasons for not placing too much reliance on them . . . and ought not to be treated as gospel truth”

⁴⁰⁴ E.g. *Robert C. Herd & Co v Krawill Machinery Corp* (1959) 359 US 297 at p.301 and *Day v Trans-World Airlines* (1975) 528 F 2d 31 where the US Courts of Appeal had regard to the minutes of the original drafting of the Warsaw Convention

At first glance it might appear that detailed definitions may avoid the problems associated with construing international conventions in different contracting states as the judiciary would theoretically be able to interpret provisions uniformly; but the inclusion of interpretation provisions may have the effect of making convention provisions particularly narrow and the inclusion of more expansive clauses can be of benefit. Firstly, it can overcome the problem of including events and/or circumstances which were perhaps not foreseen at the time the legislation was developed; and secondly, it has also been said that expansive provisions have been used to overcome 'sticking points' where delegates cannot agree during the negotiation of a convention which ultimately may have prevented the Convention being produced in its entirety⁴⁰⁵. Moreover, defining specific terms can often cause more problems than it solved, as words can only be defined in terms of other words; and different words and phrases can often have different meanings in different contracting states.

This section will therefore examine what interpretation provisions exist for construing international conventions and what recourse the judiciary have made to such provisions when interpreting the international carriage conventions.

5.1 Vienna Convention on the Law of Treaties

Following the UK's ratification of the Vienna Convention on the Law of Treaties⁴⁰⁶ on 25 June 1971 and its entry into force on 27 January 1980 (following ratification by the required number of signatories), interpretation of conventions is governed by Article 31 (1) which provides that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"; and

Article 32 further provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order

⁴⁰⁵ J.G. Verplaetse, 'International Review: From Warsaw to the French Cour de Cassation: Article 25 of the Warsaw Convention', (1970) 36 J. Air L. & Com. 50

⁴⁰⁶ Treaty Series No. 058 (1980) Cmnd. 7964

to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

Thus, the Vienna Convention provides general rules for convention interpretation which are international in origin but which apply in the same way to convention interpretation in whatever legal system their use is required⁴⁰⁷. However, the House of Lords noted in *Fothergill v Monarch Airlines*⁴⁰⁸ that the Vienna Convention applies only to treaties concluded after it came into force and thus does not apply to the Hague Rules, the Hague-Visby Rules, the Warsaw Convention and its subsequent Protocol of 1955 or the CMR.

Nevertheless, recourse to the ‘preparatory work of the treaty’ under Article 32 (i.e. the travaux préparatoires) was effectively sanctioned in specific circumstances under *Fothergill* (see previous section); and in *Re Deep Vein Thrombosis & Air Travel Group Litigation*⁴⁰⁹ Lord Steyn held that “Article 31 of the Vienna Convention on the Law of Treaties . . . is the starting point of treaty interpretation to which other rules are supplementary”.

5.2 Hague & Hague-Visby Rules Interpretation Provisions

Article 1 of the Hague Rules sets out the meanings that are to be attributed to: ‘carrier’, ‘contract of carriage’, ‘goods’, ‘ship’ and ‘carriage of goods’ - although some of these definitions are not particularly precise, ‘contract of carriage’, for example:

“applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea . . .”

It is perhaps subjective as to what documents constitute ‘similar documents of title’, but this definition is essentially the same as that which appeared in the first draft code of the Hague Rules in 1921, and from the various drafting committees and delegate

⁴⁰⁷ See generally R. Gardiner, *Treaty Interpretation*, (OUP, Oxford, 2008)

⁴⁰⁸ n(368) at 282 per Lord Diplock

⁴⁰⁹ [2005] UKHL 72 at 31

discussions it is apparent that they saw no reason to list the documents of title which, in addition to bills of lading, would be considered acceptable, preferring to retain the wording 'similar documents of title' as "the desire was to avoid the possible side-stepping of the convention by parties through the adoption of a similar document that was not called a bill of lading"⁴¹⁰. Therefore, use of the phrase 'similar documents of title' acted as an anti-avoidance device, so that the Hague Rules could not be avoided simply by renaming a bill of lading.

Another advantage of using terms or phrases which are widely drawn is that a term can be inclusive rather than exclusive. This was noted by Lord Steyn in *J I MacWilliam Co Inc v Mediterranean Shipping Co SA*⁴¹¹ where at issue was whether straight bills of lading were 'similar documents of title', as he held that:

"similar documents of title are words of expansion as opposed to restriction. They postulate a wide rather than narrow meaning [and that] any attempt to treat those words as importing a restrictive meaning of a conforming document under article I(b) involves a distortion of the plain language".⁴¹²

Conversely, issues have arisen with phrases in the Hague Rules which are widely drawn. The duties of the carrier, such as 'the carrier shall properly and carefully stow'⁴¹³, 'management of the ship'⁴¹⁴, and the 'exercise [of] due diligence to make the ship seaworthy'⁴¹⁵ have regularly required judicial interpretation as it is unclear as to what particular obligations are specifically included and whether certain obligations could be delegated to a third party in certain circumstances⁴¹⁶. Potential differences in

⁴¹⁰ n(377) at 432 per Sir Leslie Scott

⁴¹¹ 2005 UKHL 11

⁴¹² n(411) at 44

⁴¹³ Article III r.2 which provides that "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

⁴¹⁴ Article IV r.2 (a) neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

⁴¹⁵ Article III r.1 (a) the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) Make the ship seaworthy.

⁴¹⁶ A carrier may employ some other person to exercise due diligence, (e.g. an independent repairer) but if that delegate is not diligent, the carrier is responsible. The test is what a prudent man would do in the circumstances. See *Union of India v. N.V. Reederij Amsterdam, 'The Amstelslot'* [1963] 2 Lloyd's Rep. 223 at 234-235 and *The Muncaster*

interpretation were highlighted in the early 1950s case *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*⁴¹⁷ as Devlin J held that:

“The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules”.

The definition of terms and phrases is perhaps further complicated in respect of the Hague Rules as similar words were used in the US Harter Act of 1893⁴¹⁸ and so had been adopted in bills of lading in the UK and the US (see section 3.1). Therefore, the judiciary has tended to apply the meaning previously adopted. In *Gosse Millard Ltd v Canadian Government Merchant Marine*⁴¹⁹, for example, the House of Lords held that in using the phrase ‘management of the ship’ there was no “reason for supposing that the words . . . have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date”. The result of the early English and American cases was that a distinction was drawn between care of cargo and care of the ship indirectly affecting the cargo.

However, due to differences in terminology between contracting states, the omission of precise definitions in some situations has meant that the Hague Rules have not been uniformly applied. For example, the English judiciary have interpreted the word ‘suit’ as contained in Article 3(b), as including arbitral proceedings whereas US judges have not⁴²⁰.

Despite such issues, further interpretative provisions were not deemed necessary by the legislators when the Hague Rules were subsequently amended, as the Hague-Visby

Castle [1961] 1 Lloyd’s Rep 57. See also W. Tetley, *Marine Cargo Claims*, (3rd Ed, International Shipping Publication, Montreal, 1988) at p.391

⁴¹⁷ [1954] 2 QB 402 at 418

⁴¹⁸ E.g. s.2 “to carefully handle and stow her cargo and to care for and properly deliver the same”

⁴¹⁹ [1929] AC 223 (HL) at 231 & 441

⁴²⁰ E.g. *Son Shipping Co Inc v De Fosse & Tanghe, Solel Bonel Ltd* (1952) 199 F. 2d 687 (US Court of Appeals 2nd Circuit)

Rules retained the original Article 1 definitions. By contrast, the 2008 Rotterdam Rules⁴²¹ incorporate numerous and specific definitions, with many more detailed provisions.

5.3 Warsaw Interpretation Provisions

The Warsaw Convention comprises few definitions apart from Article 1 which sets out the meaning of 'international carriage' and Article 35 which expressly states that 'days' when used in the Convention means working days.

It could be argued that if the drafters of the Warsaw Convention had explicitly addressed what constitutes an accident causing bodily injury under Article 17⁴²², what 'damage' under Article 26(2) specifically includes⁴²³ and who has title to sue under Articles 12, 13, 14, 15 and 30⁴²⁴; it would have provided the judiciary with clear direction and avoided much uncertainty amongst contracting states. But as phenomenon such as hijacking, terrorism or medical conditions such as psychiatric injury or deep vein thrombosis were perhaps not considered during the drafting process in the early 20th century, the judiciary have had to interpret the specific wording of the Convention to establish whether these conditions or events give rise to a claim in damages against an airline.

Nevertheless, the drafters of the Warsaw Convention did share a concern for the financial ability of all airlines to survive a single unfortunate event and recognised that airlines could not operate under the constant risk of traditional damage awards⁴²⁵. Although this concern hinged on the view that airlines could be the key to a nation's

⁴²¹ Being the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'

⁴²² E.g. whether 'bodily injury' in Article 17 includes psychiatric injury - see *Re Morris v KLM Dutch Airlines; King v Bristow Helicopters Ltd* [2002] UKHL 7 (HL)

⁴²³ E.g. whether 'damage' includes partial loss – see *Fothergill v Monarch Airlines* [1981] AC 251 (HL)

⁴²⁴ Warsaw Convention confers rights on the consignor and consignee identified on the air waybill but is silent as to whether other parties with an interest in the goods (typically cargo owners not named as consignor or consignee) are also entitled to sue the carrier. See for e.g. *Western Digital Corp v British Airways plc* [2001] 1 All ER 109 (CA) at 127-128 and *Sidhu v British Airways plc; Abnett v British Airways plc* [1997] AC 430 (HL) at 450

⁴²⁵ G.T Hill, 'Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry' (1996-1997) 19 Loy LA Int'l & Comp L.J. 635-636

economic development, it did produce a convention which was broad enough to cover loss and damage for some 70 years, albeit with some increases in limits of liability; and when the Warsaw Convention was subsequently amended, the drafters of the Montreal Convention did not see the need to add further interpretation provisions.

5.4 CMR Interpretation Provisions

As with the sea and air conventions, the CMR contains brief definitions and as with the other carriage conventions the judiciary have had to construe the meaning of several of the CMR provisions.

In some instances this has occurred because the methods of transporting goods have changed. Although Article 1(1) of the CMR provides that the “Convention shall apply to every contract for the carriage of goods by road in vehicles for reward”, it did not detail whether this actually included contracts where carriage by road was just part of the overall carriage contract and this was at issue in *Quantum Corp Inc and others v Plane Trucking Ltd and another*⁴²⁶ where goods were flown from Singapore to Paris and then carried by road to Dublin by a subcontractor. The Court of Appeal held that Article 1(1) of the CMR did not only apply where a contract provided for carriage by road from start to finish it was also to be read as applying to the road leg of an international contract for multimodal carriage.

In contrast to the other carriage conventions the CMR defines its main method of transport in terms used in another convention, as Article 1(2) describes ‘vehicles’ as “motor vehicles, articulated vehicles, trailers and semi-trailers as defined in Article 4 of the Convention on Road Traffic dated 19th September 1949”. However, modernisation of the transport industry and the development of container transport have rendered the Article 1(2) provisions virtually obsolete⁴²⁷.

⁴²⁶ [2002] EWCA Civ 350 (CA)

⁴²⁷ I. Bon-Garcin, ‘The 50th Anniversary of the CMR Convention – Future and Perspectives of International Road Transport’ Unif L. Rev 2006, p.708

Article 1(4) outlines the types of carriage to which the CMR does not apply, namely “(a) carriage performed under the terms of any postal convention (b) funeral consignments and (c) furniture removal”, and it is perhaps interesting to note from the commentary of the CMR that the original draft of the CMR did not provide for the exclusion of furniture removals instead it contained a series of special provisions applicable to transport operations of this type⁴²⁸. Nevertheless for various reasons, including the fact it was not possible to find a satisfactory definition for the concept of ‘furniture removal’, the special provisions were excluded from the final drafting of the convention⁴²⁹.

Moreover, unlike the Hague Rules, the term ‘carrier’ is not defined in the CMR and in *Ulster Swift Ltd v Taunton Meat Haulage, Fransen Transport NV (Third Party)*⁴³⁰, the Court of Appeal construed a ‘carrier’ as being a

“person who contracts to carry goods is a carrier even if he subcontracts the actual performance of the whole of the carriage to someone else. This view is strongly, and we think conclusively supported in Article 3. In our view, this article entitles a person who has contracted to carry, to perform the contract by means of a subcontractor, though he himself remains liable under the Convention as a carrier”⁴³¹.

However, the lack of defining words in certain provisions has meant that national judges have been able to construe phrases according to their own jurisdictions. For example, Article 23(4) of the CMR states “the carriage charges, Customs, Duties and other charges incurred in respect of the carriage of the goods shall be refunded in full”, and the House of Lords held in *Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd*⁴³² that ‘other charges’ included consequential expenses so they included expenses consequential to breach of the contract of carriage, such as the cost of surveying the damaged goods, the amount of extra duty and/or VAT payable because the goods did not reach their designated destination, and return carriage charges. Thus, the English judiciary have taken a broad approach to the interpretation of “other charges” as have

⁴²⁸ R. Loewe, ‘United Nations Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)’, Geneva 1975, p.12

⁴²⁹ n(428)

⁴³⁰ [1977] 3 All ER 641(CA)

⁴³¹ n(430) at 646 per Megaw LJ

⁴³² [1978] AC 141 (HL)

the judiciary in Belgium and France. The Dutch judiciary however have followed a narrower interpretation⁴³³.

In Article 29 of the CMR, there is not only an absence of defined terms but there also differences between the different language versions of the text. In the English version a carrier will lose his right to limitation if he causes the loss by wilful misconduct or by default equivalent to wilful misconduct, but in the French version a carrier loses his right to limitation if he causes the loss intentionally (*dol*) or with negligence (*faute*) that is considered to be equal to intent. This has resulted in different interpretations across different states, as the English courts have held that 'wilful misconduct' is different to 'negligence'⁴³⁴ but the French and Swedish courts have found that the concept *gross negligence (faute lourde)* is equal to intent, so a carrier is not required to be aware of the risk at the time the damage was caused⁴³⁵. Consequently, it would appear that a carrier faces a greater risk of losing his right to limitation in France and Sweden compared to in England.

6.0 JUDICIAL RECOURSE TO FOREIGN LANGUAGE TEXT OF CONVENTIONS

As the Hague Rules, the Warsaw Convention and the CMR were all drawn up in French, with an English translation incorporated in the enabling UK statutes, this section will examine the different versions of the convention and the circumstances under which the judiciary have made reference to the original foreign text of the convention.

Figure 9 demonstrates the extent to which the judiciary have made recourse to the original language of the Convention when interpreting its provisions.

⁴³³ E.g. *Phillip Morris v Van der Graaf* (NJ 2006/599) where the Supreme Court held that no "other costs would be refunded, with the exception of those pertaining to a normal execution of the carriage as such so costs pertaining to customs, duties and other charges that came to life due to theft, need not be refunded"

⁴³⁴ See *Horabin v BOAC* [1952] 2 All ER 1016 where Barry J distinguished between 'wilful misconduct' where the carrier must know or appreciate and the consequences of his actions and 'negligence' where wrongful intent is absent

⁴³⁵ See Cass. 8.1.74, ETL 1974.314, Cass. 29.1.85, BT 1985.345 and ND 1986.27 SH in Johan Schelin, 'CMR Liability in a Law & Economics Perspective', available at <http://www.juridicum.su.se/transport/Forskning/artiklar/Scandinavian.pdf>

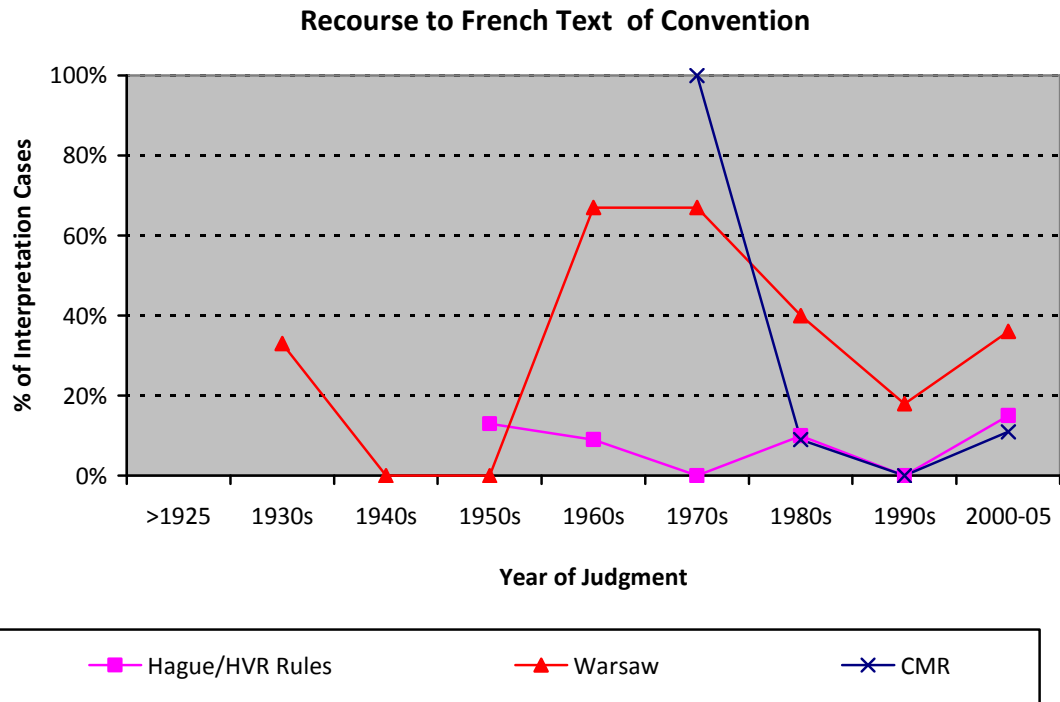


FIGURE 9

6.1 French Text of the Hague Rules / HVR

Whilst the authoritative version of the Hague Rules is French, it is the English translation of the French text of the convention which was given statutory force in the UK under the Carriage of Goods by Sea Act 1924.

Nevertheless, Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd*⁴³⁶ held that as the French text was the only authoritative version of the Convention, it was permissible to look at it and that it may help to solve an ambiguity. Since which time, the judiciary have sporadically referred to the French text to construe provisions of the Hague Rules.

In *G.H Renton & Co Ltd v Palmyra Trading Corporation of Panama*⁴³⁷ and *Albacora S.R.L. v Westcott & Laurence Line*⁴³⁸, where the phrase ‘shall properly and carefully load’ in

⁴³⁶ [1954] 2 QB 402 at 421

⁴³⁷ [1956] 1 All ER 209 (CA) at 220

⁴³⁸ [1966] 2 Lloyd's Rep 53 (HL)

Article III r.2 was at issue, the Court of Appeal and the House of Lords respectively, held that the phrase meant carrying out tasks in an appropriate manner with reasonable care as per the French text '*de façon appropriée*'; and not as previously held in *Gosse Millard v Canadian Government Merchant Marine*⁴³⁹ where it was taken to mean "deliver from the ship's tackle in the same apparent order and condition as on shipment".

However, the French text has not always been referred to. For example, in *T.B. & S Batchelor & Co Ltd (Owners of Cargo on The Merak) v Owners of S.S Merak*, '*The Merak*⁴⁴⁰ the parties agreed that the Hague Rules should be construed according to the English text – therefore, in considering whether the expression 'suit is brought' within Article III r.6 included the commencement of arbitral proceedings, the Court of Appeal was not invited to consider the precise meaning and ambit of the French expression '*intenter une action*'.

When the Hague Rules were subsequently amended by the Hague-Visby Rules, they were given the force of law by the Carriage of Goods by Sea Act 1971 which again contained an English translation of the French text of the Convention⁴⁴¹. But although the English version was deemed to be equally authentic to the French text⁴⁴², it has not prevented the judiciary from having recourse to the French text where interpretation of the convention is at issue, as Figure 9 demonstrates. In fact in the period 2000-2005 there was a 50% increase in the judiciary's reference to the French text of the convention. The most recent case being *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA, 'The Rafaela S'*⁴⁴³ where Lord Rodger in the House of Lords, used the French text to demonstrate that the words 'bill of lading or any similar document of title' should be read as words of expansion rather than restriction as this supported a wider interpretation.

⁴³⁹ [1927] 2 KB 432 at 434

⁴⁴⁰ [1965] 1 All ER 230 (CA)

⁴⁴¹ As Schedule One of the Act

⁴⁴² E.g. *The Hollandia* [1983] 1 AC 565 (HL) at 576 "[the] version in the French language is of equal authenticity" per Diplock LJ and also *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping* [2004] UKHL 49 (HL) at 18 "the English and French texts are equally authentic in the case of the Hague-Visby Rules"

⁴⁴³ [2005] UKHL 11 (HL) at 75

6.2 French Text of the Warsaw Convention

As with the Hague Rules, the French text is the only authoritative text of the Warsaw Convention⁴⁴⁴ and s.1 (1) of the Carriage by Air Act 1932 provides that “the provisions [of the Convention] as set out in the First Schedule to this Act shall . . . have the force of law in the United Kingdom”. However, whilst this schedule contains an English translation, it was plainly the intention of Parliament to give effect to the French text by making an exact translation of it into English, yet the judiciary has made recourse to the French text in interpreting various provisions.

In 1938 the Court of Appeal noted in *Philippson v Imperial Airways Ltd*⁴⁴⁵ that the foreign text of the Warsaw convention was capable of a different interpretation than that of the English translation, and on appeal to the House of Lords⁴⁴⁶ their Lordships referred to the French text of the convention, in determining the Article 1 term ‘high contracting parties’.

It was a further 30 years before the French text of the Warsaw Convention was referred to again by the judiciary. By this time the Warsaw Convention had been amended by the Hague Protocol, which had been done in three authentic texts - French, English and Spanish, with the proviso that in the case of any inconsistency the French language text, (as the text of the original convention) shall prevail and been give statutory effect by the Carriage by Air Act 1961 . But unlike the original 1932 Act, the 1961 Act incorporated in Schedule 1 both English and French language versions of the amended Warsaw Convention, with s.1(2) providing that “if there is any inconsistency between the text in English . . . and text in French, the French text shall prevail”.

This was demonstrated in *Corocraft Ltd and Another v Pan American Airways Inc*⁴⁴⁷ where the Court of Appeal upheld the French interpretation, because the insertion of the word ‘and’ in the English translation of Article 8(i) and Article 8 (h) of the Warsaw

⁴⁴⁴ Article 36 states that “The Convention is drawn up in French in a single copy”

⁴⁴⁵ [1938] 1 All ER 759 (CA) at 764

⁴⁴⁶ *Philippson v Imperial Airways Ltd* [1939] 1 All ER 761 (HL) at 766

⁴⁴⁷ [1969] 1 All ER 82 (CA)

Convention effectively meant that three of the four requirements had to be stated on the air consignment note, whereas in the French text only one out of the four requirements needed to be stated. This case therefore highlighted the problems of adopting English translations of foreign convention texts, as Denning LJ held

“it was plainly the intention of the English Parliament to give effect to th[e] French text by making an exact translation of it into English . . . [but] The translator put his own gloss on the French text. He produced certainty where there was ambiguity and clarity where there was obscurity”⁴⁴⁸.

However, Browne LJ and Geoffrey Lane LJ both noted in *Fothergill v Monarch Airlines*⁴⁴⁹ that the s.1 provision where the French text prevailed, could give rise to certain difficulties. Browne LJ holding that:

“My knowledge of French law is hopelessly inadequate to enable me to decide what ‘avarie’ means in the French language generally, in French law (civil or maritime) or in the context of the French text of this convention . . . if the airline wanted to rely on this point they should have called a French lawyer to give expert evidence”⁴⁵⁰.

Nonetheless, such difficulties were overlooked when *Fothergill v Monarch Airlines*⁴⁵¹ went on appeal to the House of Lords, as Lord Wilberforce held that:

“it is not only permissible to look at a foreign language text, but obligatory. What is made part of English law is the text set out in Schedule 1, so both English and French texts must be looked at.”⁴⁵²

As Figure 9 shows, the judiciary continued to make limited but relatively consistent reference to the French text⁴⁵³ of the Warsaw Convention with peaks of usage in the 1980s and in the 2000-2005. It is worth noting that by the late 1990s recourse to the French text appears to have become dependent on ambiguity in the English text, as

⁴⁴⁸ n(447) at 87

⁴⁴⁹ [1979] 3 All ER 445 (CA) at 455 and 459

⁴⁵⁰ n(449) at 455

⁴⁵¹ [1981] AC 251 (HL)

⁴⁵² n(451) at 272

⁴⁵³ In cases such as *Goldman v Thai Airways* [1983] 3 All ER 693 (CA) at 700 and *Adatia v Air Canada* Official Transcripts (1990-1997) 21 May 1992 (CA)

Phillips LJ held in *Milor SRL and others v British Airways plc*⁴⁵⁴ that “in the absence of ambiguity it is not a legitimate aid to interpretation”.

This was also the case in *KLM Royal Dutch Airlines v Morris*⁴⁵⁵ and *Re M; King v Bristow Helicopters Ltd*⁴⁵⁶ where the words ‘accident’ and ‘bodily injury’ in Article 17 of the Warsaw Convention were held to be ambiguous and thus the French text was used to interpret whether they included mental injury.

However, by 2005 in the *Deep Vein Thrombosis v Air Travel Group*⁴⁵⁷ series of actions, where the same words fell to be construed in order to ascertain whether the onset of deep vein thrombosis was included within the provisions of Article 17, the French text was referred to without any reference to ambiguity in the English version.

6.3 USA Version of the Warsaw Convention

In 1956 it became apparent in *Preston and Another v Hunting Air Transport Ltd*⁴⁵⁸ that there were divergent English language translations of the Warsaw Convention. The US case⁴⁵⁹ cited in authority referred to the United States translation of the original French text of the Warsaw Convention and this was held to differ to that which appeared in Schedule 1 of the Carriage by Air Act 1932. Although Ormerod J did state that “the words are substantially the same”⁴⁶⁰.

Some 25 years later, in *Rothmans of Pall Mall (Overseas) Ltd & Others v Saudi Arabian Airline Corporation*⁴⁶¹ the Court of Appeal, in construing Article 28 of the Warsaw Convention, identified a number of US decisions, but it was found that these cases proceeded upon a US translation of the French text and the language used differed from

⁴⁵⁴ [1996] QB 702 (CA) at 708

⁴⁵⁵ [2001] All ER 214 (CA)

⁴⁵⁶ [2002] UKHL 7 (HL)

⁴⁵⁷ [2005] UKHL 72 (HL)

⁴⁵⁸ [1956] 1 All ER 443

⁴⁵⁹ *Grey v American Airlines Inc* (1950) 95 F Supp 756 (Southern District Court of New York)

⁴⁶⁰ n(458) at 447

⁴⁶¹ [1981] QB 368 (CA)

that scheduled to the English Act, so although the cases perhaps achieved the same result they did not afford a safe guide to the right conclusion because they were based upon differing texts⁴⁶².

Similarly, in *Rolls Royce plc and another v Hevylift-Volga DNEPR Ltd and another*⁴⁶³ where the exact boundaries of the 'aerodrome' in Article 18(2) of the Warsaw Convention fell to be interpreted in respect of a cargo destined for the US. Morrison J held that the international aspect of the convention demands that no distinction is drawn between 'airport' contained within the US text of the Warsaw Convention and 'aerodrome' contained within the English and French text of the Convention. "It makes no sense to hold that if unloading of cargo took place in the USA it would be covered by the convention but that if the same activity had been carried out in precisely the same location in France and the UK it would be outside the convention"⁴⁶⁴.

6.4 French Text of the CMR

By contrast to the Hague Rules and the Warsaw Convention, the CMR states it was "done in the English and French languages, each text being equally authentic"⁴⁶⁵, although it is the English text alone which is given the force of law in the Carriage of Goods by Road Act 1965.

Nevertheless, the judiciary have made recourse to the French text of the convention as Figure 9 demonstrates. The first case to refer to the French text of the CMR was *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*⁴⁶⁶ in the Court of Appeal, where Roskill LJ held he was entitled to look at the French text of the Convention citing

⁴⁶² n(461) at 383

⁴⁶³ [2000] 1 All ER 796

⁴⁶⁴ n(463) at 805

⁴⁶⁵ See text of CMR available at http://www.unece.org/fileadmin/DAM/trans/conventn/cmr_e.pdf. See also *James Buchanan & Co Ltd v Babco Forwarding and Shipping (U.K) Ltd* [1978] AC 141 (HL) at 153 and *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] 1 All ER 883 (CA) at 890

⁴⁶⁶ [1977] Q.B. 208 (CA)

an earlier judgment which stated “it was legitimate to look at the French and Spanish texts of the convention in question to resolve any ambiguity”⁴⁶⁷, and that it did

“not require profound knowledge of the French language to gain assistance from the words ‘*les autres frais encores à l’occasion du transport de la merchandise*’ as they are quite general in their nature and wide in their compass and [thus] quite clearly allowed the plaintiffs to recover the excise duty in question”⁴⁶⁸.

However, on appeal to the House of Lords⁴⁶⁹, the judiciary’s recourse to the French text of the convention was not unanimous. Lord Wilberforce held that it was “perfectly legitimate to look for assistance, if assistance is needed, to the French text, and there was no need to impose a preliminary test of ambiguity”⁴⁷⁰. This view supports the notion that the texts of the CMR convention are equally authentic but it was not a view shared by Viscount Dilhorne and Lord Salmon who were sceptical of the utility of consulting the French text, stating that there should actually be no recourse to the French text as Parliament had only scheduled the English text of the CMR to the Carriage by Air Act 1961 and declared it had the force of law. Lord Edmund-Davies also expressed “misgivings about the bench drawing solely of its knowledge of a foreign language in arriving at important conclusions” and he was not convinced the Lords “were justified in claiming to have derived enlightenment from the French text”⁴⁷¹.

It is interesting to note that even when the judiciary have not been invited by counsel to look to the French text, Megaw LJ held in *Ulster-Swift Ltd & Another v Taunton Meat Haulage Ltd*⁴⁷², that “we should willingly looked at the text of the convention in the French language to see whether it would provide any assistance on any doubtful questions as to the meaning of the convention”.

⁴⁶⁷ See *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA) at p.760 referring to the ‘Convention on the Territorial Sea and Contiguous Zone’ per Diplock LJ

⁴⁶⁸ n(466) at 221

⁴⁶⁹ *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 (HL)

⁴⁷⁰ n(469) at 153 also referring to *Carter v Bradbeer* [1975] 1 WLR 1204 (HL) at 1206

⁴⁷¹ n(469) at 167

⁴⁷² [1977] 3 All ER 641 (CA) at 648

During the 1980s the judiciary referred to the French text of the convention in just two cases, and the English version was held to be consistent with the French text⁴⁷³. No further referral was made to the French text until 2001 when the judiciary in *Andrea Merzario Ltd v International Spedition Leitner Gesellschaft GmbH*⁴⁷⁴, simply reaffirmed the dicta of Wilberforce LJ in *James Buchanan & Co Ltd v Babco Forwarding & Shipping* stating it was legitimate to look for assistance at the French text and that there was no need to impose a preliminary test of ambiguity.

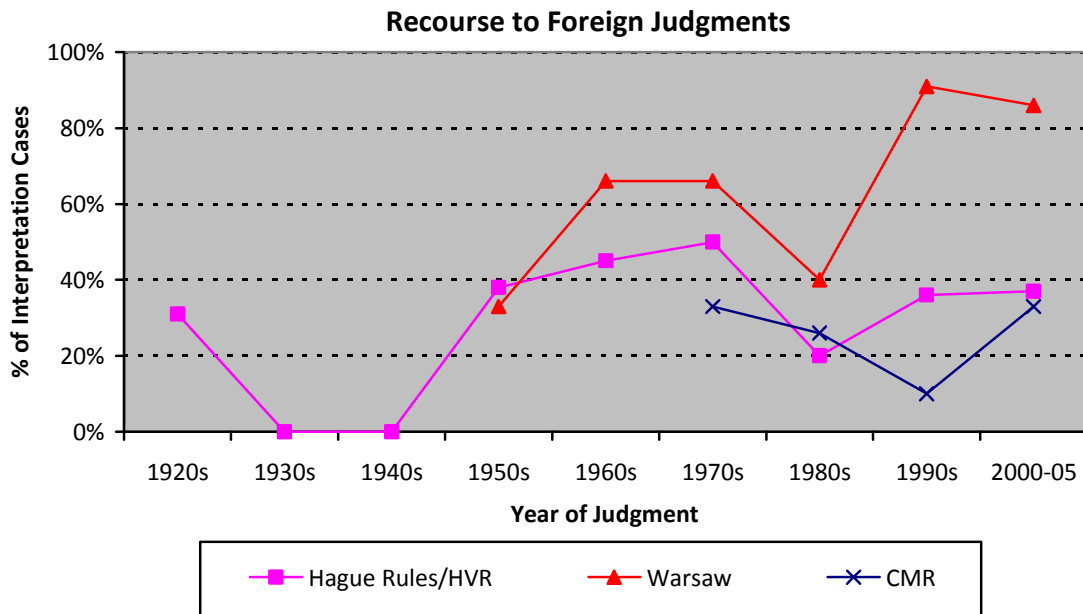
7.0 JUDICIAL RECOURSE TO COMPARATIVE JURISPRUDENCE

This section focuses on the extent to which the judiciary have consulted the decisions of Courts in Contracting States when construing the provisions of the carriage conventions and the compatibility of those decisions with English law. This is an important consideration as international conventions are developed to harmonise laws between different jurisdictions, but the provisions are interpreted by the various domestic courts of the contracting parties, which can lead to differing judgments.

Figure 10 shows the extent to which the judiciary have made recourse to the decisions of foreign courts when interpreting provisions of the carriage convention. It is clearly evident that in over 80% of cases from 2000-2005 involving interpretation of the Warsaw Convention the judiciary have referred to foreign judgments; but in comparison when interpreting the Hague Visby Rules or the CMR the judiciary have made recourse in less than 40% of cases.

⁴⁷³See *Eastern Kayam Carpets Ltd v Eastern United Freight Ltd* (unreported) 6 December 1983 at 28 and *J.J. Siber Ltd & Others v Islander Trucking Ltd* (unreported) 8 November 1984 at 4

⁴⁷⁴[2001] All ER 131 (CA) at 18

**FIGURE 10**

7.1 The Hague / HVR Rules

7.1.1 Use of Foreign Judgments 1925 - 1949

In 1927, some two years after the Hague Rules were given effect in English law, Atkin LJ noted in *Brown & Co Ltd v Harrison, Hourani v Harrison*⁴⁷⁵ the commercial importance of uniformity of construction when “dealing with words in statutes dealing with the same subject matter” and the need for decisions in English courts “to correspond with the decisions given by the courts of the highest authority in the United States” – although the case itself did not refer to any foreign judgments.

However, the need for unity between English and US decisions was a view not shared by all the judiciary. In *W. Angliss & Co (Australia) Proprietary Ltd v P & O*⁴⁷⁶ Wright J in construing ‘due diligence to make the ship seaworthy’⁴⁷⁷ held that the carrier was not liable for the breach of due diligence as it was a defective repair which had damaged the

⁴⁷⁵ [1927] All ER Rep 195 (CA) at 202

⁴⁷⁶ [1927] 2 KB 456 at 464

⁴⁷⁷ Article III r.2

cargo and this work had been delegated to competent workmen and surveyors, which was contrary to the US decisions in *The R.P. Fitzgerald*⁴⁷⁸ and *The Abbazia*⁴⁷⁹.

Likewise in *Gosse Millard v Canadian Government Merchant Marine*⁴⁸⁰ the Court of Appeal concluded that negligence in the management of the hatches fell within the meaning of the phrase 'neglect of default ... in the management of the ship'⁴⁸¹ and therefore the carriers were not liable for the damage. This judgment being contrary to US decisions where the expression was held *not* to include insufficient covering of the hatches (*The Jeannie*⁴⁸²) and failure to close the hatches in rough weather (*Andean Trading Co v Pacific Steam Navigation Co*⁴⁸³); even though these cases were decided under the US Harter Act of 1893 from which the Hague Rules article had been adopted. In fact, Scrutton LJ highlighted a potential tension in following US decisions as he doubted the expediency of:

“making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive and commercial adventure is far more timid . . . The United States of America have not been . . . a shipowning country, and they have approached shipping matters from the point of view of the cargo owners. I cannot think that their decisions, whilst treated with great respect, should necessarily control the shipping decisions in the courts of the greatest shipping country in the world”⁴⁸⁴.

At first glance any such tension appears to have been swiftly resolved, because when 'management of the ship' fell to be construed again two months later, Wright J in *Foreman and Ellams Ltd v Federal Steam Navigation Company Ltd*⁴⁸⁵ followed the US judgments such as *The Samland*⁴⁸⁶ and earlier English cases such as *Rowson v Atlantic*

⁴⁷⁸ (1914) 212 Fed Rep 678

⁴⁷⁹ (1904) 127 Fed Rep 495

⁴⁸⁰ [1928] 1 KB 717 (CA)

⁴⁸¹ Article IV r.2(a)

⁴⁸² 236 Fed Rep 463

⁴⁸³ (1920) 263 Fed Rep 559

⁴⁸⁴ n(480) at 733

⁴⁸⁵ [1928] 2 KB 424

⁴⁸⁶ (1925) 7 Fed Rep (2nd Series) 155

*Transport Co*⁴⁸⁷ and held that the words "neglect or default . . . in the management of the ship" referred to matters directly affecting the ship as a ship, and did not apply to negligent acts in relation to those parts of the ship - such as the refrigerating machinery - which were provided solely for the care of the cargo, and that therefore the carriers were liable.

The House of Lords subsequently reversed the Court of Appeal decision in *Gosse Millard v Canadian Government Merchant Marine*⁴⁸⁸ holding that the dicta of earlier English cases⁴⁸⁹ and followed by the US Courts⁴⁹⁰ was the correct interpretation to apply. Consequently, any early uniformity appears to be fundamentally uniformity with English common law.

7.1.2 Hague Rules / HVR - Use of Foreign Judgments 1950 - 1979

As Figure 11 shows, for some 30 years the only foreign decisions referred to by the judiciary were those of the United States Courts. This is perhaps not surprising given that there was a collective body of authorities for the judiciary to refer to, as both the US and the English courts had previously decided cases under the US Harter Act, which was the basis of some of the Hague Rule provisions.

This changed somewhat in 1954, when Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd*⁴⁹¹ considered two Australian court decisions⁴⁹² in addition to a US case⁴⁹³ although these cases concerned third parties on the carrier's side, whereas *Pyrene* concerned a

⁴⁸⁷ [1903] 2 KB 666 (CA)

⁴⁸⁸ [1929] AC 223 (HL) at 231

⁴⁸⁹ E.g. *The Ferro* [1893] P36, 44, 46 and *The Glenochil* [1896] P10,15, 16,19

⁴⁹⁰ See *The Jeannie* n(481) and *Andean Trading Co v Pacific Steam Navigation Co* n(482)

⁴⁹¹ [1954] 2 QB 402

⁴⁹² i.e. *Gilbert Stokes & Kerr Proprietary Ltd v Dalgety & Co Ltd* (1948) 48 S.R. (NSW) 435 and *Waters Trading Co v Dalgety & Co Ltd* [1952] S.R. (NSW) 4 which both allowed stevedores and other agents of the carrier to claim the benefits of the Hague Rules

⁴⁹³ *Collins v Panama Railroad Co* (1952) 197 F. 2d 893 (US Court of Appeals 5th Circuit) which held that "A stevedore so unloading . . . does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed"

third party on the shipper's side. Devlin J nevertheless held that a party, whilst not directly party to the contract of carriage, could participate sufficiently to be bound by the limitation imposed by Article IV r.5 of the Hague Rules⁴⁹⁴. Devlin J further held that under Article III r.2 of the Hague Rules the carrier may contract out of the loading and discharging obligations but where he does undertake such obligations he is obliged to do so 'properly and carefully' and whilst this view has been followed in subsequent English cases⁴⁹⁵, courts in Australia, the US and South Africa have taken contrary views⁴⁹⁶.

The question of privity was further considered in the 1962 case *Scruttons Ltd v Midland Silicones Ltd*⁴⁹⁷, where the House of Lords held that stevedores engaged by the carrier but not party to the contract of carriage were *not* entitled to rely on the limitation of liability limits contained within the Hague Rules. This decision was contrary to the decision in *Pyrene*⁴⁹⁸ (and hence the Australian and US judgments referred to in it), but by then the Australian High Court had overruled the earlier decisions of its lower courts⁴⁹⁹ and there had been considerable litigation in the United States, some of which agreed with the English judiciary⁵⁰⁰. Therefore, a degree of uniformity in regard to privity was reached, with Viscount Simonds noting that:

“it is very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should, after protracted negotiations, reach agreement ... and that their several courts should then disagree as to the meaning of what they appeared to agree upon”⁵⁰¹.

⁴⁹⁴ This judgment also agreed with the principles in *White v John Warrick & Co Ltd* [1953] 2 All ER 1021 (CA) and *Elder Dempster & Co v Paterson Zochonis & Co* [1924] AC 522 (HL)

⁴⁹⁵ E.g. *G.H. Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1956] 3 All ER 957 (HL) per Lord Morton at 967

⁴⁹⁶ See for e.g. *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor* (1998) 44 NSWLR 371 at 387 (Australia); *Associated Metals and Minerals Corp v M/V The Arktis Sky* (1992) 978 F 2d 46 (US Court of Appeals 2nd Circuit) and *The MV Sea Joy* (1998) 1 SA 487 (South Africa)

⁴⁹⁷ [1962] AC 446 (HL)

⁴⁹⁸ n(491)

⁴⁹⁹ See *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* [1956] 1 Lloyd's Rep 346

⁵⁰⁰ See for e.g. *Robert C. Herd & Co v Krawill Machinery Corp* [1958] 256 F 2d 946 (US Court of Appeals 4th Circuit)

⁵⁰¹ n(497) at 471

Although uniformity appeared to be the outcome of several House of Lords cases at this time⁵⁰², it was not necessarily because English Courts were following the dicta of foreign courts, rather it continued to be due to the fact that English courts were following their own earlier dicta, which in some cases agreed with the decisions of foreign courts. This meant, however, that when long established English law met with contrary foreign dicta, the English judiciary were given to apply English precedent. This was clearly shown in cases from the mid to late 1960s and the 1970s, when the judiciary although referring to foreign judgments in some 50% of interpretation cases, were often not given to following such decisions. In *T.B. & S Batchelor & Co Ltd (Owners of Cargo on The Merak) v Owners of S.S Merak, 'The Merak'*⁵⁰³, the Court of Appeal dissented from a US⁵⁰⁴ interpretation of Article III r.6 of the Hague Rules holding that 'suit' included arbitral proceedings⁵⁰⁵; and in *Aries Tankers Corporation v Total Transport*⁵⁰⁶ the House of Lords declined to follow US decisions⁵⁰⁷ holding that the 12 month time limit did not only bar a remedy but extinguished the right to claim, so no alternative method of recovery was available.

Similarly, in *Henriksens Rederi A/S v T.H.Z Rolimpex, 'The Brede'*⁵⁰⁸ the Court of Appeal considered judgments from the US⁵⁰⁹ and Australia⁵¹⁰, which supported the principle that the right to 'set-off' was distinguishable from a counter claim and therefore not subject to the Hague Rules 12 month limitation period, but Denning LJ held it was long

⁵⁰² See for e.g. *Riverstone Meats Co Pty v Lancashire Shipping Co Ltd* [1961] 1 All ER 495 (HL) in which the House of Lords upheld court judgments in the US (*The Colima* (1897) 82 Fed Rep at p.678) Canada (*Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd* [1952] 1 D.L.R. 850 at 854). and New Zealand (*B.J. Ball (New Zealand) Ltd v Federal Steam Navigation Co Ltd* [1950] NZLR 954), that on the true construction of Article III r.1 of the Hague Rules the obligation on the carriers to 'exercise due diligence . . . to make the ship seaworthy' cannot be escaped by employing a competent independent contractor who was in fact negligent. In so doing the House of Lords reversed the decision of the Court of Appeal, but the foreign dicta also agreed with earlier English cases e.g. *Dobell & Co v SS Rossmore* [1895] 2 QB 408 at 413, 416

⁵⁰³ [1965] 1 All ER 230 (CA)

⁵⁰⁴ In *Son Shipping Co Inc v De Fosse & Tanghe, Solel Bonel Ltd* (1952) 199 F. 2d 687 (US Court of Appeals 2nd Circuit)

⁵⁰⁵ See also *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842 (CA) where the Court of Appeal preferred the English interpretation in the '*SS Merak*' n(503) to that of the US decision in *Son Shipping* n(504)

⁵⁰⁶ [1977] 1 All ER 398 (HL)

⁵⁰⁷ i.e. *Bull v United States* (1935) 295 US 247 (US Supreme Court) and *Pennsylvania Railroad Co v Miller* (1942) 124 F 2d 160 at 162 (US Court of Appeals)

⁵⁰⁸ [1974] QB 233 (CA)

⁵⁰⁹ *Compania Naviera Puerto Madrin SA Panama v Esso Standard Oil Co* (1962) AMC 147

⁵¹⁰ *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* [1969] ALR 533 (High Court of Australia)

established in English law that a cargo owner had no right to make deductions from freight in respect of short delivery or damage to cargo, so freight was payable according to the terms of the contract.

7.1.3 Hague Rules / HVR Rules – Use of Foreign Judgments 1980 - 2005

Despite this trend towards ‘English law’ interpretations and the fact that the judiciary referred to foreign judgments in fewer cases during the 1980s – 20% of cases compared with 50% in the previous decade (see Figure 10); uniformity of interpretation was still noted by the judiciary as an important objective. In *The Clifford Maersk*⁵¹¹ for example, Sheen J held that it was desirable that there should be consistency between the decisions of English and United States courts, and in deciding when the Hague Rules limitation period expired, agreed with the US Court of Appeals⁵¹². Although it should be noted the judgment of Sheen J also followed a rule applicable to time bars prescribed by statute, which had been laid down by the English Court of Appeal⁵¹³.

Likewise, in *Effort Shipping Co Ltd v Linden Management SA, ‘The Giannis NK’*⁵¹⁴ Lord Steyn stated that “in the construction of an international convention an English court does not easily differ from a crystallised body of judicial opinion in the United States”⁵¹⁵. Nevertheless, the House of Lords were disinclined to follow the decisions of the US courts⁵¹⁶ in holding that Article IV r.6 was a free standing provision which imposed strict liability on shippers in relation to the shipment of dangerous goods.

Consequently, when a degree of international uniformity was reached in the interpretation of Hague Rule provisions, it continued to be more by default than by a definite intention by the English judiciary to follow the decisions of foreign courts. Nonetheless, the judiciary continued to consider foreign judgments, particularly US

⁵¹¹ [1982] 3 All ER 905 where Article III r.6 the Hague Rules was again at issue

⁵¹² *J. Aron & Co Inc v SS Olga Jacob* (1976) 527 F 2d 416 (US Court of Appeals, 5th Circuit)

⁵¹³ See *Pritam Kaur v S Russell & Sons Ltd* [1973] 1 All ER 617 (CA)

⁵¹⁴ [1998] 1 All ER 495

⁵¹⁵ n(514) at 509

⁵¹⁶ I.e. that there should be no liability without fault, the US interpretation being based on the alleged overriding effect of Article IV r.3

decisions, as can be seen in Figures 10 and 11. In *River Gurara v Nigerian National Shipping Line Ltd*⁵¹⁷ for example, the Court of Appeal held that where parcels of cargo were loaded into containers it was the parcels, not the containers which constituted the relevant packages for the purposes of computing liability under the Hague Rules. Although this approach was supported by courts in jurisdictions such as the US, Canada, Australia and Italy⁵¹⁸, Phillips LJ stated that an earlier English case⁵¹⁹ and the *Oxford English Dictionary* definition of ‘package’ would have led him to the same conclusion in the absence of authorities.

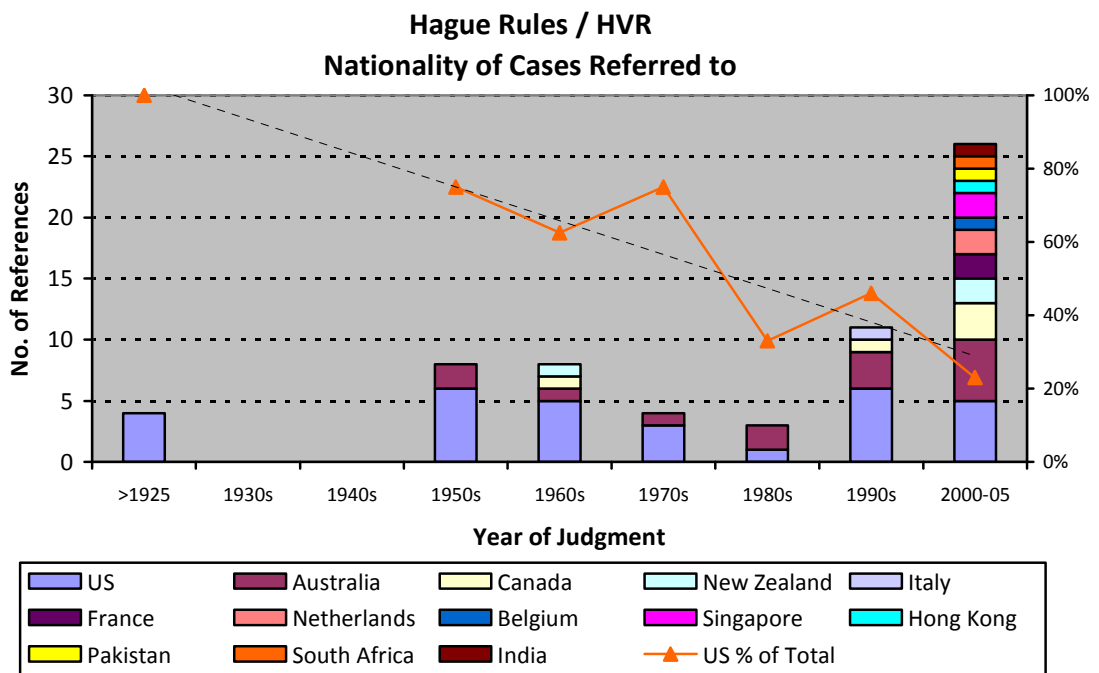


FIGURE 11

It is also important to note that *River Gurara* was the first case where authorities from a civil law jurisdiction (i.e. Italy) were considered alongside decisions from hitherto common law jurisdictions.

⁵¹⁷ [1998] QB 610 (CA) where at issue was whether Article IV r.5 of the Hague Rules, which entitled carriers to limit their liability to £100 per package or unit, meant per container or per individual item listed on the bill of lading

⁵¹⁸ See for e.g. *The Mormaclynx* [1971] 2 Lloyd’s Rep 476 (US Court of Appeals 2nd Circuit); *The Tindjell* [1973] 2 Lloyd’s Rep 253 (Canada) *P.S. Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd’s Rep 413 (New South Wales Supreme Court, Australia); *Compagnia Meditterranea Servizi Maritimi S.p.A v Carniti* 27 April 1984 No. 2643 (Italian Supreme Court of Cassation)

⁵¹⁹ *Bekol B.V. Terracina Shipping Corporation* (unreported) 13 July 1988 which had considered the meaning of ‘package’

In *Finagra (UK) Ltd v OT Africa Ltd*⁵²⁰ Rix J held that even though cases turned on their own special factors, foreign authorities did provide several guidelines for interpretation and during the first five years of the 21st century, the judiciary referred to authorities from foreign jurisdictions in nearly 40% of cases (see Figure 10). Although many of these referred to the decisions of US courts, an increasing number began referring to judgments from a range of civil jurisdictions. For example, in *The David Agmashenebeli*⁵²¹ Colman J followed cases from Belgium⁵²² and the US⁵²³ in holding that Article III, r.3 of the Hague Rules did not imply a contractual guarantee of absolute accuracy as to the order and condition of the cargo; the shipowner's duty was to issue a bill of lading which recorded the apparent order and condition of the goods according to the reasonable assessment of the master - a judgment which however also agreed with earlier English dicta⁵²⁴.

It is apparent though, that even when English courts have agreed with foreign judgments, higher courts can subsequently overrule their interpretation. For example, in *Parsons Corporation & Others v CV Scheepvaartonderneming, 'The Happy Ranger'*⁵²⁵ the phrase limitation of liability 'in any event' under Article IV r.5 fell to be construed. This had previously been interpreted in England⁵²⁶, the US and Canada⁵²⁷ as meaning carriers could not rely on the limitation provisions if they were in fundamental breach. But the Court of Appeal rejected this interpretation, holding it to be applicable to a breach, irrespective of the seriousness of the breach and this was affirmed by the Court

⁵²⁰ [1998] All ER 296

⁵²¹ [2002] EWHC 104

⁵²² E.g. *The SS Rosario*, unreported 3 November 1977 (Brussels High Court)

⁵²³ E.g. *Sidney J Groban and Union Tractor Ltd v SS Pegu and Elder Dempster Lines Ltd* (1971) 331 F Supp 883 (Southern NY District Court)

⁵²⁴ For e.g. in *Cia Naviera Vasconzada v Churchill & Sim, Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237 at 245, where in relation to s 4 of the 1893 Harter Act, Channel J held that as an unskilled person the master 'is expected to notice the apparent condition of the goods, though not the quality'; and in *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416 (CA) at 425–426 Scrutton LJ approving the judgment of Sir Robert Phillimore in *The Peter der Grosse* (1875) 1 PD 414 at 420 that 'shipped in apparent good order and condition' means that 'apparently, and so far as met the eye.

⁵²⁵ [2002] All ER 278 (CA)

⁵²⁶ For e.g. *Wibau Maschinenfabric Hartman SA v Mackinnon Mackenzie, 'The Chanda'* [1989] 2 Lloyd's Rep 494

⁵²⁷ See for e.g. *Falconbridge Nickel Mines Ltd v Chimo Shipping* [1969] 2 Lloyd's Rep 277 at 298 (Canadian Exchequer Court) and *The John Weyerhaeuser* [1975] 2 Lloyd's Rep 439 (US 2nd Circuit) where it was held that the carrier was entitled to limit his liability to the stated sum per package or unit even if he had failed to exercise due diligence to make the ship seaworthy

of Appeal in *Daewoo Heavy Industries Ltd v Kilpriver Shipping Ltd, 'The Kapitan Petko Voivoda'*⁵²⁸.

During the period 2000-2005 it is apparent that the judiciary have begun to consider a greater number of foreign decisions per case. In *Jindal Iron and Steel Co Ltd and others v Islamic Solidarity Shipping Company Jordan Inc*⁵²⁹ the House of Lords referred to cases from the US, South Africa, Australia, New Zealand, Pakistan and India but declined to overrule previous English authorities⁵³⁰ as all parties would have acted on the basis it correctly stated the law⁵³¹ and noted that no uniform international view actually existed in respect of Article III r.2⁵³².

Similarly, in *J I MacWilliam Co Inc v Mediterranean Shipping Co SA, 'The Rafaela S'*⁵³³ the House of Lords agreed with the judgments of the Dutch, French and Singapore courts⁵³⁴, in holding that a straight bill of lading was a bill of lading or similar document of title within the meaning of Article I(b) of the Hague-Visby Rules; with Lord Steyn holding that to conclude otherwise was to distort the language used and that it would reveal "a preoccupation with notions of domestic law regarding documents of title which ought not to govern the interpretation of an international maritime convention"⁵³⁵. Lord Bingham also emphasised the fact that as the Hague-Visby Rules were products of international conferences, recognition of this had to govern the court's interpretation⁵³⁶.

⁵²⁸ [2003] EWCA Civ 451 (CA) at 14

⁵²⁹ [2004] UKHL 49 (HL)

⁵³⁰ E.g. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 and *G.H. Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1956] 3 All ER 957 (HL)

⁵³¹ n(529) at 28

⁵³² n(529) at 24

⁵³³ [2005] UKHL 11 (HL)

⁵³⁴ E.g. *The Duke of Yare* (unreported) 10 April 1997 (ARR-Recht B Rotterdam); *The MSC Magallanes* (unreported) 16 May 2002 (2nd Division Court of Appeal of Rennes, France) and *Voss v APL Ltd* [2002] 2 Lloyd's Rep 707 (Singapore Court of Appeal)

⁵³⁵ n(533) at 44

⁵³⁶ n(533) at 7

Consequently, over the 80 years that the English judiciary have been interpreting provisions of the Hague and/or Hague-Visby Rules, there has been some international uniformity but it appears that it has not been the result of the English courts following the decisions of foreign courts, rather when uniformity has occurred, it has fundamentally been the result of the English judiciary following English precedents, and the foreign judgments have incidentally also agreed.

7.2 The Warsaw Convention

In contrast to the Hague Rules, where because of earlier legislation a collective body of English law existed in which the judiciary had interpreted similar terms to those used in the Hague Rules; the Warsaw Convention regulated a new industry and thus this section provides data as to the judiciary's recourse to foreign decisions where no previous common law existed.

Although entering into English law in 1931, the judiciary did not refer to foreign decisions when interpreting Warsaw Convention provisions until the 1950s. But since the 1950s, the judiciary have in 65% of cases concerning interpretation of a provision of the Warsaw Convention, considered at least one decision from a foreign jurisdiction (see Figure 10).

7.2.1 Use of Foreign Judgments 1950 - 1979

Between the 1950s and the 1970s, the judiciary referred to foreign judgments in an average of 55% of interpretation cases and in doing so, demonstrated a preference for actually following the decisions of US courts rather than simply considering them as in Hague Rules at this time. For example, in *Preston & Another v Hunting Air Transport Ltd*⁵³⁷ Ormerod J followed a decision of the US District Court of New York⁵³⁸; and in

⁵³⁷ [1956] 1 All ER 443 holding that the liability of the carrier under Warsaw Convention Article 17 was limited by Article 22(1) despite the fact the delivered ticket was deficient in certain respects

⁵³⁸ i.e. *Grey v American Airlines Inc* (1950) 95 F Supp 756, holding that a deficiency in the ticket, did not mean that a ticket had been delivered and, therefore, the plaintiffs could not rely on Article 3(2) as depriving the defendants of the

*Samuel Montague & Co Ltd v Swiss Air Transport Co Ltd*⁵³⁹ the Court of Appeal followed a similar US case⁵⁴⁰ with Denning LJ holding that “[i]t is of the highest importance that we should be in keeping with the courts of the United States”⁵⁴¹.

But whereas the judiciary had by the 1950s when interpreting the Hague Rules, considered a few Australian authorities in addition to US decisions, it was not until 1968 that the judiciary considered foreign decisions other than US in respect of the Warsaw Convention. In *Corocraft Ltd & Another v Pan American Airways Inc*⁵⁴² where the interpretation of Article 8(i) of the Convention was at issue, the Court of Appeal, in addition to a US judgment⁵⁴³ referred to contrary decisions from the courts of Switzerland⁵⁴⁴ and Malaysia⁵⁴⁵, but Denning LJ held that “we must surely take the same view” as the US authority. Nevertheless, reference to a Swiss authority showed that the judiciary were given to considering civil law authorities in addition to US ones from the late 1960s in respect of interpreting provisions of the Warsaw Convention (See Figure 12) in contrast to the sole use of common law authorities until the 1990s in respect of the Hague/Hague-Visby Rules.

In *Fothergill v Monarch Airlines Ltd*⁵⁴⁶ Kerr J considered a German authority⁵⁴⁷ in addition to two US decisions⁵⁴⁸, when deciding whether ‘damage’ in Article 26 included loss or partial loss, but was not minded to follow either foreign authority holding that the German construction was against “ordinary English construction” and the decisions

limitation of liability provided by article 22, and, accordingly, the damages must be limited to the sum laid down by that article

⁵³⁹ [1966] 1 All ER 814 (CA) holding that Article 8(q) did not require the air consignment note to contain the words verbatim that the carriage was subject to the convention rules

⁵⁴⁰ *Seth v British Overseas Airways Corporation* [1964] 1 Lloyd’s Rep 268

⁵⁴¹ n(539) at 818

⁵⁴² [1969] 1 All ER 82 (CA)

⁵⁴³ *Block v Compagnie Nationale Air France* (1967) 386 F. 2d 323 (US Court of Appeals 5th Circuit)

⁵⁴⁴ *Black Sea Insurance Co v Scandinavian Airlines* 4 March 1966 (Zurich High Court)

⁵⁴⁵ *The Borneo Co Ltd v Braathens South American & F E Air Transport A S* (1966), 26 MLJ 200 and *Shriro (China) Ltd v Thai Airways International Ltd* [1967] 2 MLJ 91 (Federal Court of Appeal)

⁵⁴⁶ [1978] QB 108

⁵⁴⁷ Berlin District Court, *Landgericht Berlin* Case 435/72

⁵⁴⁸ *Parke Davis & Co v British Overseas Airways Corporation* (1958) 170 N.Y.S. 2d 385 (New York Court of Appeals) and *Schwimmer v Air France* (1976) 384 N.Y.S.2d 658 (New York Civil Court, Bronx County)

of the New York City Courts were neither in agreement nor were they of high persuasive authority⁵⁴⁹.

7.2.2 The Warsaw Convention – Use of Foreign Judgments 1980 - 2005

The decision of Kerr J was later affirmed in *Fothergill v Monarch Airlines Ltd*⁵⁵⁰, but the Court of Appeal held that the US dicta in *Schwimmer v Air France*⁵⁵¹ applied. Nevertheless, the decisions of the lower courts were both subsequently reversed by the House of Lords in *Fothergill v Monarch Airlines*⁵⁵², with the Lords commenting that the judgments of some foreign courts were more persuasive than others and that:

“the persuasive value of a particular court’s decision must depend on its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system”⁵⁵³.

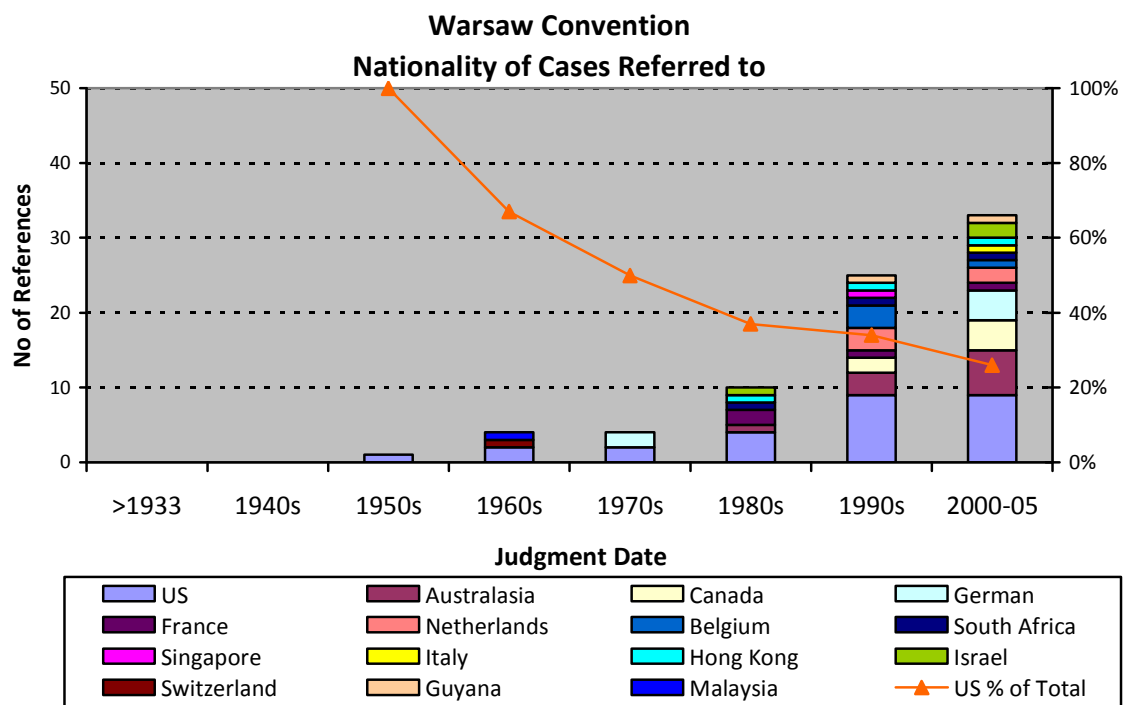


FIGURE 12

⁵⁴⁹ n(546) at 118

⁵⁵⁰ [1979] 3 All ER 445(CA) at 452

⁵⁵¹ See n(548)

⁵⁵² [1981] AC 251 (HL)

⁵⁵³ n(552) at 285 per Lord Diplock

During the 1980s and 1990s, the foreign authorities considered by the judiciary often indicated that there was not a clear line of approach to follow, with differences not only between courts in different jurisdictions but also between courts in the same jurisdiction. In *Rothmans of Pall Mall (Overseas) Ltd & Others v Saudi Arabian Airlines Corporation*⁵⁵⁴, for example, the Court of Appeal noted that the US version of Article 28(1) contained the word 'domicile' which differed legally from the English text 'ordinarily resident. Roskill LJ held that as a consequence it "did not provide a safe guide to the right conclusion"⁵⁵⁵. A French judgment⁵⁵⁶ was also referred to which interpreted the French text word 'domicile' but it was held that there were differences in meaning between the English, French and US words.

Lack of a uniform construction was also demonstrated in *Swiss Bank Corp & Others v Brink's-MAT Ltd & Others*⁵⁵⁷ where at issue was whether Article 22(4) of the Warsaw Convention permitted interest on damages to be awarded. Bingham J cited two opposing US decisions and held that "if there were an international consensus on the construction of the convention on this point, there [would be] strong reasons for falling into line with that construction, even if my predilection would have been in favour of some other approach"⁵⁵⁸.

Likewise in *Gatewhite Ltd & Another v Iberia Aereas de Espana SA*⁵⁵⁹ where Articles 24(1) and 30(3) of the Warsaw Convention fell to be construed, Gatehouse J in considering cases from Hong Kong, Israel, Guyana, the US, South Africa and New Zealand, held that whilst uniform construction of international conventions was desirable, the cases showed there was already a division of opinion on the issue and not only in dissenting judgments but in the actual decisions of foreign courts⁵⁶⁰. A point

⁵⁵⁴ [1981] QB 368 (CA)

⁵⁵⁵ n(554)

⁵⁵⁶ *Consorts Tarnay v Cie. Varig* April 28 1978 Tribunal de Grande Instance de Paris (1st Chamber 2nd Division)

⁵⁵⁷ [1986] 2 All ER 188

⁵⁵⁸ n(557) at 193

⁵⁵⁹ [1989] 1 All ER 944

⁵⁶⁰ n(559) at 951

which was re-emphasised in *Sidhu & Others v British Airways Plc*⁵⁶¹ where the Court of Appeal held that “we must reach our conclusions without definite aid from the United States” as the US authorities referred to showed there was no uniform interpretation of Article 24 between circuits or even within courts of the same circuit⁵⁶². Furthermore, when the case went on appeal to the House of Lords⁵⁶³ in 1996 Lord Craig, in considering New Zealand, French and US authorities, concluded that the value of the [foreign decisions] will be reduced if the decisions conflict with each other or if no clear line of approach appears from them after they have been analysed”⁵⁶⁴.

This was also the case in *Adatia v Air Canada*⁵⁶⁵ where various authorities from the US⁵⁶⁶ and Brussels⁵⁶⁷ were referred to but all provided differing interpretations of the Article 17 phrase ‘in the course of any of the operations of embarking or disembarking’. The Court of Appeal were then given to agree with the Editors of *Shawcross*⁵⁶⁸, a UK text, and held that:

“modern conditions governing embarkation and disembarkation at different international airports may well differ widely [and] while not minimising the importance of foreign decisions in this context . . . the ultimate question is whether, the passenger's movements through airport procedures (including his physical location) indicates that he was at the relevant time engaged upon the operation of embarking upon (or disembarking from) the particular flight in question”⁵⁶⁹.

Nevertheless, some five years later in *Chaudhari v British Airways*⁵⁷⁰ when the meaning of ‘accident’ in Article 17 of the Warsaw Convention fell to be construed, the Court of Appeal did not follow the earlier meaning of ‘accident’ adopted in the English case

⁵⁶¹ Transcript 27 January 1995 (CA) per Leggatt LJ

⁵⁶² See for e.g. *Husserl v Swiss Air Transport Co* (1973) 485 F 2d 1240; *Boehringer-Mannheim Diagnostics Inc v Pan American World Airways Inc* (1984) 737 F 2d 456 and *Jack v Trans World Airlines Inc* (1993) 820 F. Supp 1218

⁵⁶³ *Sidhu & Others v British Airways Plc* [1997] AC 430 (HL)

⁵⁶⁴ n(563) at 443

⁵⁶⁵ (1992) *The Times*, 4 June (CA)

⁵⁶⁶ *MacDonald v Air Canada* 439 F 2d 1402 (1st Circ, 1971); *Day v Trans World Airlines Inc* (1975) 528 F 2d 31; and *Guaridenex de La Cruz v Dominicana de Aviacion* (1989) 550 F d 152

⁵⁶⁷ *Adler v Austrian Airlines* [1986] 1 S & B A v R VII/191 (Brussels CA)

⁵⁶⁸ J.D. McClean et al (Eds), *Shawcross & Beaumont on Air Law* (4th Edn, Lexis Nexis, 1991), at paras 155, 155.1 and 155.2

⁵⁶⁹ n(565) per Slade LJ

⁵⁷⁰ (1997) *The Times* 7 May (CA)

*Fenton v Thorley & Co Ltd*⁵⁷¹ as this case was “concerned with the Workmen's Compensation Act, and the dicta of their Lordships about the meaning of the word 'accident' in that context are of little assistance when construing the meaning of the word in the Convention”. Instead they followed the US Supreme Court conclusion in *Air France v Saks*⁵⁷² that liability “arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger”.

However, it is not necessarily the decisions of US courts which have been followed. In *Antwerp United Diamonds BVBA & Another v Air Europe*⁵⁷³, for instance, the Court of Appeal considered cases from the US, Canada and Brussels but held that a case from the Netherlands⁵⁷⁴ was by far the most significant decision, both by virtue of its highest authority and by virtue of its close reasoning and analysis⁵⁷⁵.

Despite the apparent lack of uniform decisions, it is worth noting that during the 1990s there was a marked increase in the number of cases concerning interpretation of the Warsaw Convention provisions, which referred to foreign judgments - as Figure 10 depicts. The 1990s also showed a significant increase in the range of foreign judgments the judiciary referred to, as Figure 12 shows, and this included both common law and civil law jurisdictions - a trend which has continued in the 21st century, as the following cases demonstrate.

In *Western Digital Corp v British Airways*⁵⁷⁶ where at issue was whether the Warsaw Convention permits suit against a contracting or actual carrier in respect of loss of or damage to cargo by anyone other than a person named in the air waybill as consignor or consignee or a person entitled to delivery under the air waybill. The Court of Appeal concluded after considering some 20 foreign cases⁵⁷⁷ from 8 different jurisdictions, that:

⁵⁷¹ [1903] AC 443 (HL)

⁵⁷² (1985) 470 US 392 at 171

⁵⁷³ [1995] 3 All ER 424 (CA)

⁵⁷⁴ i.e. *Insurance Co of North America v Royal Dutch Airlines (KLM)* [1978] Rd W62 (Dutch Supreme Court)

⁵⁷⁵ n(573) at 430

⁵⁷⁶ [2001] 1 All ER 109 (CA)

“the interests of international uniformity no longer point towards a restriction of right of suit to any named consignor, consignee or person entitled under Article 12(1) [of the Warsaw Convention]. The new magnetic pole of international jurisprudence draws quite strongly towards conclusions that there is no such general restriction in the convention.”⁵⁷⁸

In *Morris v KLM Royal Dutch Airlines*⁵⁷⁹ the Court of Appeal considered cases from the US, Israel and Australia in deciding whether an incident on a flight was an ‘accident’ constituting a ‘bodily injury’ under Article 17, before accepting a US decision⁵⁸⁰ in which bodily injury did not extend to psychiatric injury, so the carrier was not liable for such injury. On appeal, the House of Lords⁵⁸¹ also considered similar cases but followed a different US decision⁵⁸² where it was held that no recovery was possible under the Warsaw Convention for mental injury following an accident if such mental injury was not accompanied by a demonstrable physical injury.

Likewise, in *Deep Vein Thrombosis v Air Travel Group Litigation*⁵⁸³ the House of Lords considered judgments from the US, Australia and Canada, before following the US decision⁵⁸⁴ and holding that a passenger who suffered deep vein thrombosis on an international flight would not have suffered an ‘accident’ under Article 17 and could not succeed in a claim against the airlines, because an accident required an unexpected or unusual event or happening external to the passenger.

⁵⁷⁷ These ranged from courts in Hong Kong, Guyana, South Africa, Australia, France, The Netherlands, Germany and New Zealand, but more than 50% of the cases referred originated from various US courts

⁵⁷⁸ n(576) at 141

⁵⁷⁹ [2001] All ER 214 (CA)

⁵⁸⁰ from *Eastern Airlines Inc v Floyd* (1991) 499 US 530 (Supreme Court)

⁵⁸¹ [2002] UKHL 7 (HL) where *Morris* was joined by a Scottish case *King v Bristow Helicopters Ltd* as the appellate courts in England and Scotland had on similar facts, reached different conclusions as to the meaning of ‘bodily injury’

⁵⁸² *Weaver v Delta Airlines* (1999) 56 F Supp 2d 1190 (Montana DC)

⁵⁸³ [2005] UKHL 72 (HL)

⁵⁸⁴ *Scherer v Pan American World Airways Inc* (1976) 387 N.Y. S. 2d 580

7.3 The CMR

Since the CMR's incorporation into English law, the judiciary have only referred to foreign decisions in 22% of cases. This compares to 35% for the Hague Rules and 65% for the Warsaw Convention. However, the range of authorities potentially available to the judiciary is limited for the CMR in comparison to the other carriage conventions - as most of the contracting states and therefore relevant authorities available to the judiciary, are mainly only European jurisdictions.

7.3.1 The CMR – Use of Foreign Judgments 1970 - 1979

Whilst the judiciary have appeared to promote the objective of uniformity in interpreting the CMR, it appears that diverse foreign judgments have often not made it possible for the judiciary to adopt a uniform approach, as these earlier judgments show:

In *Ulster-Swift Ltd v Taunton Meat Haulage Ltd*⁵⁸⁵, Megaw LJ stated that:

“courts in six member countries have produced 12 different interpretations of particular provisions – so uniformity is not reached by that road. To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are supposed likely to adopt is speculative as well as masochistic”; and

in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*⁵⁸⁶ Lord Wilberforce held that the foreign cases before the court “show that there is no universal wisdom available across the Channel upon which our insular minds can draw”⁵⁸⁷. Similarly, Lord Salmon held that “If a corpus of law had grown up overseas which laid down the meaning of Article 23, our courts would no doubt follow it for the sake of uniformity. But no such corpus exists”⁵⁸⁸.

Similarly, in *J.J. Siber Ltd & Others v Islander Trucking Ltd; Patenta GmbH & Others v Islander Trucking & Another*⁵⁸⁹ Mustill J in considering decisions from the courts of Germany and Austria, held that such cases did not “establish any coherent body of

⁵⁸⁵ [1977] 3 All ER 641 (CA) at 647

⁵⁸⁶ [1978] AC 141 (HL)

⁵⁸⁷ n(586) at 154

⁵⁸⁸ n(586) at 162

⁵⁸⁹ Official Transcripts (1980-1989) 8 November 1984 at 4

authority which would require the court to adopt, in the interests of comity, any one ... in preference to the others”.

7.3.2 The CMR – Use of Foreign Judgments 1980 – 2005

During the 1980s, it became apparent that some foreign judgments were unsuitable for uniform adoption as different rights and obligations were often assigned to the contracting parties in different legal systems – a situation perhaps exacerbated by the number of European Civil law contracting states. Such differences were demonstrated in *Poclair SA v SCAC*⁵⁹⁰ which referred to a decision of the Court of Appeal of Paris⁵⁹¹, under French law the party interested in the goods has a direct right of action against the carrier’s insurers which is distinct from the right of action against the carrier himself, but under English law there is no claim against the insurer, so in this regard there is no uniformity.

Nevertheless, the judiciary did agree with some foreign decisions during the 1980s. In *Michael Galley Footwear Ltd (in liq.) v Iaboni*⁵⁹² where Article 17 of the CMR fell to be construed, Hodgson J held that Dutch, German and Belgium authorities⁵⁹³ accord with the natural meaning of the words in the article and that whilst the carriers were not negligent and exercised the diligence of a reasonably careful carrier, the carrier was nevertheless liable because he could have avoided the loss.

Similarly, in *Worldwide Carriers Ltd & Another v Ardtran International Ltd & Others*⁵⁹⁴ Parker J held that on the plain wording of Article 32 (2) “a plaintiff who, when met by a limitation plea, wishes to set up suspension must show that the party relying on the time-bar has received a written claim from him . . . This is in accordance with the decisions in the Court of Appeal in *Aix-en-Provence* [⁵⁹⁵] and to the decision of the

⁵⁹⁰ Official Transcripts (1980-1989) 14 May 1985 at 5

⁵⁹¹ *Allgemeine Elektrizitäts-Gesellschaft v Pernet* 12 June 1970

⁵⁹² [1982] 2 All ER 200

⁵⁹³ i.e. *Zeilemakers Transportbedrijf v NV Transportverzekeringmaatschappij van de Nederlanden van 1845* (1965) 1 ETL 305; *Anon* (1975) 10 ETL 506 Bundesgerichtshof; *SA Soffritti v Usines Balteau* (1977) 12 ETL 881

⁵⁹⁴ [1983] 1 All ER 692 at 699

⁵⁹⁵ *Verdier v Nazionale di Transport Flli Gondrand* (1968) 4 ETL 918

Dusseldorf State Court of Appeal”⁵⁹⁶. Furthermore, in *Eastern Kayam Carpets v Eastern United Freight*⁵⁹⁷, where it was contended there was a gap in the article of CMR at issue, Hirst J agreed with Dutch⁵⁹⁸ and German⁵⁹⁹ authorities that where the CMR is silent, national law must apply. So whilst not uniformity there was agreement.

It is interesting to note that between 1980 and year 2000 the number of interpretation cases referring to foreign judgments in respect of the Hague Rules and Warsaw Convention increased, but in respect of the CMR such cases decreased as Figure 10 on page 163 demonstrates. Out of the 10 cases in the 1990s concerning interpretation of the CMR, only *Frans Maas Logistics (UK) Ltd v CDR Trucking BV*⁶⁰⁰ referred to a decision by a court outside England and in that instance it was to an opinion of the European Court of Justice (ECJ)⁶⁰¹ which concerned the construction of the International Convention Relating to the Arrest of Sea-Going Ships 1952.

During the first five years of the 21st century, the research has shown that the number of CMR interpretation cases referring to foreign judgments has increased to a third of cases, a similar number to that of the Hague-Visby Rules, but it is still significantly less than the 86% of cases in respect of the Warsaw Convention. Nonetheless, it does perhaps demonstrate the judiciary’s willingness to at least consider the judgments of foreign courts in some instances. For example, in *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft*⁶⁰² Dutch and ECJ cases were referred to when deciding that an application to stay English proceedings which were commenced and served after the commencement of, but before service of Austrian proceedings, failed. The Court of Appeal holding that “given the desirability of finding an approach to the construction of Article 31(2) which would fulfill its role in an international convention, an action which had been commenced but not yet served was not a ‘pending’ action for the purposes of

⁵⁹⁶ *Anon* (1973) 8 ETL 620

⁵⁹⁷ Official Transcripts (1980-1989) 6 December 1983

⁵⁹⁸ *Neele Transport S.A. v A.P.H. Rignart* 1970 ULC 298 Tribunal of Breda

⁵⁹⁹ *Anon* (1966) ETL 691 – although the court explicitly held that the CMR did not apply

⁶⁰⁰ [1999] 1 All ER 737 at 743

⁶⁰¹ *The Maciej Rataj Case C-406/92* [1995] All ER (EC) 229 at 244

⁶⁰² [2001] All ER 131 (CA)

Article 31(2)”⁶⁰³. Moreover, the Court of Appeal concluded that the earlier judgment of the Commercial Court in *Frans Maas Logistics (UK) Ltd v CDR Trucking BV*⁶⁰⁴ had been wrongly decided⁶⁰⁵.

The judiciary have also overturned lower court decisions and followed foreign judgments. In *Quantum Corporation Ltd v Plane Trucking Ltd*⁶⁰⁶, for example, where goods were flown from Singapore to Paris and then carried to road to Dublin, the Court of Appeal reversed the judgment of Tomlinson J and held that the CMR applies to the international road carriage element of a ‘mixed’ or multimodal contract. In so doing, Mance LJ held that the court had “no real hesitation about adopting the conclusion which other European countries have reached”⁶⁰⁷, with decisions being cited from the German, Dutch and Belgium courts.

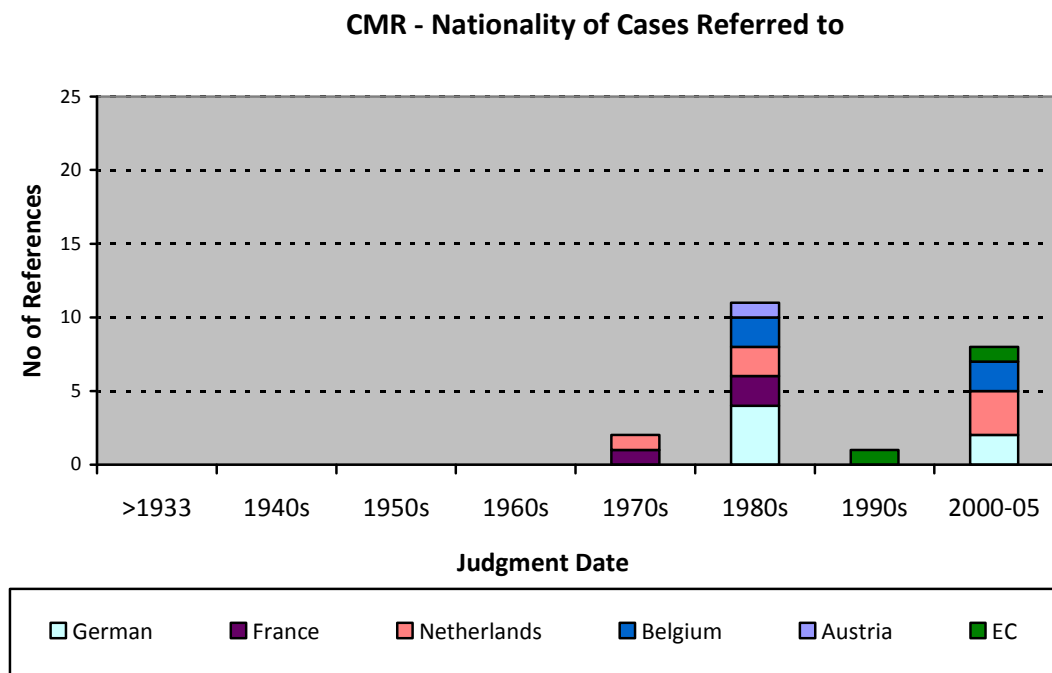


FIGURE 13

⁶⁰³ n(602) at 50

⁶⁰⁴ n(600)

⁶⁰⁵ n(602) at 80-88

⁶⁰⁶ [2002] EWCA Civ 350 (CA)

⁶⁰⁷ n(606) at 59

7.4 Civil Law v Common Law

It can be seen from Figures 11 and 12 that in the period from the inception of the air and sea carriage conventions until the 1990s, the judiciary only made reference to the decisions of foreign courts in common law jurisdictions. However, since the 1990s the judiciary have increasingly made recourse to foreign judgments from civil law jurisdictions, when interpreting provisions of the Hague-Visby Rules and Warsaw/Montreal Conventions - a trend which appears to be continuing into the 21st century. But in comparison to the Hague-Visby Rules, there have been 30% more referrals to decisions from civil law jurisdictions in respect of the Warsaw Convention provisions, as Figure 14 depicts.

Nevertheless, in contrast to the sea and air conventions, the judiciary have only had recourse to foreign decisions from courts in civil law jurisdictions when interpreting provisions of the CMR – see Figures 13 and 14, albeit such decisions did not always show a uniform approach to the CMR provisions.

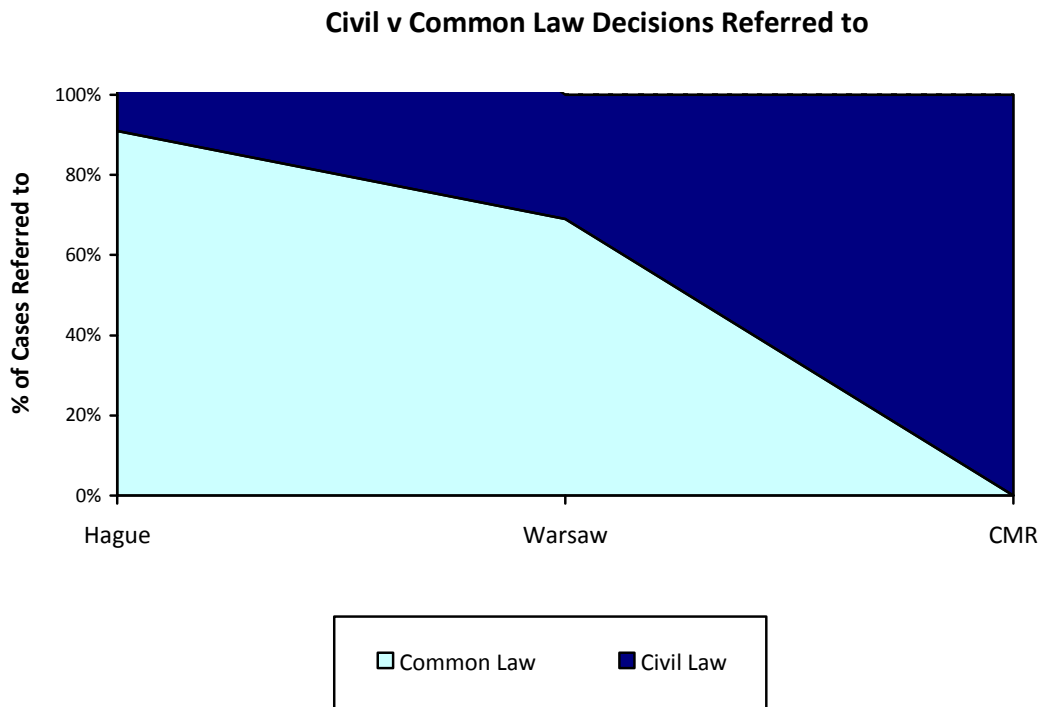


FIGURE 14

This raises the question as to why the judiciary began considering decisions of courts of civil law jurisdictions, when interpreting the Hague-Visby Rules and the Warsaw/Montreal Conventions, after considering solely common law judgments. It can perhaps be attributed to the UK's membership of the EU and the judiciary's need to also consider civil law systems.

In 2003 when speaking on the 'International Role of the Judiciary', Lord Woolf, then the Lord Chief Justice of England and Wales, stated that "not only do we have to learn from other common law systems, but also from the civil systems as well . . . [and it was] important that, where we can, we should harmonise our legal systems not only with other common law jurisdictions but also with civil jurisdictions"⁶⁰⁸. Lord Woolf further suggested that whilst some see this harmonisation with civil law jurisdictions as a disadvantage to the links with the Commonwealth and other common law jurisdictions, it has fostered greater understanding of civil law and as a result, English civil procedure is now much closer to the French and described it as "situated somewhere in the middle of the English Channel"⁶⁰⁹.

8.0 JUDICIAL USE OF COMMENTARIES & TEXTS

This section will examine the extent to which the judiciary have made recourse to commentaries and academic texts, when construing provisions in the international carriage conventions.

8.1 The Hague / HVR Rules

In *Heyn v Ocean Steamship Co Ltd*⁶¹⁰, one of the earliest cases where a provision of the Hague Rules fell to be construed, MacKinnon J held that in giving the words their clearest meaning in the English language; the loss or damage arose without the actual

⁶⁰⁸ 13th Commonwealth Law Conference in conjunction with the 33rd Australian Legal Convention, Melbourne Australia 16 April 2003

⁶⁰⁹ n(608)

⁶¹⁰ [1927] All ER Rep 657 at 660

fault **or** privity of the carrier⁶¹¹. This, he acknowledged was not the view expressed in '*Scrutton on Charterparties and Bills of Lading*'⁶¹² which stated that the word 'or' must mean 'and'.

Despite this early disagreement, since the 1950s consistent reference has been made to practitioner texts in approximately 50% of interpretation cases, as Figure 15 shows. In *Pyrene Co Ltd v Scindia Navigation Co Ltd*⁶¹³ Devlin J held that whilst there was no binding authority on the interpretation of loading in Article III r.2 of the Hague Rules, he noted the view expressed in '*Carver's Carriage of Goods by Sea*'⁶¹⁴, and the alternative views in '*Temperley's Carriage of Goods by Sea Act 1924*'⁶¹⁵ and '*Scrutton on Charterparties and Bills of Lading*'⁶¹⁶. This judgment suggesting that at the very least the judiciary were willing to refer to a range academic works.

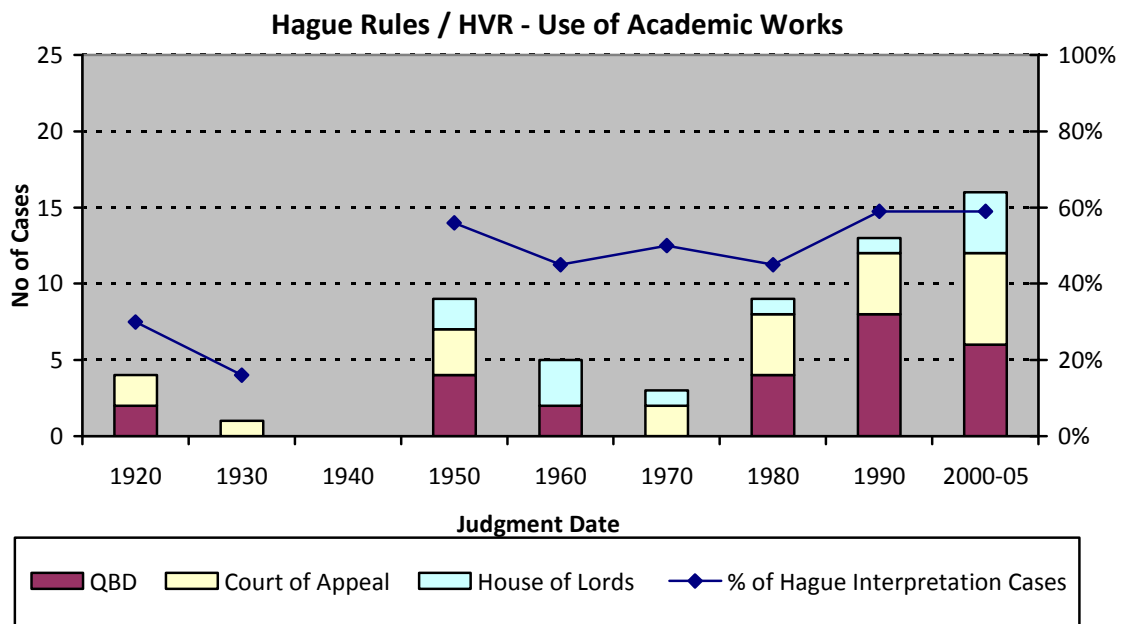


FIGURE 15

⁶¹¹ In Article IV(2)(q)

⁶¹² 12th Ed (1925)

⁶¹³ [1954] 2 QB 402

⁶¹⁴ 9th Ed (1952) p.186

⁶¹⁵ 4th Ed (1932) p.32

⁶¹⁶ 15th Ed (1948) p.160

Nevertheless, in the 25 years following *Pyrene*, in all but 5 cases, it was only *Scrutton on Charterparties* that was referred to and this reference appears to have been done somewhat reluctantly – even though early editions of *Scrutton* were edited by members of the judiciary. In *G.H. Renton & Co Ltd v Palmyra Trading Corporation of Panama*⁶¹⁷, for example, Viscount Kilmuir held that although there was support for a particular interpretation in “*Scrutton on Charterparties and Bills of Lading* (12th Edn) whose senior editor was Lord Porter ... [it] did not enable him to give a strained construction to a simple word”⁶¹⁸; and in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd*⁶¹⁹, Lord Merriman held that his interpretation of Article III r.1 was “incidentally, although the point must not be pressed too far ... the interpretation put on the words by the learned judge himself as the editor of the 12th and 13th Editions of *Scrutton on Charterparties*”.

This reluctance is also evident when *Scrutton* was used to show support for a particular interpretation in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd*⁶²⁰ where Viscount Simonds held that he “should have come to this conclusion without the aid of any external circumstance but that is was also confirmed by the editors of *Scrutton on Charterparties*”.

As Figure 16 demonstrates, from the 1980s, the judiciary referred to a greater range of texts and commentaries in addition to *Scrutton*. One of the early cases to do so was *The Hollandia*⁶²¹, where Ackner LJ drew attention to the fact that in referring to academic texts, there was not always agreement. In deciding whether a carrier can contract out of the Hague-Visby Rules by selecting some other law as the law of the contract, the textbook writers were in conflict - ‘*Scrutton on Charterparties and Bills of Lading*’⁶²² and ‘*Dicey and Morris on the Conflict of Laws*’ contending that there can be no contracting out, whilst ‘*Carver on Carriage by Sea*’ took the contrary view.

⁶¹⁷ [1956] 3 All ER 957 (HL)

⁶¹⁸ Lord Porter being a Lord of Appeal

⁶¹⁹ [1961] 1 All ER 495 (HL) at 515 in reference to MacKinnon LJ

⁶²⁰ [1958] 1 All ER 725 (HL) at 732

⁶²¹ [1982] 1 All ER 1076 (CA)

⁶²² 18th Edn (1974) pp.404,413 and Dicey 10th Edn (1980) vol. 2, pp 754, 821

Differences of opinion between *Scrutton* and *Carver* have also been noted by the House of Lords in such cases as *Effort Shipping Co Ltd v Linden Management SA & Another*⁶²³.

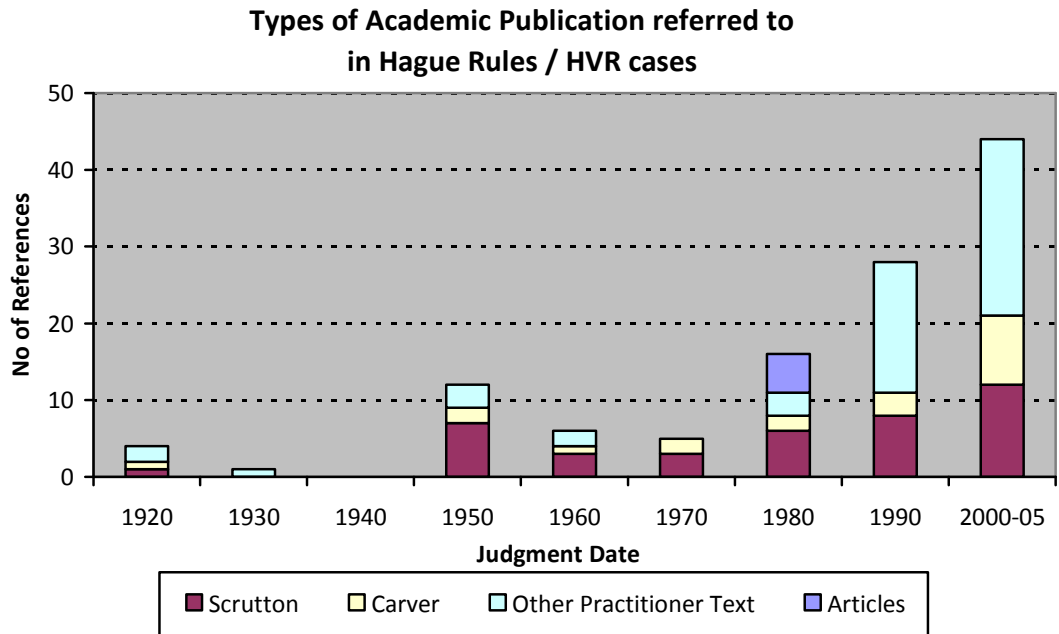


FIGURE 16

The Hollandia was also one of the first carriage cases where academic articles were referred to, with the judgment of Ackner LJ citing contrasting propositions by Dr F.A. Mann⁶²⁴ and Dr J.H.C Morris⁶²⁵. Subsequently, when the case went on appeal to the House of Lords⁶²⁶, Diplock LJ cited the article by the “distinguished commentator Dr F.A Mann but was disinclined to agree with the author’s proposition.

Reference to textbooks by the judiciary has also highlighted changes in academic thinking. For example, in *The Nordglimt*⁶²⁷ Hobhouse J noted in regard to Article III r.6 “unless suit is brought within one year”, that the effect of this in the then current

⁶²³ Transcript 30 January 1996 (CA)

⁶²⁴ (1973) 46 BYIL 117 and (1979) 95 LQR 346

⁶²⁵ (1979) 95 LQR 59

⁶²⁶ [1983] 1 AC 565 (HL) at 578

⁶²⁷ [1988] 2 All ER 531 at 537

edition of *Scrutton on Charterparties*⁶²⁸ meant that “the suit must be brought in the jurisdiction in which the dispute is ultimately decided”; which contrasted to the statement in an earlier edition of *Scrutton on Charterparties*⁶²⁹. Similarly, in *Daewoo Heavy Industries Ltd & Another v Klipriver Shipping Ltd & Another*⁶³⁰ Longmore LJ noted that in regard to deck cargo the 20th Edition of *Scrutton* had an amended passage to that contained within the 18th and 19th Editions.

It is also interesting to note the relative weight given to academic texts. In *Cia Portorrafti Commerciale SA v Ultramar; Panama Inc & Others; The Captain Gregos*⁶³¹ Hirst J held that as “delivery [was] outside the scope of Article II, misdelivery of whatever kind [was] outside the scope of Article III r.6 as the carrier is under no liability in that respect”. This view, Hirst J stated, was strongly supported by an article by Mr Michael Mustill QC⁶³² and by a footnote in *Scrutton*⁶³³; with a contrary view in an article by Mr Anthony Diamond QC⁶³⁴ held to be ‘hesitant and tentative’ and not of similar weight. However, the decision of Hirst J was reversed on appeal⁶³⁵.

Nevertheless, from the mid 1990s, there has been an increasing tendency for the judiciary, especially the House of Lords, to refer to multiple academic references (see Figure 15). In *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co*⁶³⁶ and *J.I. MacWilliam v Mediterranean Shipping Co, The Rafaela*⁶³⁷, two of the most recent House of Lords cases in this study concerning interpretation of the Hague-Visby Rules, their Lordships referred to 6 and 7 references respectively, which contrasts with an

⁶²⁸ 19th Edn (1984) p.441

⁶²⁹ 16th Edn (1955) p.478

⁶³⁰ [2003] EWCA Civ. 451 (CA) at 14

⁶³¹ [1989] 2 All ER 54 at 63

⁶³² Entitled ‘*Carriage of Goods by Sea Act 1971*’ (1972) 11 Arkiv Sjørett 684 at 706

⁶³³ (19th Ed) 1984, p.441

⁶³⁴ ‘The Hague-Visby Rules’ [1978] Lloyd’s MCLQ 225 at 256

⁶³⁵ *Cia Portorrafti Commerciale SA v Ultramar; Panama Inc & Others; The Captain Gregos* [1990] 3 All ER 967(CA)

⁶³⁶ [2003] UKHL 12

⁶³⁷ [2005] UKHL 11

average of one reference made in earlier years. However, it is noted that most references made by the judiciary to academic works are solely to English publications⁶³⁸.

8.2 The Warsaw Convention

In contrast to interpretation of the Hague Rules, the judiciary have, from the late 1960s, referred to foreign academic publications when interpreting provisions of the Warsaw Convention, but have not always followed them.

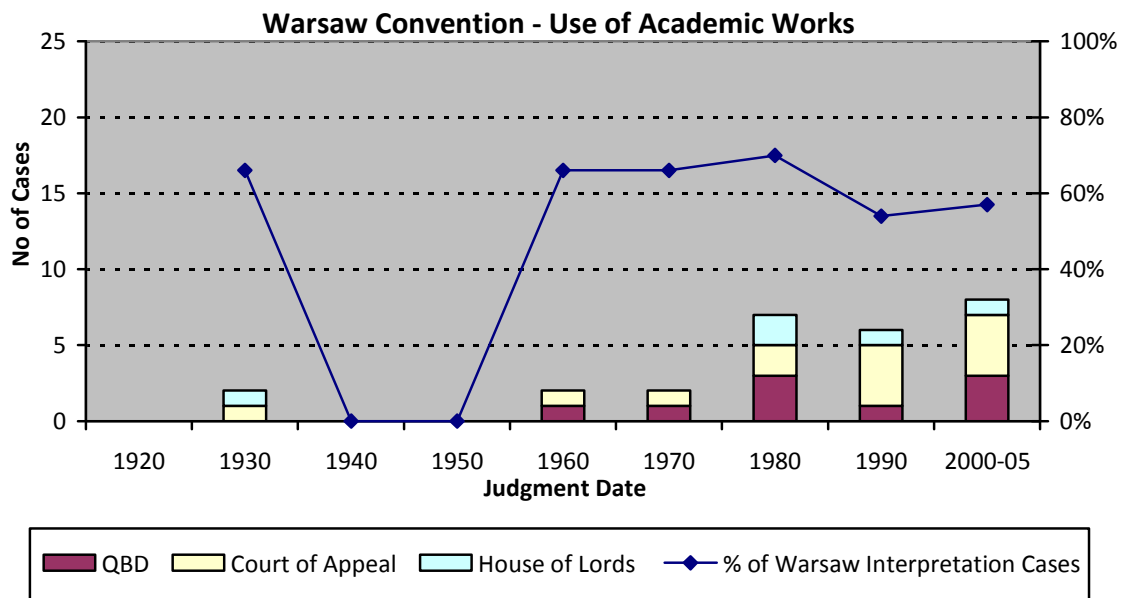


FIGURE 17

In *Corocraft Ltd & Another v Pan American Airways Inc*⁶³⁹ Donaldson J held that as the volume and dimensions were not stated on the consignment note it did not comply with Article 8(i) of the Convention and as a consequence Article 9 disentitled the carrier to any limitation of liability. In so doing Donaldson J referred to a work by an international expert in air law, the Dutch Professor Drion⁶⁴⁰ for information on how other systems of

⁶³⁸ Perhaps most notable of the exceptions being Michael Sturley's US publication *'The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules'* see n(378) although this is predominately a record of the preparatory meetings of the Hague Rules

⁶³⁹ [1968] 2 All ER 1059 at 1071

⁶⁴⁰ *'Limitation of Liabilities in International Air Law'* (Nijhoff, 1954) p.311 "...it should be sufficient if either the weight, or the quantity, or the volume, or the dimensions of the goods are mentioned on the airway bill"

law treated Article 8(i) of the Warsaw Convention⁶⁴¹. However, the Court of Appeal⁶⁴² reversed the decision of Donaldson J, Denning LJ did not agree with the interpretation of Professor Drion, holding that on a true construction of Article 8(i) the weight should be given whenever appropriate, the volume and dimensions when necessary or useful and the quantity only where it was applicable.

In *Fothergill v Monarch Airlines*⁶⁴³ Denning LJ referred to the works of Professor Abrahams of Frankfurt and Dr Guldemann of Zurich who stated that a broad interpretation should be given to the word 'damage'; and held that the "weight of judicial and academic opinion is clearly in favour of interpreting damage as including partial loss"⁶⁴⁴. But Browne LJ claimed the references were "expressions of opinion by two textbook writers . . . who may be very eminent but about whose status and qualifications we have no information"⁶⁴⁵ and held that as a matter of ordinary English the term 'damage' used in Article 26(2) of the Warsaw Convention, referred to physical injury to baggage and did not extend to partial loss of the contents.

This decision was subsequently reversed by the House of Lords⁶⁴⁶, with Lord Wilberforce referring to some five foreign textbooks (including that of Dr Guldemann) and holding that we should follow the continental writers so that "partial loss of contents is included in damage"⁶⁴⁷. Lord Wilberforce further stating that

"The process of ascertaining the meaning of a word or expression in a foreign language must vary according to the subject matter and no precise rule can be laid down. There is no reason why a judge should not use his own knowledge of the language, nor why he should not consult a dictionary. Other evidence, including expert evidence, other dictionaries, other reference books, textbooks, articles and decided cases may be called by the parties to supplement his resources if they think fit."⁶⁴⁸

⁶⁴¹ Donaldson J also referred to '*McNair's Law of the Air* which listed certain differences in the English language versions between the Carriage by Air Act 1932 and the American legislation, but contained no reference to Art 8(i).

⁶⁴² i.e. *Corocraft Ltd & Another v Pan American Airways Inc* [1969] 1 All ER 82 (CA) at 88-90

⁶⁴³ [1979] 3 All ER 445 (CA) at 453

⁶⁴⁴ n(643) at 453

⁶⁴⁵ n(643) at 456

⁶⁴⁶ *Fothergill v Monarch Airlines* [1981] AC 251 (HL)

⁶⁴⁷ n(646) at 276

⁶⁴⁸ n(646) at 274

However, this was not a stance shared by Lord Diplock, who held that “Those commentaries by learned authors on the text of the convention . . . were published after the convention had been concluded. They did not precede it”⁶⁴⁹.

Academic texts have also highlighted potential problems that may arise when the various language texts of the Warsaw Convention are compared. In *Rothmans (Overseas) Ltd v Saudi Arabian Airlines Corp*⁶⁵⁰ for example, where the Article 28 (1) terms “ordinarily resident” and “principal place of business” fell to be interpreted. In holding that they must be construed in the context of that code, so the fact that the defendant foreign corporation had a branch office in England was insufficient to confer jurisdiction on the English courts to entertain the plaintiffs’ claim, the Court of Appeal referred to “an interesting passage . . . in a textbook by Madame Georgette Miller [⁶⁵¹] . . . not because it affords a safe or indeed any guide to the solution of the problem with which we are concerned, but because it contains . . . a useful warning of the dangers which may arise if one tries to apply the language of the text of other translations to the English text of article 28 which is scheduled alongside the French text in our statute”⁶⁵².

It is interesting to note that in the 21st century, there has been an increasing the number of references to texts and articles, especially in relation to what constitutes an ‘accident’ under Article 17 of the Warsaw Convention. These include both legal texts such as ‘*Munkman on Damages for PI and Death*’⁶⁵³ and ‘*Mullany & Handford’s Tort Liability for Psychiatric Damage: The Law of ‘Nervous Shock*’⁶⁵⁴, and medical texts such as the ‘*Shorter Oxford Textbook of Psychiatry*’⁶⁵⁵, ‘*Diagnostic and Statistical Manual of Mental Disorders*’⁶⁵⁶ and ‘*Black’s Medical Dictionary*’⁶⁵⁷.

⁶⁴⁹ n(646) at 284

⁶⁵⁰ [1981] QB 368 (CA) at 332

⁶⁵¹ ‘*Liability In International Air Transport: The Warsaw System in Municipal Courts*’,(Kluwer, New York, 1977) p.301

⁶⁵² n(650) at 388

⁶⁵³ (LexisNexis, London, 1996)

⁶⁵⁴ (Sweet & Maxwell, London, 1993)

⁶⁵⁵ M. Gelder et al, (4th Edn, OUP, Oxford, 2001)

⁶⁵⁶ (4th Edn, American Psychiatric Association, 1994)

⁶⁵⁷ (39th Edn, A & C Black Publishers, 1999)

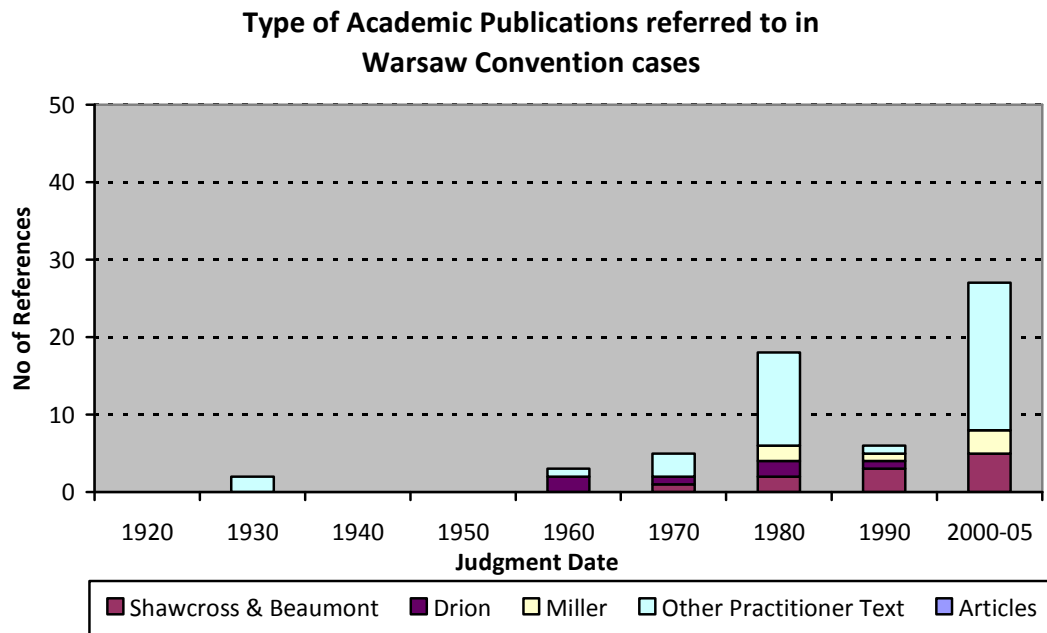


FIGURE 18

The research has also shown that although, the judiciary showed an early propensity to refer to foreign publications and articles when interpreting the Warsaw Convention as compared to the Hague Rules, such resources are now used more extensively when interpreting the Hague-Visby Rules than other carriage conventions.

8.3 The CMR

In comparison to the Hague/ Hague-Visby Rules and the Warsaw Convention, the judiciary have not referred to many commentaries and texts when interpreting provisions of the CMR. Principally, the judiciary have referred to three main academic works, namely the '*International Carriage of Goods by Road: CMR*'⁶⁵⁸, '*Hill & Messent: CMR Contracts for the International Carriage of Goods by Road*'⁶⁵⁹; and the Commentary on the CMR prepared by Professor Roland Loewe⁶⁶⁰.

⁶⁵⁸ M.A. Clarke, (Stevens, 1982)

⁶⁵⁹ (3rd Edn, LLP Publishing, 2000)

⁶⁶⁰ 'Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)', (United Nations, Geneva, 1975)

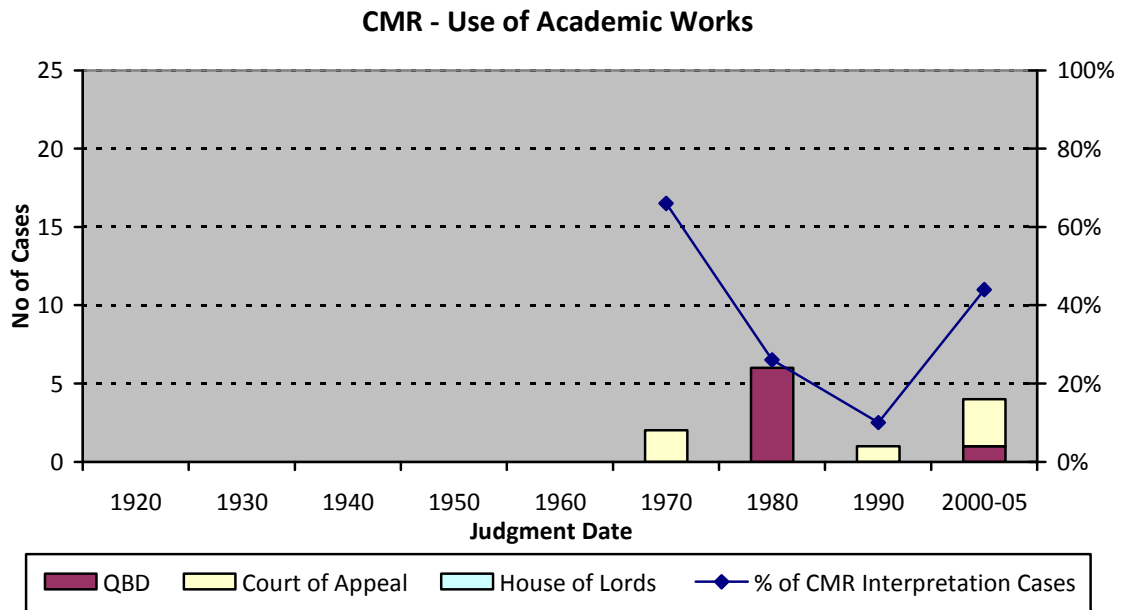


FIGURE 19

9.0 JUDICIAL RULES OF CONSTRUCTION

This chapter has so far examined the extent to which the judiciary have made recourse to different sources when interpreting provisions of the international carriage conventions, and under what circumstances. But the question arises as to whether the judiciary have adopted a particular approach to the construction of international convention provisions and whether this differs from the interpretation of domestic legislation.

9.1 The Purposive Approach

The drafting of international conventions has tended to follow the civil law approach, whereby legislation is drafted in general principles rather than fine detail, and have therefore tended to be more widely drawn than legislation drafted in the UK. But in interpreting the provisions of the international carriage conventions has the English judiciary adopted the purposive approach and looked to the purpose of the legislation and construed the meaning of the convention in light of that purpose?

Since the UK joined the European Economic Community in 1973, the judiciary have been required to adopt the purposive approach when interpreting EU law⁶⁶¹ and as a result it has been said that they have become accustomed to using this approach to interpret domestic law⁶⁶². But the research has shown (see Figure 20) that since the 1930s - some 40 years prior to membership of the EEC - the judiciary have at times taken a broad if not purposive approach when interpreting provisions of the international carriage conventions.

In the early 1930s the House of Lords in *Stag Line Ltd v Foscolo Mango & Co Ltd*⁶⁶³ appeared to look more to the purpose of the Rules rather than using the established methods of interpreting English legislation, as Lord MacMillan held that in the interests of uniformity and given the Rules were the result of an international conference, “the language of the [Hague] rules should be construed on broad principles of general acceptance”. The purpose of the rules also being upheld by Greene LJ in *Grein v Imperial Airways Ltd*⁶⁶⁴ when he held that in approaching the construction of the Warsaw Convention it was important to keep in mind its general object being the unification of certain rules relating to international carriage by air.

In recent times, the ‘broad approach’ adopted in early cases has been referred to as a purposive approach. In *Jindal Iron and Steel Co Ltd and Others v Islamic Solidarity Shipping Company Jordan Inc*⁶⁶⁵, for example, the House of Lords referred to the approach taken in *G.H. Renton & Co Ltd v Palmyra Trading Corp of Panama*⁶⁶⁶ as a purposive rather than a literal reading - even though it was not originally referred to as ‘purposive’.

⁶⁶¹ In *Marleasing SA v LA Comercial Internacional de Alimentacion SA* C-106/89 of 13th November 1990, the ECJ held that national laws must if at all possible be construed in accordance with relevant EU Directives and that this is so even if the national law existed before the date on which the Directive came into effect.

⁶⁶² In *Pickstone v Freemans* [1989] AC 66 the House of Lords held that “in order to give effect to the purpose for which the Regulations were enacted [it] should be construed in a way which gives effect to the declared intention of the Government of the United Kingdom . . . and is consistent with the objects of the EEC Treaty...”.

⁶⁶³ [1932] AC 328 (HL) at 350

⁶⁶⁴ [1937] 1 KB 50 (CA)

⁶⁶⁵ [2004] UKHL 49 (HL) at 19

⁶⁶⁶ [1956] 3 All ER 957 (HL)

The *Stag Line* 'broad principles' approach to interpretation of international carriage conventions has been referred to in 18% of all Hague/HVR interpretation cases. Moreover, the *Stag Line* approach has been referred in 21% of interpretation cases in respect of the Warsaw Convention and 8% in respect of the CMR. In fact in the late 1970s Lord MacMillan's prescription that 'broad principles of general acceptance' was seen by Lord Wilberforce as the appropriate basis for interpreting the CMR in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (U.K) Ltd*⁶⁶⁷; and this approach is now often credited to Lord Wilberforce in many cases. The purposive approach was also evidenced by Viscount Dilhorne, although not mentioned as such, as he held that "where the language is capable of two interpretations one must seek to give effect to the intentions of those who made it"⁶⁶⁸.

The *Stag Line* and *Buchanan* approach were both cited in the Warsaw Convention case *Fothergill v Monarch Airlines*⁶⁶⁹, where the House of Lords (which included Lord Wilberforce) were minded to follow a broader approach to interpretation in respect of Article 26 of the Warsaw Convention. Their Lordships held that although on a literal interpretation in an English legal context 'loss' was to be differentiated from 'damage' that was not an appropriate method of interpretation of an international convention - instead broad principles of construction were to be applied⁶⁷⁰ and this was also referred to as the adoption of a purposive construction⁶⁷¹ - the first reference to such by the judiciary in relation to the international carriage conventions.

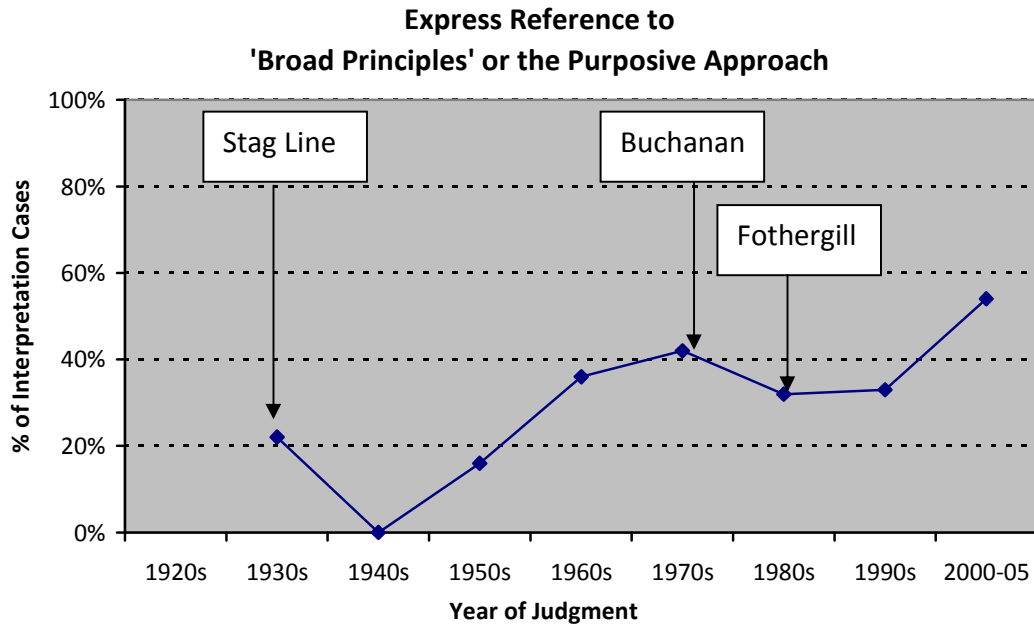
⁶⁶⁷ [1978] AC 141 (HL) at 153

⁶⁶⁸ n(667) at 158

⁶⁶⁹ [1981] AC 251 (HL)

⁶⁷⁰ n(669) at 710 per Lord Fraser and at 715 per Lord Scarman

⁶⁷¹ n(669) at 697

**FIGURE 20**

The *Stag Line*, *Buchanan* and *Fothergill* cases have become the cornerstone authorities in judgments discussing the approach that should be taken to the interpretation of international conventions and as a result the 'broad principles' and/or purposive approach are consistently referred to – as Figure 20 illustrates.

However, the increase in reference to the 'purposive approach' in the late 1990s and 2000's may in part be due to the judiciary's increasing awareness of interpreting legislation not drafted in the UK, as EU legislation began to be adopted into English law which tended to be drafted in the broader continental manner. Added to which, the House of Lords in *Pepper (Inspector of Taxes) v Hart*⁶⁷² effectively sanctioned the adoption of a purposive approach to the construction of English legislation in order to give effect to the true intention of the legislature.

⁶⁷² [1993] 1 All ER 42 (HL)

Therefore, by the early years of the 21st century it was well established that a purposive approach *should* be taken to legislation especially international conventions and in the period 2000-2005 the judiciary referred to the purposive approach in 54% of cases concerning the interpretation of a convention provisions, which amounted to a 21% increase in five years, as Figure 20 demonstrates. However, it is most important to note that this does not imply that a purposive approach was actually applied to the interpretation of the convention, only that such an approach was referred to.

9.2 The 'English Approach'

Although the House of Lords judgments in *Stag Line*, *Fothergill* and *Buchanan* appeared to endorse the application of a 'broad approach' or an approach which looked to the intention or purpose of the legislation and upheld the notion of uniform decisions; on deeper analysis, the overlay of English law and the English judiciary, has effectively meant that an 'English approach' to interpretation of convention provisions has evolved. This approach or method is characterised by four features, all of which are evidenced in the landmark Lords decisions:

9.2.1 Identifiably different

Firstly, the 'English approach' is identified as being different. In *James Buchanan Co Ltd v Babco Forwarding & Shipping (UK) Ltd*⁶⁷³, Denning LJ in the Court of Appeal considered the approach taken to interpretation by European Judges, to be different to the English approach:

“European Judges adopt a method they call in English by strange words – the schematic and teleological method . . . All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislation - at the effect it was sought to achieve. They then interpret the legislation so as to achieve the desired effect”.⁶⁷⁴

⁶⁷³ [1977] QB 208 (CA)

⁶⁷⁴ n(673) at 523

This difference in interpretation styles appears to stem from differences in the drafting style of international conventions as opposed to English legislation. In 1965 Davies LJ in noted in *T.B. & S Batchelor & Co Ltd (Owners of Cargo on The Merak) v Owners of S.S Merak*⁶⁷⁵, that as the Hague Rules had been adopted by a large number of countries, the rules were drafted in the widest possible terms to allow interpretation by a range of jurisdictions and legal systems. However, the evidence suggests that the English judiciary were fully aware of the different drafting patterns. Lord Diplock claimed, that the language of an international convention “has not been chosen by an English parliamentary draftsman - it is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges”⁶⁷⁶. Lord Wilberforce held that “the assumed and often repeated generalisation that English methods are narrow, technical and literal, whereas continental methods are broad, generous and sensible, seems to be insecure at least as regards interpretation of international conventions” but he also added the CMR “convention was not drafted in language of precision or consistency”⁶⁷⁷.

9.2.2 Uniform Interpretation ‘so far as it is possible’

Secondly, the ‘English Approach’ to interpretation endorses the aim of uniform interpretations in all contracting states.

In 1928, soon after the Hague Rules were ratified, Atkin LJ noted in *Brown & Co Ltd v Harrison, Hourani v Harrison*⁶⁷⁸ the commercial importance of uniformity of construction and the need for decisions in English courts “to correspond with the decisions given by the courts of the highest authority in the United States”. Similarly, Lord MacMillan’s judgment in *Stag Line Ltd v Foscolo Mango & Co Ltd*⁶⁷⁹ referred to interpretation “in the interests of uniformity”. Following these early cases, whenever a provision of an international carriage convention has fallen to be construed, the desirability of

⁶⁷⁵ [1965] 1 All ER 230 (CA) at 238

⁶⁷⁶ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) at 707

⁶⁷⁷ *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) at 154-155

⁶⁷⁸ [1927] All ER Rep 195 (CA) at 202

⁶⁷⁹ [1932] AC 328 (HL) at 350

uniformity of interpretation has been mentioned by the judiciary in almost all cases. For example:

“it is very desirable that the same conclusions should be reached in whatever jurisdiction the question arises”⁶⁸⁰;

“we must do our best to interpret it, so far as we can, with a view to promoting the objective of uniformity in its interpretation”⁶⁸¹

“the expressed objective of the convention to produce uniformity in all contracting states”⁶⁸²;

“uniformity is the purpose to be served by most international conventions”⁶⁸³;

“... having regard to the objects and structure of the convention, which was to achieve a uniform international code”⁶⁸⁴.

In the 21st century ‘uniformity’ is still constantly quoted as the aim of international conventions. In *Re Deep Vein Thrombosis and Air Travel Group Litigation*⁶⁸⁵ Lord Scott held that “it is common ground . . . that it is important that the courts of the respective signatory states should try to adopt a uniform interpretation of the convention” and in *J I MacWilliam Co Inc v Mediterranean Shipping Co SA*⁶⁸⁶ “effect must be given so far as possible to the international consensus expressed in the rules”.

However, despite this outward strive for uniformity; it is apparent from the analysis of the judiciary’s recourse to foreign judgments in section 7.0, that the decisions from the courts of other jurisdictions have not always been followed. There appears to be various reasons for this, firstly, long established English law principles are not followed by foreign courts; secondly, foreign courts often do not have the requisite standing or authority; thirdly, differences in language or in civil procedures can result in different interpretations; and finally, in some cases there is no uniform decision to follow.

⁶⁸⁰ *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL) per Viscount Simonds at 472

⁶⁸¹ *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 3 All ER 641 (CA) per Megaw LJ at 644

⁶⁸² *James Buchanan v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) per Lord Wilberforce at 153

⁶⁸³ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) per Lord Scarman at 294

⁶⁸⁴ *Sidhu & Others v British Airways plc* [1997] AC 430 (HL) per Lord Hope at 450

⁶⁸⁵ [2005] UKHL 72 at 1

⁶⁸⁶ [2005] UKHL 11 at 7

Nevertheless, the judiciary have at times found agreement with foreign judgments – although this mostly appears to occur when foreign decisions have also agreed with other principles laid down in English law.

Lord Steyn has recently stated that “uniformity is not always attainable but it must be the constant aim”⁶⁸⁷ and therefore it would appear that the ‘English Approach’ to the interpretation of international conventions is uniformity ‘so far as it is possible’ to do so without impacting on the principles and concepts inherent in English law.

9.2.3 English Judicial History

Thirdly, the ‘English approach’ to interpreting international conventions is informed by English judicial experience and common law.

When the judiciary first starting interpreting the international carriage conventions, some of the judiciary were of the opinion that because of their experience with dealing with issues of the shipping industry, it was questionable as to whether foreign decisions, “whilst treated with great respect, should necessarily control the shipping decisions in the courts of the greatest shipping country in the world”⁶⁸⁸. Moreover, as analysis in section 7.0 has shown over the ensuing 80 years the ‘English Approach’ to interpretation has been founded on a strong sense of English judicial history and not just been in relation to shipping decisions.

Despite the frequently repeated statement of Lord MacMillan that judicial interpretation should be “unconstrained by technical rules of English Law or by English legal precedent but on broad principles of general acceptance”⁶⁸⁹; it is clear that ‘broad principles of general acceptance’ refer to that which is generally accepted in English law, as these judgments demonstrate:

“English judges have been interpreting such international instruments as the Hague Rules and commercial documents for many years with some success

⁶⁸⁷ n(685) at 35

⁶⁸⁸ *Gosse Millard v Canadian Government Merchant Marine* [1928] 1 KB 717 (CA) per Scrutton LJ at 733

⁶⁸⁹ *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (HL) at 350

and international approbation...To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt is speculative as well as masochistic” and that “We must use our own methods following Lord Macmillan's prescription and taking such help as existing decisions give us”⁶⁹⁰;

“We must rely on our own methods of interpretation and the broad principles. . . It would seem that our system of administering justice enjoys considerable confidence abroad and that we can safely leave out courts to apply their own methods of interpreting the convention [i.e. the CMR] until such time, if ever, as better methods are devised abroad and universally accepted”⁶⁹¹; and

in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Company Jordan Inc*⁶⁹² it was held there was no case for departing from a principle had stood for almost 50 years especially as it had not been shown that it had worked unsatisfactorily or had led to unjust results.

Therefore, whilst the judiciary have a desire for uniform judgments (see section 9.2.2) this is conditional upon such judgments not conflicting with previous principles established within English law. This approach tends to also agree with Professor Michael Sturley’s suggestion that:

“Courts consider [themselves] bound to interpret and apply international uniform law in a manner that will avoid inconsistency or tension with its own domestic law. Constrained by substantially different domestic laws, national courts allow their desire to minimise the disruptive effects of international law to overwhelm their mandate to maintain uniformity”⁶⁹³

9.2.4 Plain or Ordinary Meaning of the Words

The fourth and final ‘limb’ of the ‘English approach’ to the interpretation of international conventions appears to be giving the words of the convention their plain or ordinary meaning, within the context of the Convention in which they appear.

⁶⁹⁰n(682) per Lord Wilberforce at 153-154

⁶⁹¹n(682) per Lord Salmon at 162

⁶⁹² [2004] UKHL 49 (HL) per Lord Steyn at 15

⁶⁹³‘International Uniform Law in National Courts: The influence of domestic law in conflicts of interpretation’ (1986-1987) 27 Va. J. Int’l J. 733

Traditionally, English Courts tended to apply a literal approach to statutory interpretation which no doubt developed from English legislation being drafted in a 'narrow and technical' sense⁶⁹⁴. But with international conventions drawn in a wider style than domestic legislation, it is often suggested in judgments that a purposive approach to interpretation be adopted where effect is given to the purpose of the legislation (see section 9.1), rather than applying a strict literal meaning. However, it appears that this 'broad approach' to interpretation is restricted to or is reliant upon the text of the convention, at least initially, as the "Courts today demonstrate a single-minded devotion to the text of the Convention"⁶⁹⁵.

Furthermore, in construing the text of the Convention, Lord Atkin held in *Stag Line Ltd v Foscolo Mango Co Ltd*⁶⁹⁶, that it is "important to bear in mind that one has to give the words as used their plain meaning". This has also been variously described as giving the words their every day meaning or interpreting them in a 'normal manner'⁶⁹⁷. More recently, in *Morris v KLM Royal Dutch Airlines*⁶⁹⁸ Lord Steyn held that the concepts deployed in conventions are autonomous, so 'bodily injury' and 'accident' should be interpreted by reference only, or at least mainly, to the convention itself.

Consequently, in contrast to other jurisdictions, when interpreting the words and phrases of a convention, the English judiciary look to the text of the convention for indications of the legislative intention and only when that is unclear is it permissible to look to other sources. However, this has meant that referral to external sources has been limited, because as Diplock LJ stated "If the words are clear in themselves, there is little need to have recourse to the travaux préparatoires"⁶⁹⁹. Nevertheless, the judiciary has decided that when there is ambiguity or obscurity in the text then recourse can be had to the travaux préparatoires (see section 4.0), so as to ascertain what meaning was

⁶⁹⁴ See for e.g. *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 (HL) at 155

⁶⁹⁵ M. Clarke, 'National Judges Facing Gaps in the CMR: British Case Law', Rev dr unif. 2006 p.633; available at <http://ulr.unidroit.org/index/pdf/xi-3-0633.pdf>; accessed 11/09/11

⁶⁹⁶ [1932] AC 328 (HL) at 342

⁶⁹⁷ n(694) per Lord Wilberforce at 152; see also Viscount Dilhorne at 157 and Lord Salmon at 160

⁶⁹⁸ [2002] UKHL 7 (HL) at 16

⁶⁹⁹ *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA) at 761

intended by the draftsmen and signatories of the convention and what they really meant to convey by the words they used. Similarly, the judiciary have at times stated that recourse to the French text of the convention (see section 6.0) is condition dependent upon ambiguity in the English text⁷⁰⁰ but this condition is not always apparent⁷⁰¹.

It has been suggested that “in Britain the judiciary finds it difficult to deviate from a clear text even if that text would lead to unintended results”⁷⁰². In *Re Deep Vein Thrombosis and Air Travel Group Litigation*⁷⁰³ Lord Scott held that in interpreting the provisions of a convention “the starting point is to consider the natural meaning of the language”⁷⁰⁴ and although it arguably produced a harsh result⁷⁰⁵, Lord Scott maintained the balance of interests struck by the Warsaw Convention should not be distorted by judicial interpretation. Whilst it is unlikely that deep vein thrombosis was within the contemplation of the Convention drafters in the 1920s; the draft of Article 21, (the precursor of Article 17) which was submitted to the conference convened in Warsaw in 1929 stated that “[t]he carrier shall be liable for damage sustained during carriage: (a) in the case of death, wounding or any other bodily injury suffered by a traveler . . .”⁷⁰⁶ so it could be argued that the Convention intended to include injuries other than ‘accidents’.

In *J I MacWilliam Co Inc v Mediterranean Shipping Co SA*⁷⁰⁷ the House of Lords held that giving the words ‘bill of lading or any similar document of title’ in Article 1(b) of the Hague-Visby Rules, their plain meaning it meant a ‘straight bill of lading’ was a similar

⁷⁰⁰ *Milor SRL and others v British Airways plc* [1996] QB 702 (CA) per Phillips LJ at 708 “in the absence of ambiguity it is not a legitimate aid to interpretation”

⁷⁰¹ For e.g. in *Fothergill v Monarch Airlines* [1981] AC 251 (HL) per Lord Wilberforce at 272 “it is not only permissible to look at a foreign language text, but obligatory” and recently in *Deep Vein Thrombosis v Air Travel Group* [2005] UKHL 72 (HL) recourse was made to the French text without any reference to ambiguity in the English version

⁷⁰² H. G. Schermers, ‘Netherlands’ in F.G. Jacobs and S. Roberts (Eds) *The Effect of Treaties in Domestic Law*, Sweet & Maxwell (1987) “the [British] judiciary finds it difficult to deviate from a clear text even if that text would lead to unintended results”, p.117

⁷⁰³ [2005] UKHL 72 (HL)

⁷⁰⁴ n(703) at 11

⁷⁰⁵ i.e. the mere occurrence of deep vein thrombosis did not constitute an ‘accident’ under Article 17 and therefore the claim to recover compensation from the airlines failed

⁷⁰⁶ In *Re: Deep Vein Thrombosis and Air Travel Group Litigation* [2002] 1 All ER 935 at 16

⁷⁰⁷ [2005] UKHL 11 (HL)

document. Lord Steyn held the words were words of expansion and any attempt to treat those words as importing a restrictive meaning involved a distortion of plain language and a preoccupation with notions of domestic law which ought not to govern the interpretation of an international maritime convention⁷⁰⁸. But it is interesting to note that had domestic English law been applied, the judiciary may not have arrived at the same result as the Carriage of Goods by Sea Act 1924 treats 'straight bills of lading' as 'sea waybills'⁷⁰⁹.

10.0 CONCLUSION

This chapter has examined the approach of the judiciary to international commercial instruments – an important sector in the study as the research has shown that over the years an average of 45% of international carriage conventions cases have concerned the interpretation of particular provisions.

International conventions by their very nature require interpretation by the domestic courts of contracting states and different states will inevitably put different interpretations on the same enacted words. In most, if not all, cases in England and Wales where interpretation of a carriage convention has been at issue, the importance of a common construction in all Contracting States has been consistently mentioned in judicial judgments. The 1930's *Stag Line Ltd v Foscolo Mango & Co Ltd*⁷¹⁰ dictum of Lord MacMillan has often been quoted, which suggested that interpretation of the Hague Rules "should not be rigidly controlled by domestic precedents of antecedent date, but rather . . . construed on broad principles of general acceptance"; and it was re-emphasised in respect of the CMR and the Warsaw Convention in the landmark House of Lords judgments of *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*⁷¹¹ and *Fothergill v Monarch Airlines*⁷¹² respectively.

⁷⁰⁸ n(707) per Lord Steyn at 44

⁷⁰⁹ Under s.1(3)

⁷¹⁰ [1932] AC 328 (HL) at 350

⁷¹¹ [1978] AC 141 (HL)

⁷¹² [1981] AC 251 (HL)

However, from the research it is apparent that definitive interpretation of international conventions for the English judiciary does not necessarily lie simply in the ‘broad principles’ or even necessarily in the purpose of the legislation. In practice, the judiciary have created an ‘English Approach’ to interpretation, whereby the judiciary look to the text of the convention when interpreting its provisions and give the words and phrases their plain or ordinary meaning⁷¹³ within the context of the convention. But in doing so, it was found that the judiciary are also given to applying similar meanings to that which have previously been applied in English law – in order to maintain consistency and certainty.

Therefore, the ‘English Approach’ is reliant upon the text of the convention and only when that is unclear, do they look to other sources, such as the travaux préparatoires, and foreign language texts. This has meant that judicial reference to external sources in order to interpret a particular provision has perhaps been restricted. Recourse to the travaux préparatoires, for example, has been limited to cases which satisfy the ‘bulls-eye’ conditions⁷¹⁴ - which are arguably more onerous than those contained within the Vienna Convention on the Law of Treaties⁷¹⁵ which entered into force in the UK in early 1980. However, despite the fact that the travaux préparatoires of the Hague Rules and the Warsaw Convention are publicly available, and that an increasing number of interpretation cases concerning these conventions make reference to the travaux (see Figure 8); the travaux has not often been used, as it seldom provides “a clear and indisputable indication of definite legislative intention”⁷¹⁶.

The French text of the respective conventions has also been referred to by the judiciary when interpreting provisions, as the Conventions were all drawn up in French – the authentic text in the case of the Hague Rules and Warsaw Convention. At times recourse to the French text

⁷¹³ See for e.g. *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72 (HL) per Lord Scott at 11

⁷¹⁴ i.e. where the text of a convention is ambiguous or obscure, where the travaux préparatoires is public and accessible; and where the travaux clearly and indisputably points to a definite legislative intention; see *Effort Shipping Company Limited v Linden Management SA & Another; The Giannis NK* [1998] 1 All ER 495 (HL) at 510

⁷¹⁵ Article 32 of which permits recourse to the travaux to if the meaning to be given to the terms in light of their context, object and purpose leaves the meaning ambiguous or obscure; or it leads to a result which is manifestly absurd or unreasonable

⁷¹⁶ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) per Lord Wilberforce at 278

has been provisional on the English text being obscure or ambiguous; but in most cases where the French text has been referred to, the judiciary have tended to use it to support their interpretation of the English text. Although there was a 50% increase in the judiciary's reference to the French text of the Hague-Visby Rules in the period 2000-2005; such reference is less than half that made to the French text of the Warsaw Convention. By comparison, reference to the French text of the CMR is less than for the other two carriage conventions, with only several references noted.

In parallel with the judiciary's reliance on the text of the convention when construing its provisions, and its acceptance of external sources to aid in its construction in certain circumstances; is the judiciary's support for the objective of uniformity with the courts of other contracting states⁷¹⁷ which has been expressed for much of the 85 or so years since the first international carriage conventions were given effect in English law. This is also reflected in the number of cases in which the judiciary refers to foreign dicta. Since the 1970s the judiciary have made recourse to the decisions of foreign courts in an average of 71% of cases in respect of the Warsaw Convention; 36% for the Hague-Visby Rules and 25% for the CMR (see Figure 10).

However, it is important to note that the judiciary's recourse to foreign judgments does not necessarily equate with adherence to their dicta. The research has shown that within the 'English Approach' to interpretation that has evolved, it is a 'qualified' uniformity which exists, because for a variety of reasons, the judiciary has decided not to follow the judgments of foreign courts. These reasons include the fact that foreign courts have not followed a legal principle or concept long established in English law; that the foreign court did not have the requisite authority or standing to allow their decision to be followed; that there were differences in language as to what was included; that there were differences in civil procedures; or there was just no uniform decision amongst contracting states to follow.

⁷¹⁷ See for e.g. n(716) per Lord Scarman at 294; also *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 3 All ER 641 (CA) per Megaw LJ at 644 and *James Buchanan v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) per Lord Wilberforce at 153

It was also apparent from the research that the English judiciary consider themselves 'leaders' not 'followers', especially in relation to the Hague-Visby Rules. In comparison to Warsaw Convention interpretation cases, only half those numbers of Hague-Visby Rule cases refer to foreign dicta (see Figure 10), although the Hague/Hague-Visby Rules have been adopted in over 80 countries. Moreover, whilst the judiciary began considering judgments in the 1980s from a wider range of foreign courts when construing the Warsaw Convention - including decisions from civil law jurisdictions – such recourse did not occur in relation to the Hague-Visby Rules until the turn of the 21st century. This perhaps suggests that in respect of carriage of goods by sea, the judicial view of the supremacy of the UK as the world's leading shipping nation expressed by Scrutton LJ⁷¹⁸ in 1928 has rather remained. In respect of the CMR, the judiciary have been slightly more circumspect and held that "where we lead, others may follow"⁷¹⁹ but only where the decisions of other courts have been inconclusive or where no prior judgments have existed regarding the interpretation of a particular provision.

Consequently, even when uniformity is achieved following the adoption of an international convention, uniform interpretation is by no means guaranteed and perhaps the judiciary have drawn upon the common reservoir of rules and notions "for the purpose of better fitting [English] law to the task in hand, not as a means of applying some other body of rules in preference to the governing national law"⁷²⁰. In 1946, Francis A. Mann wrote that: "English Courts tend to regard uniform legislation as a step in the development of English law. Accordingly they are inclined to apply to such legislation, canons of construction developed by English municipal law and are likely to construe such legislation in the light of previous English authorities"⁷²¹; and some 65 years later it would appear that this tends to be the approach that is still adopted by the judiciary.

⁷¹⁸ *Gosse Millard v Canadian Government Merchant Marine* [1928] 1 KB 717 (CA) at 733

⁷¹⁹ *James Buchanan & Co Ltd v Babco Forwarding and Shipping (U.K) Ltd* [1977] QB 208 (CA) per Denning LJ at 524

⁷²⁰ M. Mustill, 'The New Lex Mercatoria: The First twenty Five Years', Available at <http://www.trans-lex.org/126900> p.89; accessed 11/11/11

⁷²¹ 'The Interpretation of Uniform Statutes', (1946) 62 LQR 283

Chapter 6 : Parliament and Government

1.0 INTRODUCTION

The incorporation of international commercial conventions into English law is a process involving both the Executive and the Legislative functions of State. It is usually Government (through its officials and representatives) who are involved in the negotiation and establishment of a particular treaty or convention at diplomatic conferences, and it is also Government, as an exercise of the Royal Prerogative⁷²², who has the authority to sign the convention on behalf of the UK⁷²³. But as treaties are not self-executing in English law, Parliament is required to enact legislation to give effect to the treaty⁷²⁴, prior to its formal ratification. Therefore, both the Government and Parliament have important roles to play in the harmonisation of international commercial law in the UK.

This chapter therefore looks at *who* and *what* has drawn Government's attention to the harmonisation of particular areas of law; *how* Government has responded to the need for legislation; and *what* role Government and its representatives have played in negotiating and developing international commercial law conventions. Moreover, the study looks beyond the official processes that must be followed in order to adopt an international convention into English law, and examines how Parliament's approach to international instruments has both developed and been informed. Ultimately this chapter asks if there is a process to follow for successful implementation or is a convention's success dependent on factors outside the process.

⁷²² i.e. an action of government not authorised by statute, as defined by Dicey in H. Barnett '*Constitutional and Administrative Law*' (4th Edn 2002, Cavendish, London) p.135 & 166

⁷²³ According to the Foreign and Commonwealth Office unless a treaty provides that it enters into force on signature, by signing a treaty the State is in agreement with the text, but it is not bound by it until the treaty has been ratified and entered into force. See Treaty Section, Information Management Department, Foreign and Commonwealth Office, '*Treaties and MOUs: Guidance on Practice and Procedures*' (2nd Ed April 2000 Revised May 2004), p.4

⁷²⁴ It is constitutional practice (known as the Ponsonby Rule under the Constitutional Reform and Governance (CRaG) Act 2010) to lay signed treaties before both Houses of Parliament for 21 sitting days, so the matter may be considered

2.0 METHODOLOGY

2.1 What Conventions were selected

It is clearly impossible to examine the approach of Government and Parliament to all international commercial conventions, so conventions in 4 main areas have been examined:

Carriage of Goods by Sea

The Hague Rules 1924 as amended by the Visby and S.D.R. Protocols;
The Hamburg Rules; and
The Rotterdam Rules

Carriage by Air

The Warsaw Convention 1929 as amended by The Hague & Montreal
Protocols; and
The Montreal Convention 1999

International Sale of Goods

The United Nations Convention for Contracts for the International Sale of
Goods (CISG) 1980

Security Transactions

Cape Town Convention on Mobile Equipment 2001

This selection does not demonstrate any presumed typicality rather it simply concentrates on significant and prominent conventions which have been developed by a range of unification organisations. The selection also comprises a combination of ratified and unratified conventions, as solely examining those conventions which have been enacted into English law would be to exclude analysis as to why some conventions have been adopted whilst other have not.

2.2 Reasons why these Conventions were selected

The Hague Rules were one of the earliest commercial conventions to be ratified by the UK, so this convention will provide an historical benchmark, which can be used to confirm whether the process used for implementing conventions has remained the same, or whether other factors have come into play.

The two carriage conventions were selected as a comparison, as the Hague Rules brought regulation to a well established shipping industry whereas the Warsaw Convention, introduced uniform rules to the commercial aviation industry whilst it was in its infancy. Furthermore, at the time the United Kingdom gave the force of law to the Warsaw Convention effectively limited airline liability, they were providing subsidies to Imperial Airways – an airline which was subsequently nationalized; so this Convention will demonstrate what effect, if any, this had on the approach that Parliament has taken. The subsequent amendments and new carriage by sea and air conventions have also been included within the study, as the question arises as to why some amendments and conventions been enacted into UK law, whilst others have not.

The CISG has been included in the study, because as with the previous conventions, the UK played a significant role in its drafting, but unlike the Hague Rules and the Warsaw Convention, the CISG has not been ratified by the UK. Therefore analysis of this convention may perhaps shed a different light on the UK's approach to harmonisation, especially given the fact that as at 1 August 2011, 77 States have adopted the CISG.

Finally, the Cape Town Convention on Mobile Equipment and the aircraft Protocol were selected as an example of, not only a relatively new convention, but also a convention which has provided for accession by a Regional Economic Integration Organisation, which meant that the European Union could accede to the Convention and protocol – although some aspects of both would remain within the competences of Member States.

2.3 How the Study has been conducted

Firstly, the study examines the involvement of the UK in the negotiation and drafting of international conventions. This was ascertained through examination of the travaux préparatoires, commentaries and reports or minutes of work/study group sessions; as well as academic histories of specific conventions.

Secondly, the manner of the Convention's incorporation into English law is examined. Usually private commercial law conventions requiring subsequent ratification are contained within a schedule to a Bill which is then introduced and progressed through Parliament. Therefore, analysis involved detailed study of the relevant Hansard publications in order to follow the Bill's progress or otherwise, through both Houses of Parliament. In order to establish what other factors were influencing the industry sector at the time of a bills introduction into Parliament – available cabinet papers and government industry reports were also consulted.

2.4 Limitations of the Study

As the study is limited to international conventions in four areas of commercial law – carriage of goods by sea, by air, international sales and international secured transactions – it is possible that study of others may have produced different findings. This has been minimised as far as possible by selecting a broad cross section of conventions which take into account different time periods, as well as ratified and unratified conventions. Therefore this chapter will provide a reasonably accurate indication of the Government and Parliamentary approach to international commercial conventions. However, with more recent conventions it is not possible to consult cabinet papers and other such documents which may have provided more information as to why the CISG and the Cape Town Convention have yet to be ratified.

As with the preceding chapters, the study does not make detailed examination of the specific provisions of the Conventions or their application, it seeks only to look at the

approach that Government and Parliament have to instruments of international commercial harmonisation.

3.0 THE CARRIAGE OF GOODS BY SEA

3.1 The Need for Legislation

At the turn of the 19th century bills of lading issued by ship-owners contained limitation clauses which effectively excluded them from all liability for loss of or damage to cargo, and as the UK reigned supreme in the shipping industry⁷²⁵ neither Parliament nor judges paid much heed to the complaints of cargo owners⁷²⁶. Consequently, by the late 1800s exemption clauses were the source of much consternation amongst cargo owners around the world, in 1890 the Glasgow Corn Trade Association, for example, complained to the Prime Minister that bills of lading were “so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility”⁷²⁷.

In the United States, when US ship-owners faced a downturn in business due to the British domination of the American export business⁷²⁸, they lobbied the US Federal government for some form of statutory protection against oppressive exemption clauses and short limitation periods, and as a result the US Congress passed the Harter Act in 1893⁷²⁹. The Act represented a form of compromise between carrier and shipper interests by prohibiting exemption clauses in any bill of lading which relieved ship-owners of liability for loss or damage arising from negligence, fault or failure in respect of proper loading, stowage, custody, care or delivery; but exempted ship-owners from liability where they had exercised due diligence in making the ship seaworthy. The

⁷²⁵ a position which it held from the end of the 18th century until well into the 20th century, apart from a brief period in the 19th century when the United States was dominant. See Hendrikse & Margetson, *Aspects of Maritime Law: Claims under Bills of Lading*, (Kluwer Law International, 2008) p.4

⁷²⁶ Even when cargo owners did win in court shipowners were quick to insert clauses into future bills of lading. See Michael Sturley (Ed), *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rule: Volume I, II, III* (Fred B. Rothman & Co, 1990) Vol. I pp.158-159

⁷²⁷n(726) Vol I p.5

⁷²⁸ It is estimated that 20 British shipping companies carried nearly all the American export trade. See A.W. Knauth, *The American Law of Ocean Bills of Lading*, (4th Edn, American Maritime Cases Inc, 1953) at 120. Bills of lading at this time also contained choice of law and forum clauses which shifted most litigation from the US to Britain, see generally S. Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules)* (2nd Edn, Witherby, 1960)

⁷²⁹ US Code chapter 105, Sec. 3, 27 Stat. 445

Act applied to ships transporting goods from or between ports in the US and ports in other countries; and thus, all bills of lading issued in the US required a clause in the contract of carriage declaring the shipment was subject to the provisions of the Harter Act⁷³⁰. Following the introduction of similar legislation in Australia, New Zealand and Canada in the early 1900s⁷³¹, the British Chamber of Commerce actively supported uniform legislation regarding the limitation of ship-owners liability by clauses in bills of lading⁷³². The Dominions Royal Commission also made recommendations in 1917 as far as the British Empire was concerned, but no further action was taken, despite Dominion Countries urging the United Kingdom Government to legislate for provisions akin to the Harter Act to apply throughout the Empire.

3.2 The UK Role in the Development of the Hague Rules

3.2.1 The Imperial Shipping Committee

Some three years later however, in June 1920 the British Government appointed an Imperial Shipping Committee composed of representatives of British State Departments, Dominion Governments, and shipping and commercial interests⁷³³; to look into the shipping industry within the British Commonwealth. The Committee submitted a report⁷³⁴ to Parliament in February 1921 recommending that there should be uniform legislation throughout the Empire, based on the Canadian Water Carriage Act 1910, prohibiting ship owners from contracting out of carriers' risks by clauses in bills of lading. The Committee acknowledging that although English law would be fundamentally altered, uniformity of law would be a gain⁷³⁵. The report was

⁷³⁰ R. Force, A. N. Yiannopoulos, M. Davies, *'Admiralty And Maritime Law'* (Beard Books,2006) p.198

⁷³¹ I.e. the Australian Sea Carriage of Goods Act 1904; the New Zealand Shipping and Seamen Act 1908 and the Canadian Water Carriage of Goods Act 1910

⁷³² Similar proposals were brought in France, Holland and the Scandinavian countries

⁷³³ From an article in *Lloyd's List* 29 September 1921 cited in S. D. Cole, *'The Hague Rules 1921 Explained'* (Effingham Wilson, London, 1921), p.18. See also D. C. Frederick 'Political Participation & Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules' (1981) 22 J. Mar. L. & Comm. 81

⁷³⁴ I.e. 'Report Of The Imperial Shipping Committee On The Limitation Of Shipowners' Liability By Clauses In Bills Of Lading And On Certain Other Matters Relating To Bills Of Lading', (1921) Cmd. 1205

⁷³⁵ Cole n(733) p.18

subsequently adopted by the Imperial Conference⁷³⁶ in 1921 and that resolution committed the British Government and the Governments of the Dominions, to propose legislation on the matter⁷³⁷.

There had been an assumption that as Britain owned the majority of the world's merchant shipping fleet, only the shipowners' interests would be pursued in any legislation, but the Shipping Committee's report offered greater protection to cargo owners and did not make 'freedom of contract' their objective⁷³⁸. It is however, important to note that by the 1920s economic circumstances had changed and British carriers were in a weakened state following the First World War. Sir Norman Hill of the Liverpool Steamship Owners Association, later stating:

“[T]he all powerful shipowners are at their wits end to secure freights to cover their working expenses. Voyage after voyage is being made at a dead loss. Vessels by the hundreds are lying idle in port. At the moment any cargo owner could secure any conditions of carriage he required provided he would only offer a freight that would square the yards”⁷³⁹

Therefore, the Government in accepting the Shipping Committee's Report perhaps saw legislation as a way of re-invigorating the shipping industry as well as placating the Dominions; and by being involved in the negotiation and drafting of any such legislation it would give them the opportunity to influence its final form.

3.2.2 The Draft Hague Rules

The Imperial Shipping Committee's Report also prompted the International Law Association's Maritime Law Committee to consider bills of lading⁷⁴⁰; and in May 1921 it formed a drafting committee to produce a draft code to give international effect to the intentions of the Harter Act 1893 and the Canadian Water Carriage of Goods Act 1910.

⁷³⁶ I.e. At a meeting of the British Government and leaders from self governing colonies and dominions of the British Empire (later called Commonwealth Heads of Government Meeting)

⁷³⁷ Hansard, 19 April 1923 Vol. 53 cc755-69, Carriage of Goods by Sea Bill (HL), The Lord Chancellor

⁷³⁸ See Hendrikse & Margetson n(725) p.5

⁷³⁹ n(726) Vol I p.144

⁷⁴⁰ Initially the Committee was to draft an international code on the law of affreightment which only incidentally referred to bills of lading. See S. D. Cole n(733) p.21

Cole⁷⁴¹ and Sturley⁷⁴² submit that ship-owners, shippers, consignees, bankers and underwriters collaborated in the drafting of the Rules, but another publication and the travaux préparatoires of later meetings⁷⁴³, state that “officially the ship-owners took no active part in [the drafting] although at the request of the merchants an eminent lawyer associated with shipping interests assisted in an advisory capacity”⁷⁴⁴.

By mid-June the draft was complete and the rules were considered at several international conferences⁷⁴⁵ where support for the rules mounted from both ship-owners and cargo owners; and at the September 1921 Conference of the International Law Association in The Hague, the draft set of rules, which became known as the Hague Rules, were unanimously agreed to by the delegates. The delegates were mainly from the private commercial sector, with only four, including Sir Henry Duke⁷⁴⁶ who chaired the meeting, representing political, judicial or diplomatic interests. In contrasting this ‘individual’ approach to purely diplomatic efforts organised by nation-states, Duke commented that “in any convention in which nations were represented they would vote by nations. We represent interests”⁷⁴⁷ and it has been said that, these ‘individuals’ produced rules that comported closely with the prevailing economic interests and this together with the political power of the major protagonist states, may partially account for the longevity of the rules⁷⁴⁸.

The so-called Hague Rules were further considered in October 1922 by delegates at the Fifth International Diplomatic Conference on Maritime Law in Brussels – including delegates from the British Government, where they unanimously agreed to recommend to their respective governments, the adoption of a revised draft set of rules as the basis for the ‘Convention for the Unification of Certain Rules relating to Bills of Lading’.

⁷⁴¹ n(733) p.7

⁷⁴² n(726) Vol I p.9

⁷⁴³ i.e. the 1922 meeting see n(726) Vol. II p.340

⁷⁴⁴ Pacific Maritime Review: The National Magazine of Shipping, Vol. 18 November 1921 p.692

⁷⁴⁵ E.g. ICC Meeting in London, see also n(726) Vol I pp.10-12

⁷⁴⁶ a Conservative politician until 1918 and subsequently President of the Probate, Divorce and Admiralty Division of the High Court

⁷⁴⁷ n(726) Vol I p.115

⁷⁴⁸ See Frederick n(733) p.93

3.3 Enacting the Hague Rules into English Law

3.3.1 Bill Introduced in House of Lords

The British Government had promised to introduce its own proposals if a convention was not concluded quickly enough, and this may account for the fact that despite the ongoing negotiations for further amendments to the draft convention, it was an earlier Draft⁷⁴⁹ which was included in the Carriage of Goods by Sea Bill when it was introduced and given its First Reading by the House of Lords on 26 March 1923.

It has been claimed that this somewhat early introduction jeopardised further negotiations in respect of the Convention, because if substantial changes to the text had been accepted, these would have differed from the English Bill, and without British participation, the convention would not have been particularly useful given the major role Britain played in merchant shipping at that time⁷⁵⁰. Therefore, the British delegation was seen as exerting pressure on the negotiations to prevent changes being made and in fact the 1924 version of the Convention contains very few changes from the 1921 draft text. A point illustrated in the travaux préparatoires, when asked whether they wished to pursue a particular issue, the French delegation replied “*avec la dernière énergie*” - it was to no avail now that a bill had been introduced in the United Kingdom⁷⁵¹.

Parliamentary support for the Carriage of Goods by Sea Bill was not unanimous however, at its Second Reading in the House of Lords on 19 April 1923, Lord Sumner stated that whilst he was not proposing the Bill be rejected, it must be appreciated that the “sheet anchor of trade was freedom of contract and . . . all that the law had to say was that contracts should be interpreted and enforced”⁷⁵²; Lord Phillimore regretted “that it should be necessary to have any interference with that freedom of contract under which our carrying trade has been carried on so successfully for the last sixty or

⁷⁴⁹This draft essentially comprised the proposals in the Imperial Shipping Committee Report, which the Government had agreed to at the Imperial Conference. See Hendrikse & Margetson n(725) p.9

⁷⁵⁰Hendrikse & Margetson n(725) p.10-12

⁷⁵¹n(726) Vol I p.10

⁷⁵²Hansard 1803-2005 HL Deb 19 April 1923 vol. 53 cc755-69

seventy years”⁷⁵³; and Lord Nunburnholme stated that the provisions “will be very harassing to British commerce” and “unfair to carrying companies”⁷⁵⁴ - although, it should be noted that Lord Nunburnholme was one of the heirs to the Thomas Wilson Sons & Co Shipping Line⁷⁵⁵.

It is also interesting to note that in the acclaimed work *Scrutton on Charterparties and Bills of Lading*, Sir Thomas Edward Scrutton (later Lord Justice) opposed the adoption of the Hague Rules by the UK Parliament, stating in the preface, that:

“should this work reach another edition, it may be necessary to consider in detail the rules, if any enacted by Parliament. We sincerely hope, however, that the matter may remain as it is now rests, on the bargaining of parties, free to contract”⁷⁵⁶;

and further described the proposals for statutory enactment of an international code as a “terrifying prospect”⁷⁵⁷. Scrutton incidentally relinquished the editorship of the publication when the Hague Rules were subsequently adopted, although some nine years later in *The Torni*⁷⁵⁸, Scrutton LJ appeared to be reconciled to the Hague Rules and their public policy nature.

3.3.2 Consideration by Joint Select Committee

Due to the criticism of the Bill which, according to The Marquess of Salisbury in the House of Lords had been of considerable concern to the Government, it was decided (after discussion with representatives of shipowners, cargo owners and bankers) that the Bill should be considered by a Joint Select Committee (under the chairmanship of Lord Sterndale) before being passed into law – as it was “far better that all difficulties be got over and interests conciliated rather than the Bill driven through by the mere force of political majorities”⁷⁵⁹. The resultant Joint Committee Report, tabled in both Houses

⁷⁵³ n(752)

⁷⁵⁴ n(752)

⁷⁵⁵ Thomas Wilson’s grandson being Charles Henry Wilson the 2nd Baron of Nunburnholme

⁷⁵⁶ 11th Ed, London (1923) p. iii-iv

⁷⁵⁷ n(756) p. v

⁷⁵⁸ [1932] All ER Rep 374 (CA) at 386

⁷⁵⁹ Hansard 1803-2005 HL Deb 31 May 1923 vol. 54 cc351-2

on 16 July 1923, recommended enacting the Bill with only minor amendments in the implementing portion of the Bill⁷⁶⁰, but although the Bill was given its final Reading in the Lords and was passed to the Commons on 1 August 1923 where it had its First Reading the following day⁷⁶¹; the dissolution of Parliament in November 1923 prevented the bill from passing through its Second and Third Readings.

3.3.3 Reintroduction in the House of Lords

Despite a change in government, the Carriage of Goods by Sea Bill (with the Sterndale Committee recommendations) was reintroduced into the House of Lords on 27 February 1924⁷⁶². But unlike the previous year the Bill was passed without opposition or amendment through Second and Third Readings in the Lords and through similar stages in the Commons. The only comment being made during the Commons Second Reading, by Sir Leslie Scott, who stated that the Bill:

“Represents . . . a very nicely balanced consideration upon which each side, merchant and shipowner and each nation, has made concessions in order to get mutual reciprocity from the other side. It is, therefore, essentially, par excellence, an agreed Bill. . . The fact that measures of this kind can, be introduced by one Government and carried forward without alteration or qualification by another Government, essentially opposite in character, is one of the best characteristics of our Parliamentary institutions”⁷⁶³.

The apparent change in attitude towards the Carriage of Goods by Sea Bill in 1924 to that of 1923 perhaps reflects a change from freedom of contract and a *laissez-faire* approach by government to one of regulation. This could in part be due to the fact that a Labour government (with support from the Liberal Party) replaced the Conservative government in the 1923 Election⁷⁶⁴ and the fact that the world’s shipping industry was moving towards a form of uniform regulation and Britain did not want to be left out especially as it had had considerable influence in the drafting of the Hague Rules.

⁷⁶⁰ Hansard 1803-2005 HL Deb 25 July 1923 vol. 54 cc1410-2

⁷⁶¹ Hansard 1803-2005 HC Deb 02 August 1923 vol. 167 c1721

⁷⁶² Hansard 1803-2005 HL Deb 27 February 1924 vol. 56 c372

⁷⁶³ Hansard 1803-2005 HC Deb 05 June 1924 vol. 174 cc1560-1

⁷⁶⁴ Although Labour won less seats than the Conservatives, it formed a minority government with Liberal party support

3.3.4 Entry into Force

The Carriage of Goods by Sea Act 1924 gained Royal Assent on 1 August 1924, which actually preceded the UK's signing of the Hague Rules Convention on 25 August 1924. The UK ratified the convention on 2 June 1930 and it entered into force 2 June 1931⁷⁶⁵ as per Article 14. Parliament's initial haste may in part be attributable to the downturn that was being faced by UK carriers in the mid-1920s and a desire to be seen to be offering shippers more equitable terms in order to boost the shipping industry - as less than five years after the Hague Rules took effect in English law, Government passed the British Shipping (Assistance) Act 1935 which effectively subsidised the British shipping industry⁷⁶⁶ by some £10,000,000 in order for it be more competitive against foreign companies and to enable it to secure a greater share of the trade carried throughout the world.

It should however be noted that although the US had participated in the preparation of Hague Rules it was slow to ratify them⁷⁶⁷. This apparently made other countries hesitate to adopt the Rules⁷⁶⁸ and led to a movement by UK shipowners in the early 1930s to lobby, unsuccessfully, for the repeal of the rules on the basis that the rest of the world had been unwilling to join the uniformity⁷⁶⁹.

3.4 The Visby Protocol

By the 1950s it became evident that the Hague Rules had shortcomings⁷⁷⁰ and were not meeting the needs of the international trading community. For example, the rules on limitation of liability were predicated upon shipments in bales, bags or boxes and were deemed not suitable for containerised cargoes which necessitated an improved

⁷⁶⁵ U.K. Treaty Series No.17 (1931) Cmd. 3806

⁷⁶⁶ see Cabinet Meeting 28 November 1934 Item 13 and Hansard 1803-2005 HC Deb 14 December 1934 vol. 296 cc711-89

⁷⁶⁷ Although the US implemented the Hague Rules domestically, see US Carriage of Goods by Sea Act 1936

⁷⁶⁸ S.R. Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions', (1995-1996) 23 Transp. L.J. 477

⁷⁶⁹ n(768) p.477

⁷⁷⁰ See R.P. Colinvaux, '*The Carriage of Goods by Sea Act 1924*' (Stevens & Sons, 1954), at p. v "every month sees some new and insoluble problem". Also see e.g. *Vita Foods Inc v Unus Shipping Co Ltd* [1939] AC 277; *Scruttons v Midland Silicones* [1962] AC 446 and *The Muncaster Castle* [1961] AC 807

definition of the term 'package'; and inflation had reduced the effective recovery amounts⁷⁷¹. Developing countries also objected to the allocation of risk under the Hague Rules, as being "slanted too much in favour of carriers Limitation of shipowner liability tips the balance so much in the shipowner's favour that it must necessarily have affected the cost of insurance, although no compensation is given by way of lower freight rates for shippers"⁷⁷².

These issues were thus considered at the 1963 Conference of the Comité Maritime International (CMI) in Stockholm and a draft was produced in Visby, Sweden. Some five years later these so-called Visby rules were further amended at a diplomatic Conference in Brussels, where Lord Diplock led the British delegation and chaired the rules drafting committee. The conference took the view that only limited changes were necessary⁷⁷³ and the resulting Protocol⁷⁷⁴ included *inter alia* increased limits of liability and increased time limits for bringing claims.

The amended Hague Rules became known as the Hague-Visby Rules and at the conclusion of the Brussels Conference on 23 February 1968, 7 nations including the UK signed the Protocol⁷⁷⁵.

3.4.1 Enacting the Hague-Visby Rules into English Law

The Hague-Visby Rules comprised a Schedule to the Carriage of Goods by Sea (Amendment) Bill, which was introduced as a Private Member's Bill in the House of Commons on 10 February 1970. Although it should be noted that the Rules had not been accepted in their entirety – Article I(c) of the Hague-Visby Rules exempted live

⁷⁷¹ J.J. Donovan, 'The Hamburg Rules: Why a New Convention on the Carriage of Goods by Sea' (1979) 4 Mar. Law 3

⁷⁷² Report of the U.S. Delegation to the Hamburg Conference (Feb 5 1979) in J. Maher, 'Marine Transport, Cargo Risks, and the Hamburg Rules, Rationalization or Imagery', (1979-1980) 84 Dick L. Rev 202

⁷⁷³ 'Carver's Carriage by Sea', (13th Edn. 1982) Vol. 1, para 448

⁷⁷⁴ Formally known as the Protocol to amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Full text available at <http://www.admiraltylawguide.com/conven/visbyrules1968.html>

⁷⁷⁵ I.e. Treaty Series 083/1977 Cmnd 6944

animals and deck cargo, but the Bill expressly restored these items into the category of 'goods'⁷⁷⁶.

Nevertheless, in presenting the Bill, Mr Charles Fletcher-Cooke suggested that as two years had passed without any state depositing ratifications, the UK should give a lead to other nations in the way Lord Diplock gave a lead at the conference⁷⁷⁷. The Bill however, was to be a casualty of the general election and it was over a year before the Bill was reintroduced – again as a Private Member's Bill but this time in the House of Lords by Lord Diplock. Lord Diplock stating that the bill was "of very considerable importance to the trade and commerce of this country and of the world [and that it] had the approbation of all commercial interests involved in this country: shippers as well as shipowners; insurers of cargo as well as the clubs and bankers, and others who are interested in the export of goods"⁷⁷⁸. It was again suggested that as the UK had taken a leading part in the original Hague Rules conference and at the Brussels Conference in 1968, it should take a leading part in ratifying the Protocol.

It was not a view shared by all - Lord Kennet was of the opinion that the 1968 Protocol did not have the same level of agreement in undeveloped countries and Lord Chorley stated that commercial and maritime lawyers were very much divided as to how successful the Hague Rules had been and that the editor of '*Carver's Carriage of Goods by Sea*' had devoted pages to demonstrating how ineffective and almost futile the Rules were⁷⁷⁹. The Hague-Visby Rules were however, given effect in the UK by the passing of the Carriage of Goods by Sea Act 1971⁷⁸⁰ and the Visby Amendment was subsequently ratified on 1 October 1976.

⁷⁷⁶ See s. 1(7) of the Act

⁷⁷⁷ Hansard 1803-2005, HC Deb 10 February 1970 vol. 795 cc1098-100

⁷⁷⁸ Hansard 1803-2005, HL Deb 25 March 1971 vol. 316 cc1028-43

⁷⁷⁹ n(778)

⁷⁸⁰ Which repealed the Carriage of Goods by Sea Act 1924

The Hague-Visby Rules became effective on 23 June 1977⁷⁸¹ after the accession of the tenth state⁷⁸². However, despite widespread industry support amongst commercial interests, the Hague-Visby rules did not attract widespread political acceptance⁷⁸³. Reasons for this failure have been attributed to the success of the developing countries in shifting the discussions on maritime issues from the commercial arena to an overtly political forum⁷⁸⁴ and in the US case, the retirement of the Government officials who had been delegates at the conferences⁷⁸⁵.

Whilst it may appear that the Hague-Visby Rules marked the end of the uniformity of carriage of goods by sea law that had existed for some 45 years, as there were now effectively two, albeit very similar, international carriage by sea regimes – the Hague Rules and the Hague-Visby Rules, but in fact as Contracting States had adopted the Hague Rules with modifications and/or text variations using various legislative methods, there had always been differences in the supposed ‘uniform rules’.

3.5 The S.D.R. Protocol

The provisions defining the limits of liability, in both the Hague Rules and Hague-Visby Rules were expressed in terms of Poincaré gold francs. But given gold had fallen into disuse, the problem of converting gold francs to a transferable currency was raised at the CMI Conference in Rio de Janeiro in 1977. A further Special Drawing Rights (S.D.R) Protocol⁷⁸⁶ was therefore, produced which modified the Hague-Visby Rules⁷⁸⁷ and changed the basic unit of account from gold francs to Special Drawing Rights of the

⁷⁸¹ Under SI 1977/981

⁷⁸² See further Article 13

⁷⁸³ E.g. the USA did not ratify the Visby Protocol despite the Bill of Lading Committee of the Maritime Law Association (MLA) consistently and steadfastly advocating US acceptance of the Visby Protocol (see MLAUS Doc No. 591 at 6448 (November 1975) .

⁷⁸⁴ Frederick n(733) p. 97

⁷⁸⁵ See MLAUS Doc No, 539 at 5729 (June 1971) “there is no particular interest of authorship in getting it ratified”.

⁷⁸⁶ Formally entitled the ‘Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 as Amended by the Protocol of 23 February 1968: Brussels 21 December 1979’; text available at <http://www.admiraltylawguide.com/conven/sdrprotocol1979.html>

⁷⁸⁷ I.e. Article IV paragraph 5

International Monetary Fund (I.M.F.)⁷⁸⁸. The Protocol was signed at Brussels by the UK on the 21st December 1979⁷⁸⁹.

The SDR Protocol is given effect in the United Kingdom by an amendment to s.1(1) of the Carriage of Goods by Sea Act 1971⁷⁹⁰. The Bill⁷⁹¹ introducing this amendment passed through Parliament without opposition, and the UK ratified the Protocol on 2 March 1982. It entered into force on 14 February, 1984 but the Protocol was to also further limit uniformity as the majority of states were still party to the unamended Hague Rules; some states were party to the Hague-Visby Rules and by the mid 1980s some states were party to the Hague-Visby Rules as amended by the S.D.R Protocol.

The S.D.R. Protocol also highlights the complicated arrangements that exist in UK legislation. The prior Visby amendment had been introduced as a Carriage of Goods by Sea (Amendment) Bill but in this instance, in order to enable the UK to ratify the similar amending protocols of two international maritime conventions, the Merchant Shipping Bill was introduced – which effectively amended the Merchant Shipping (Liability of Shipowners and Others) Act 1958 and the Carriage of Goods by Sea Act 1971. Whilst acknowledging the efficiency of this process, it makes it extremely difficult for interested parties to follow what amendments to international conventions are coming before Parliament, or not as the case may be. This was clearly demonstrated again in 1992 when a Carriage of Goods by Sea Bill was introduced into Parliament, which sought to repeal the Bills of Lading Act 1855 but some observers mistakenly believed the UK was implementing legislation to give effect to the Hamburg Rules⁷⁹² - which given the title of the legislation was not unsurprising.

⁷⁸⁸ The SDR, created by IMF in 1969, is a unit of account valued on the basis of a basket of four key national currencies (presently, the euro, pound sterling, US dollar and Japanese yen)

⁷⁸⁹ Treaty Series No, 28 (1984) Cmnd 9197 (previously published as Miscellaneous No, 18 (1980) Cmnd 7969

⁷⁹⁰ Ratified by s. 2(1) of the Merchant Shipping Act 1981 'Substitution of special drawing rights in limitation provisions of Carriage of Goods by Sea Act 1971'

⁷⁹¹ Merchant Shipping Bill 1980

⁷⁹² See Hansard 1803-2005 HL Deb 04 February 1992 vol. 535 cc230-9 and Hansard 1803-2005 HL Deb 15 June 1992 vol. 538 cc73-9

3.6 The Hamburg Rules

During the 1960s there was mounting pressure from developing countries for a re-examination of cargo liability regimes; particularly as there was a perception that the Hague Rules had been developed by colonial nations, such as the UK and the US in the early 1920s, largely for the benefit of their maritime interests. Furthermore, it was felt that the allocation of responsibilities and risks within the Hague Rules heavily favoured carriers at the expense of shippers and that traditional maritime law impaired the balance of payments position of developing countries which thus contributed to continued poverty and perpetual under-development⁷⁹³. This dissatisfaction was expressed at the 1st UN Conference on Trade and Development (UNCTAD) organized in 1964 where it was agreed by the UK and other members that “all countries should cooperate in devising measures to help developing countries build up maritime and other means of transport for their economic development”⁷⁹⁴.

Following a resolution made at the 2nd UNCTAD conference a Working Group on International Shipping Legislation was established in 1969 which had as its first priority a study of bills of lading⁷⁹⁵. However, in 1971 it was considered prudent to shift the legal questions arising from this study to the United Nations Commission on International Trade Law (UNCITRAL) and a Working Group on International Legislation on Shipping was set up. This Working Group subsequently produced a new draft convention covering liability for the carriage of goods by sea, which sought to find a new compromise between the interests of both carrier and shipper, and was modelled on conventions relating to carriage by air and road, particularly the CMR and the Warsaw Convention.

⁷⁹³ J. C Sweeney, ‘UNCITRAL and the Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods’ (1991) 22 J. Mar. L & Com. 520-1

⁷⁹⁴ United Nations Yearbook 1964 at 195

⁷⁹⁵ United Nations Yearbook 1969 at 336-338

3.6.1 UK Opposition to the Hamburg Rules

These draft rules were presented to the United Nations Conference on the Carriage of Goods by Sea held in Hamburg, Germany in March 1978, attended by representatives of 78 states including the UK as well as specialized governmental and non-governmental organizations⁷⁹⁶. There were fundamental tensions at the conference however, as many saw the new Rules as a set of principles to be defended whilst the majority saw it “as a dragon to be slain by whatever means could be bought to bear”⁷⁹⁷. The UK was apparently amongst the most resolute of the ship-owning nations opposing the elimination of the traditional ‘errors of navigation and management of the ship’ defence contained in the Hague and Hague-Visby Rules, and commented that the proposed elimination “will undoubtedly raise the overall cost of international maritime transport and thus have an adverse effect on world trade”⁷⁹⁸. However, the UK did admit that “any estimate of the economic implications of the proposed change is difficult as statistics are not normally kept”⁷⁹⁹.

It has been said that the absence at the Hamburg Conference of commercial delegates (other than those representing their countries) led to political compromises rather than economic bargaining; and this is reflected in the text containing rather ambiguous language⁸⁰⁰. The rules were nevertheless adopted as the United Nations International Convention on the Carriage of Goods by Sea 1978 on 30th March 1978 and became known as the Hamburg Rules. The Convention remained open for signature until 30 April 1979 - at which date there were 28 signatory states⁸⁰¹, but the UK did not sign.

⁷⁹⁶ Such as the Organization of African Unity and the International Union of Marine Insurance

⁷⁹⁷ J. C. Moore, ‘The Hamburg Rules’ (1978) 10 J. Mar. L & Com. 1, 5

⁷⁹⁸ United Nations Conference on the Carriage of Goods by Sea, Hamburg 6-31 March 1978, ‘Comments and Proposals by Governments and International Organisations on the Draft Convention on the Carriage of Goods by Sea, and on Draft Provisions concerning Implementation, Reservations and other Final Clauses: Prepared by the Secretary-General’, U.N. Doc. A/CONF. 89/7 December 5 1977, p.3

⁷⁹⁹ n(798) p. 5

⁸⁰⁰ Frederick n(733) p.105

⁸⁰¹ Which included the US, France and Germany; See U.N. Doc. A/CN.9/325

In the UK, there was continued opposition to the Hamburg Rules amongst Parliamentary peers. Lord Roskill, for example, the then Chairman of the British Association of Average Adjusters stated shortly after the Hamburg Conference, that:

“Those who propose [the Hamburg Rules] do not, with all respect, seem to me to be asking the only relevant question – Is this change necessary to a better working result in practice? One begins to suspect, rightly or wrongly that other influences were at work and that these proposals emanate from some who have no practical experience in how well the Hague Rules have worked over the last fifty years . . . has anyone counted the cost of these changes if they are made?”⁸⁰²

Similarly, at the 1979 CMI colloquium on the Hamburg Rules held in Vienna, Lord Diplock who chaired the colloquium, concluded that the majority of international lawyers would prefer to retain the existing Hague/Visby liability system to shifting to another set of rules, as the economic consequences of doing so would be uncertain. However, Lord Diplock did add that if the new regime entered into force in parallel with the Hague systems, appropriate steps would need to be taken by shipping nations in order to maintain uniformity of law in relation to the carriage of goods by sea⁸⁰³.

To this end, a further conference was held by the CMI in Paris in 1990 which dealt with future improvements or updates to the Hague/Visby liability system to bring it into line with the Hamburg Rules, as it was foreseen that the Hamburg Rules would enter into force in the future. This resulted in the Paris Declaration on the Uniformity of the Law of Carriage of Goods by Sea June 29 1990⁸⁰⁴, but despite further meetings of the CMI International sub-committee during the 1990s, which the UK participated in, it was not deemed appropriate to draft any text even on issues where a consensus was reached in consideration of potential future developments resulting from other issues of transport law⁸⁰⁵.

⁸⁰² From an address on 11 May 1978, Cited in J. C. Moore, 'The Hamburg Rules' (1978) 10 J. Mar. L & Com. 5

⁸⁰³ See generally 'Colloquium on the Hamburg Rules, Vienna 8-10 January 1979' Report published by the CMI

⁸⁰⁴ See generally 'Documents of the XXXIV International Conference of the Comité Maritime International – Paris 1990'

⁸⁰⁵ CMI, 'Yearbook 1999 Annuaire' p.107

It is however, interesting to note that the issues the developing countries raised for the adoption of the Hamburg Rules were very similar to the ones that the Dominions raised prior to the adoption of the Hague Rules in the 1920s, but whereas, the political urgings of the Dominion countries overcame opposition by the shipowner lobby in the 1920s and the Government ratified the Hague Rules, in the 1990s the Government was not moved in the same way to ratify the Hamburg Rules and thus *inter alia* increase carrier liability.

3.6.2 Hamburg - Entry into Force or Dis-harmonisation?

By the time the Hamburg Rules came into force on 1 November 1992 one year after the deposit of the 20th instrument of ratification⁸⁰⁶, there was a growing expectation that the Hamburg Rules would slowly gain acceptance as opposition to the rules diminished. Some nations, although not the UK began to consider adopting the rules, for example France was apparently open to implementing the rules⁸⁰⁷ and the United States held that with the rules entry into force, their continued relegation to the back burner appeared unlikely⁸⁰⁸. Canada and Australia⁸⁰⁹ considered giving effect to the Rules but decided to wait for other major maritime states to ratify.

In 1993 the UK attended a colloquium⁸¹⁰ convened to discuss whether or not the EU should adopt the Hamburg Rules. Given that the EU represented a high percentage of the world shipping tonnage and opposition to the Hamburg Rules had come mostly from the EU and Scandinavian Countries, the objective of the colloquium was “to confront points of view on the main subjects in dispute”⁸¹¹. However, despite the fact that some 9 EU states had originally signed the Hamburg Rules, only the land-locked member states of Austria and Hungary actually ratified the Rules along with Romania.

⁸⁰⁶ Under Article 30 of the Rules

⁸⁰⁷ Francesco Berlingieri, ‘*The Hamburg Rules: A Choice for the EEC?* : International Colloquium held on 18 and 19 November, 1993’ (1994, Maklu) p.17

⁸⁰⁸ D.A. Werth, ‘The Hamburg Rules Revisited – A Look at the U.S. Options’ (1991) 22 J. Mar. L. & Com. 59

⁸⁰⁹ The Australian Government has passed a statute bringing the Hamburg Rules into effect 1 November 1994, unless the Government of the day otherwise proclaims. Cited in C.C. Nicoll, ‘Do the Hamburg Rules suit a Shipper-Dominated Economy’ (1993) 24 J Mar. L. & Com. 159

⁸¹⁰ See generally n(804) the UK representation included Professor N Gaskell from the University of Southampton

⁸¹¹ n(807) p.17

As at May 2011 the Hamburg Rules have been ratified by 34 countries but this represents less than 5% of world maritime trade⁸¹² as none of the major shipping nations have ratified the Rules. Therefore, whilst the Hamburg Rules offered the potential for achieving greater uniformity, as the UK, the US and Japan have not been motivated to ratify them, the Hamburg Rules have perhaps made for greater disharmony, as now more international conventions potentially govern the international carriage of goods by sea.

3.7 The Rotterdam Rules

The ongoing problems with the Hague-Visby Rules and the disunity in the carriage of good by sea law led to the Comite Maritime International (CMI)⁸¹³ deciding in 1988 to revisit the Hague-Visby Rules, in order to “find out whether and to which extent its provisions were still in line with the requirements of the industry and provided a balanced solution of the conflicting interests of the carriers . . . on one hand and of the cargo owners on the other”⁸¹⁴. The ‘International Sub-Committee on Transport Law’, thus began drafting a new international uniform cargo liability convention, which was submitted to the 1990 CMI conference in Paris⁸¹⁵.

Some four years later the CMI, at its 1994 meeting, decided to investigate the possibility of greater uniformity by soliciting the views of Member Associations through a questionnaire. These responses and earlier drafts were then considered by the International Sub-Committee in a number of sessions between 1995 and 1998⁸¹⁶ with the UK being represented by solicitor and British Maritime Law Association Member⁸¹⁷, Mr Stuart Beare.

⁸¹² See: http://www.oecd.org/document/32/0,3746,en_2649_34367_1866253_1_1_1_1,00.html

⁸¹³ I.e. the, a non-governmental international organisation, comprising national associations such as the British Maritime Law Association, which seeks to unify all aspects of maritime law

⁸¹⁴ CMI Yearbook 1999 p.106

⁸¹⁵ which produced the ‘Paris Declaration on Uniformity of the Law of Carriage of Goods by Sea 29th June 1990’

⁸¹⁶ See CMI Yearbook 1995 p.229-243; CMI Yearbook 1996 p.360-420 and CMI Yearbook 1997 p.288-29; CMI Yearbook 1998 p.163-185

⁸¹⁷ Officers of which included the Parliamentary Peers Lord Mustill, Lord Lloyd and Lord Goff

At the same time UNCITRAL was undertaking a study of the current practices and laws in the area of carriage of goods by sea⁸¹⁸. This study highlighted the fact that both national and international legislation had significant gaps which hindered the free flow of trade and increased transaction costs and thus UNCITRAL invited interested international organisations to devise potential solutions. In response to this the CMI International Sub-Committee (under the chair of Mr Stuart Beare) submitted a draft report⁸¹⁹, which in addition to the areas it had previously identified, considered the wider issues of transport law such as the interface between the carriage contract and sale of goods contract, the relationships within the contract of carriage and transport documents.

The UNCITRAL secretariat then set up an inter-governmental Working Group on Transport Law, composed of all States members of the Commission⁸²⁰, to negotiate a preliminary draft convention. The UK had representatives at all thirteen sessions over the following six years⁸²¹, and although the Working Group reports do not detail what views or suggestions were held by which representatives, the formal comments and proposals received from Member States and International organisations are included. The UK government making a formal comment to the 2005 Working Group regarding arbitration:

“As a matter of principle, it is questionable whether there is a compelling case for the inclusion of any provisions on arbitration in the UNCITRAL draft instrument. If however, provisions are to be included, the most straight forward approach would be a provision upholding the validity and enforceability of an arbitration agreement in accordance with the parties’ agreement”⁸²².

⁸¹⁸ See United Nations ‘Transport Law: Possible Future Work – Report of the Secretary General’, Doc A/CN.9/476 (31 March 2000), p.2

⁸¹⁹ In the CMI Yearbook 2001 p.532-597

⁸²⁰ Including international organisations such as UNCTAD and CMI, with the UK represented by Mr Stuart Beare

⁸²¹ I.e. between April 2002 and January 2008 reports of these sessions available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html; with the ‘Draft Convention on the Carriage of Goods [Wholly or Partly] by Sea’ [UNCITRAL Doc A/CN.9/WG.III/WP56], published in September 2005

⁸²² ‘Comments by the United Kingdom of Great Britain and Northern Ireland regarding Arbitration’ UN Doc A/CN.9/WG.III/WP.59 (18 November 2005), p.2

Article 75 permitted the parties to refer any dispute to arbitration, and as this may potentially reduce the number of arbitrations taking place in London, as arbitration could possibly take place in a number of different locations. Given that many carriage contracts provided for London arbitration, the Government were clearly keen to protect the parties' freedom to choose, noting that "the Hague and Hague-Visby Rules do not include provisions regulating arbitration and this has proved satisfactory; but that the Hamburg Rules do contain prescriptive provisions as to arbitration, and this was arguably one of the reasons why the rules had not been widely implemented"⁸²³.

The Draft Convention was reviewed by UNCITRAL in June 2008 and later that year the UN General Assembly adopted the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'. The new Convention consisting of some 96 articles, which legislate both for international maritime carriage of goods and for international multi-modal carriage (where there is a maritime leg in the contract of carriage), and increases the liability of carriers in respect of the carriage of cargo. The Convention was open for signature on 23 September 2009 at Rotterdam, so it became known as the Rotterdam Rules.

3.7.1 Rotterdam - Entry into Force or Further Dis-harmonisation?

The Rules aimed to replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules in order to re-achieve uniformity of law in relation to the contract of maritime carriage of goods. To this end 20 states signed the Convention in Rotterdam on 23 September 2009 and three subsequently signed, with Luxembourg the last to do so on 31 August 2010. These 23 signatory states to the convention include the USA and six member states of the EU⁸²⁴ and account for approximately 25% of the world's trade.

The UK has not signed - speaking at the signing ceremony in 2009 Mr Malcolm Blake-Lawson from the Department for Transport stated that:

⁸²³ n(822) p.2

⁸²⁴ See http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

“We would have liked to have been able to sign today, but we do have to complete a consultation process . . . Her Majesty’s government will continue its work with business leaders and the legal the [sic] profession, ensuring that all relevant industrial sectors are involved in the consultation process on whether or not the UK signs or ratifies the new rules”⁸²⁵.

In early 2010 the EU Parliament gave a clear recommendation that Member States should move “speedily to sign, ratify and implement the Rules”⁸²⁶; but such a recommendation is not a mandatory directive, so is non-binding on member states.

3.7.2 The UK Government Position

According to a 2009 paper by the Shipping Policy Department (Department for Transport), the key objective for the UK government is to achieve an internationally agreed and workable regime for the carriage of goods by sea that is broadly acceptable to all commercial parties⁸²⁷.

Similarly, SITPRO⁸²⁸, a government funded UK Trade facilitation body, published its ‘Guide to the Rotterdam Rules’⁸²⁹ in early 2010, stating that the Government will base its policy position on three key tenets:

1. “The priorities for the UK are not defined by favour towards cargo or carrier interests;
2. Common law and the Hague-Visby Rules have stood the test of time and have served the UK trading community well. However any new regime should take account of current and future practices;
3. The UK’s approach to the Rules should ensure that the UK remains a pre-eminent centre for maritime dispute resolution and an exporter of maritime expertise generally. The UK approach should also enable the UK’s banking, insurance and financial service industries to benefit.”⁸³⁰

⁸²⁵ See Freight and Logistics News Service (previously International Freighting Weekly) available at <http://www.ifw-net.com/freightpubs/ifw/article.htm;jsessionid=EF6266116AAADC88E722377C087B543E.5fa4e8cc80be35e2653c9f87d8b8be45bf6ba69a?artid=20017701156&printable=true>; accessed 20/07/11

⁸²⁶ See Item 11 of the EU Transport Policy Document ‘Rotterdam Rules – European Parliament resolution on strategic goals and recommendations for the EU’s maritime transport policy until 2018’

⁸²⁷ Presented by Malcolm Blake-Lawson of the Department for Transport, to the ICC Transport Group 29 January 2010

⁸²⁸ See generally <http://www.sitpro.org.uk>; accessed 20/07/11; this organisation has since ceased operation

⁸²⁹ Available <http://www.sitpro.org.uk//reports/rotterdamrulesguide.pdf>; accessed 20/07/11

⁸³⁰ n(829) at p.15

According to SITPRO, the government viewed the last of these tenets as the most critical⁸³¹ and this, together with the fact that the only formal comments that the UK government submitted to the UNCITRAL Working Group concerned arbitration provisions, tends to suggest that protection of the legal and financial services sector were important considerations for the Government.

SITPRO also stated that the Department for Transport (DfT) had set up a stakeholder working group comprising representatives from carrier and cargo interests, legal, banking and insurance sectors, academics and other interested parties. This is supported by the Lloyds List, which reported that the Department for Transport “has appointed consultants to discuss the convention with freight industry groups before submitting its recommendation to ministers. A UK decision is expected at the end of this year, according to one industry insider”⁸³².

It is difficult to ascertain exactly who the Government has consulted with, but it appears the Government has consulted with practitioners, academics and some industry groups. Solicitor, Mr Craig Neame of Holman Fenwick Willan and Professor Richard Williams of Swansea University have both noted on their respective websites⁸³³ that they have been members of the Consultative Committee constituted to advise the Government on the impact of the Rotterdam Rules in the UK. The Institute of International Shipping and Trade Law⁸³⁴ website states that “The Committee reports at regular intervals to the Department for Transport and it is expected that its work will be influential in determining the political stance that the British government will take on the Rotterdam Rules”⁸³⁵. Likewise, BIFA have stated “The Legal & Insurance Policy Group continued to monitor the progress of the so-called Rotterdam Rules including representation on the DfT consultative committee”⁸³⁶.

⁸³¹ n(829) at p.15

⁸³² Lloyds List, Roger Hailey, ‘EU to Push for Rotterdam Rules Ratification’ 18 May 2010

⁸³³ <http://www.swan.ac.uk/law/istl/members/professorrichardwilliams/>

⁸³⁴ The Institute, established in 2000, exists as a specialist research and professional training centre within the School of Law at Swansea University

⁸³⁵ <http://www.swan.ac.uk/law/istl/newsandevents/>; accessed 11/08/11

⁸³⁶ British International Freight Association, ‘Annual Report and Accounts 2010’, p.9

However, this Government process is apparently a consultative working group not part of a formal consultation which would be required together with an Impact Assessment before the UK government takes a decision on the Rotterdam Rules⁸³⁷. Consequently, its omission from the DfT website detailing the various formal 'Consultations' would suggest that private international maritime law is not high on the priority list of the present coalition government.

4.0 THE CARRIAGE OF GOODS BY AIR

4.1 The Need for Legislation

Towards the end of the First World War, the British Government recognised that the military aviation industry needed to be adapted to a civil aviation industry and set up the Civil Aerial Transport Committee in May 1917 under Lord Northcliffe to explore the potential for such an industry. Thus in February 1919, the Government established the Department of Civil Aviation within the Air Ministry, with Winston Churchill appointed Secretary of State for Air.

Civil aviation at international level was also being considered at this time, with a legal framework being first considered at the Paris Peace Convention in 1919, where twenty six participants (including the British Empire) signed the Convention Relating to the Regulation of Aerial Navigation⁸³⁸ which incorporated the principle that every state has absolute and exclusive sovereignty over the airspace above its territory.

The world's first scheduled international air service took place on 25 August 1919, when the English company Air Transport and Travel Limited (AT&T) carried one passenger and a consignment of goods from London to Paris⁸³⁹, and air travel and cargo service

⁸³⁷ See Jonathan Lux et al, (Ince & Co), 'England & Wales', Shipping 2011, p.64; Available at <http://incelaw.com/documents/pdf/Strands/Shipping/Article/getting-the-deal-through-2011-england-wales.pdf>

⁸³⁸ Available at http://library.arcticportal.org/1580/1/1919_Paris_convention.pdf; accessed 12/07/11

⁸³⁹ See generally http://www.britishairways.com/travel/explore-our-past/public/en_us

companies soon began to proliferate in Europe⁸⁴⁰. By 1920, three French companies were competing with three British ones⁸⁴¹ on the London-Paris route, but there was insufficient business to support six airlines and as the French airlines received substantial subsidies from their government (as did other European airlines), it was the British air companies that had all ceased operations by February 1921 as they did not receive any such Government support.

Churchill had made successive statements in Parliament rejecting State support for air transport, declaring that it was not “the business of the Government to carry civil aviation forward by means of great expenditure of public money⁸⁴² and that “civil aviation must fly by itself; the Government cannot possibly hold it up in the air . . . and any attempt to support it artificially by floods of State money will not ever produce a really sound commercial aviation service”⁸⁴³. But it was not a view shared by all, as Lord Weir’s Committee recommended in its 1920 report that although the initiative for establishing commercial air services should be left to businessmen, the industry would need assistance from the state, and recommended subsidising civil aerial transport firms to the extent of 25 per cent, of their gross earnings⁸⁴⁴.

By March 1921 Churchill had succumbed, stating that whilst he did not “expect to see a very large or a very rapid development of domestic civil aviation . . . There is one route which we should keep open, and which certainly offers superior prospects of success. I mean the air route from London to Paris”⁸⁴⁵. But by then it was apparent that even if the recommendations of Lord Weir’s Committee were followed these would not be sufficient to prevent the British firms being so heavily undercut by the French that they would not be able to continue, so Churchill also approved substantial subsidies to allow the British companies to resume commercial services. A ‘Civil Air Transport Subsidies

⁸⁴⁰ E.g. In France some 11 airlines were in business in 1920

⁸⁴¹ I.e. AT&T, Handley Page Transport and Instone

⁸⁴² Hansard 1803-2005 HC Deb 15 December 1919 Vol. 123 cc87-147

⁸⁴³ Hansard 1803-2005 HC Deb 11 March 1920 Vol. 126 cc1579-640

⁸⁴⁴ Hansard 1803-2005 HC Deb 01 March 1921 Vol. 138 cc1619-715

⁸⁴⁵ n(844)

Committee' was also set up in January 1922 under Lord Hambling to make recommendations *inter alia* on the best method of subsidising air transport in the future.

In 1924 the Government implemented the recommendations of Lord Hambling's Committee which included the creation of a single commercial organisation to eliminate unprofitable competition. 'Imperial Airways' was thus formed through the merger of several companies⁸⁴⁶ and according to its charter, would serve as the chosen instrument of the state for the development of British commercial air transport. The Government agreed to subsidise Imperial with a grant of £1 million spread over ten years on the basis that it would develop routes to the Empire⁸⁴⁷ yet it was also expected to operate commercially⁸⁴⁸. The Government undertook a further review of the aviation industry in 1927⁸⁴⁹ as "British commercial air transport [was] lagging seriously behind developments on the Continent"⁸⁵⁰, but reconfirmed its support for the air transport company, Imperial Airways.

4.2 The UK Role in the Development of the Warsaw Convention

During the 1920s it became apparent that the expansion of the commercial aviation industry would link countries with differing languages and legal systems, and therefore there was a need for an international code to regulate not only the rights and obligations of shippers and carriers, but also carrier liability⁸⁵¹. At first these issues had been dealt with by applying the laws of several nations, but the lack of uniformity "constituted a formidable obstacle to international commerce and transportation by air"⁸⁵². The International Chamber of Commerce and the French Government

⁸⁴⁶ Formed from the merger of Instone Airline Limited, Daimler Airways, Handley Page Transport Limited and British Marine Air Navigation Co Ltd

⁸⁴⁷ Air Ministry 'Report of the Committee of Inquiry into Civil Aviation' March 1938 Appendix B p.40

⁸⁴⁸ M. Staniland, *Government Birds: Air Transport and the State in Western Europe*, (Rowman & Littlefield, Oxford, 2003) p.24

⁸⁴⁹ Minutes of Cabinet Meeting 25 January 1928, p.3

⁸⁵⁰ Cabinet Committee Report on the Future of British Commercial Air Transport', CP327(27), 23 December 1927, p.231

⁸⁵¹ J.G. Wensveen, *Air Transportation: A Management Perspective*, (6th Edn, Ashgate Publishing Ltd, Aldershot, 2007), p.463

⁸⁵² n(851) p.463

recognised the need for an international private air law, and thus convened the First International Conference on Private Air Law in Paris in 1925 for the purpose of considering an international convention which would “regulate carriers and shippers in international air traffic and codify the private international law of the air”⁸⁵³, as the Paris Convention of 1919 had done for public international air law⁸⁵⁴. The conference considered a draft convention prepared by the French Government but adopted a recommendation establishing the Comité International Technique d’Experts Juridiques Aériens⁸⁵⁵ (CITEJA) which would develop a uniform code for private international air law. Although the Conference was attended by Great Britain, it was the French Government who appeared to take the early lead in unifying international aviation law; perhaps in much the same way as Britain had taken the lead in unifying international law relating to the carriage of goods by sea (see Section 3.2).

Uniformity of law was, according to Sir Alfred Dennis on behalf of Great Britain, the main objective⁸⁵⁶ of the Second International Conference on Private Air Law held in Warsaw, Poland in October 1929⁸⁵⁷, but there was also a need to create a limitation of liability regime in order to protect the fledgling aviation industry from potential bankruptcy in case of accidents⁸⁵⁸, particularly as air carriers were struggling to compete with the rail and shipping industries. The conference therefore considered the draft Convention that CITEJA had prepared on ‘documents of carriage and liability of the carrier relating to carriage by air’, together with the amendments put forward by governments during the preceding four years in respect of international liability for carriers for the death or injury to passengers and for the damage, loss or delay to goods or luggage⁸⁵⁹. A final draft was adopted as the Warsaw Convention⁸⁶⁰ which *inter alia*

⁸⁵³ n(851) p.463

⁸⁵⁴ See section 4.1

⁸⁵⁵ I.e. The International Technical Committee of Legal Aeronautical Experts, later to become the International Civil Aviation Organisation (ICAO)

⁸⁵⁶ Minutes of the Second International Conference on Private Aeronautical Law, 4-12 October 1929 at Warsaw, (R.C Horner trans. 1975 Fred B. Rothman & Co) p.85

⁸⁵⁷ which was attended by 32 countries, interestingly the US only sent an observer; see G. Giumulla, ‘Liability in International Law’ in L. Weber, *International & EU Aviation Law* (2011, Kluwer Law International)p.224

⁸⁵⁸ A. Lowenfeld & A. Mendelsohn, ‘The United States and the Warsaw Convention’, (1967) 80 Harv. L. Rev. 498

⁸⁵⁹ See attachment to n(856)

established liability limits in respect of passengers, goods and luggage carried by air between 2 countries who were contracting parties, and the Convention was signed by Great Britain and 22 other States on 12 October 1929.

It has been said that the limits of liability set by the Convention were low even in 1929, but it was hoped that such a limit “applied uniformly on international flights would enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident”⁸⁶¹. This was an important consideration for many governments including Great Britain, as they were heavily subsidising their air carriers.

In accordance with Article 37, the Convention came into force on 13 February 1933; ninety days after the fifth state deposited their instrument of ratification.

4.3 Enacting the Warsaw Convention into English Law

Although the Warsaw Convention was drafted in French, it was an English translation which was included in the Carriage by Air Bill. The Bill being introduced and read for the first time by Lord Templemore in the House of Lords on 1 June 1932. At the Second Reading of the Bill on 7 June 1932 the Earl of Lucan was keen to emphasize the endorsement of the Convention by the aviation industry, stating that “representatives of the air transport industry, such as Imperial Airways and the National Flying Services, have been kept in close touch throughout and the Convention has the unanimous support of all parties concerned”⁸⁶².

The Bill was duly sent to the House of Commons where it had its First Reading on 16 June 1932, its Second Reading on 24 June 1932, and was considered in Committee on 30 June 1932 with the only comment being as to when it would come into use⁸⁶³. The Bill was duly returned on the Lords on the 4 July 1932 and gained Royal Assent on 12 July

⁸⁶⁰ Formally entitled the ‘Convention for the Unification of Certain Rules Relating to International Carriage by Air’ Text available at <http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html>

⁸⁶¹ n(858) 499

⁸⁶² Hansard 1803-2005 HL Deb 07 June 1932 Vol. 84 cc635-6

⁸⁶³ Hansard 1803-2005 HC Deb 30 June 1932 Vol. 267 cc2060-I per Mr Tinker

1932 – its passage through Parliament taking just six weeks. The Act was, however, merely an enabling statute, as the Convention itself was not ratified by the Government until 14 February 1933 and it was not until the 15 May 1933 that the Convention actually came into force, as between Great Britain and the other High Contracting Parties.

During this time a Government Committee found that whilst Imperial Airways had been relatively successful in establishing routes to India, the Far East and South Africa it had made little impact elsewhere and it was again lagging behind France and Germany, so further subsidies and aviation research were recommended. Thus in 1935, British Airways (not the same entity as today) was established through a further series of mergers to concentrate on domestic and European markets⁸⁶⁴.

It is interesting to note that the Warsaw Convention was initially introduced in the late 1920s as a way of protecting the aviation industry in its infancy, particularly as it was competing with maritime transportation; but some eighteen months after the Warsaw Convention was given effect in English law, the Government passed the British Shipping (Assistance) Act 1935 in order to subsidise the British shipping industry by some £10,000,000⁸⁶⁵. Therefore, whilst the Government were keen to develop international carriage by air, they were also still keen to protect international carriage by sea even though sea carriers had not been nationalised.

By the late 1930s aviation was clearly of great significance to the Government⁸⁶⁶ especially as the Second World War approached. The 1938 Air Navigation Act raised the grants to civil aviation and, in an endeavour to increase efficiency, Imperial Airways and British Airways were merged and nationalised to form British Overseas Airways

⁸⁶⁴ 'Report of Committee Set up to Consider Development of Civil Aviation in the United Kingdom: Memorandum of the Secretary of State for Air' 20 January 1937

⁸⁶⁵ Walter A. Morton, 'British Finance 1930-1940' (1943) and Cabinet Meeting 28 November 1934 Item 13

⁸⁶⁶ 'The Committee of Inquiry into Civil Aviation and the Observations of H.M. Government' Report of 8 March 1938' drew attention *inter alia* to the advances in aircraft engineering, increased meteorological services and improved radio communication facilities

Corporation (BOAC), under the provisions of the BOAC Act 1939⁸⁶⁷. It was also accepted that the new company would be at least at the outset “largely dependent on subsidies from His Majesty’s government”⁸⁶⁸.

Following the Second World War, the Government established the Ministry of Civil Aviation⁸⁶⁹ for the development of the civil aviation industry and proposed the opening of new air routes for their public airways corporation. Consequently, attempts by private organisations (such as railway or shipping interests) keen to diversify were strongly opposed by Government⁸⁷⁰, which was a different stance to that taken in the mid-1930s, when Government were subsidising the shipping industry.

4.4 The Hague Protocol 1955

Almost from the date the Warsaw Convention entered into force, conferences began on amending it and by the early 1950s the legal committee of the International Civil Aviation Organisation (ICAO)⁸⁷¹ were drafting an entire replacement to the Convention – with its author being the British representative, lawyer Major Kenneth Beaumont. But at a meeting of the committee in Rio de Janeiro in August 1953 it was decided to make limited amendments to the Warsaw Convention, as there were doubts as to whether the United States Government would ratify an entirely new convention. Consequently, the Warsaw Convention was only amended at a diplomatic conference in The Hague on 28 September 1955.

The Hague Protocol⁸⁷² as it became known, basically simplified the information requirements in regard to documents of carriage, clarified certain provisions governing

⁸⁶⁷ BOAC was later governed by the Civil Aviation Act 1946 and became British Airways in 1974.

⁸⁶⁸ Cabinet Papers - Imperial Airways and British Airways “Memorandum by the Chancellor of the Exchequer and the Secretary of State for Air” 3 November 1938

⁸⁶⁹ See ‘Cabinet Aviation Policy: Memorandum by the Minister of Civil Aviation’ 12 October 1945

⁸⁷⁰ n(869)

⁸⁷¹ An organisation established in 1944 by some 52 States with the purpose of “securing international co-operation and the highest possible degree of uniformity in regulations and standard, procedures and organisation regarding civil aviation matters” from www.icao.int/chi/hist; accessed 8/6/11

⁸⁷² Formally the ‘Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air’

the liability of the air carrier's agents and increased the limit of liability for the death or injury of passengers to 250,000 French francs⁸⁷³. The Protocol made no change to the carrier's liability in respect of freight, although it was suggested that this met "the wishes of both carriers and their consignors . . . [as] the consignors prefer to take a fairly low basic limit of damages which they can claim in the event of loss because it tends to keep freight rates low"⁸⁷⁴. Furthermore, in order to avoid difficulties in interpretation, the Protocol was drafted in three authentic texts, French, English and Spanish, but in the event of any inconsistency the French text would prevail.

Although the Protocol was signed by the Government on 23 March 1956, there was difficulty finding parliamentary time to enact the requisite legislation to give the force of law to the provisions of the Protocol - despite representations to Government from various interested parties⁸⁷⁵. It was not until 23 November 1960 that a Private Member's Bill was introduced in the House of Commons to give effect to the 'Warsaw Convention as Amended by the Hague Protocol 1955'⁸⁷⁶. At the Second Reading of the Carriage by Air Bill in both the House of Commons⁸⁷⁷ and the House of Lords, attention was drawn to fact that it had been dealt with as a Private Member's Bill. In the Lords, Lord Morrison stated that it was extraordinary and an abuse of governmental procedure that "when it comes to a Bill such as this, which ratifies and puts into legal form an important and complicated International Convention ... that the Government should land this on to a Private Member"⁸⁷⁸.

It is therefore apparent that Parliament did not consider enacting the Hague Protocol into English law as a high priority, even though the British representative, Major Kenneth Beaumont was instrumental in drafting its provisions. Incidentally, Beaumont had also co-authored the widely acclaimed '*Air Law*'⁸⁷⁹ with Christopher Shawcross, a

⁸⁷³ See generally R.M. Forrest, 'Carriage by Air: The Hague Protocol' (1961) 10 Int'l. & Comp. L.Q. 726-738

⁸⁷⁴ Hansard 1803-2005 HL Deb 09 May 1961 Vol. 231 cc122-49 per Lord Abinger

⁸⁷⁵ n(873) p.726

⁸⁷⁶ The First Schedule to the Bill comprising the English text of the Protocol in Part I and the French text in Part II

⁸⁷⁷ Hansard 1803-2005 HC Deb 24 February 1961 Vol. 635 cc1138-55 per Major W. Hicks Beach

⁸⁷⁸ n(874)

⁸⁷⁹ First published by Butterworths in 1945

Labour MP from 1945 – 1950, but this seemingly had no impact on the time or route taken for introducing the Bill into Parliament.

The Carriage by Air Act 1961 gained Royal Assent on 22 June 1961 but under s.1 it did not become effective until the day on which the Convention comes into force as regards the UK, which as it turned out, was not until 1 June 1967⁸⁸⁰.

Interestingly, in May 1962 the non-ratification of the Hague Protocol by the US was raised in the UK and the Government was asked to use some persuasion to get them to ratify the Hague Protocol on the limitations of liability as soon as they can⁸⁸¹. The Parliamentary Secretary to the Ministry of Aviation, Mr. C. Woodhouse responded that “I do not think we can do any more than to ask them to take note of the feeling we all have that the sooner The Hague Protocol and the Guadalajara Convention are ratified the better it will be for all of us, because the object of bringing these Conventions into force is to diminish the danger of unnecessary litigation in a very complicated field of private law”⁸⁸². However, despite this apparent support the UK was seemingly reluctant to ratify the Protocol.

The Hague Protocol came into force on 2nd August 1963, after deposit of the 30th instrument of ratification⁸⁸³, but in May 1966 the question was again being asked in Parliament, as to when the UK would ratify the Protocol⁸⁸⁴. To which the Parliamentary Secretary to the Ministry of Aviation, then Mr Julian Snow replied, “I shall as soon as possible, as soon as the necessary preparations have been made, invite the Foreign Office to deposit the instrument of ratification”⁸⁸⁵. Another MP, Mr Ronald Bell (who had originally introduced the Private Member’s Bill) questioned whether there was a risk that the long delay in ratification may result in the compensation in respect of

⁸⁸⁰ The Carriage by Air (Convention) Order 1967

⁸⁸¹ at the Third Reading of the Carriage by Air (Supplementary Provisions) Bill in the Commons, Hansard 1803-2005 HC Deb 18 May 1962 Vol. 659 cc1776-8 per Airey Neave

⁸⁸² n(881)

⁸⁸³ Under Article XXII

⁸⁸⁴ Hansard 1803-2005 HC Deb 11 May 1966 Vol.728 cc394-5 per Mr Maxwell-Hyslop

⁸⁸⁵ n(884)

personal injury under the Hague Protocol being already somewhat out of date; to which Mr Snow stated that “we think we have achieved the best solution we can”⁸⁸⁶.

However, it was to be a further ten months before the Protocol was ratified by the UK on 3 March 1967 and it became effective in the UK on 1 June 1967⁸⁸⁷, nearly four years after the Protocol came into force. By way of a comparison Australia ratified the Protocol on 23 June 1959 and it became effective from 1 August 1963. No reasons for the delay are given beyond the lack of Parliamentary time, but by delaying ratification, the British Government were limiting to £3,000 the liability of the national carrier BOAC, who they were subsidising; under the Hague Protocol this rose to £6,000.

4.5 The Guadalajara Convention 1961

During the period when the Hague Protocol was under consideration, a further diplomatic conference was held in Guadalajara, Mexico in 1961 which sought to ameliorate the position where the contracting carrier and the actual carrier are different persons. The resultant Guadalajara Convention⁸⁸⁸ supplemented the Warsaw Convention and effectively brought both the contracting carrier and the actual carrier within the terms of the Warsaw Convention, so that a claimant has rights against both without proof of fault, and the liability limits of the Convention were extended to both. The UK signed the Convention at Guadalajara on 18 September 1961.

The Carriage by Air (Supplementary Provisions) Bill giving effect to the Guadalajara Convention was introduced into Parliament as a Private Member’s Bill⁸⁸⁹ - the Convention being attached as a schedule to the Bill in both English and French – and was passed without opposition. The Carriage by Air (Supplementary Provisions) Act 1962 gained Royal Assent on 19 July 1962 and the Guadalajara Convention was ratified a

⁸⁸⁶ n(884)

⁸⁸⁷ At which time the Carriage by Air Act 1932 which gave effect to the original Warsaw Convention was repealed

⁸⁸⁸ Formally known as the ‘Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air performed by a person other than the Contracting Carrier’

⁸⁸⁹ Hansard 1893-2005 HC Deb 23 March 1962 Vol. 656 cc719-52 per Mr Airey Neave

year after signature on 4 September 1962, becoming effective on 1 May 1964⁸⁹⁰ nearly three years before the Hague Protocol.

Although the legislation to give effect to the Convention had been introduced into Parliament by Private Member's Bill it had only taken six months from the date of signature, to do so – compared to 56 months for the Hague Protocol. The debates in Parliament when the Bill was being passed show that there was a great deal of public interest in this Convention perhaps because at the time the concept of package holidays was in its infancy and the convention was aimed at solving the potential problem where a passenger contracts with a package tour operator who may not be the actual carrier. Therefore, the speed with which the process for ratification was carried out suggests that public interest was more of a motivating factor for Parliament than commercial use or importance.

4.6 The Guatemala City Protocol 1971

Whilst the Hague Protocol had increased the limits of liability, the USA considered the new limit was still too low and did not ratify the Protocol. Instead the US announced its withdrawal from the Warsaw Convention, effective as of May 1966. However before the notice of denunciation became effective, it was withdrawn by the US in consideration of the so-called Montreal Agreement of 1966⁸⁹¹ - a private agreement⁸⁹² between the American Civil Aeronautics Board⁸⁹³ and air carriers operating passenger services to, from or via the US, wherein the air carriers agreed to an increased liability limit of \$US58, 000 (or \$US75, 000 inclusive of legal fees)⁸⁹⁴ and to waive the Article 20 defence with respect to passenger injury or death. This agreement was generally assumed to be an emergency measure, pending a formal and comprehensive amendment of the Warsaw Convention at inter-governmental level.

⁸⁹⁰ as provided for by s.7 of the Carriage by Air (Supplementary Provisions) Act 1962

⁸⁹¹ Approved by the US Civil Aeronautics Board (CAB) Order E-23680 on 13 May 1966, 31 Fed Reg. 7302; CAB Agreement No 18900

⁸⁹² effectively a 'special contract' under Article 22(1) of the Warsaw Convention

⁸⁹³ The predecessor of the U.S. Department of Transportation

⁸⁹⁴ By comparison, the limit of liability under the Hague Protocol was \$US16,000 (250,000 Franc Poincaré)

Thus, after several unsuccessful meetings held under the auspices of the ICAO⁸⁹⁵, the Legal Committee of the ICAO at its 1970 session produced a draft amendment which became the basis for the Diplomatic Conference held at Guatemala City in March 1971 attended by 55 states including the UK. The Guatemala City Protocol⁸⁹⁶ sought to introduce *inter alia* increased and unbreakable liability limits of \$US100, 000 in case of passenger death or injury.

Although the UK signed the Protocol on 8 March 1971⁸⁹⁷ (as did 20 other states), no steps have ever been taken by the Government to enact the Protocol into English law. Similarly, the US has never ratified the Protocol despite promoting its provisions. In fact only 7 ratification instruments have been received by ICAO and the Protocol requires 30 ratifications to bring it into force – and these states must represent at least 40% of the total international scheduled air traffic of ICAO Member states, in order to avoid the Protocol coming into force, without ratification by the major aviation states.

4.7 The Montreal Additional Protocols 1975

In 1975 at the Diplomatic Conference on Air Law in Montreal further opportunity arose to revise the amended Warsaw Convention, and thus four Montreal Additional Protocols were produced. Protocols 1 – 3 primarily amended, for the various versions of the Convention⁸⁹⁸, the unit of currency defining the limits of liability applicable to air carriers and replaced gold francs with Special Drawing Rights (S.D.R.) as defined by the International Monetary Fund. Protocol 4 principally raises the limits of liability applicable to the carriage of cargo and revises the Warsaw Convention with respect to

⁸⁹⁵ See generally ICAO Doc 8584 (Special Meeting); GE-Warsaw, Reports 1 and 2 (Panel of Experts) and ICAO Doc 8878/LC/162

⁸⁹⁶ Formally the 'Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by The Hague Protocol, done at Guatemala City March 8, 1971'

⁸⁹⁷ See PRO FO949/062 Miscellaneous Series 004/1971 Cmnd 4691

⁸⁹⁸ Additional Protocol No. 1 amends solely the Warsaw Convention 1929; Additional Protocol No. 2 amends the Warsaw Convention 1929 as amended by the Hague Protocol 1955 and Additional Protocol No. 3 amends the Warsaw Convention as amended by the Hague Protocol 1955 and the Guatemala City Protocol 1971

documentation. However, it has been said that the Protocols initially failed to gain acceptance because the liability limits were still considered too low⁸⁹⁹.

The UK signed all the Montreal Additional Protocols on 25 September 1975⁹⁰⁰, but it was not until 1979 that the Carriage by Air and Road Bill was introduced into Parliament to give them effect in the UK. At the second reading of the Bill, attention was again drawn to the time taken to pass enabling legislation. Lord Jacques stating “there is a time lag which is unnecessary [but] it is partly due to the difficulty of finding parliamentary time for the necessary legislation”⁹⁰¹.

In order to avoid this situation, the Bill also provided that future amendments of the convention should be made by Government by Order in Council, subject to an Affirmation Resolution from both Houses. Lord Trefgarne was the only peer or MP that disagreed with giving Government such power, “Acts of Parliament ought to be varied by Acts of Parliament and not by orders slipped through in the wee small hours”⁹⁰². But the Bill was duly passed and Government was thus able under Section 3(1) of the subsequent Carriage by Air and Road Act 1979 to amend the provisions of the Carriage by Air Act 1961⁹⁰³ and other related Acts by Order in Council⁹⁰⁴. However, this section did not come into force until 22 October 1998⁹⁰⁵.

Although **Protocol 1** (which amends the Warsaw Convention) had been ratified by the United Kingdom in 1984 and sufficient ratifications had been received to bring the Protocol into force on 15 February 1996, it was not until late 1997 that an order was introduced into Parliament. During the House of Commons Fourth Standing Committee

⁸⁹⁹ Lawrence B. Goldhirsch (Ed) *The Warsaw Convention Annotated: A Legal Handbook* (2000, Kluwer Law International)p.8

⁹⁰⁰ Additional Protocol No 1 - Miscellaneous Series 012/1976 Cmnd 6480; No.2 – Miscellaneous Series 015/1976 Cmnd 6481; No 3 Miscellaneous Series 016/1976 Cmnd 6482; No.4 – Miscellaneous Series 017/1976 Cmnd 6483

⁹⁰¹ Hansard 1803-2005 HL Deb 13 February 1979 vol. 398 cc1234-8 per Lord Jacques

⁹⁰² n(901) per Lord Trefgarne

⁹⁰³ Clause 8A provides that the government may by Order in Council modify, adapt or make exceptions to the Act subject to the approval by resolution of each House of Parliament

⁹⁰⁴ The Carriage by Road and Air Act 1979 (via the Carriage by Air and Road Act 1979 (Commencement No.4) Order 2000) also amended s.4A of the Carriage by Air (Supplementary Provisions) Act 1962 so that an Order in Council can alter the 1962 Act as a consequence of any revision to the Convention

⁹⁰⁵ under The Carriage by Air and Road Act 1979 (Commencement No. 3) Order 1998 (SI 1998 No. 2562)

on Delegated Legislation, debate on the Draft Carriage by Air Acts (Application of Provisions) (Fourth Amendment) Order 1997 on 20 November 1997 the question was raised as to why it had taken the Government over a year to bring an Order to the House, to which the Minister of Transport, Ms Glenda Jackson replied that the Department had only been notified “earlier in the year that sufficient ratifications had been received to bring the changes into effect”⁹⁰⁶. But as other states had been able to enact the requisite domestic legislation from February 1996, some 20 months before the UK, it does suggest that giving effect to the Protocol was not high on Parliament’s priority list.

The draft order was subsequently approved by the House of Commons on 25 November 1997, but the House of Lords could not find time for a debate before the date of the final meeting of the Privy Council of 1997, so it was necessary for the House of Commons Standing Committee to consider the proposal again. Hence it became the Draft Carriage by Air Acts (Application of Provisions) (Fourth Amendment) Order 1998 and was subsequently approved by each House of Parliament, coming into effect on 2 May 1998⁹⁰⁷; over two years after the Protocol had received sufficient ratifications to bring it into force.

Delays also existed in respect of **Protocol No. 2** (which amends the Warsaw Convention as amended by the Hague Protocol 1955). Although the UK had ratified Protocol No. 2 on 5 July 1984 with the required legislation being included in the Carriage by Air and Road Act 1979⁹⁰⁸, it was not given effect in the UK until 1 December 1997 by the Carriage by Air and Road Act 1979 (Commencement No.2) Order 1997⁹⁰⁹, again nearly 2 years after the Protocol entered into force on 15 February 1996⁹¹⁰.

⁹⁰⁶ Hansard, Commons Debate, General Committee Debates Session 1997-1998. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmstand/deleg4/st971120/71120s01.htm>; accessed 14/06/11

⁹⁰⁷ Civil Aviation Carriage by Air Acts (Application of Provisions) (Fourth Amendment) Order 1998, SI 1998 No. 1058 made 22nd April 1998

⁹⁰⁸ Which amended Article 22 in the First Schedule of the Carriage by Air Act 1961

⁹⁰⁹ SI 1997 No 2565

⁹¹⁰ After 30 signatory states had deposited instruments of ratification

Protocol No. 3 (which amends the Warsaw Convention as amended by the Hague Protocol 1955 and the Guatemala City Protocol 1971) has yet to enter into force as it will not become effective until after the deposit of the thirtieth instrument of ratification and to date there have been 21 ratifications⁹¹¹. Although the UK has not ratified the Guatemala City Protocol, it ratified Additional Protocol No.3 on 5 July 1984 and this is included in the Carriage by Air and Road Act 1979 as prospective legislation.

Protocol No. 4 was also ratified by the UK on 5 July 1984 and is given effect by provisions within the Carriage by Air and Road Act 1979. But whilst Protocol No. 4 entered into force on 14 June 1998 after 30 states had deposited instruments of ratification, the Order in Council to give effect to it was not debated by the House of Commons Standing Committee on Delegated legislation until 29 March 1999.

The Carriage by Air Acts (Implementation of Protocol No. 4 of Montreal, 1975) Order 1999⁹¹² was subsequently brought into the House of Commons for approval on 31 March 1999 and the Lords on the 15 April 1999 – where Baroness Thomas in what appears to be a somewhat ironic comment, drew attention to the length of time it had taken to bring a 1975 Protocol to effect in the United Kingdom, stating “it reassures one that the process_of legal creation is not moving so rapidly that the pace of change is too fast for us to keep up . . . in 1975 the Protocol was written in Montreal; it was signed by us sometime in the 1980s and now [in 1999] – good heavens! – it is being implemented into British law”⁹¹³. Protocol No. 4 was finally brought into force in the UK under the Carriage by Air Acts (Implementation of Protocol No. 4 of Montreal, 1975) Order 1999⁹¹⁴ on 21 May 1999.

⁹¹¹ As per the International Civil Aviation Organisation website http://www2.icao.int/en/leb/List%20of%20Parties/AP3_EN.pdf; accessed 8/6/2011

⁹¹² Together with the Carriage by Air Acts (Application of Provisions)(Fifth Amendment) Order 1999 which amends Schedule 1 of the Carriage by Air Acts (Application of Provisions) Order 1967 to incorporate the provisions of Protocol No 4 for domestic carriage by air, save that documentation requirements are not included.

⁹¹³ Hansard 1803-2005 HL Deb 15 April 1999 vol. 599 cc909-13

⁹¹⁴ SI 1999 No 1312

Therefore, it had been some 24 years before three of the protocols produced in the 1975 actually became effective in the UK. Whilst most of this time has been in waiting for the requisite number of ratifications to enable the Protocols to enter into force, this occurred on average, a year and a half before the UK implemented orders giving effect to them in English law (see Table 8). Therefore, despite using the mechanism of 'Orders in Council' (rather than the lengthier Bill process) for amending the Warsaw Convention; delays still occurred due the priority of other legislation and the apparent lack of parliamentary time. Nevertheless, cargo liability was deemed of sufficient importance to simultaneously introduce domestic legislation to give effect to such international provisions at the first opportune time.

By contrast In the US, when Congress was unable to ratify any of the Montreal Protocols increasing the Warsaw Convention limits of carrier liability⁹¹⁵, they held the only way to make changes was by a carrier agreement under Article 22(1). The US Department of Transport thus granted IATA and the US Air Transport Association (ATA) approval in February 1995 to develop agreements which included the 'IATA Inter-carrier Agreement on Passenger Liability' (IIA) and the 'Agreement on Measure to Implement the IATA Inter-carrier Agreement' (MIA) whereby carriers would *inter alia* waive the Warsaw Convention liability limits and be strictly liable up to 100,000 S.D.R. (approximately \$US135, 000)⁹¹⁶. The fact that Congress used alternative measures to give effect to the Protocols, rather than face lengthy delays in introducing enabling legislation suggests that the US government were considerably more eager than the UK government to eliminate the Warsaw Convention's low limits of air carrier liability.

4.8 The Montreal Convention 1999

It was against a background of the IATA/US and Japanese agreements, and an increasing dissatisfaction with the Warsaw regimes, that the ICAO Assembly in October 1995 gave

⁹¹⁵ In 1983 the Montreal Protocols failed to attain sufficient votes in the Senate for consent to ratify and in 1990, even when the Foreign Relations Committee agreed to recommend the Montreal Protocols for consent, they were never presented for vote

⁹¹⁶ As of June 2000, 122 international carriers representing 90% of the world's air transport industry had signed the IATA Inter-Carrier Agreement and most had signed the MIA

a mandate to the ICAO Council to modernise and consolidate the Warsaw Convention and all its amendments. A Study Group was thus formed and a 'Draft Convention for the Unification of Certain Rules for International Carriage by Air' which effectively broaden the scope of the Inter-Carrier Agreement provisions and created a two-tier liability system for passenger death or injury, was submitted to the ICAO Legal Committee for consideration at its meeting in May 1997⁹¹⁷ and then subsequently circulated to member states for review in late 1997⁹¹⁸.

In May 1999 ICAO convened the International Diplomatic Conference on Air Law in Montreal, which was attended by some 121 ICAO member states including the UK and the EU, to consider the Draft Convention as a replacement for the 'Warsaw System'. The so-called 'Montreal Convention'⁹¹⁹ introduced *inter alia* a new liability regime for loss or damage to cargo and was signed by 52 states including the UK on 28 May 1999. The Convention also made provision under Article 53(2) for signature and ratification by Regional Economic Integration Organisations and as such the European Community signed the Convention on 9 December 1999. In April 2001 there was approval by the EC Council for Community ratification⁹²⁰.

The Draft Carriage of Air Act (Implementation of the Montreal Convention 1999) Order 2001⁹²¹ giving effect in English law to the Montreal Convention was considered on 3 December 2001 by the Standing Committee on Delegated Legislation. This procedure⁹²² contrasting with the introduction of a bill into Parliament followed by the often lengthy progression through various readings in both Houses. In introducing the draft order the Parliamentary Under-Secretary of State for Transport, Local Government and the Regions, Mr David Jamieson stated that in April 2000 the EU Transport Council

⁹¹⁷ Report of the Legal Committee, 30th Session (Montreal 28 April – 9 May 1997), ICAO Doc 9693-LC10

⁹¹⁸ ICAO Doc State Letter LE 4/51-97/65

⁹¹⁹ Formally, the 'Convention for the Unification of Certain Rules for International Carriage by Air'

⁹²⁰ Council Decision 2001/539/EC – Official Journal L194 18/07/2001 P.0038-0038

⁹²¹ Amending the Carriage by Air Act 1961 by introducing a new schedule setting out the Montreal Convention and amending the Carriage by Air (Supplementary Provisions) act 1962

⁹²² Under s.8A of the Carriage of Air Act 1981, where the Government have agreed to a revision or replacement to the Warsaw Convention; the Government may, by Order in Council, make such amendments to the Act, provided a draft of the Order has been laid before Parliament and approved by resolution by each House

had urged Member States to be in a position to ratify the Convention as soon as possible and that the Government had consulted widely with airlines and other interested parties, and had received broad support from all concerned⁹²³. Both Houses of Parliament duly approved the Implementation Order in December 2001⁹²⁴ with Royal assent on 12 February 2002.

However, in March and June 2003 the question was being asked in the Commons as to when the 1999 Montreal Convention was going to be ratified. To which the Secretary of State for Transport, Mr Jamieson replied that as “it contains issues that are subject to Community competence we are waiting until all 15 members of the EU are in a position simultaneously to deposit their instruments of ratification”⁹²⁵. Therefore, ratifying an international convention where a Regional Economic Integration Organisations could accede; was no longer just dependent on the UK Parliament, it was also dependent on the legislatures of other EU states as well.

At first glance this would appear to have delayed the Montreal Convention coming into effect in the UK, given that Parliament had passed an Implementation Order in 2001 which would have given Government approval to ratify the Montreal Convention. But in actual fact, as the Convention required 30 signatory states to bring it into force an early UK ratification would not have made significant difference to the date the Convention actually entered into force, on 4 November 2003⁹²⁶ – which by coincidence, was 70 years after the entry into force of the Warsaw Convention. Consequently, synchronised ratification by EU states only delayed the convention from being effective in the UK by some 7 months (see Table 8) as it was finally ratified by the UK and other EU states on

⁹²³ Hansard, Delegated Legislation Committee Debates Session 2001-02; available at <http://www.publications.parliament.uk/pa/cm200102/cmstand/deleg7/st011203/11203s01.htm>; accessed 16/6/2011

⁹²⁴ See House of Commons Hansard Debates for 4 Dec 2001: Column 283 and Hansard 1803-2005 HL Deb 19 December 2001 vol. 630 cc338-9

⁹²⁵ See House of Commons Hansard Written Answers for 6 Mar 2003 Col 1148W and Written Answers for 13 Jun 2003 Col 1058W

⁹²⁶ 60 days after the United States deposited the 30th instrument of ratification

29 April 2004, and it took effect in the UK on 28 June 2004⁹²⁷. However, as the Cape Town Convention (see Section 5.0) has demonstrated EU accession has perhaps elongated the process of ratification for the UK.

5.0 INTERNATIONAL SECURITY INTERESTS IN MOBILE EQUIPMENT

As a comparison to the international carriage conventions examined in Sections 3 and 4 which have been ratified and enacted into English law, this section examines the approach Government and Parliament have taken to a convention that has *not* been ratified by the UK, i.e. the Convention on International Interests in Mobile Equipment 2001 (also known as the Cape Town Convention).

5.1 The Need for Legislation

The need for a convention for international security interests stems from the fact that high-value moveable equipment, such as trains, aeroplanes and oil drilling equipment are frequently used in States other than where the owners have their principal place of business or where the equipment was acquired. As vast capital expenditure is required for the acquisition of such assets⁹²⁸, finance agreements frequently provide a security interest in the asset for the investor. These security interests are usually constituted by the law of the State where the secured party and debtor are based or the law of the State where the equipment is situated at the time the security interest is created. Accordingly, regulation of the security interests in movable equipment had primarily grown up under the aegis of national legal systems and investors have historically had to rely on different national laws to protect their investments.

However, not all jurisdictions provide equivalent recognition of such security interests. Therefore, the value of the security interest as a means of protecting the investor will be affected by the extent to which the law of the State where the debtor moves the

⁹²⁷ As per notice in the London Gazette - under Article 1(2) of the Carriage of Air Act (Implementation of the Montreal Convention 1999) Order 2001

⁹²⁸ E.g. prior to the 1960s new commercial aircraft were generally financed by retained earnings or short-term bank loans, but these were inadequate to finance jet aeroplanes which required complex financing arrangements; See e.g. D. Bunker, *'International Aircraft Financing'*, (IATA, Montreal, 2005) at 154

equipment, recognises the efficacy of the security interest and its priority over other interests acquired in the equipment while it is located in that State. This meant that financing of high end mobile equipment was hampered by the lack of protection for creditors provided by different legal systems or their unpredictable nature. Consequently, financiers have sought a premium on their lending as a hedge against the legal risks involved. Furthermore, in the event of airline insolvency, the discretion exercised by insolvency administrators can create uncertainty in the timing of aircraft repossession and thus is a risk for lenders and investors.

In June 1988, the Canadian member of UNIDROIT's Governing Council, Mr T.B. Smith QC, mooted a proposal for a convention on international aspects of security interests in mobile equipment and proposed that a working group be convened composed of experts in the area of personal property security law to examine the feasibility of such a convention. To assist the Governing Council in determining whether UNIDROIT should undertake such a project, Professor Ronald Cumming from the College of Law University of Saskatchewan, prepared a report⁹²⁹ which concluded that a questionnaire⁹³⁰ be distributed amongst the business and financial sectors in all UNIDROIT Member States, to ascertain the level of interest in and the need for such a regime.

The 1991 Report on the questionnaire responses⁹³¹ showed 93 responses from 29 countries - with 9 from the UK and concluded that there was "widespread support for the drawing up of an international convention or set of uniform rules as a means of recognising security interests in movables at the international level . . . [and a] willingness to transcend and where necessary abandon their particular legal order'

⁹²⁹See UNIDROIT, 'International Regulation of Aspects of Security Interests in Mobile Equipment: Study prepared by Professor Ronald C.C. Cumming' December, 1989 (Study LXXII - Doc 1). p.1

⁹³⁰ UNIDROIT, 'International Regulation of Aspects of Security Interests in Mobile Equipment: Questionnaire' December, 1989 (Study LXXII – Doc 2)

⁹³¹ UNIDROIT, 'Analysis of the Replies to the Questionnaire on an International Regulation of Aspects of Security Interests in Mobile Equipment' April, 1991 (Study LXII - Doc 3)

conception of the security interest”⁹³²; and a further report concluded that UNIDROIT should draw up such a convention⁹³³.

5.2 The UK Role in the Development of the Mobile Equipment Convention

In early 1993 a UNIDROIT Study Group was set up comprising experts from the world of law and practice⁹³⁴ under the Chair of Sir Roy Goode of the UK, to prepare a uniform set of rules. After receiving comments from a range of Governmental and non-Governmental organisations⁹³⁵, a sub-committee of the Study Group began preparing the first draft of the convention in February 1994 – with input from interested parties such as the aircraft manufacturers Airbus Industrie and the Boeing Corporation.

In early 1996, seminars were organised in London, Beijing and Moscow for government officials and others, such as practising lawyers, to draw attention to the work being undertaken by the UNIDROIT Study Group, in order to “reduce substantially the perennial difficulty of government experts being faced for the first time [at a diplomatic conference] with a text which neither they nor the relevant constituencies has any degree of familiarity”⁹³⁶.

By late 1997 the Study Group had completed a preliminary draft Convention on International Interests in Mobile Equipment⁹³⁷, which was designed to be supplemented by equipment protocols in order to meet the particular requirements of specific industries. The first protocol was developed for ‘aircraft objects’⁹³⁸ and in June 1998 the

⁹³² n(931) p.14

⁹³³ See UNIDROIT, ‘Restricted Exploratory Working Group to Examine the Feasibility of Drawing Up Uniform Rules on Certain International Aspects of Security Interests in Mobile Equipment: Report’, March 1992

⁹³⁴ With observers from organisations such as the European Bank for Reconstruction and Development and the International Maritime Committee

⁹³⁵ E.g. the European Federation of Equipment Leasing Company Associations (Leaseurope)

⁹³⁶ UNIDROIT Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment, ‘Extract from the 75th Session of the Unidroit Governing Council’ August 1996,(Study LXXII – Doc 28) p.6

⁹³⁷ UNIDROIT Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment, ‘Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment’, December 1997 (Study LXXII – Doc 37)

⁹³⁸ which includes airframes, aircraft engines and helicopters

preliminary Draft Aircraft Protocol⁹³⁹ was produced by a Working Group chaired by Jeffrey Wool from the UK, an expert consultant to the Study Group and co-ordinator of the Aviation Working Group (AWG).

In August 1998 the Draft Convention and Aircraft Protocol were distributed to UNIDROIT member governments (including the UK) and non-governmental organisations, with comments being received from the USA, Australia, Canada, Switzerland, Japan, the International Air Transport Association (IATA) and AWG which were discussed at a meeting in February 1999. It is interesting to note that the UK did not make any submissions - although this may be due to the central role that Professor Sir Roy Goode played in negotiating and drafting the Convention and the involvement of Jeffrey Wool in the development and drafting of the Aircraft Protocol.

After some ten years in the preparation, the 'Convention on International Interests in Mobile Equipment' and the 'Protocol to the Convention on Matters Specific to Aircraft Equipment'⁹⁴⁰ was finally adopted at a further diplomatic conference⁹⁴¹ held in Cape Town in October and November 2001 - attended by 68 States and 14 international organisations. The Convention, now more commonly known as the Cape Town Convention (CTC), created international standards for the registration of ownership, establishes a standard legal framework for international security interests and provides various legal remedies for default in financing agreements; thereby giving intending creditors greater confidence in the decision to grant credit, enhancing the credit rating of equipment receivables and reducing borrowing costs to the advantage of all interested parties⁹⁴². The role of the UK in the negotiation and drafting of the Convention was later described in the following terms:

⁹³⁹ 'Steering and Revisions Committee, Preliminary Draft Protocol thereto on Matters specific to Aircraft Equipment', June 1998 (Study LXII Doc 39)

⁹⁴⁰ The Convention and Protocol are both drawn up in English, Arabic, Chinese, French, Russian and Spanish, each text being equally authentic

⁹⁴¹ Convened under the joint auspices of UNIDROIT and the International Civil Aviation Organization (ICAO)

⁹⁴² R.M. Goode, 'The Cape Town Convention on International Interests in Mobile Equipment : a Driving Force for International Asset-Based Financing'; available at <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/information/overview.pdf>; accessed 13/07/11

“The Cape Town Treaty reflects, enhances and internationally promotes basic concepts found in English law. That should be expected given the central role played by the UK in negotiating and drafting the instruments. In fact the drafting committee at every intergovernmental meeting that negotiate, and at the diplomatic conference that adopted the Cape Town Treaty was chaired by a UK representative either Sir Roy Goode (Oxford) or Bryan Welch (BIS) [i.e. the Department of Business, Innovation and Skills]”⁹⁴³

At the close of the conference on 16 November 2001, 20 States including the UK signed both the convention and the aviation protocol. The Convention came into force on 1 April 2004, three months after the third instrument of ratification was deposited and the Protocol came into force on 1 March 2006, three months after the eighth instrument of ratification had been deposited⁹⁴⁴.

5.3 The Consultation Process I

The UK was one of the initial States to sign the Convention and Protocol - the Department of Trade and Industry having previously conducted a public consultation in August 2001 which generally supported the United Kingdom signing⁹⁴⁵. It is worth noting however, that this consultation document was listed in the House of Commons Weekly Information Bulletin of 20 October 2001⁹⁴⁶ under the heading ‘Mobile Phones’ – which perhaps suggests that Parliament was unsure of quite what mobile equipment was. It was also to signal a ten year period where, although Government maintained a commitment to its ratification, the actual importance and use of the Convention by industry was seemingly lost to Government.

This also appeared to be the case in June 2002, when the Law Commission⁹⁴⁷ produced a consultation document on the ‘Registration of Security Interests: Company Charges

⁹⁴³ See Aviation Working Group Submission p.27 in Department for Business, Innovation & Skills, ‘Call for Evidence: Full List of Responses: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment’ (July 2010)

⁹⁴⁴ Under Convention Article 49(1) and Protocol Article 28(1)

⁹⁴⁵ See Hansard 16 July 2002 Written Answers (Commons) Trade and Industry Public Consultations.

⁹⁴⁶ Which listed Green Papers received during recess although the period for consultation had now passed

⁹⁴⁷ a statutory independent advisory non-departmental public body sponsored by the Ministry of Justice, created by the Law Commissions Act 1965 for the purpose of promoting the reform of the law

and Property other than Land⁹⁴⁸, as part of a project which looked at how security interests should be registered. The Cape Town Convention and Protocol was not mentioned however, apart from a short paragraph in Part I under 'Other Systems'⁹⁴⁹. The Law Commission's Final Report⁹⁵⁰, was presented to Parliament on 31 August 2005 and recommended *inter alia* a new online system to register charges, but no reference was made to the Convention or Protocol, despite quoting Professor Sir Roy Goode:

“. . . security in personal property has become enormously important both within a country and in relation to cross-border transactions. Without an adequate legal regime for personal property security rights, it is almost impossible for a national economy to develop”⁹⁵¹.

In the same 1998 article from which the Law Commission quote, Professor Goode suggests possible approaches to the problems of security interests, one of which being a “convention providing for a new form of international interest protected by registration in an international registry for high-value equipment . . . This is the approach adopted in the UNIDROIT Draft Convention on International Interests in Mobile Equipment”⁹⁵². But the Commission in their report made no recommendation for Parliament to ratify this Convention.

5.4 Giving Effect to the Cape Town Convention

The Cape Town Convention and the Aircraft Protocol both provided for accession by a Regional Economic Integration Organisation⁹⁵³. This provision therefore allowed the European Union to accede to the Convention and Protocol – although some aspects would remain within the competences of Member States. But in April 2003, the Minister for International Trade and Investment, Baroness Symons revealed that the

⁹⁴⁸ Consultation Paper No 164, Available at http://www.justice.gov.uk/lawcommission/docs/p164_Company_Security_Interests_Consultation.pdf; accessed 23 June 2011 This paper culminated in a Final Report to Government on 31 August 2005

⁹⁴⁹ n(948) para 1.44

⁹⁵⁰ In Law Commission Report No. 176; but apparently taken from R.M. Goode, 'Security in Cross Border Transactions' (1998) 33 Tex. Int'l. L.J. 47

⁹⁵¹ See R.M Goode in n(912) 47

⁹⁵² n(951) 50

⁹⁵³ Convention Article 48 and Protocol Article 27

Government and a number of other Member States were arguing with the European Commission, that the insolvency aspects of the Convention and Protocol were a matter for Member States rather than Community competence, and until this was resolved the decision on accession would not be carried forward⁹⁵⁴.

In 2006, some three years later, the Minister of State for Industry and the Regions, Department of Trade and Industry, Mr Alun Michael stated that a draft text of a declaration to be made on signature of the Convention and Protocol by the Community had been agreed and that this confirmed that Member States retained competence in respect of the substantive rules of insolvency⁹⁵⁵. However, the Minister commented that the lack of progress was due to the fact that “as this [was] a so-called mixed competence treaty, its conclusion at Community level has fallen foul of disagreement between the UK and Spain over Gibraltar”⁹⁵⁶, but added that the Government was trying to find a solution in the near future as it was important to reach agreement as quickly as possible, especially in the context of the Cape Town Convention as it was committed to its ratification⁹⁵⁷.

It must be noted that prior to the Minister’s comments, the Government had received evidence from the Society of British Aerospace Companies (SBAC) which claimed that the UK’s aerospace industry stood to lose out competitively if the government continued to delay to ratification of the Cape Town Convention; and whilst acknowledging that ratification at EU level had been held up by a ‘Gibraltar hold’ put in place by Spain, there was no reason why the United Kingdom could not ratify in its own right, as other Member States had done⁹⁵⁸. SBAC had also given written evidence to the Trade and Industry Select Committee in 2004 stating that for the UK Aerospace

⁹⁵⁴ See House of Commons, Select Committee on European Scrutiny: 19th Report considering the Draft Council decision on the signing and conclusion by the European Community of the Convention and its Protocol

⁹⁵⁵ House of Commons, Select Committee on European Scrutiny: 21st Report considering Trade and Industry Minister’s letter of 26 February 2006

⁹⁵⁶ n(955) p.2 and House of Commons Hansard Written Answers for 23 January 2006 Column 1762W, Similar was expressed on 10 October 2006 by the Secretary of State for Trade and Industry – see House of Commons Hansard Written Answers for 10 Oct 2006 Column 719W

⁹⁵⁷ n(955)

⁹⁵⁸ Flight International 15 November 2005

Industry to remain competitive in global markets, the presence of a competitive, responsive and adequately funded Export Credit Agency was vital. But whilst the Export-Import Bank of the United States supported Boeing by giving signatories to the Cape Town Convention a one-third reduction in its premium, the UK Export Credit Guarantee Department (ECGD)⁹⁵⁹ were increasing premium levels for British interests in Airbus, Boeing's principal competitor⁹⁶⁰.

A similar urge for the UK to ratify the Convention came from Rolls Royce, the aircraft engine manufacturers based in South Derbyshire. They claimed that ratification of the Convention would open up markets deemed too risky by financiers and broaden the range of commercial financing alternatives available to support demand for new aircraft in China, India and the Middle East and that it would also reduce the cost of new engines. Furthermore, by delaying ratification, UK companies such as Rolls Royce were at serious competitive disadvantage as countries with competitive aircraft engine businesses such as the United States, had already ratified the Convention⁹⁶¹.

By 2008 despite these industry warnings, the EU had still not signed the Convention nor had the UK ratified it. Although Britain and Spain had settled a dispute over Gibraltar that had blocked the EU from ratifying some international conventions⁹⁶²; in an Explanatory Memorandum of 2 October 2008 the Minister for Business and Competitiveness at the Department for Business, Enterprise and Regulatory Reform, Baroness Vadera noted that there were still some outstanding issues in relation to the Protocol. Firstly, the European Commission maintained that Member States should not make declarations relating to remedies on insolvency, but the UK and some other Member States wanted to be free to do so. Secondly, the Commission held that it

⁹⁵⁹ I.e. the export credit agency of the UK, a Government Department that operates under an Act of Parliament

⁹⁶⁰ House of Commons, Trade and Industry Select Committee Session 2004 – 2005; Appendix 16 Memorandum by the Society of British Aerospace Companies (SBAC) para 11; The ECGD was also encouraged to lobby for the UK's adoption of the Cape Town Convention, in a Memorandum submitted by Rolls Royce to the Commons Select Committee Business, Innovation and Skills 'Maintaining UK Excellence in Motorsport and Aerospace' 8 February 2010.

⁹⁶¹ Mark Todd MP for South Derbyshire website, <http://www.marktodd.org.uk>, 4 April 2007 'Mark calls on Government to sign Cape Town Convention'; accessed 21/6/11

⁹⁶² Reuters 8 Jan 2008 'Britain and Spain settle a dispute over Gibraltar' available at <http://uk.reuters.com/article/2008/01/08/uk-britain-gibraltar-idUKL0845118820080108>; accessed 17/6/ 11

should accede to the Convention and Protocol followed by Member States but the UK and other Member States considered that they should be able to choose when or whether to ratify⁹⁶³. The Select Committee therefore decided to hold the Draft Council Decision to accede and conclude the Convention and Protocol until these issues had been resolved to the Government's satisfaction. In February 2009, the Commons Select Committee received notification from the Minister of Trade and Investment (Lord Davies) that it had been established that the competence of Member States concerning the rules of substantive laws of insolvency were not affected by EC accession and accordingly the UK was able to lift its Parliamentary scrutiny reserve.

Two months later on 28 April 2009 the European Union finally acceded to the Cape Town Convention and Aircraft Protocol⁹⁶⁴ and the accession entered into force on 1 August 2009. But the EU's accession was as a Regional Economic Integration Organisation, not a Contracting State so its accession was only in respect of the areas in which it had competence. Therefore it still remained for the UK to ratify the Convention, and in April 2010 the question was being asked in Parliament as to when this was to be expected. The Minister of State, Department for Business, Innovation and Skills, Ian Lucas replied that "the UK played an active role in negotiations regarding the Cape Town Convention . . . the UK is committed to its ratification and will be using a Call for Evidence seeking stakeholder views on the matter in the near future"⁹⁶⁵.

5.5 The Consultation Process II

Despite the Government receiving recommendations from the industry to ratify the Convention (see above) over the 8½ years since signing the Convention, the Department for Business Innovation and Skills (BIS) in July 2010, called for evidence from interested

⁹⁶³ House of Commons, Select Committee on European Scrutiny: 34th Report considering Explanatory Memorandum of 2 October 2008

⁹⁶⁴ Official Journal of the European Union: Council Decision of 6 April 2009 (2009/370/EC). At accession the European Union made declarations under Article 48(2) of the Convention, under Article 55, and under Article 27(2) of the Protocol which affects the capacity of Member States

⁹⁶⁵ House of Commons Hansard Written Answers for 06 April 2010 Business, Innovation and Skills, Aviation: Treaties Column 1289W

parties in relation to the Convention and the Aircraft Protocol⁹⁶⁶, in order to ascertain “whether it would benefit the UK to move toward ratification of the Convention and Protocol or to take no further action at this time”⁹⁶⁷. The Introduction in the Call for Evidence also stated that “if the decision were made to move towards ratification, we would expect there to be a further consultation on the detail of the legal options, and the changes that would be required to UK law”⁹⁶⁸ – so the Government did not view ratification and the associated advantages of the conventions provisions for the industry as requiring any urgency or immediacy.

This is despite the fact that the Aviation Working Group’s (AWG)⁹⁶⁹ Independent Technical Advisor, Professor Vadim Linetsky, had produced a report on the economic implications of the United Kingdom ratifying the Cape Town Convention⁹⁷⁰ which estimated that ratification would save UK based airlines between £534m and £2.7b in funding costs relating to aircraft deliverables over the next 20 years; that UK lenders and lessors would benefit from decreased risk for the financing of UK registered aircraft; and that UK lenders financing aircraft registered in other jurisdiction would also benefit, as UK accession to the Cape Town Convention is expected to facilitate ratification/accession by other jurisdictions including other EU members⁹⁷¹.

The Government’s Call for Evidence closed on 8 October 2010 and thirty responses were received from a variety of interested parties, including United Kingdom airlines, EU and UK financial institutions, asset financing / leasing organisations, aircraft manufacturers and Governments of Overseas Territories. From the ‘Full List of Responses’⁹⁷² most

⁹⁶⁶ Department for Business, Innovation & Skills, ‘Call for Evidence: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment’ (July 2010)

⁹⁶⁷ n(966) para.3

⁹⁶⁸ n(966) para.3

⁹⁶⁹ AWG is a non-for-profit legal entity comprised of major aviation manufacturers, leasing companies and financial institutions that contribute to the development of policies, laws and regulations that facilitate advanced international aviation financing and leasing; see generally <http://www.awg.aero>

⁹⁷⁰ ‘Accession to the Cape Town Convention by the UK: An Economic Assessment Study’ December 2010; available at <http://www.awg.aero/assets/docs/UKCTC%20Econ%20Impact%20Final%20Version.pdf>; accessed 15/07/11

⁹⁷¹ n(970) para 2.4

⁹⁷² Department for Business, Innovation & Skills, ‘Call for Evidence: Full List of Responses: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment’ (July 2010)

respondents overwhelmingly supported the United Kingdom immediate ratification of the Convention and Protocol citing the economic advantages in Professor Linetsky's report. In February 2011 a summary of the thirty responses received was published⁹⁷³, which also noted that BIS had also had meetings with the AWG and RBS Aviation Capital.

Furthermore, in a memorandum submitted to the House of Commons Business, Innovation and Skills Select Committee⁹⁷⁴, Rolls Royce (the largest engine providers to the aircraft industry) stated that although the Export Credits Guarantee Department (ECGD) is indifferent about adopting the CTC to some extent because UK law as it stands is adequate in relation to secured asset finance and the urgency for change is not immediately evident, Rolls Royce would encourage the UK's adoption of the Cape Town Convention as:

“. . . no harm can come from adoption of the CTC and the potential benefits are twofold: increased asset security through use of the Cape Town registry in Dublin and access to increased volumes of longer term debt through access to US capital markets.”⁹⁷⁵

Despite support for ratification, progress toward the UK's adoption of the Cape Town Convention is minimal. On 17 May 2011 Andrew Stephenson, a Conservative MP asked the Secretary of State for Business, Innovation and Skills what progress has been made on the ratification of the Cape Town Convention. To which, the Minister of State for Business and Enterprise Mr. Prisk replied that:

“The UK is committed to its ratification, and . . . following the call for evidence, BIS officials held several meetings with industry stakeholders to discuss the benefits of UK ratification. A Government response to the call for evidence will be released in the near future”⁹⁷⁶.

⁹⁷³ Department for Business, Innovation & Skills, 'Call for Evidence: Summary of Responses: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment' (February 2010), although dated 2010 it was published 2011

⁹⁷⁴ Contained within the BIS publication 'Full Speed Ahead: Maintaining UK Excellence in Motorsport and Aerospace' Prepared 22 March 2010; available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/173/173we01.htm>; accessed 21/7/11

⁹⁷⁵ 'The Relevance of Export Credit Agency Financing in Aerospace' dated 8 February 2010

⁹⁷⁶ Daily Hansard 17 May 2011 Written Answers, HC Deb 17 May 2011 c149W

But by the end of 2011 no Government response was apparent and the Cape Town Convention remained unratified.

6.0 INTERNATIONAL SALE OF GOODS

This section examines the approach taken by Government and Parliament to conventions relating to the international sale of goods. This provides a somewhat different set of circumstances to that of the previous sections, as the Government ratified the initial attempts at uniform law in this particular area of international commercial law, but has left the later United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 (also referred to as the 'Vienna Sales Convention') unratified, despite its adoption by some 77 countries.

6.1 The Need for Legislation

During the 18th century the *lex mercatoria*, which had governed the cross border dealings of merchants for centuries, became integrated into English common law⁹⁷⁷ but mercantile law, was still considered by some as "the same all over the world. For from the same premises, the same conclusions of reason and justice must universally be the same"⁹⁷⁸. Thus, some one hundred years later when statutes such as the Bills of Exchange Act 1882 and the Sale of Goods Act 1893 attempted to codify much of this common law, they had the cosmopolitan features of the *lex mercatoria*. However, the this benefit was to some extent offset by the fact that commercial law did not continue to be developed on a transnational basis in light of new customs and practices – even though these statutes were adopted almost verbatim in Commonwealth countries and in the US the Sales Act was adopted in the Uniform Sales Act - and as a result English commercial law began to lose its international flavour⁹⁷⁹.

It is generally accepted that the existence of different legal systems around the world, hinders the smooth operation of international trade, as diverse national laws can

⁹⁷⁷ R. M. Goode, 'Commercial Law' (3rd Edn, Penguin, 2004) p.6

⁹⁷⁸ *Pelly v Royal Exchange Assurance Co* (1757) Burr 341 at 347 per Lord Mansfield

⁹⁷⁹ n(977)p.7

produce conflict and uncertainty, and from the early 20th century there were efforts to return to a universal concept of trade law⁹⁸⁰. In the late 1920s the German scholar Ernst Rabel recommended⁹⁸¹ to the International Institute for the Unification of Private Law (UNIDROIT)⁹⁸² that one of its first projects should be the unification of the law of international sales of goods, and work began on this in the 1930s. It should be noted however, that whilst the 'old' *lex mercatoria* had developed from usage and practice, the preparation of a new uniform law for the international sale of goods was "the result of careful and, at times, political deliberations and compromises by large international organisations and diplomats"⁹⁸³.

6.2 The ULIS and ULFIS Conventions

Although work had begun in the 1930s, it was not until April 1964 that the draft Convention Relating to a Uniform Law for the International Sale of Goods (ULIS) and the draft Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), were presented at a Diplomatic Conference in The Hague. The UK delegation included Professor B.A. Wortley of the University of Manchester who also chaired the Committee on the draft ULIS Convention, with the UK apparently taking a prominent part in the drafting of the Uniform Laws⁹⁸⁴. Moreover, the Conference accepted proposals made by the UK delegation that the Uniform Law should apply only where the parties had expressly adopted it as the law of their contract⁹⁸⁵ and thus Article V of the Convention permitted Parliament, in giving effect to the Convention, to provide that it would only be applicable to contracts where the

⁹⁸⁰ J. Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (Kluwer Law International 2000-2001) 115-265

⁹⁸¹ See generally M.J. Bonell, 'Introduction to the Convention', in C.M. Bianca & M.J. Bonell (Eds), 'Commentary on the International Sales Law: The 1980 Vienna Convention' (Fred B. Rothman & Co, 1987)

⁹⁸² UNIDROIT was set up in Rome in 1926 under the aegis of the League of Nations, and the UK became a member state on 24 September 1948 by accession to the UNIDROIT statute

⁹⁸³ n(981)

⁹⁸⁴ Hansard 1803-2005 HC Deb 24 May 1966 Vol. 729 cc87W

⁹⁸⁵ Hansard 1803-2005 HL Deb 24 April 1967 Vol. 282 cc404-18

parties chose it as the law of the contract⁹⁸⁶ - unlike the carriage conventions which are mandatorily applicable for conforming cargoes.

The UK duly signed ULFIS on 8 June 1964 and ULIS on 21 August 1964, but it was not until 2 February 1967 that the Uniform Laws on International Sales Bill was introduced in Parliament in order to give effect to the conventions. At the Third Reading of the Bill in the House of Commons the Minister of State, Board of Trade Mr George Darling, stated that the introduction of this legislation was an “indication of the importance which we in this country attach to international co-operation in such matters to facilitate the expansion of world trade”⁹⁸⁷. However, several Members of Parliament were of the opinion that the optional application of the Conventions did not create a very great degree of uniformity, stating that:

“[t]he concept that the laws should be optional is peculiar . . . this is the first law known to me which is optional in its extent. Because it is optional, I criticise it on the ground that it makes things harder, not easier, for exporters . . . businessmen contemplating entering into a contract with a national of a foreign country have two laws to take into account—the law of this country, and the law of the other country concerned—and . . . Now they may or may not have to take into account the possibility of a third law applying. This increases confusion instead of bringing about uniformity”⁹⁸⁸.

The House of Lords took a somewhat different view, supporting ratification of the Convention, as it would not compel traders to adopt the Uniform Laws, yet it would allow the UK to have a voice when amendments to the Laws were being considered. It was thought that this would be of great importance if there was general acceptance of the Laws abroad, or at least in other European countries, which would mean that in practice traders may be compelled to contract subject to the Convention terms⁹⁸⁹.

⁹⁸⁶ i.e. s.1(3) of the Uniform Laws on International Sales Act 1967, and as ULFIS has only ancillary character it applies only to contracts to which ULIS is applied

⁹⁸⁷ Hansard 1803-2005 HC Deb 12 April 1967 Vol. 744 cc1124-37

⁹⁸⁸ n(987)

⁹⁸⁹ Hansard 1803-2005 HL Deb 06 June 1967 Vol. 283 cc280-1

The Uniform Laws on International Sales Act 1967 gained Royal Assent on 14 July 1967 and the UK ratified both Conventions⁹⁹⁰ on 31st August 1967 and they entered into force on 18 August 1972 after 5 ratifications were received. However, it has been said that the UK's implementation of these conventions cannot be seen as an endorsement or acceptance of a move towards the unification of international sales law, as the ULIS was only implemented in a restricted form⁹⁹¹; and at 2010 there are no reports of a single case in the UK where the parties have chosen the Uniform Laws to apply⁹⁹². In fact the Uniform Laws did not achieve world wide acceptance, which is due in part to the predominance of European States in drafting the conventions⁹⁹³, and as a result were only ratified by 8 states.

6.3 The UK Role in the Development of the CISG

In 1966 the United Nations established the United Nations Commission on International Trade Law (UNCITRAL) – its members including the UK; with the mandate of furthering "the progressive harmonisation and unification of the law of international trade"⁹⁹⁴. Following the failure of the Uniform Laws, UNCITRAL was seen as the ideal organisation to undertake the task of drafting a new international convention since its broad-based membership, would counter the political objections that plagued the Uniform Laws⁹⁹⁵. Consequently, one of UNCITRAL's primary goals in developing a subsequent convention was to attract increased participation in uniform international sales rules⁹⁹⁶.

⁹⁹⁰ See Treaty Series No 74 (1972) Cmnd 5029 'Convention relating to a Uniform Law on the International Sale of Goods, The Hague 1 July 1964 – 31 December 1965' and Treaty Series No 75 (1982) Cmnd 5030 'Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague 1 July 1964 – 31 December 1965'

⁹⁹¹ See e.g. n(977) p.914 and B. Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 L.Q. Rev 202

⁹⁹² U. Magnus, 'Action Plan for a European Contract Law- European Contract Law and the CISG'; available at http://ec.europa.eu/consumers/con_int/safe_shop/fair_bus_pract/cont_law/stakehold_ers/5-35.pdf

⁹⁹³ J. Honnold, 'The Sales Convention: Background, Status, Application' (1988) 8 J. L. & Com. 3

⁹⁹⁴ See generally 'The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law', Vienna (2007) p.1; available at http://www.uncitral.org/uncitral/en/about_us.html

⁹⁹⁵ P.J. Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods'; available at <http://www.cisg.law.pace.edu/cisg/biblio/osborne.html#57>; accessed 22/7/11

⁹⁹⁶ H.M. Flechtner, 'The United Nations Convention on Contracts for the International Sale of Goods', available at <http://www.untreaty.un.org/cod/avl/ha/cisg/cisg.html>; accessed 1/8/11

In 1970 UNCITRAL established a Working Group, with most representatives being academics rather than Government Ministers or officials - the UK being represented by Anthony Guest a Professor of English Law at the University of London⁹⁹⁷. The Working Group began considering *inter alia*:

“the comment and suggestions of States [on the ULIS and ULFIS Conventions] in order to ascertain which modification of the existing texts might render them capable of wider acceptance . . . or whether it will be necessary to elaborate a new text for the same purpose or what other steps might be taken to further the harmonisation or unification of the law of international sales”⁹⁹⁸.

From this and the Progress Reports of the Working Group during the period 1970 -1975 it is apparent that the Group was considering the ULIS articles and working on alternative drafts - either a new text of a uniform law or a revised text of ULIS⁹⁹⁹.

In 1976 the Working Group published the first Draft Convention on the International Sale of Goods¹⁰⁰⁰, although it is apparent that the UK unlike other States, did not submit any comments¹⁰⁰¹. But by September 1977 the UK had responded to a draft, with comments generally relating to the fact that some articles were too widely drawn, or were too vague and unclear in their effect. From these comments it is clear that the UK were keen to establish rules of the ilk of English contract law – proposing that Article 9 make provision for the withdrawal of public offers by providing that the withdrawal of such offers may be communicated by taking reasonable steps to bring the withdrawal to the attention of those to whom the offer was addressed, with similar proposals in regard to Article 10 and the revocation of an offer¹⁰⁰². The UK further proposed that it

⁹⁹⁷ UNCITRAL Report A/CN.9-35 'Report of the Working Group on the International Sale of Goods: First Session: 5-16th January 1970 New York'

⁹⁹⁸ n(997)

⁹⁹⁹ See generally the Report of Working Group II '1968 – 1978: International Sale of Goods' Available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Sale_of_Good.html

¹⁰⁰⁰ A/CN.9-116 Annex 1 'Draft Convention on the International Sale of Goods' 5-16th January 1976 Geneva

¹⁰⁰¹ A/CN.9-125 'Comments by Governments and International Organisations on the Draft Convention on the international sale of goods' 4-14th January 1977 New York

¹⁰⁰² See generally A/CN.9-146 Analytical compilation of Comments by Governments and International Organisations on the Draft Convention on the International Sale of Goods' 19-30th September 1977 Geneva

should be possible for the draft convention or any of its provisions to be excluded or varied by the unilateral act of a party not only by the agreement of both parties¹⁰⁰³.

The 1978 UNCITRAL draft led to the convening of a diplomatic conference in Vienna in 1980 - at which sixty two countries, including the UK were represented. From the Official Record of the conference it is clear that the UK delegation played a full and constructive role in the discussion and drafting of each of the articles in the Convention¹⁰⁰⁴. The UK was instrumental for example, in the final form of Article 28 which specifically accommodates common law jurisdictions and allows the judiciary to refrain from using the remedy of specific performance unless they would do so under domestic law¹⁰⁰⁵.

At the conclusion of the Vienna conference, the United Nations Convention on Contracts for the International Sale of Goods was open for signature, although the UK did not sign. It is interesting to note, however, that a Command Paper¹⁰⁰⁶ was prepared by Government in 1980, so it was expected that the convention would be laid before Parliament.

6.4 The Consultation Process I

In 1980 the Government, via the Department of Trade and Industry (DTI) solicited views from interested parties as to whether the United Kingdom should ratify the UN Convention. Exactly who responded is unclear, but from the Law Reform Committee of the Law Society of England and Wales recommended non-ratification¹⁰⁰⁷.

¹⁰⁰³ n(1002)

¹⁰⁰⁴ See generally A/CONF97-19 'United Nations Conference on Contracts for the International Sale of Goods: Vienna 10 March – 11 April 1980: Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and the Meetings of the Main Committee', United Nations, New York 1981

¹⁰⁰⁵ See n(992) and also C.B. Andersen, 'United Kingdom' in Franco Ferrari, *'The CISG and its Impact on National Legal Systems'* (Selier 2009) p.303

¹⁰⁰⁶ Miscellaneous Series 024/1980, Cmnd 8074

¹⁰⁰⁷ See A. Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1996-1997) 26 U. Balt. L. Rev. 57-58

Nearly a decade later in 1989, the DTI issued a consultative document¹⁰⁰⁸ which identified three advantages which accession to the CISG might bring to the United Kingdom. But from the 1500 documents issued, only 55 responses were received – 28 in favour of implementing the Convention, 17 were against and 10 were neutral. Whilst the Law Commission and the Commercial Law Sub-Committee of the City of London Law Society¹⁰⁰⁹ recommended that the United Kingdom should accede; several large organisations such as Shell, BP, ICI and the CBI were against ratification, but no official announcement was forthcoming.

6.5 Giving Effect to the CISG

It was not until May 1995 that the CISG was raised in Parliament. During a House of Lords debate on the Sale of Goods (Amendment) Bill, Lord Steyn invited the Lords to view the Bill's wider commercial context and the apparent long slumber of the trade law project commonly called the Vienna Convention. In response to a question as to whether it was in the best interests of the United Kingdom as a trading nation to ratify the Vienna Convention, Lord Steyn stated:

“If Britannia still ruled the waves, and if our traders could regularly impose English law as the applicable law in international transactions, there would be no pressing need to ratify the convention. But the international marketplace for the sale of goods has changed. For every such transaction in respect of which an English trader is able to insist on English law as the applicable law, there will be one or more where the English trader has to concede to the applicability of a foreign legal system. . . . At present our traders are at a disadvantage in international transactions relating to the sale of goods. Our trade law has fallen behind. It is not sufficiently attuned to the needs of commerce. We have not responded swiftly to the developments in the marketplace. It seems to me the case is made out for an official announcement that the United Kingdom will ratify the convention”¹⁰¹⁰

¹⁰⁰⁸ DTI '*United Nations Convention on Contracts for the International Sale of Goods*', (1989) Part 2 of this document was based on Professor Nicholas's article entitled '*The Vienna Convention on International Sales*' (1989) 105 L. Q. Rev. 201

¹⁰⁰⁹ a body representing the constituency most likely to be affected by accession

¹⁰¹⁰ Hansard 1803-2005 HL Deb 03 May 1995 Vol. 563 cc1453-63

Lord Clinton-Davies agreed that “it is important we ratify at an early stage”¹⁰¹¹ and Lord Inglewood confirmed that the “Government continue to take an active part in the business of the convention. We shall look most carefully at the reasons advanced . . . and bear them in mind in forming our future plans”¹⁰¹². But it was a further two years before any plans were apparent.

6.6 The Consultation Process II

In 1997 the DTI published a further Consultative Document¹⁰¹³. The DTI judging that as the number of countries ratifying the Convention had doubled to 48 that:

“this evidence suggests the UK is becoming increasingly isolated within the international trading community in not having ratified the convention . . . [and] the time is therefore right to consider again whether our international traders are at a disadvantage because the UK was not a party to the convention”¹⁰¹⁴.

Interestingly the DTI also stated that “ratification would also enable our courts to contribute to the interpretation and development of the convention”¹⁰¹⁵. However, of the 450 documents issued, there were only 36 responses - 26 in favour of ratification on the grounds that use of a neutral and uniform law would be beneficial in an increasingly globalised market, 7 opposed ratification and 3 respondents did not have a clear view either way. The organisations against included the Law Society of England and Wales and the Commercial Bar Association; whilst those in favour included British Telecom, British Airways, and the Law Commission of England and Wales¹⁰¹⁶.

Indira Carr and Peter Stone in their publication *‘International Trade Law’*¹⁰¹⁷ suggest that “the low response rate is indeed surprising, if not alarming, given the involvement of a government canvassing opinions on the suitability of ratifying a convention. This

¹⁰¹¹ n(1010)

¹⁰¹² n(1010)

¹⁰¹³ Department of Trade & Industry, *‘United Nation Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention): A Consultation Document’* 97/875 (September 1997)

¹⁰¹⁴ n(1013)

¹⁰¹⁵ n(1013)

¹⁰¹⁶ S. Moss, *‘Why the United Kingdom has not Ratified the CISG’* (2005-2006) 25 J. L. & Com. 483-485

¹⁰¹⁷ Routledge, 2005

could be an indication of ignorance or apathy on the part of interested parties towards the Vienna Convention". Similarly Angelo Forte claimed in an article published in 1997 that "a lethal combination of antipathy and apathy have ensured that the government of the United Kingdom will do nothing until the English legal profession actively presses for change"¹⁰¹⁸.

However, others have claimed that it was perhaps the Government that was not taking the matter seriously - a "story is told of an unnamed senior civil servant who suggested that, if exporters and importers were to stage a demonstration in Whitehall in favour of the CISG, the Government would take the matter seriously". Michael Bridge commented that this stance "conjures up strange visions of chanting demonstrators - What do we want? We want the CISG. When do we want it? We want it now"¹⁰¹⁹.

Nevertheless, following the 1997 consultation, the DTI issued a position paper in February 1999 stating that the Convention should be brought into national law when time was available in the legislative programme¹⁰²⁰. Sally Moss of the DTI stating that although the 1997 consultation was "hardly a ringing endorsement for accession"¹⁰²¹, Government Ministers gave approval for the United Kingdom to proceed to accession and a draft bill was prepared which was to be introduced in Parliament as a Private Member's Bill. However, progress was stalled when the Peer introducing the Bill was taken ill and subsequently died, so no further action was taken due to lack of resources in the DTI – but acceding to the Convention apparently continued to be the Government's aim during that time¹⁰²².

¹⁰¹⁸ A. Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1996-1997) 26 U. Balt. L. Rev. 51-66

¹⁰¹⁹ Michael G. Bridge, 'Uniformity and Diversity in the Law of International Sale', 15 Pace International Law Review (Spring 2003) 55-89.

¹⁰²⁰ Department of Trade and Industry, 'United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), Report to the House of Commons' (London: Department of Trade and Industry), February 1999

¹⁰²¹ n(1016) p.483

¹⁰²² n(1016) p.484

In 2001 Professor Sir Roy Goode, in commenting on the approach of the United Kingdom to the harmonisation of commercial law, stated that the “United Kingdom Government is not opposed to ratification [of the CISG], it is just that it has not been possible to provide find legislative time”¹⁰²³ but suggested that despite the volume and complexity of modern legislation, “one has to say that the excuse of lack of Parliamentary time wears a little thin after 20 years”¹⁰²⁴.

In early 2003 the Secretary of State for Trade and Industry was asked in Parliament by Ross Cranston MP to make a statement about the Convention. Nigel Griffiths replying that primary legislation will be needed to implement the Convention and that the United Kingdom intends to ratify the convention, subject to the availability of parliamentary time¹⁰²⁵. And before the Easter Adjournment Ross Cranston raised the subject again in Parliament as “it is important for our position as an international trading economy to sign up to that Convention. It is not acceptable that we cannot find the legislative time for that”¹⁰²⁶.

However, it was January 2004, before the DTI began to look again at implementing the Convention, and instead of pursuing the primary legislation route, as it was apparently a particularly busy time in Parliament, an alternative method of ratifying the Convention was examined, namely the Regulatory Reform Order (RRO). But use of an RRO required that a ‘burden in legislation must be either removed or reduced’ and the DTI were advised that the changes introduced by implementing the CISG would not qualify as removal of a burden or a reduction under the Regulatory Reform Act¹⁰²⁷. Therefore, the only route to ratification of the Convention was primary legislation.

¹⁰²³ R.M. Goode, ‘Insularity or Leadership: The Role of the United Kingdom in the Harmonisation of English Law’ (2001) 50 *Int’l. & Comp. L. Q.* 756

¹⁰²⁴ n(1023)

¹⁰²⁵ Hansard 1803-2005 HC Deb 31 January 2003 Vol. 398 c1063

¹⁰²⁶ Hansard 1803-2005 HC Deb 03 April 2003 Vol. 402 cc1101-56

¹⁰²⁷ n(1016) p.484

To this end, the DTI looked at how it might prompt ratification via primary legislation and conducted further consultations with the business community and legal practitioners. According to Ms Moss the general view of the business community was ‘if it ain’t broke don’t try to fix it’ and that there were arguments for and against implementation which included:

- The convention would be good news for lawyers but bad news for clients.
- Implementation would involve a greater number of disputes.
- There was a danger that London would lose its edge in international arbitration and litigation.¹⁰²⁸

A second consultative meeting was held with academics and arbitrators. However, Ms Moss states that “both meetings were poorly attended and we were left with the feeling that we had not received a truly representative view from those affected by the CISG”.¹⁰²⁹

In September 2004 Ross Cranston asked the question yet again of the Secretary of State for Trade and Industry in Parliament, when expects she to be in a position to introduce legislation implementing the UN Sales Convention. Ms Hewitt replied “when Parliamentary time permits. We are at a comparatively early stage towards possible legislation, but we are proposing to issue a consultative document, in the course of the next few months, to examine the available options”¹⁰³⁰.

But by February 2005 the question was being asked again in Parliament, this time in the House of Lords by Lord Lester, as to why United Nations Convention on Contracts for the International Sale of Goods had not been ratified¹⁰³¹. The Under-Secretary of State, Department of Trade and Industry, Lord Sainsbury replying that “The United Kingdom intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a

¹⁰²⁸ n(1016) p.484

¹⁰²⁹ n(1016) p.485

¹⁰³⁰ Hansard 1803-2005 HC Deb 07 September 2004 vol. 424 c1048W

¹⁰³¹ Hansard 1803-2005 HL Deb 07 February 2005 vol. 669 c86 per Lord Lester

consultation document in the course of the next few months to examine the available options”.

Professor Alastair Mullis suggests in his 2005 article to mark the 25th Anniversary of the CISG, that “probably the real reason for the U.K.'s failure to ratify [is that] there has not been sufficient political, or industry, interest to get the Convention onto the statute books. The Convention is very much 'lawyer's law' and it is therefore not likely to be high on the agenda of a government seemingly fixated with the problems of anti-social behaviour and fox-hunting”¹⁰³².

In 2009 Michael Bridge¹⁰³³, in reviewing Franco Ferrari’s *The CISG and Its Impact on National Legal Systems*¹⁰³⁴, stated that whilst the DTI (superseded by BER) now BIS, have come out in favour of the CISG, influential opposition and lack of political will lie at the crux of the UK’s failure to ratify the CISG, and that this stems from lack of enthusiasm particularly on the part of national trading and professional constituencies.

So although the CISG is the uniform international sales law of the 78 countries that have now ratified the CISG¹⁰³⁵ - which account for over three-quarters of all world trade, the UK is still not moved sufficiently to ratify.

¹⁰³² Alastair Mullis, ‘Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention’ (2007) 71 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 35-51

¹⁰³³ *Reviews* (2009) 72 *Mod. L. Rev.* 867

¹⁰³⁴ (Sellier, Munich, 2008)

¹⁰³⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

7.0 SIGNATURE, RATIFICATION & ENTRY INTO FORCE DATES

It is clear from the research that adopting an international convention is a lengthy process. Excluding the negotiation and drafting of the convention, which in itself can take many years, the time from signature to entry into force can also extend to years, as Table 8 shows.

Table 8 thus details for the main international commercial conventions, the date the UK signed the Convention; the date the convention entered into force; and if the UK has ratified the convention, the date of UK ratification and its entry into force.

Table 8 shows that 10 international commercial conventions or protocols have *not* been signed – 5 of which relate to financial undertakings. It is to be noted that 7 of the conventions or protocols not signed by the UK are in force. Moreover, 4 conventions or protocols have been signed but not ratified by the UK, although one, the Guatemala City Protocol, has not entered into force.

Two of the conventions and protocols not ratified by the UK, namely the CISG and the Cape Town Convention on International Interests in Mobile Equipment, have been examined in detail in Sections 6 and 7 of this chapter; and the reasons the UK's non-ratification are further discussed in the following conclusion.

It is also apparent that on average sea carriage conventions and their amendments have taken over 80 months or some 6 ½ years to enter into force from their initial signing. The carriage by air Conventions and Protocols have taken on average 156 months or 13 years – although this is mostly due to the Montreal Protocols. The Carriage by Road Convention, by comparison took 133 months or 11 years from signature to entry into force.

Chapter 6 - Parliament and Government

Convention Name	Signature Date (UK) (a)	Ratification Date (UK)	Date Convention in Force	Date in Force in UK (b)	Total Months (b-a)
Carriage by Sea:					
Hague Rules	25 Aug 1924	2 Jun 1930	2 Jun 1931	2 Jun 1931	82
Hague-Visby Rules	23 Feb 1968	1 Oct 1976	23 Jun 1977	23 Jun 1977	112
SDR Protocol	21 Dec 1979	2 Mar 1982	14 Feb 1984	14 Feb 1984	50
Hamburg Rules	Not signed		01 Nov 1992		-
Rotterdam Rules	Not signed				-
Carriage by Air:					
Warsaw Convention	12 Oct 1929	14 Feb 1933	13 Feb 1933	15 May 1933	43
Hague Protocol	23 Mar 1956	3 Mar 1967	1 Aug 1963	1 Jun 1967	135
Guadalajara Convention	18 Sep 1961	4 Sep 1962	1 May 1964	1 May 1964	32
Guatemala City Pro	8 Mar 1971	Not ratified	Not in force		-
Montreal Protocol 1	25 Sep 1975	5 July 1984	15 Feb 1996	2 May 1998	272
Montreal Protocol 2	25 Sep 1975	5 July 1984	15 Feb 1996	1 Dec 1997	267
Montreal Protocol 3	25 Sep 1975	5 July 1984	Not in force	Not in force	-
Montreal Protocol 4	25 Sep 1975	5 July 1984	14 Jun 1998	21 May 1999	284
Montreal Convention*	28 May 1999	29 Apr 2004	4 Nov 2003	28 Jun 2004	61
Carriage by Road					
CMR	19 May 1956	21 Jul 1967 (accession)	2 Jul 1961	5 Jun 1967	133
Conflict of Laws					
Hague Convention on Law Applicable to Agency 1978	Not signed		1 May 1992		-
Hague Convention on Law Applicable to Contracts for International Sale of Goods	Not signed		Not in force		-
Rome Convention on the Law Applicable to Contractual Obligations	7 Dec 1981	26 Oct 2000	1 April 1991	1 Jan 2001	229
International Sales					
CISG 1980	Not signed		1 Jan 1988		-
	Continued	Over			

Chapter 6 - Parliament and Government

Convention Name continued	Signature Date (UK)	Ratification Date (UK)	Date Convention in Force	Date in Force in UK	Total Months
Payment Undertakings					
UN Convention on Independent Guarantees & Standby Letters of Credit 1995	Not signed		1 Jan 2000		-
Financial Leasing					
UNIDROIT Convention on International Financial Leasing 1988	Not signed		1 May 1995		-
Receivable Financing					
UNIDROIT Convention on International Factoring 1988	31 Dec 1990	Not ratified	1 May 1995		-
UN Convention on the Assignment of Receivables 2001	Not signed		Not in force		-
Secured Transactions					
Brussels Convention on Maritime Liens & Mortgages 1926	Not signed		2 June 1931		-
Brussels Convention on Arrest of Sea Going Ships 1952	10 May 1952	18 Mar 1959	24 Feb 1956	18 Sep 1959	88
Geneva Convention on Maritime Liens & Mortgages 1993	Not signed		5 Sep 2004		-
Convention on International Interests in Mobile Equipment 2001	16 Nov 2001	Not ratified	01 Mar 2006		-
Protocol on Matters specific to Aircraft Equipment 2001	16 Nov 2001	Not ratified	01 Mar 2006		-
International Civil Procedure					
UN Convention on Jurisdictional Immunities 2005	30 Sep 2005		Not in Force		-
Hague Convention on the Service Abroad 1965		17 Nov 1967	10 Feb 1969	10 Feb 1969	
Hague Convention on Taking Evidence 1970	18 Mar 1970	16 Jul 1976	7 Oct 1972	14 Sep 1976	78

* Provision for Regional Economic Integration Organisations to accede

TABLE 8

8.0 CONCLUSION

This chapter has examined the approach of Government and Parliament to international commercial conventions. From the research, it is apparent that Government has played an active role in the negotiation and drafting of many international commercial conventions. For example, in the 1920s when the world's trading nations were moving towards uniform regulation in regard to the carriage of goods by sea, the Government was clearly motivated to take an active role in the development of the Hague Rules, in order to have some influence over the final form of the rules.

However, for the Government, there can be tensions between whose interests it supports. In discussions leading to the Hague Rules, the Government was faced with the political need to look after the British ship owning industry built up over centuries¹⁰³⁶ and the need to protect the interests of merchants, not only those in the UK but also those in countries within, what was the Empire, who used British owned ships to carry their cargo – as evidenced by the early legislation made in NZ, Australia and Canada. The assumption appears to have been that the Government would protect ship-owning interests but the Rules actually offered greater protection to shippers/cargo owners, so Government perhaps realised that uniformity was of greater benefit to international trade than maintaining freedom of contract.

Although the shipping industry was one that the Government knew well, it has taken the same active approach to the harmonisation of laws in other aspects of international trade. For example, Government and its representatives have participated in diplomatic conferences and working groups that have negotiated and drafted conventions in such areas as carriage by air (even though the aviation industry was in its infancy); financial regulations; international sale of goods and secured transactions. But despite this active role, there is an apparent reluctance for Government to support the introduction of the resulting conventions and protocols into Parliament. In respect of the CISG, this appears to stem from the fact that traders and practitioners responding to public consultations have given Government the

¹⁰³⁶ At the time when the introduction of a bill of lading convention was under discussion in the early 1900s, the United Kingdom owned most of the world's merchant fleet. See Hendrikse & Margetson, *Aspects of Maritime Law: Claims under Bills of Lading* (Kluwer Law International, 2008) p.4

impression that they did not require or need a particular convention¹⁰³⁷. Although in the case of the Cape Town Convention, the public consultations have shown that there is support from interested parties, yet the Government has not openly supported its introduction. Therefore, it would seem that other factors are at play, and the research highlighted the fact that the successful introduction of the requisite legislation in Parliament has required someone to 'champion the cause'. For example, in the case of the Visby Protocol, its passage through Parliament was no doubt eased by Lord Diplock (who had led the British delegation to the Brussels conference) but even then it still took two attempts with a Private Member's Bill to get it introduced into Parliament.

This brings into question whether conventions accepted and signed by the Government should require legislative statutes to bring them into effect in English law. The Warsaw Convention / Montreal Convention can be amended and replaced by Order in Council – and although this requires presentation in Parliament it does not require a Bill to be introduced in Parliament. Some scholars may argue that ratifying conventions without the full Parliamentary process would be contrary to the Doctrine of Separation of Powers, but this doctrine is surely being diluted now with the advent of EU legislation. Some other mechanism or process would at least circumvent the situation whereby Government and/or its representatives spend years negotiating and drafting conventions only for them not to be ratified because Parliament supposedly does not have time.

Nonetheless, if for constitutional reasons, conventions do require such legislation to enact them into English law; it does raise questions as to why such enabling legislation requires a Private Member's Bill for their introduction into Parliament and why the requisite Parliamentary time cannot be found. Surely, enabling legislation could be introduced as a Public Bill by the relevant Government Minister and laid before Parliament within a particular session. A cursory glance at the Bills before Parliament in early 2012 shows that Bills concerning such esoteric areas as Caravan Sites, Demonstrations in the Vicinity of Parliament, Face Coverings, Food Waste, Keeping of Primates as Pets, Passive Flue Gas Systems and Snow

¹⁰³⁷ n(1016) pp.483-485

Clearance¹⁰³⁸ had Parliamentary time allocated to them, but arguably these are no more (or less) important than the Cape Town Convention, for instance.

The approach by Parliament to the adoption of the Hague Protocol indicated that amendments to international commercial conventions were not seen as a high priority, either in terms of importance or in terms of their usefulness. This is borne out by the fact that no Public Bill mechanism existed for introducing legislation to give effect to them, it was reliant on a Private Member's Bill which took some 4½ years. And despite attention being drawn to this situation in the House of Lords, it has changed little over the ensuing years, as most legislation giving effect to international commercial conventions (both amendments and original conventions) has continued to be initiated by Private Member's Bill - which is distinctly different from public international law conventions. Furthermore, the unavailability of Parliamentary time to pass the necessary legislation continues to be cited as a reason for the non-ratification of numerous international commercial conventions¹⁰³⁹.

It is also apparent from the research that whereas Parliament appears content to enact legislation to bring into effect public international law, there is a reluctance to legislate on international private law matters. It would appear that tensions exist between making laws and protecting freedom of contract – for example, it took some 42 years from 1882 to 1924 before Parliament, as a result of an international convention, placed uniform bills of lading on the statute books, and even then Parliament still showed signs of being averse to legislative interference with the contractual autonomy between merchants and carriers. But of more importance to the Parliamentarians at the time, was correcting the imbalance of power that existed between merchants and carriers. Therefore, Parliament effectively gate-keeps what is included or excluded from English law and this is not only dependent on the international conventions and protocols themselves, but on financial, economic and social circumstances existing in the UK at the time.

¹⁰³⁸ See generally: <http://services.parliament.uk/bills/>

¹⁰³⁹ see also the attempt to introduce the CISG at Section 7.4

Chapter 7 : Conclusion

1.0 OVERALL CONCLUSION

This thesis has examined the approach of five main institutions and groups in England and Wales to international commercial instruments, namely Universities; Practitioners; Cargo Owners, Freight Forwarder and Carriers; the Judiciary and Government/Parliament. These institutions and groups were selected as they represent the structures and mechanisms responsible for the functioning and on-going development of international commercial law in this country. The primary aim of the research work was to establish whether a particular culture has developed in response to international instruments of commercial harmonisation and if so, how it has been informed

From the research undertaken, it has become apparent that the approach of all has been characterised by competing tensions between 'the national' and 'the international' and between the shared ideal of international instruments and the application of national laws. Moreover the tensions evident in one institution or group have also been found to influence the approach to international instruments of others. Therefore, it cannot be said that each has a distinct and individual culture; rather there are inter-related cultures which have been formed by the complex inter-relationship between the different institutions and groups.

Within the Universities, the general approach is to teach commercial law at undergraduate level with little or no international content. This at first appeared to be a consequence of the Practitioners' Regulating Authorities setting the six 'foundation subjects' as prerequisites for a Qualifying Law Degree; but on closer inspection there remains scope for universities to offer international content within undergraduate commercial law subjects, at least within the LLB Degree Programme. Despite this, only 15% of universities include detailed study of international conventions which have not been incorporated into English law, and whilst a further 45% of law schools include a brief introduction to rules such as Incoterms, it means 40% of universities in England and Wales do not include *any* international content within commercial subjects at undergraduate level. The exclusion of international material would be

not be considered acceptable in any other university legal, sciences or arts subjects, but it appears to be accepted in undergraduate commercial law.

Universities nevertheless realize the merits of international commercial law as some 80% offer LLM Courses in 'International Commercial Law', including some law schools who do not offer any commercial law at undergraduate level. This tends to suggest that universities have developed a culture which treats international commercial law as a postgraduate academic subject rather than as a potentially applicable law for international transactions. This culture appears to be strongly influenced by financial considerations as such postgraduate courses with international content attract high fee paying foreign students. It should also be noted that postgraduate law studies are outside the reach of the practitioner regulating authorities and therefore the law schools are able to wholly set their own curriculums.

The University culture that has developed, whereby international commercial law is largely an academic subject for postgraduate study, is also supported and reinforced by Practitioners and their firms. In the course of the research it was found that Commercial firms are equally willing to accept law and non-law graduates for training contracts and this means the profession's acceptance of trainees with little or no knowledge of commercial law beyond a simple 'awareness' and certainly no knowledge of international commercial laws. Consequently, there is no vocational need for students entering commercial practices to have any concept of international commercial instruments and this must impact on the culture and attitudes that these individual develop towards such instruments going forward.

Moreover there was a general perception amongst the practitioners surveyed that English law is indeed adequate for international transactions and therefore there is no need for international conventions. This perception appears to be born largely of ignorance and fear of alternative laws and this attitude stems from the approach of universities in England and Wales, which in turn is informed by the practitioners themselves. In most law schools, it is English sales law which is taught at undergraduate level as the applicable law for international sales and this can inform knowledge and attitudes within future careers as practitioners or

academics. In practise, the unfamiliarity with international commercial conventions and the rights and obligations that these give rise to, appears to have resulted in practitioners only willing or able to advise clients on English law.

The research undertaken concerning cargo exporters tends to support the findings as to the Practitioner's approach of solely recommending English sales law. Whilst it was unclear exactly how many cargo owners had sought legal advice; most stated during interviews that they relied on information received from their legal advisers, freight forwarders and government international trade websites, and that advice was generally sought from lawyers in relation to cross-border sales contracts. The the exporters responses to the research questionnaire show that they have not been made aware of the CISG as an alternative to the application of English sales law, as 96% did not know of its existence and during interviews, the majority stated that the 'international contract provisions' of the CISG were 'a good idea'. Moreover, 15% stated that, had they been aware of such conventions as the CISG, they may have voluntarily contracted on its terms, as they had experienced difficulties establishing international sales contracts especially with new buyers in new markets areas, due to differences in legal regimes.

The research also indicated that cargo owners were unaware of the application of international conventions for carriage of goods by sea and air. This appeared to be the direct result of exporters using freight forwarders and contracting on the British International Freight Association (BIFA) standard terms and conditions. Although these state they are subject to other compulsorily applicable legislation, all the cargo owners in the survey and a third of forwarders were unaware that the carriage conventions were applicable to exports from UK ports. The cargo owners' reliance on information supplied by others demonstrates again how cultures that have developed towards international commercial instruments in one particular institution or group evolve and inform the approach of others. However, in the cross-pollination of approaches some of the rules, practices and conventions which were developed to overcome specific impediments to international trade are not being used by the very merchants they were intended to benefit and in some cases traders are not even aware

of their existence. That is not to assume that cargo exporters would necessarily use international conventions by choice even if they were aware of them, as such use would also need to overcome the culture that the traders appeared to have to contracts in general – whether offer and acceptance match perfectly is less of a problem for instance, than how and when delivery will be effected until such matters are in dispute. But even then, whilst many cargo owners cited instances of goods damaged in transit, goods lost or delivered late, when questioned as to what legal remedies were sought, all replied with variations of ‘no action was taken as it was not worth it’ - not in time, cost and damage to relationship with buyers or freight companies. This then raises the issue as to whether international commercial instruments are developed for the needs of traders or for the legal needs of practitioners, and whether the ‘needs’ of the two institutions are ever resolved by one instrument, but this is beyond the scope of this research.

In other areas of law, such as human rights or public international law, laws have become internationalised in the UK almost without question, but it is apparent from the research that Parliament has a sense of reluctance for legislating on international private law matters and that tensions exist between making laws and protecting freedom of contract. For instance, it took some 42 years from 1882 to 1924 before Parliament, as a result of an international convention, placed uniform bills of lading on the statute books, and even then Parliament still showed signs of being averse to legislative interference with the contractual autonomy between merchants and carriers. Therefore, there is an underlying reluctance in the culture that has developed between Parliament and international commercial instruments.

Furthermore, English commercial law has an established reputation for legal certainty, fairness and transparency. It is English law which brings commercial cases to the courts and arbitral tribunals of London (even when the parties have no connection with this country)¹⁰⁴⁰ and given the number of banks and financial institutions head-quartered in London, the use of financial documents issued under English law is well established practice. As a consequence, commercial law in England and Wales is not only a governing law but it is

¹⁰⁴⁰ See for e.g. *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL) per Dilhorne LJ

effectively, also an ‘industry’ - an industry, which perhaps explains the culture that Practitioners have developed towards international conventions and an industry which the Government and Parliament is keen to promote and protect given the revenue it generates. This sense of protection appears to be at the crux of the culture that has developed within Parliament and Government towards international commercial conventions, and this is perhaps why these institutions have not aided the introduction of legislation to enact international conventions such as the CISG and the Rotterdam Rules into domestic law, as these would arguably compete against ‘the English legal industry’. Although Government is seen to be determining the question as to whether the UK ratifies a particular international convention by public consultation¹⁰⁴¹, the responses do not meet with consistent line of approach. Government has consistently used the apparently unsupportive responses to consultation as a reason for non-ratification the CISG¹⁰⁴² for example; yet the largely positive responses to the Cape Town Convention consultation have, to date, also failed to initiate any further progress towards ratification.

This culture of protectionism is also evident from the complex justification process for ratifying commercial conventions. English constitutional law requires an Act of Parliament to incorporate a convention into English law and whether this process is necessary or whether a more satisfactory method exists is outside the scope of this thesis; but the research has shown that international private law is not high on Parliament’s legislative priority list. This is clearly reflected in the fact that international commercial conventions and protocols have in the main required Private Members’ Bills for their introduction rather than being introduced into Parliament as a Public Bill. Furthermore, enabling legislation to pass international commercial conventions and protocols into English law has always had to compete against the social issues and economic policies of the day, so lack of parliamentary time is often cited as a reason for a convention’s non-ratification.

¹⁰⁴¹ See ‘Call for Evidence’ documents issued by the Department Trade Industry (DTI) now Department for Business, Innovation and Skills (BIS)

¹⁰⁴² Sally Moss, ‘Why the United Kingdom has not Ratified the CISG’, 25 *Journal of Law and Commerce* 92005-06) p.483
“we have held two formal consultations . . . Neither consultation can be said to have shown a strong desire for the UK to ratify”

However, even when international conventions have been ratified there are still competing tensions between ‘international’ and ‘national’ laws, when they come to be interpreted in the courts of England and Wales. Outwardly the judiciary have emphasised the need for conventions to be “construed on broad principles of general acceptance” and not “rigidly controlled by domestic precedents of antecedent date”¹⁰⁴³; and other landmark cases have sanctioned the use of the *travaux préparatoires*¹⁰⁴⁴ and the French text¹⁰⁴⁵ of the Convention, for example, when interpreting convention provisions. But the research has shown that by ruling when and in what circumstances recourse to external sources is held to be legitimate, the judiciary has effectively developed its own method of interpreting international conventions. Consequently, such sources have only been followed to the extent that it is possible to do so without impacting on the principles and concepts inherent in English law.

In essence this describes the culture that has developed within the judiciary to international commercial instruments, and whilst this approach has allowed the judiciary to minimise the effects of international law, it has perhaps tended to place conditions on the overall objective of international conventions, being uniformity. Consequently, although there has been some uniformity with the decisions of other contracting states, it is often been the case that foreign judgments coincide with or are used in support of the approach taken by the English judiciary. It is also worth noting that historically the judiciary were only minded to refer to the decisions of US courts (and less frequently those of Australia and New Zealand) with their common law background and shared language and history, rather than the judgments of the UK’s near geographical neighbours with their civil law jurisdictions. However, since the turn of the 21st century there has been reference to the decisions of both civil law and common law courts.

The research has also highlighted that tensions between international and national laws also emanate from the way international commercial laws are initiated and developed and this can also influence the cultures that institutions and groups develop as a result. Whilst administrative law or criminal law, for example, are developed out of the UK’s domestic and

¹⁰⁴³ *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (HL) per Lord MacMillan at 350

¹⁰⁴⁴ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL)

¹⁰⁴⁵ *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (HL)

social infrastructure - so there is a certain distance between the law and the practitioners; international commercial law by contrast has largely been the result of a series of projects carried out by lawyers and interested parties, which means from the outset there is not the same sense of political urgency. Therefore, international commercial law depends for its success on the practitioners practicing it, but the research has shown that in England and Wales the approach of practitioners is one of paradox. On one hand, practitioners are initiators of the harmonisation process by incorporating rules and practices, such as Incoterms and the UCP into the contracts of international traders; but on the other hand, practitioners and their regulatory authorities do not support the ratification of conventions which they perceive as a move away from familiar English law – despite English practitioners participating in the negotiation and drafting of many conventions and protocols.

A further influence on the cultures that have developed towards international commercial law is the way in which the institutions and groups studied function as gate-keepers for and to English law. The research has shown that Government, Parliament and the judiciary gate-keep what enters into English law via statutes and common law. Practitioners, through their regulatory bodies indirectly set the length and accompanying cost of university undergraduate law degree courses, and therefore gate-keep student access to legal education, which in turn gate-keeps student access to the profession. Practitioners also gate-keep English law by excluding international instruments from client contracts. Consequently, within the cultures that have developed, there are complex structures which keep distinct boundaries around English law.

The insular approach that government, parliament, practitioners and universities have developed in relation to commercial law, conflicts with the international or global image which each institution strives to portray. For example, Government departments¹⁰⁴⁶ promote and support international trade as a major contributor to the economy; most universities in England and Wales promote their international perspective and there has been a growth in the number of large co-called ‘international’ law firms (both those indigenous to the UK and

¹⁰⁴⁶ Such as UK Trade & Investment (UKTI)

US law firms establishing London offices) - to the extent, that a senior partner in Clifford Chance stated that he did not feel bound so much by the ethics or rules of conduct of the Law Society of England and Wales, but by international codes which more clearly affect their transnational and international business¹⁰⁴⁷. Consequently, although there may be a fear of international commercial instruments it is perhaps not caused by an overriding fear of globalisation as such.

In summary, the research has provided clear evidence that within the institutions and groups studied a distinct culture has developed towards international commercial instruments. At its basis is the tension between 'international' and 'national' law; and an apparent need to protect English law. Furthermore, there is an overriding sense that international instruments are used as a means of better fitting English law to cross-border transactions; rather than applying such instruments as an alternative to or in preference to English law. It may be the case that to overcome the particular cultures that have developed more analysis needs to be done as to the type of international instruments that are used to harmonise commercial law. Rules, practices, model laws and conventions are all considered international instruments but it is perhaps not a coincidence that all cargo traders, freight forwarders and most practitioners were familiar with the use of rules such as Incoterms whilst many were unaware of the international carriage conventions which were potentially applicable or other conventions which could have been incorporated in cross-border contracts.

Historically, the UK was able to 'make' international conventions with a few other States, to suit particular needs at the time and these conventions were ratified and used by traders and carriers; more recently however a range of international organisations, regional entities and states are involved in producing international conventions and it is noticeable that many have not been ratified by the UK despite being involved in their development and many traders are unaware of their existence. Consequently the development of 'recommended international rules' for specific issues of international commercial life rather than international conventions, may assist in overcoming the cultures that have developed towards

¹⁰⁴⁷ Avrom Sherr, 'Globalisation and the English Judiciary' (2001) p.8-9; Available at <http://sas-space.sas.ac.uk/259/>

international commercial instruments in general and enable more effective and greater harmonisation of commercial laws, as institutions might feel less restricted by established approaches and existing practices and procedures. Thus, rules and practices developed by the international trade sector, in response to a particular commercial or trading obstacle, would be approved and used by the international trade sector without requiring government or parliamentary intervention, and in doing so a new *lex mercatoria* may emerge, which may also avoid or overcome the cultures that have developed in respect of the existing international commercial instrument.

APPENDICES

APPENDIX I : Post Graduate International Commercial LLM Courses

1. Golden Triangle

University	LLM Course
Cambridge	International Commercial Litigation* ¹
King's College	International Business Law* ^{1 2} International Commercial Law* ^{1 2} International Trade Law
LSE	Corporate and/or Commercial Law International Business Law
Oxford *	Transnational Commercial Law
UCL	Commercial Law International Business Law International Commercial Law

*¹ Some modules focus on public international law

*² Includes international commercial arbitration

*BCL/M.Jur course

2. Russell Group

University	LLM Course
Birmingham	Commercial Law International Commercial Law
Bristol	Commercial Law
Cardiff	Commercial Law
Leeds	International Trade Law* ¹
Liverpool	International Business Law* ¹
Manchester	International Business & Commercial Law
Newcastle	International Commercial Law* ¹
Nottingham	International Commercial Law
Sheffield	Commercial Law
Southampton	Commercial & Corporate Law* ¹ International Business Law
Warwick	International Economic Law* ²

*¹ Some modules focus on public international law

*² Includes international commercial arbitration

3. 1994 Group

University	LLM Course
Birkbeck	-
Durham	International Trade & Commercial Law
UEA	International Trade International Commercial & Business Law
Essex	International Trade Law
Exeter	International Business Law
Lancaster	International Business & Corporate Law* ¹
Leicester	International Commercial Law
Queen Mary	Commercial & Corporate Law International Business Law
Reading	International Commercial Law*
SOAS	International & Comparative Commercial Law
Surrey	International Commercial Law
Sussex	International Trade Law* ¹
York	International Corporate & Commercial Law* ¹

*¹ Some modules focus on public international law

4. Million+

University	LLM Course
Anglia Ruskin	International Business Law
Bedfordshire	Commercial Law
Birmingham City	Corporate & Business Law* ¹
Bolton	-
Buckinghamshire New	International Commercial Law
Central Lancashire	International Business Law
Coventry	International Business Law
Derby	Commercial Law
East London	-
Greenwich	International and Commercial Law
Kingston	International Commercial Law
Leeds Metropolitan	-
London Metropolitan	International Commercial Law
London South Bank	-

APPENDIX 1 - Post Graduate International Commercial LLM Courses (contd)

Middlesex	International Business Law* ¹
Northampton	International Business Law
Southampton Solent	LLM (includes Law of International Trade)
Staffordshire	Business Law International Business Law
Sunderland	International Public and Private Law* ¹
Teesside	-
Thames Valley	International Business and Commercial Law
Wolverhampton	International Corporate and Financial Law

*¹ Some modules focus on public international law

5. University Alliance

University	LLM Course
Aberystwyth	International Business Law
Bournemouth	International Commercial Law
Bradford	-
De Montfort	Business Law
Glamorgan	International Commercial Law
Gloucestershire	International Business Law (Commercial Law)
Hertfordshire	International & Commercial Law
Huddersfield	Commercial Law
Kent	International Commercial Law
Lincoln	-
Liverpool John Moore's	International Business & Commercial Law
Manchester Metropolitan	-
Northumbria	International Commercial Law International Trade Law
Nottingham Trent	International Trade Law
Open	-
Oxford Brookes	International Trade & Commercial Law
Plymouth	Maritime & Marine Law
Portsmouth	International Business Law
Salford	International Business Law & Regulation (New 2010)
Sheffield Hallam	Corporate Law & Strategy
West of England	Commercial Law International Trade Law

6. Unaffiliated Universities

University	LLM Course
Aston	International Commercial Law
Bangor	International Commercial & Business Law
Brighton	-
Brunel	European & International Commercial Law International Trade Law* ¹
Buckingham	International & Commercial Law
Canterbury Christ Church	-
Chester	-
City, London	International Commercial Law* ¹
Cumbria	-
Edge Hill	-
Hull	International Business Law
Keele	-
London, External	International Business Law
Swansea	International Commercial Law International Commercial & Maritime Law International Maritime Law International Trade Law
Westminster	International Commercial Law
Winchester	-

*¹ Some modules focus on public international law

APPENDIX 2 : Legal Firms Practitioners Selected From

1. Major London firms (in the 'UK200') – 10 randomly selected

Allen & Overy	Ashurst
Berwin Leighton Paisner	Bird & Bird
Clifford Chance	CMS Cameron McKenna
Freshfields Bruckhaus Deringer	Herbert Smith
Hogan Lovells	Linklaters
Norton Rose	Simmons & Simmons
SJ Berwin	Slaughter and May

2. Medium-Sized London firms (in the 'UK200') – 10 randomly selected

Bircham Dyson Bell	Bristows
Capsticks	Davenport Lyons
Farrer & Co	Field Fisher Waterhouse
Finers Stephenson Innocent	Fladgate
Forsters	Harbottle & Lewis
Holman Fenwick Willan	Howard Kennedy
Ince & Co	Kingsley Napley
Lawrence Graham	Lewis Silkin
Macfarlanes	Mishcon de Reya
Payne Hicks Beach	Reynolds Porter Chamberlain
Speechly Bircham	Stephenson Harwood
Travers Smith	Watson Farley & Williams
Wedlake Bell	Withers

3. London offices of US Headquartered firms (in the 'UK200') – 10 randomly selected

Arnold Porter	Baker & McKenzie
Chadbourne & Parke	Cleary Gottlieb Steen & Hamilton
Devey & Le Boeuf	K & L Gates
Latham & Watkins	Mayer Brown
Morgan Lewis	Orrick Herrington
Sidley Austin	Skadden Arps Slate Meagher & Flom
Reed Smith	White & Case

4. National Firms (in the 'UK200') – 20 randomly selected

Berrymans Lace	Mawer Clyde & Co
Cobbetts	Clarke Wilmott
DAC Beachcroft	DLA Piper
DWF	Eversheds
Freeth Cartwright	Gateley
Howes Percival	Irwin Mitchell
Kennedys	Keystone Law
Mills & Reeve	Pannone

Pinsent Masons
Simpson Millar
Watson Burton

Shoosmiths
Trowers & Hamlin
Weightmans

5. Regional Firms (in the 'UK200') – 20 randomly selected

Addleshaw Goddard
Barlow
Birchall Blackburn
Blake Laphorn
Brabners Chaffe Street
Charles Russell
Dickinson Dees
Foot Anstey
Harvey Ingram
IBB
Lupton Fawcett
Michelmores
Morgan Cole
Osborne Clarke
Penningtons
Thomas Eggar
Thrings

Ashfords
RobbinsBevan Brittan
Birketts
Bond Pearce
Browne Jacobson
Cripps Harries Hall
FBC Manby Bowdler
Geldards
Hill Dickinson
Lester Aldridge
Matthew Arnold & Baldwin
Moore Blatch
Nelsons
Paris Smith
Shakespeares
Thomson Snell & Passmore
Wilsons

6. Firms in Major Port Cities (UK Wide) – 10 randomly selected

Bridge McFarland
Darwin Gray
Hay & Kilner
John Weston
Mace & Jones
Mundays
Ward Hadaway

Burges Salmon
Hallmark
Hugh James
Kester Cunningham John
Mills & Co
Trethowans
Warner Goodman

7. Niche International Trade/Shipping Firms (UK Wide) – 10 randomly selected

Bentley Stokes & Lowless
Campbell Johnson Clark
Dale Stevens
DRG Solicitors
Fishburns
Grier Olubi
Ross & Co

Bolt Burdon
Capital Law
Davies Battersby
Fishers
Geoffrey Leaver
Lax & Co
TLT

8. Firms outside 'The UK200' – 10 randomly selected

Aaron & Partners

BP Collins

Boodle Hatfield

Forbes

HLW Commercial Lawyers

Kuit Steinart Levy

Norton Peskett

Beale & Co

BPE Solicitors

Curwens

Hillyer McKeon

Humphreys & Co

Last Cawthra Feather

Pritchard Englefield

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