UNIFICATION OF PRIVATE MARITIME INTERNATIONAL LAW THROUGH TREATIES—AN ASSESSMENT

by

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PART ONE

INTRODUCTION

"In the world of sea, impulsiveness is left to nature; man gives longer thought to his actions."

Jean Rouiller

(1) Private Maritime Law

Private Maritime International Law

And Maritime Conflicts Law

Maritime law has been the subject matter of many unification endeavours ever since man began to use oceans as highways of commerce and culture. It is almost a commonplace of the science of unified law to say that of all the branches of commercial law, maritime law is most susceptible to unification, since the shipping enterprise needs to anchor itself in one homogeneous legal order for its continued existence.

... See 3 Wigmore, A Panorama of World's Legal Systems, 875 (1928); Robinson, Handbook of Admiralty Law in the United States, 1–13 (1939); Gormley, The Development of the Rhodian Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision, 9. Int. American Law Rev., 317 (1961); 4 Rabel, The Conflict of Laws: A Comparative Study, 238 (1964); Generous recognition of these unification endeavours is evident in the assimilation of maritime law, as a 'private' law, into the system of 'transitional law.' See Jessup, The Transnational Law, 110–113 (1950); and also Id., "Diversity and Uniformity in the Law of Nations," 58 Am. J. Intl. Law, 241, 350–351 (1964). In an over-uniformization, usually in this field, Jessup observes: "... the needs of trade and commerce have in the past afforded examples of international processes by which legal diversity has been supplanted by uniformity in regard to maritime law. It might be said, even though the seas do not constitute a region the maritime interests of the world have long been given evidence that to a degree they constitute a functional international community. The customs of seamen and sea-faring man tended to unify maritime law as far back as at least the seventh century B.C." (Emphasis added.) But see the trenchant remarks of Gilmore and Black who regard even the scription of the Rhodian Code to 900 B.C. as a "ridiculously early date." and further, "The student will want to know how important it is that he be familiar with the medieval sea codes. Probably, a recognition of their names is all that he will need even for the ornamental purposes by the complete admiralty proctor. They could hardly state much living law for the concerns of modern shipping." Gilmore and Black, Law of Admiralty, 4, 7 (1957).

... It is hoped that forward-looking epitaph is not going to be proven incorrect. Already we hear of unified law as an autonomous discipline and attempts are being made to correlate it to other areas of law. See Vallindra, "Autonomy of International Private Law," 7 Revue Hellenique De Droit International 8, (1958); Id., "International Uniform Law in a Branch of Law," 27 Annual of the Association of Attorneys and the Alumni of the Hague Academy of International Law (1957); Malinuppi, "Relations Between Uniform Law and Private International Law" (in French), to appear in the Revue des Courts (1965), not available unfortunately at the time of writing; Vallindra also, "Private International Law, Uniform Law, and Comparative Law," in the 21st Century Comparative and Conflicts Law (1961) at p. 104 even suggests "Conceptively, Private International Law could be considered as a part of general uniform law, for as the latter aims at international uniformity of divergent civil, commercial, and procedural laws of the world, it also envisages unification of various internal systems of private international law."

... See also, Kegel, "The Crisis of Conflict of Laws," St. 12. Recueil des Courts, 362 (1964); "Perhaps it would be advisable to from a special discipline of unification of law and assign it to the New Law Merchant." (Emphasis added).

We prefer to use the term "unified law" instead of the term "international law," because the former does not necessarily result in a unified, though that might be the aim. The term "unified law" was originally used in the meaning that the law had been subject to some kind of unification process. But these differences in terminology are not significant, so long as the aspiration and achievement of unification form a subject matter of a separate discipline.
be one of our aims to discern those peculiar to maritime enterprise, which require the unification of conflicts rules along with, if not prior to, unification of the substantive maritime law.

It is believed that this differentiation of the aspects of private maritime law will greatly assist an analysis of the unification process. It is also felt that wider academic recognition of this classification will engender a special tradition of learning in maritime law so desperately needed for the success of both the present and future unification endeavours.

to the cases generally cited in discussion of the "proper law of contracts" theories. See, e.g., Cheshire, Private International Law, 185 (1965) and also Gravez, The Conflict of Laws, 341 (1965). A few noted American authorities may be mentioned—Janson v. Swedish American Line, 185 E. 2d 212 (1st Cir. 1950); Knorr v. Rotary Mills 196 U.S. 69 (1900); Lawrence v. Larson, 345 U.S. 571 (1953); Liverpool and Great Western Steam Co. v. Phoenix Ins. Co. 129 U.S. 397 (1889); Siegelman v. Canard White Star Ltd., 221 F. 2d 189 (2d Cir. 1955). In general see Yannopoulos, Negligence Claims in Ocean Bills of Lading (1962).

The study of private maritime law is largely one in the national laws: comparative and international aspects of private maritime law do not form generally. The English authorities in the field reflect a professional, rather than a scholarly orientation. Among these are Carver's Carriage of Goods by Sea Act (1963); Marshall's Collisions at Sea (1963); Arnould's Marine Insurance (1963); Tempery's Merchant Shipping Acts (1963); Scrutton's Charterparties and Bills of Lading (1964); and Kennedy's Civil Salvage (1958); each one of which has undergone several editions and is indispensable to Anglo-American maritime lawyer. The leading American treatises in the field are: Robison, A Handbook of Admiralty Law of the United States (1919); Benedum, Law of an Admiralty (1929); Quidor and Black, The Law of the Law of Admiralty (1937); Knauss, Ocean Bills of Lading (1953) and late Griffin, Collisions (1949). There are also several textbooks on American admiralty law. A few special works on specific areas of private maritime law are mentioned at their context later in this paper.

At present, one notes striking difference between the attention that the civil law scholarship pays to the private maritime law in contrast to the relative indifference towards that subject of the Anglo-American scholarship. Thus we have in the Continent in addition to excellent individual studies of private maritime law special journals devoted to this study: Revue De Droit Maritime Comparé (France 1922-1940); Le Droit Maritime Franc (France); Il Diritto Marittimo (Italy); Rivista di Diritto Della Navigazione (Italy) and Arkiv for Sjöfart (Norway).

The Common Law world has only reports of cases, containing occasional short articles on the subject. The leading reports are Lloyd's List Law Reports (United Kingdom); and the American Maritime Cases. Legal Periodicals do not contain a very great number of articles or notes on maritime law. Thus, there is considerable difference in the scholarly efforts between two legal cultures.

Recognition of maritime law as urged above may lead to significant revival of maritime scholarship.

Unification of Private Maritime International Law Through Treaties—an Assessment

(i) The Unification of Law and Private Maritime International Law:

The science of unified law is recent and many theoretical problems as to its nature and methodology still perplex scholars. Its autonomy as a discipline and its relation to the law of conflict of laws are questions which remain to be settled. As to science of unified law see supra note 3. The writer found the following material very helpful:


For a succinct survey of the impact of unification of private international law principles see Steiner, "The Development of Private International Law by International Organizations," 30 Pro. Am. J. Int'l L. 38 (1965). Steiner applies states that "two decades ago the "achievement of unification..." could have been termed anemic. Today a more appropriate characterization might be pale, with an improving complexion..." The commentator may well say, "much has been realized, but much you have made us realize," id. 46-47. (emphasis added). As to what appears to this writer as an inconsistency in Steiner's approach see his question and answer by the professor on pp. 30-31.
An aura of ambiguity surrounds the term “unification.” The term has been loosely applied and we have to concede that it admits of equivocation. This results in a mixed criteria of assessment of unification endeavours. It is therefore, important to understand the meaning of that term as it is used here.

Unification cannot mean liquidation of all differences within a given area of world law. Utopian notions of unification have been consciously denounced by all but apparently unconsciously retained by some of us, with the interesting result that a unification endeavour is sometimes criticised on the very assumption that unification...

Semantics of unification needs to be studied in greater detail. Various terms are loosely applied to the process of unification, which may imply some confusion as to the nature and aims of the process itself. The terms synonymously used are “harmonisation,” assimilation, codification and “uniformity.” Chetham, for example, enumerates five meanings of the term “uniformity” see Chetham, “Problems and Methods in Conflict of Laws,” Recueil des Cours, 237, 239-40 (1960).

The question of criteria of assessment needs to be studied. We often hear of the “success” or the failure of unification but the theoretical basis of evaluation are not so often explicated. We presented the following general scheme to the Centre for assessment of unification of maritime law:

(a) Qualitative criteria: (i) Participation in the C. M. I. meetings by the maritime nations; (ii) Signatures to the text of the proposed Convention; (iii) Ratifications; (iv) Accessions; (v) Future possibilities of acceptance through accessions; (vi) Actual compliance with the Convention by its infusion in the national law.

We will find later that not all signatory states ratify the conventions first signed by their representatives; some conventions signed by many states ultimately receive no ratification or accession from any state; and some Conventions not yet in force may still influence the national legislation (e.g. infra notes 164 and 227).

Therefore, exclusive reliance on the list of ratifications or accessions can be misleading.

(b) Qualitative criteria: (i) Aims of unification (aims may often vary: here the “impulse” for unification may also be examined); (ii) Method employed—here the technique of elaboration of the rules, the rejected alternatives, compromises to the main principle, deliberate limitation of the scope of unification and the technique of adaptation of the convention may all be examined; (iii) Function of unification may also be viewed in the light of unification of conflict rules and that of substantive rules of law; and the area of discrepancy in the laws of contracting and non-contracting states. Assessment of unification of conflict rules also demands further investigation according to the categories suggested infra. As to the function of assessment, it may be: (i) descriptive of the executive, legislative and judicial responses to the unification endeavours; (ii) evaluative of the institutional and methodological aspects of the unifying process and (iii) predictive of future measures of unification.
drafting skills. The executive phase consists in adoption of the convention in a national legal system, through appropriate national legislative processes. Significant deviations occur at this stage, either through seemingly innocent editorial changes in the text of the convention or through deliberate attempts to bring the conventions near to national acceptance. Equally important is the judicial phase where the judicial appreciation of the norms of unification in solution of actual legal controversies determines the ultimate success or the failure of any unification endeavour. Absence of appropriate adjudicatory forum on a world-wide scale renders it inevitable that the national jurisprudence of convention-states may assert itself in a variety of ways.

No assessment of unification can then be scientifically complete unless an evaluation of all these phases is made. Providing the necessary data in this respect may well be the first task of a writer on the "Text Book of Unified Maritime Law." Till then, we can

Understandably, the "international legislation" has been "moulded" by national authorities. The international court of justice has been "formed" by national laws and conventions. The "international legislation" is an attempt to harmonize the national legislation and to create a uniform body of law. It is not possible to define the international legislation in a precise and definite manner. However, it is generally agreed that the international legislation is the body of law which is created by international agreements and which is binding on the states which have ratified or acceded to these agreements.

III. Scope and Method of Present Analysis

This study deals with the international conventions on maritime law concluded under the auspices of the Comité Maritime International (C.M.I.). The history of this institution and the manner of its working are familiar to us all. There may be room for institutional innovations and improvements in the mechanism of unification, but these aspects have not been studied here.

Our efforts have mainly been to form an estimate of the extent to which unification of private maritime international law, including the maritime conflicts, has been so far achieved through the good work of the C.M.I.


The work of C.M.I. has been largely in the area of the private maritime law.

We will survey the progress of the unification of private maritime international law through multilateral conventions in three pertinent phases—viz., conflicts-elimination, conflicts-persistence and conflicts-creation. It is generally agreed that unification of substantive law eliminates conflicts problems. Indeed, conflict elimination may in itself be considered as the goal of unification rather than a result thereof. Conflicts-persistence situations may arise either because the unification is not comprehensive in the chosen area or because it suffers from poor craftsmanship. Study of conflict persistence may perhaps also demonstrate the hard core of conflicts situations always beyond the reach of the international legislation. It may prove the existence of the inevitability of conflict situations, thus providing the outer limits of any unification endeavour. Likewise, conflicts-creation may be the outcome of mixed motives of unification, combined in most cases with a deliberately poor and vague craftsmanship. Interconventional conflicts may also contribute to conflicts-creation. Thus,

The present writer arrived at this scheme of analysis independently while at the Hague and was therefore happy to note later that almost a similar scheme has been used in analysis of the unification of air law by Peter Sand, in his mimeographed thesis submitted to the Institute of Air and Space Law, McGill University, Montreal, Canada, in 1962. The title of the thesis is "Choice of Law in International Contracts of International Carriage by Air." This has been here referred to frequently for comparative purposes.

See Valladao, op. cit., n. 3, supra at 104: "To the extent that unified law makes progress in certain fields, it may be treated as uniformly legal rule for a given subject, private international law shrinks, its corresponding rules disappear." Kegel, "As substantive law is unified, no conflict law is needed," Kegel, "The Crisis of Conflict of Laws," 112 Recueil des Cours, 362 (1966); Cases, The Choice of Law Process, 251 (1965); and in general see the literature on conflict unification cited in n. 10, supra. But see the original and stimulating analysis of Wengler, who calls this system of conflicts-regulation as "the special rules method," Wengler "General Principles of Private International Law," in 104 Recueil des Cours 279, 451-459 (1961).

See the discussions of various maritime conventions, infra and our conclusions.

This may exist, first because "repeal" of multilateral convention is not possible and some states may not denounce the Convention adopted earlier in favour of a new Convention on the same subject. Thus, we have now two conventions on Limitation of Shipowners' Liability, and are likely to have two Conventions on Maritime Liens and Mortgages. It may also occur in respect of two conventions governing different aspects of maritime law altogether, as in case of the Maritime Liens Convention of 1926 and the Limitation of Liability Convention of 1967. See note 112, infra. This writer has noticed a possibility of interconventional conflict in Article 6 of the Collision Convention which abolishes "all presumptions of fault" and Article 4(3) of the Passenger Convention which creates such a presumption. Also see note 198, infra, where we find a ready acknowledgement of this aspect of unification.

and the Conventions, formulated at the Paris and Hamburg Conferences of 1900 and 1902, were subjected to intense discussions at many conferences for about four years before they were first signed on Sept. 23, 1910. 28

The Collisions Convention embodies a fundamental agreement on a major aspect of international maritime policy of apportionment of liability in both to-blame situations. The law on the subject varied greatly 29 and the prospect of unification seemed very slight in the initial stages of the endeavor. 30 Maritime community of the world seemed satisfied with a regime that merely yielded a jus dicitum rusticorum in collision matters. In addition to creating the right climate for unification, the main task of the unifiers at that time was "both harmonisation of a legal system and progressive development of an ancient rule of equal division into a


The then existing multiple systems have been well summarized by Scott: "If minor or coincidental difference be disregarded, there are amongst civilized nations four different ways of dealing with collision damage where both ships are in fault:

1. To assess the total damage and divide it equally among the two ships. This is the British rule and has been the American rule.

2. To leave the loss where it falls. This is the rule in Germany, Holland, Italy, Spain, and those of South American countries which had derived their law from Spain, and was the rule in Great Britain in our courts of Common Law previous to Judicature Act of 1873.

3. To divide the loss proportionately to the value of the vessels in collision. A kind of general average principle obtaining in Turkey and Egypt.

4. To divide the loss proportionately to the faults of two vessels. This is the rule in France, Belgium, Norway, Sweden, Denmark, Portugal, Greece and Roumania." (Footnotes omitted."

30 See the Address of Louis Franck to the American Maritime Law Association, Doc. N. 159, M L.A of the U.S. 1547-1557 (1927).

31 Ibid. Also see Barclay, "The Antwerp Congress and the Assimilation of Mercantile Law," 2 L.Q. Rev. 66 (1886).
The provisions of this Convention are to apply to a situation when "all persons interested when all the vessels belong to States of the High Contracting Parties". But the application thereof to the nationals of non-contracting states is conditioned upon reciprocity and the Convention does not apply when all the persons belong to the "same State as the Court trying the case." In such a situation, the national law will be applicable (Article 12). 36

The Convention leaves many matters to the "lex fori." Thus, the "right of contribution" by "vessels in fault" in cases of "death and personal injuries" as well as "the meaning and effect of any contract or provision of law" limiting the liability of shipowners are "left to the law of each country to determine" (Article 4). The grounds for suspension and interregnum for actions for the recovery of damages are "determined by the law of the court where the case is tried," and in certain cases, suitable extension of time may also be provided by "legislation" of the High Contracting Parties (Article 7). 37 The Convention also does not affect—but without prejudice to any Conventions which may hereafter be made," the national laws with regard to "limitation of shipowners' liability" or "alter the legal obligations arising from contracts of carriage or from any other contracts," (Article 10).

The Convention was ratified by all leading maritime states, including Great Britain, where initially there was considerable opposition to the principle of proportional fault though the rule as to division of damages prevalent till then was by no means an "organic principle" of the British maritime law, or an "original doctrine of our (i.e. British) ancient constitution." 38 The most conspicuous non-Convention State today is the United States of America, which primarily abstained from overthrowing the principle of equal division of damages on the ground that it was not a "ship-owning Nation" but a "nation of cargo owners and freighters." 39

The fact that the United States has yet to accept the convention does not indicate the failure of the unification effort. If anything, it only illustrates the limits of international legislation through treaties and points to the vitality of antiquated legal principles. 40

36 Scott, op. cit. supra n 29. But Great Britain needed a great deal of persuasion as is evidenced by the following remarks. As they offer us a rich insight in the nature of unification as conceived by unified they are quoted here in their entirety. "As a whole, English maritime law is a plain and reasonable law. There is no doubt to me that in the process of unification of maritime law, the English principles will, to a large extent, become universal principles. But still there are some, which cannot be maintained because equity and reason condemn them. Among these is the rule of division of loss. As a measure of compromise, which may lead to unification on maritime law this principle ought to be changed... We shall then have no longer the spectacle, so humiliating to reason, of a collision in the North Sea leading to consequences totally different according to the accidental fact of nationality of the nearest port of refuge." Franch, op. cit. n 29 at 273 (Emphasis added).

Quoting Franck's statement, Scott says: "As a measure of compromise, he says, and there strikes the right note." (Emphasis in original) And he continues: "It is as exact as such that the proposal to adopt the proportional rule should be regarded... (it) affords an opportunity of reform, and of concession, where no vested interests can be adversely affected." (Emphasis added) Scott, pp. 33-34 op. cit. n 29, supra.

37 This was the comment of Mr. Fredric Brown a representative of the United States delegation to the C.M.I. Meelings. "We are not a shipowning nation. It has been the policy of Congress to offer no encouragement to the building or owning of ships... We are therefore a nation of cargo owners and freighters, and our interests, as I need scarcely tell you, are very largely in that direction. The interest, therefore of my country is vastly different from that of possibly every other country, certainly of most other countries here represented." Comite Maritime International Bulletin, No. 30, 178 (1910). This rationale no longer holds true. See "The Difficult Quest for a Uniform Maritime Law: Failure of Brussels Conventions to Achieve International Agreement on Collisions Liability, Liens and Mortgages," Note, 64 Yale L. J., 878, 879, (1954-55) and also see infra n 41.

38 See in this context the dissenting opinion of Judge Hand in National Bulk Carriers v. The United States of America, 186 F, 2d 405, 410, (2d Cir, 1950). There the late judge characterised adherence to the equal damage rule as "an obstinate cleaving to the ancient rule which has been abrogated nearly by all civilized nations..."
But it can be easily foretold that the United States is, in the near future, undoubtedly going to join the rest of the maritime world in accepting the Convention, since the superior rationale of the proportional fault has been increasingly recognized and the original opposition of cargo owners is rapidly losing both its vehemence and cogency.\footnote{41}

The greatest contribution of this Convention to the unity of maritime law lies in its establishment of the regime of the proportional liability. With this, a first step was surely taken towards ending the spectacle "so humiliating to reason" of different results occurring in different parts of the world according to the choice of forum made by the litigants.\footnote{42}

However, it must be admitted that the Convention "deals only with a limited field,"\footnote{43} and as such, its potentialities for conflicts-elimination are seriously minimised. To the limited scope of the Convention, must be added the distinct forum-shopping made possible by non- adhesion of the U.S.A. to this Convention so far and the attitude of some of its courts which seems hospitable to such attempts.\footnote{44}

The unifying extent of this Convention is also limited because it does not contain any conflict rules and many important matters are left to the law of the forum.\footnote{45}

\section*{(11) Penal and Civil Jurisdiction Conventions:}

The Collisions Convention did not deal with certain important aspects of jurisdiction and procedure. In civil causes of action arising out of collisions, concurrence of actions for damages still remained possible, and diversity in outcomes persisted owing to some matters being expressly reserved to the national law in the

\footnote{44} American courts seem to encourage litigation in the cases of alien suitors. In Motor Distributors v. Olaf Pedersen's Rederi A/S 259 F. 2d. 463, (S.C.A. 1957), the six alien owners of cargo filed libel in rem in the U.S. District Court against a Norwegian vessel for loss of goods after collision off coast England with a German vessel. The Norwegian vessel was arrested in Florida, The Court of Appeals reversing the D.C.'s decision not to take jurisdiction in this case, felt that the case can be generally more impartially and satisfactorily adjudicated by the Court of a third nation having the custody of the 'res.' But for a contrary practice, at least for collisions occurring in Canadian waters, see Tettly, loc. cit. at 180.

But it should not be forgotten that both-to-blame clauses developed as a voluntary commercial practice to avoid the consequences of non-adhesion of the United States to this Convention. The U.S. Supreme Court has invalidated such clauses see the U.S. v. Atlantic Mutual Insurance Co., 343 U.S. 236 (1951). For a general discussion see Gilmore and Black, The Law of Admiralty, 152-155 (1957); Knauth, Ocean Bills of Lading, 210-213 (1953); and Tettly, Marine Cargo Claims 189-190 (1965). As Gilmore and Black describe it: "The both-to-Blame clause now belongs to the ages, or at least sleeps in the enchanted castle awaiting the magic touch of the Congress..." In Convention countries, of course, such a clause is not at all necessary.

\footnote{45} In a recent German decision the Federal Supreme Court upheld the lower court's decision that the limitation of liability should be held by the Canadian law in a situation where a collision occurred between an English vessel and a German vessel on the St. Lawrence River in Canada. For the grounds of decision see the report of this case in the 54 Am. J. Int. Law, 426 (1960). See also the discussion of American conflict principles in this regard in Robinson, supra note 43 at 828. Rabel supports the application of the "lex loci delicti" principle in such cases, vide Rabel, op. cit. note 43 supra, 342, 353. It would seem though that in the instant case the German court first looked to the Convention, and finding no guidance from it, referred to the domestic rule in situations which directed it to the application of the Canadian law as to the award of damages. Perhaps, then it may be said that the application was essentially that of the "lex fori" and not of any other principle.\footnote{46}
Collisions Convention. In addition, in almost all cases, collisions give rise to criminal liability and proceedings. Therefore, the C.M.I. prepared two conventions on these aspects, which we will call respectively the "Civil Jurisdiction Convention" and the "Penal Jurisdiction Convention."  

The Penal Jurisdiction Convention is, perhaps, the only Convention that the C.M.I. was specially commissioned to prepare.  

In fact, it is the direct result of the well-known decision of the P.C.I.J. in the Lotus case, where the situation illustrated very vividly the dual nature of the collision liability.  

For this Convention to apply, a collision or "any other incident of navigation" concerning a "sea-going ship" must involve "the penal or disciplinary responsibility of master, or of any other person in the service of the ship." The main principle of the Convention is that such proceedings may "be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation." (Article 1)  

In such a situation, the authorities of non-flag states shall not "order" "arrest or detention" of a ship "even as a measure of investigation." (Article 3). This principle, of course, does not prevent the other states from taking certain actions against the personnel of its flagship. The Convention does not extend to collisions or any incidents of navigation within the "limits of port or in inland waters." And the High Contracting Parties may reserve the right to "take proceedings in respect of offences committed within their territorial waters." (Article 4)  

The most significant contribution that the Civil Jurisdiction Convention can be said to have made with respect to conflict of laws is that it has rendered concurrent actions for civil damages in various courts impossible. Article 1 (3) specifically states: "In the event of there being several claimants, any claimant may bring his action before the court previously seized of an action..." This does not then affect the basic freedom of the plaintiff (Article 1 (2)) to select any of the three courts.  

The Convention applies to all collisions arising out of the same cause of action (Article 3 (1)) and to an action of damage in some cases where "there has been no actual collision" (Article 4).  

Considerable conflicts sophistication is evident in the drafting of the Convention. Care has been taken to avoid the use of the  

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term "domicile" as furnishing the basis of jurisdiction, though the term "place of business" unfortunately can cover even branches and secondary places of business. Interconventional conflicts seem to have been specifically avoided (Article 7). Explicit respect to party autonomy is also evident.

In the words of Lilar and Bosch: "The convention unquestionably marks a great step forward; it does not exhaust the subject, however, and leaves a certain number of questions unanswered, such as the suspension and interruption of the term for limitations of actions . . . on which unfortunately, there has been no agreement."

We may add, however, that even within the existing area of agreement, the Conventions have not won adherence of a large number of maritime states. Almost the same group of nations seem to have ratified or acceded to these Conventions and though the Conventions are open to adhesion since about 14 years now no new adhesion seems to have been filed after 1961. There seems little hope that in the coming years there will be a sudden revival of interest leading to a wider acceptance of these Conventions.

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Unification of Private Maritime International Law Through Treaties—an Assessment

(B) MARITIME ASSISTANCE AND SALVAGE CONVENTIONS

The wide acceptance of the Salvage Convention of 1910 and the traditional treatment of the salvage law as a part of "jus gentium," coupled with the relative infrequency of situations calling for salvage assistance and the basic humanistic considerations involved in the very idea of salvage service, may justifiably lead one to hope that the Convention must really have led to maximum uniformity of salvage law. It is, therefore, somewhat disconcerting to a student of unified maritime law to find fifty five years after the promulgation of this Convention that it has had only "a very slight unifying effect" and that at its very best, the Convention was "a first step on the way to uniformity . . ."
it establishes those points about which unity exists and thus helps to preserve the common ground."**

The Convention seeks to regulate certain basic aspects of maritime salvage and assistance.** The Convention applies to assistance and salvage of "seagoing vessels in danger," and also to vessels of inland navigation, irrespective of the "waters" where "the services have been rendered" (Article 1). The Convention extends to property as well as life salvage, although in case of the latter no remuneration "is due from the persons whose lives are saved" and the salvors are "entitled to a fair share of remuneration awarded to the salvors of the vessel, her cargo, and accessories." (Article 9),** Every master of a vessel is "bound" to render assistance to "everybody, even though an enemy, found at sea in danger of being lost" but this obligation is subject to the master's own safety and lack of "serious danger" to his vessel and her crew and passengers. The owner of the vessel is, however, not liable for any "contravention of this provision" by the master, (Article 11).**

**id. 273. The author continues: "The second and indeed the most important step towards uniformity would be the institution of a thorough investigation into the differences that do exist, and the formulation of rules whereby these differences might be eliminated. If such an investigation does not precede the signing of the Convention, it cannot truly be said that a real effort has been made to achieve uniformity." The author's analysis of the subject is most valuable. But, with due respect, it is difficult to agree with some of her conclusions. Her insistence on "completeness" of the Convention is commendable but in a world of uniformity, alas 1, hardly practicable. It seems to us that the learned author has taken an over-abstractive view of the Convention as the further notes below would illustrate.

**As to "assistance" see Knauth's comment that this word was practically unknown before the Convention. It was a term of art in English Law. Knauth, "Salvage Principles and Aircraft," 36 Col. L Rev 224, 226 fn. 111 (1936); note also Wildeboer's conclusion that with the exception of France, the use of this phrase in the Convention has "led to complete uniformity" in several countries. Wildeboer 26 and generally 21-26.

**See Wildeboer, 243. But we should note that "nothing in this Article shall affect the provisions of national laws on this subject."

**It was not considered desirable to hold the owner liable for indemnification, though France, Belgium and England do not seem to have adopted this part of the present Article, leaving the matter open to some divergence. And the Dutch law has extended the scope of Article II section 1 to include "persons who are in danger." All this does lead to a certain amount of confusion. See Wildeboer, 266.

**Wildeboer admits that uniformity has been brought by this Article at least with regard to two points: the conditions for the coming into existence of the right of remuneration are clearly prescribed and "the salvage reward comprises in principle a remuneration and an indemnification for costs and damage, so that an independent action for complete indemnification of cost and damage is not possible." She still feels that this Article does not have a "strong unifying effect" as certain "clear differences" or "uncertainties" persist. See Wildeboer, 124. We feel that the very result of her analysis tends to show that a great degree of uniformity has been attained as regards the main issues involved here.

**Wildeboer rather cryptically states: "Article 3 has not led to uniformity; but it has reduced the divergences existing before the signing of the Convention." As regards the consequences of prohibition in relation to the award that the salvor would have received had he been allowed to continue the salvage work uniformity does not prevail. See Wildeboer, 142.

**In relation to the judicial interpretation of these concepts, there is bound to be a great divergence. See Wildeboer, 227-42.

**Wildeboer considers this Article "superfluous" and at the same time acknowledges: "In the literature and decisions of almost all the countries, however, the relationship between the tug and the tow is discussed, because the question occurs very often in practice. This was no doubt the most important reason why the provision of Article 4 was enacted in the Convention." We do not see what significance can be attributed to the charge that this provision is "superfluous" when at the same time it is admitted that the Article in question was also "important" practically.
remuneration is due even if the services are rendered to vessels belonging to the same owner. (Article 5).\(^1\)

The amount of remuneration and its proportion for distribution is fixed by the agreement among the parties and failing such an agreement by the courts. The apportionment of the remuneration among the owners, masters and others involved in service of each salvaging vessel is to be "determined by the law of the vessel's flag" (Article 6). However, any such agreement by the parties may be modified at the request of either of the parties by the court if considers that "the conditions agreed upon are not equitable," and in all cases, where the consent of one of the parties has been vitiated by fraud or concealment or the amount of remuneration is not commensurate to the services rendered. Thus both overcompensation and undercompensation to salvors can be avoided (Article 7).\(^2\)

\(^1\) Wildeboer has comments about this article which are noteworthy: he says, (at p. 154): "... the framers of the Convention did not intend to lay down a provision regarding the question of the remuneration owed by and at the same time due to, the owner of the sister-ships. Therefore, it is incorrect to say, as is sometimes done, that Article 5 derives its most significant aspect from the solution of this question; it is for the question of no importance Article 5 does not give a claim against one's property nor against one's insurer. Neither does this provision contain the principle that a ship constitutes an entity separate from the owner's property. ... Article 5 has no meaning for the question of the owners' share in the salvage remuneration. The solution of these questions must be found in the national legislations of the contracting states."

\(^2\) For a lucid discussion of the agreements concerning the amount of salvage remuneration, mostly standardised by the now well-known and the old form of Lloyd, see Kennedy, 261; for difference of judicial treatment to the importance of the types of salvage agreement, viz. "in extremis" and the "no cure: no pay" see also Gilmore and Black, 476. For the rise of a rival form of agreement known as "The Common Market Salvage Agreement" see Griggs, "Aspects of Salvage," (2) JI of Business Law, 325, 328, (1964).

This writer feels that doctrinally this provision shows a deference to party autonomy and Article 7 sets up necessary limitations to prevent the stand-rized contract forms from usurping the function of freedom of contracting.

The function of these articles in inhibiting litigation has been amply served as even so comprehensive a research as Wildeboer's has not come across any decision in the law of five countries under review.

But from a standpoint of "complete uniformity" which Wildeboer consistently adopts, we may reluctantly agree that there remain many differences in this area. See Wildeboer, 191-92.

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Unification of Private Maritime International Law Through Treaties—an Assessment

In deciding the remuneration, a court has to take into account several factors such as measure of success attained by the salvors, dangers to which the salvaged vessel was exposed, the risks and expenses incurred by the salvors, and finally the value of the property salved (Article 8).\(^3\)

A salvage action is barred after an interval of two years from the day on which the salvage operations terminate but the High Contracting Parties have a right to extend this period "where it has not been possible to arrest the vessel assisted or salved in the territorial waters of the State in which the plaintiff has his domicile or principal place of business." (Article 10).\(^4\)

The Convention applies to "all persons interested when either the assisting or salving vessel or the vessel assisted or salved" belong to the Convention states. Non-Convention states benefit from this Convention on the condition of reciprocity with any of the convention states. As usual, when all the parties are nationals of the state "as the court trying the case" the national law and not the Convention applies, unless the former makes the latter applicable.

This Convention does not apply to "ships of war or to Government ships appropriated exclusively to public service" (Article 14), but this provision is already on its way to revision as the principle

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\(^3\) This article lays down certain standards for determination of the award of salvage. Here ideal uniformity of decision is rarely possible because the traditional weight of national jurisprudence will equally assert itself in the final judgment. Also, in a unifying treaty all the terms cannot be fully defined. Evidence of great technical expertise may be laid before the judge in relation to each of the considerations mentioned in the article as also in respect to the value of the property salved See Gilmore and Black, 461-73; Robinson, 739-52, Wildeboer 193-221; Kennedy, 161-287. In her comparative analysis Wildeboer confesses scepticism, justifiable in view of the abovementioned studies, that it is doubtful that "equally high awards would be given, in similar cases." Assessment of salvage award at a lower amount because of the misconduct etc. on the part of the salvor during the performance of the salvage services is also a cause of differences in national laws on this subject.

\(^4\) cf. a similar provision in the Collisions Convention, infra (Article 7 of that Convention). Wildeboer's conclusion (at p. 269) is: "Art. 10 has promoted the uniformity of the limitation period of the salvage claim to a considerable degree." But the reservation contained in the third section though not "supposed to create uniformity" has led "to more differences than had been expected."
behind it has been abandoned by many maritime nations and has been considered to have lost its raison d'être.  

"It is comparatively rare nowadays for a salvage case to raise a point of law which requires any prolonged consideration."75 This applies to the conflictual aspects of the Convention also. It seems that conflicts cases hardly occur in the actual operation of the Convention, though, theoretically, perhaps, these can arise as the unification of domestic laws on the subject is not quite complete.76 It is submitted that on the whole the Convention has really exercised a greater unifying effect than some studies of the Convention may lead us to believe.77

This Convention was followed by a sister Convention on the Rules Relating to Assistance and Salvage of Aircraft on or By Aircraft at Sea in 1938.78 This Convention has not received much attention as there have been practically no notifications or accessions 79 and as it was specially designed to apply to flying boats during the Second World War.80 It merits, however, some attention as

75 See Wildeboer, 29. Following a Yugoslav suggestion, this matter was reconsidered at the Rijeka Conference in 1950 and the undermentioned recommendation was made:

The provisions of this Convention shall apply also to services of assistance or salvage rendered to a ship of war or any other ship owned or operated by a State or Public Authority.

Claims against a State for assistance or salvage services rendered to a ship of war or to any other ship appropriated for exclusively to public non-commercial services shall be brought only before the Courts of such State.

When a ship of war or any other ship owned or operated by a State or Public Authority has rendered assistance or salvage services, such State or Public Authority has liberty to claim remuneration but only pursuant to the provisions of this Convention.

The High Contracting Parties reserve themselves the right of fixing the conditions in which Article II will apply to M sterns of ships of war.

See the Report of the Rijeka Conference, C.M.I. (1959). Also see Wildeboer for a critique of this formulation.


illustrating both the impact of technology on the dynamics of unification process and also as the first cooperative endeavour, between the maritime and air law unification agencies.\textsuperscript{82}

It would appear that this Convention extends the principles of maritime salvage law to the salvage by and of aircrafts. Both the aircraft and the vessel are on these principles under a duty to render assistance and salvage services to each other (Article 2). The same principles apply as to the liability of the owner and the obligation of the master (Articles 2, 7), the considerations regarding determination and apportionment of awards (Article 4, 5), life salvage (Article 7), prohibition to salvage services and the effect of fault or fraud (Article 8), the judicial annulment and modification of a salvage agreement (Article 12), and some other matters.\textsuperscript{83}

An important extension of maritime law concept occurs in Article 6 which provides for the remuneration among the operator and other persons in the service of each salvaging aircraft determined by the law of the flag.\textsuperscript{84} But there is considerable disagreement among the air law specialists, as to whether an extension of the ‘law of the flag’ concept, so peculiar to maritime law, is justified in the air law.\textsuperscript{84}

Another interesting aspect of the Convention is the very first Article which states: “The High Contracting Parties agree to take the necessary measures to give effect to the rules established by this Convention.”\textsuperscript{85} May a student of unified law not find here an

\textsuperscript{82} For a critical analysis of this Convention see Knauth, op. cit. supra. See also, Latchford, “Brussels Law Conference,” 10 JI. of Air Law and Commerce, 147, 149-154 (1939); and our discussion of the Salvage Convention supra. It is rather regrettable that we have not discussed the problem of air salvage at all in our otherwise comprehensive work on the unified salvage law. She mentions this Convention incidentally on pp 12 and 32 of her book. There is so much similarity in the purpose and the structure of these two Conventions that it would have seemed only natural for a researcher in salvage law to examine both the Conventions in depth. The present divergence among national laws on the matter, and the accompanying indifference to the Convention under review should form a subject of analysis.

\textsuperscript{83} There are different features too, e.g. Article 3, Clause four, which provides that obligation to pay for the inevitable cost of going to rescue and also the provisions relating to indemnity and recourse actions (Articles 3 and 9 respectively).

\textsuperscript{84} Does an aircraft have anything similar to the “law of the flag”? The answer is far from unanimous. See McNair, The Law of the Air, 260 (1961); Beaumont and Shawcross, Air Law, 79, 337 (1951).

\textsuperscript{85} cf. Also Article 2, 6 which provides for national legislations to be communicated “through diplomatic channels.” An unusual provision, at least in a Brussels Convention.
view of the fact that shipping is one of the most hazardous industries and would need at least in this vitally important area some basic policy agreement in the international maritime community.

(1) The 1924 Convention

This subject, appropriately enough, had engaged the attention of the negotiators since the very inception of the C.M.I. in 1897. It was discussed at several plenary conferences of the committee as well as at many diplomatic conferences but an acceptable compromise was reached only in 1924. The 1924 convention was the first attempt at compromise among the diverse systems of law then in existence and although it enjoyed a limited adherence, and is now sought to be substituted by a new convention on the subject, it still remains a part of the maritime law of many countries.

Also see present writer’s study, and the relevant literature cited therein, “Validity of ’Professio Juris’ Stipulations in Maritime Passage Contracts—A Study in American Maritime Conflicts Law” (4 Houston L. Rev. 657 (1966)).

Miller notes that the subject was discussed at six Plenary Meetings of the C.M.I., and three Diplomatic Conferences at Brussels; Miller, 631.

The abandonment system limited the owners’ personal liability on his abandonment of the ship and the freight to the claimant. This system has been adopted by Holland, Italy, Roumania, Spain, Portugal, Egypt, Mexico, most countries of central and South America and Japan. This is generally known as the “French System.” The English or the Value system limited the personal responsibility to payment of a fixed sum based on a limit per ton. The German system “saw no personal liability but only that of the ship.” Robinson, 877, A.M.L.A. Report, 2014-18. For a more sophisticated analysis, illustrating the different sub-systems and the legal consequences of the systemic differences, see 1 Altes, “On Limitation of Shipowners’ Liability—” in 10 Nederlands Tijdschrift voor Internationaal Recht, 139, 143-46 (1963). But in some countries, these systems seem to have been abandoned without reference to subsequent changes undergone by the original system. This happened in case of Israel where the Ottoman system of early French law without working in many revisions that French law adopted later. See for detailed analysis, R. Gotschall, 304 (1965).

It was ratified and acceded to by the following countries: Belgium, Brazil, Denmark, Dominican Republic, Spain, Finland, Hungary, Monaco, Norway, Poland, Portugal, Sweden, Turkey. Of these, Turkey acceded in July, 1955. Great Britain, Japan and Italy who filed declarations while signing the Convention ultimately failed to ratify the Convention and many other countries which signed the Convention unconditionally did not subsequently ratify it. France and Spain have now denounced the Convention. As and when the 1957 Convention comes into force it is hoped that all the countries which have adhered to the present Convention will follow suit.

The Convention limits the liability of the shipowner on a modified version of both value and abandonment systems. The compromise is affected by Article 1 which limits the liability of the owner of a seagoing vessel in certain cases “...to an amount equal to the value of the vessels, the freight and the accessories of the vessel.” In respect to some claims, liability is not to exceed £ 8 per ton. The claimants of damages for death or personal injury, however, can have recourse to an additional £ 8 disbursement per ton from the fund available to them, and in case their claims are still not fully compensated they rank, as regards the balance of their claims, with other claimants sharing the general fund. (Article 7). The “freight” for the purposes of the Convention, is deemed to be “a lump sum fixed at all events at 10 per cent. of the value of the vessel at the commencement of the voyage.” (Article 4).

The shipowner cannot limit his liability in certain situations. (Article 2). Both the master and the charterer are entitled to limit their liability under this Convention (Article 10). As usual, the Convention may not be extended to the non-Convention states, and does not apply to “vessels of war, nor to the government vessels appropriated exclusively to the public service.” (Articles 12 and 13 respectively). The monetary unit of pound sterling is translatable in the national currency of each country (Article 15) and an elaborate procedure is provided for different situations wherein the shipowner should prove the value of the ship. (Article 3).

Most important from the conflicts standpoint is the provision regarding the time limits and procedural questions and both these are left to the national laws (Article 8). Important questions such as the “sufficiency” of the security given in discharge of a prior arrest and the judicial cognition of the previous payment or deposit of security as limiting the shipowners’ liability are left to the rules of the forum court. Neither the competence of the tribunals, nor modes of procedure of execution are affected by the Convention (Article 14).

It cannot be denied that the Convention met with a very limited success. Attempts were made to effectuate many promises given by the signatory states to ratify it as in the Great Britain, but these were of no avail.

Miller enumerates these claims succinctly as follows: “(1) Property damage ashore; (2) Loss or damage to cargo; (3) Bill of Lading liabilities; (4) Liabilities arising out of errors of navigation; (5) Removal of wreck.” Miller, 631.
It is, however, extremely hazardous to conjecture the reasons for the limited success of the Convention. In the main, the success of any Convention necessarily depends on the general acceptability of the compromise that it embodies. It is possible that opponents of the abandonment systems in Britain and elsewhere did not find the Convention acceptable in spite of its attempts to severely modify the main principle of such systems. Besides, the changing conditions of shipping business may have caused some rethinking on the part of non-Convention states, leading to a postponement of decision to adopt the Convention.

But to suggest, as some have done, that if Great Britain had joined the 1924 Convention it would have gained a greater success than it otherwise did is, in our analysis, quite incorrect. Maritime conventions, so far do not reveal a pattern of adhesions based on cultural or political leadership of a few nations; ultimately the strong mercantile marine community seems to dictate the policies of adherence to any convention. We will soon find, for example, that Britain's acceptance of the 1957 Convention has in itself not produced wider acceptance thereof in other common law countries; in fact, that Convention has not even found the minimum number of ratifications with the result that it has not yet come into force.

2. The 1957 Convention

After the Second World War, the unifiers found that the old subject of limitation of liability "had taken on a new aspect and new problems had arisen." The unifiers were confronted with the task of re-examining the raison d'être of the institution of the limitation of liability and also to devise a new system more acceptable to maritime nations. Even within the group of states adhering to the 1924 Convention, there was considerable dissatisfaction at the monetary standard of the Convention, which really failed to represent the true value when translated in the national currencies.

The 1957 Convention, a direct result of the reconsideration of these matters, is more elaborate than the 1924 Convention and extends the right of limitation to the parties not before covered by the institution of limitation of liability. By a radical shift in maritime policy, the Convention is now seeking to protect the claimant rather than the shipowner and, thus finds a new rationale for perpetuating the limitation of liability.

The owners of seagoing ships are entitled, under this Convention, to limit their liability in respect of certain "personal" and "property" claims, unless the occurrence giving rise to the claim resulted from the "actual fault or privity of the owner" (Article I). The liability can be limited to $1,000 in case of property claims, $3,100 per ton in case of personal claims and in case of both the personal and property claims, $3,100 per ton (with the proportion of $2,100 per personal claims and $1,000 for

**For text see, Nagendra Singh, 1058.**

**For a most comprehensive analysis of this Convention see, "Note, Limitation of Shipowners' Liability—The Brussels Convention of 1957," 68 Yale L.J. 1666 (1959) hereafter referred to as Note: Y.L.J. and a more recent analysis, from the conflicts standpoint, Altes, "On Limitation of Shipowners' Liability," 10 Nederlands Tijdschrift voor International Recht, Pt. 1 139-155; Pt. II 239-253 (1963), cited hereafter by the author. Also see Miller.**

**Miller, makes this interesting point: "... the principle of limitation should be maintained. But for quite different reasons—indeed opposite reasons from those for which it was devised nearly 400 years ago, namely for the protection of claimants and not of the shipowners." Miller further analyzes the parallel rationale for liability of nuclear operators, citing the O.E.F.C. Convention on Liability of Nuclear Operators of Land-Based Nuclear Reactors which fixes "a limit minimum of $5 million, maximum of 15 million, with the proviso that the operators are compelled to maintain an insurance to that amount. The Euratom treaty "now under negotiation provides for a limit of $20 million covered partly by State indemnity." Likewise, see the Nuclear Ship Convention, which limits liability to $100 million to be "covered with combination of commercial insurance and state indemnity." Miller, 632, 633.**

**These terms are merely used as shorthand descriptions of claims enumerated in the Conventions without any theoretical commitments, see infra note 138.***
property claims). The Convention provides for the measurement of the tonnage (Article 3 (7)). The measure of liability is the "Poincaré franc." In substituting the sterling by the Poincaré franc as the unit of liability, the Convention has at least removed the inequality and consequent source of dissatisfaction with the sterling standard which permitted great variations when transformed in national currencies, and endeavoured to evolve a uniform basis of payment.

The right to limit liability has been extended to all of the shipowners' personnel—the operator, manager, master and the crew as well as the "other servants of the owner, charterer, manager or operator," and is also available to the charterer of the ship. And the liability of the shipowner includes that of the "ship herself" (Article 6). The Convention applies only when the owner or his representative "limits" or seeks to limit his liability before the Court of the Contracting State or seeks to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of any such State." However, the Contracting States are entitled to exclude from the benefits of this Convention (i) any non-contracting state or (ii) any person seeking to either limit the liability or release of security if such a person is not "ordinarily resident" in the contracting state or does not have "his principal place of business" in such a state or (iii) if the ship which is the subject matter of such an action does not "fly the flag of the Contracting State." (Article 7).

However, all important questions seem to have been left to the "lex fori." Thus, the pivotal question as to burden of proving the privy or fault is to be decided according to the "lex fori" (Article 1 (6)). Again in most cases, matters relating to the constitution and distribution of the fund and all rules of procedure are to be governed by the "national law of the state in which the fund is constituted." (Article 4). The national law of the contracting state also determines the procedure to be applied and the time-limit within which the action shall be legitimate (Article 5 (5)). In case where a ship has been arrested within the jurisdiction of a contracting state the competent Court of a Contracting State "may" order the release of ship if it finds that sufficient security or bail has been given by the owner and are "actually available to benefit the claimant in accordance with his rights." But the court "shall" order the release of the ship, where the bail or other security has been given: (a) at the port where the accident giving rise to the claim first occurred; (b) at the first port of call after the accident if the accident did not occur in a port; or (c) at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to the cargo.

It is necessary here to deal with certain obvious criticisms directed at the delegation of some matters to the "lex fori." It is true that such delegation greatly weakens the force of unification and allows a wide diversity to prevail as regards matters of procedure which may intimately affect the outcome on substantive issues. Procedural rules relating to the burden of proof, constitution of the fund, and time-limits for the institution of the suit are governed differently in various maritime nations and indeed, can, in some cases, frustrate the very principle of the Convention. But we feel that much of this criticism is hasty, and, therefore, unduly misleading, and overpessimistic.

The analysis by Altes of Article 5 here provides a good example. Altes apprehends that the Convention enjoins the courts of the contracting states to release the vessel or any other property of the shipowner if the security had been given at any of the ports mentioned therein. He, therefore, thinks that a Convention court will have to yield the right of forum and convention claimants to a foreign court which may be distant. This, in our opinion, is not a correct criticism of the Convention provision.

** See Altes, Pt. II, 246.

In order to arrive at uniformity, also a unification of procedural rules, i.a. of privileges and time limits, should be achieved. Whatever purpose Brussels "Compromise" may have had in particular because of the variety of concepts when and how limitation of liability is realised, it is not satisfactory in our view: the devil seems to be exercised to get Beezlebub in his place!

See also his discussion of analogy with bankruptcy and a neat summation of conflicts possibilities at 250-851 and 251 n. 81

For a good analysis of multiple suits and "international concourse" see Note: Yale 1704. The controversy there surrounds on the seeming ambiguity of Article 2(d) of the Convention which says: "After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the fund is actually available for the claimant." The British legislation substantially enacts this provision and so did the Bill $2314 for limiting the liability of Shipowners considered by the U.S. Congress; in spite of the nice distinctions urged in the Yale Note. See Report 1602, 87th Congress, 2nd Session, 1, (1962).

Suppose, that indeed a fund has been constituted in some oriental port and some other creditors arrest a ship in a signatory country.
consequent need to finance the purchase of ships, it became necessary to strengthen the position of the maritime mortgagees and to provide for the uniformity of treatment to ship mortgages.\textsuperscript{112}

The Convention of 1926, in addition to its numerous limitations, did not provide for the enforcement of mortgages. A Convention relating to Registration of Rights In Relation to Ships Under Construction was drafted in 1963 at the Stockholm meeting of the C.M.I., but this was not considered adequate as it did not deal with the cognate issues of enforcement and ranking of liens.\textsuperscript{113} Besides, adoption by many states of the Limitation Convention of 1957 made it inconsistent for them to adhere to the 1926 Liens Convention and led to denunciations by many States.

All these factors led to a reconsideration of the state of unification of the law in the entire field by an international sub-committee of the C.M.I. under the chairmanship of Mr. J. T. Asser, and it was unanimously felt that a new convention should be drafted on the subject. The 1926 Convention was at this stage extensively reviewed and criticized by most of the members of the C.M.I., including the states which adhered to it.\textsuperscript{114}

At present there are at least 19 nations with a tonnage well above one million G.R.T. led by the U.K. and U.S.A. who form 35.42% of the world's tonnage. For details see, Lloyd's Register of Shipping, Statistical Tables, 1962 and 1965. See also, 14 Indian Shipping, (The Journal of Indian National Steamship Association, Bombay, India.) 11 (1962); 17 Indian Shipping 11 (1965).

\textsuperscript{118} See The Asser Committee First Report 5.

\textsuperscript{119} See The Asser Committee Fourth Report, 6 (1964).

\textsuperscript{120} Ibid. The major points of criticism were: (a) the Convention recognises too many liens; (b) the provisions of the Convention as regards the liens against freight have been badly drafted and require revision; (c) the Convention does not recognise the “right of retention of the ship” or the “possessionary lien” available under some systems of law; (d) the system of ranking per “voyage” led to conflicting opinions as the concept of voyage uncertain and subject to various interpretations; (e) the Protocol permitted the States to disturb the order of priorities otherwise set up in the Convention and thus disrupted uniformity; (f) Article 9 dealing with the extinction of liens was incomplete and some possible clauses of extinction were not mentioned, e.g., constitution of the limitation fund under either limitation conventions or the sale of a ship by the order of the non-contracting state Court etc. and lastly: (a) the periods of extinction were left to “international law” and not “to uniform international law.”

Also noteworthy is the obsolence of the Article 2(3) of the Convention which gave priority over mortgages to liens securing claims resulting from contracts entered into by the Master “for the preservation of the vessel or continuation of voyage.” With the growth of telecommunication the old rationale of this rule has disappeared and it was felt that this type of lien should not enjoy unnecessary precedence over mortgage.

For this and other comments on the Convention under review, The Asser Committee Report 7, 9, op.cit supra note 112

\textsuperscript{118} Ibid.

\textsuperscript{119} See The Asser Committee: First Report.

\textsuperscript{120} Ibid.

\textsuperscript{121} “It is only when it should appear absolutely impossible to reach international agreement on one or more points which, although of minor importance, yet should nevertheless be dealt with...” is to be found in the Reports of the Committee on the Convention of 1926 and the Limitation Convention of 1957.

\textsuperscript{122} E.g. the Italian Maritime Law Association expounded the raison d’être: “It is felt that only uniform rules of substantive law, as opposed to uniform conflict rules, must be sought, in as much as uniform conflict rules, will be of very small benefit. It is a fact that uniform conflict of law rules are taken into consideration only when it is apparent that no satisfactory agreement can be arrived at on uniform rules of substantive law and that in case the latter rules not only appear not only possible, but almost certainly easier to agree than the conflict of law rules.

The delegation, however, recommended incorporation of uniform conflict rules on certain matters, such as: “the hypothec and mortgages (reference is made here to Article 1 of the 1966 Convention); (ii) those matters which are not governed internationally, such as the liens which can be created by national legislatures under the present law.” See The Asser Committee Report: Replies to Questions raised by Italy (Hypo 5: 1964) 27 (Emphasis added). We would like to point that any reference to a particular unification methodology as a “fact” takes too much for granted. Common practices may be “facts” of unification in one sense; the sense of their having occurred previously. But they ought not to be taken as inhibitions to a new approach nor be thought of as norms of unification.
Another important modification in the present law is sought to be made by the Article 8, which sets up a period of two years for the extinction of liens with certain exceptions, and makes this period beyond "suspension and interruption." In event of a "forced sale" of the vessel in a Contracting State all "mortgages, hypothèques," liens and other encumbrances shall cease provided that (i) the notice requirement is fulfilled (Article 10), (ii) the vessel is in the jurisdiction of the Contracting State at the time of the sale and (iii) the "sale has been effected in accordance with the law of the state and with the provisions of this Convention." (Article 11). The provisions of this Convention apply to all "seagoing vessels" "no matter whether they are registered in a Contracting State or in a non-contracting State" (Article 13) and also to "vessels under construction" with some qualifications (Article 12). Each ratifying state is under an obligation to "forthwith denounce" the Convention of 1926.

Dealing with an extremely complex phase of maritime law, which involves many non-legal maritime considerations and policies, the proposed Convention certainly aims at a bold reform on the law on the subject. Its unifying impact is likely to be increased by the fact that, inspite of the acknowledged indifference to the conflicts aspect of unification, the draft Convention contains many choice of law rules which might minimize conflicts occurrence.

These exceptions relate to requisitioning of the ship, bankruptcy of the owner and compulsory liquidation.

One notices a slight difference in this connection between the provision in the 1957 Liability Convention and the present provision. The former in Article 16 states: "... this Convention shall replace and abrogate" the previous Convention of 1924. In the present Convention the words used are: "Each State which ratifies this Convention or accedes to it, shall forthwith denounce" the previous Convention (Article 14). In the former case, the very act of affirming the new Convention would seem to be adequate for the abandonment of the pre-existing Convention; in the latter case, abandonment will have to be the result of a special act.

The conflict between these Conventions arises because as per the 1957 Liability Convention all established claims share in the limitation fund "parti passu," whereas under Article 3, paragraph 2, of the 1926 Lien Convention the distribution of the fund has to be effected with due regard to existing liens. However, the Asser Committee had only this to say about the possible conflict:

Of course, the problem would remain open, in the event that a new Convention along the lines of the Antwerp draft should not be adopted, and moreover in the event that such Convention be adopted, in so far as States having acceded both to the 1926 Convention and to the 1957 Convention, would not become parties to the new Convention. However, in both cases the problem will be outside the topic now under review and therefore need not be discussed in connection therewith.

one hopes the wider acceptance of the new conventions, will render the problem of inter-conventional conflicts an academic one in the near future.

The unanimity which greeted, inspired and sustained this attempt at reunification of the law of maritime mortgages and liens proves once again that no aspect of maritime law, properly handled, is inherently beyond the scope of unification endeavours as was sometimes said about this very subject.

(iii) Arrest Convention

The “arrest” or “attachment” of a vessel for the satisfaction of the debts by in rem proceedings is one of the most important aspects of the law of maritime lines and mortgages and the convention regulating the arrest of ships was the logical next step in the unification process begun with the formulation of the 1926 Convention on liens and mortgages. It was not till 1952, however, that a convention regulating the remedy of provisional arrest was finally formulated.

The 1952 Arrest Convention has been considered “to have succeeded in bringing together legislative systems more dissimilar than in any other branch of maritime law” and is regarded as “illustrative in a striking way of unification of law peculiar to the maritime sector.”

A look at the list of ratifications and accessions to this Convention may also enable one to say that the reduction of dissimilarity theoretically implicit in the convention is yet to be practically realised and that the present pattern of adherence to the Convention is as illustrative of the peculiarities of unification in maritime law as of the method.

The Convention mainly deals with two aspects of the remedy of provisional arrest. It prescribes a set of claims giving rise to the right of provisional arrest and certain rules of jurisdiction by which arrest can be accomplished.

Article I defines maritime claims for which a ship can be arrested. The category of claims described therein virtually covers almost every situation for which a vessel can be arrested—from collision and salvage to towage and pilotage. The claims can be

136 Lilar and Bosch, op. cit. n. 47, supra at 365. Of course, the divergence of legal systems in respect to arrest has been rightly emphasized. And there may have been many factors preventing adherence to this Convention, since it is intimately linked to the Mortgages and Liens Convention. The inability to compromise on certain aspects such as damages for wrongful arrest may have inhibited a group of maritime nations from accepting the otherwise agreeable scheme of principles enunciated in the Convention. This was precisely the reason, for example, why the Scandinavian countries have been unable to accede to it. Lilar and Bosch 379. A more analytic study of the Convention is made by Kriz, II, 70.

137 The claims enumerated therein are: (a) damage caused by any ship either in collision or otherwise; (b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship; (c) salvage; (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise; (e) agreement relating to the carriage of goods in any ship whether by charter party or otherwise; (f) loss of or damage to goods including baggage carried in any ship; (g) general average; (h) bottomy; (i) towage; (j) pilotage; (k) goods or materials wherever supplied to a ship for her operation or maintenance; (l) construction, repair or equipment of any ship or dock charges and dues (m) wages of Masters, Officers or crew; (n) Master’s disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner; (o) disputes as to the title to or ownership of any ship; (p) dispute between co-owners of any ship as to ownership, possession or employment or earnings of that ship; (q) the mortgage or hypothecation of any ship.
subdivided into "personal" and "real." These terms can be misleading but are used here for the sake of convenience and do not imply and specific theoretical commitment on the part of this writer. As to the possible confusion between their usage in the civil law and the common law systems, see Lilar and Bosch, 371.

139 Article 10: The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve: (a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (a) and (p) of Article 1, but to apply their domestic laws to such claims; (b) the right not to apply the first paragraph of Article 3 to the arrest of a ship, within their jurisdiction for claims set out in Article 1, paragraph (p).

Article 3, paragraph (d) is as follows:

(1) Subject to the provision of para. (d) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1 (1) (e), (p), (q).

140 The arrest may be effected even though the ship is ready to sail. Once bail or any other security is furnished, the ship shall not be subject to arrest elsewhere within the regime of Convention states, unless there be other satisfactory reasons to do so.

As to the procedure for the arrest, Article 4 stipulates that "a ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made." Article 5 provides for the sufficiency of the bail and circumstances under which the judicial authorities of the contracting state may allow trading operations of the ship. All matters of procedure are to be governed by the "law of the Contracting State in which the arrest was made or applied for" (Article 6). Article 7 fixes the jurisdiction of the court to decide the claims on merit if the domestic law of that country bestows such jurisdiction upon the court or in any of the six cases enumerated therein. Equally important is the provision which requires judicial deference to the prorogation agreements, with the qualification that the arresting court can lay down the period within which the action should be brought in the forum stipulated by the parties.

The Convention applies primarily to the convention-flag ships and excludes from its benefits, like all conventions, the non-contracting states' vessels. The Convention leaves intact such rules as may be in force with regard to "the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State."
Since the Convention only deals with the remedy of provisional arrest, it specially disavows any right-creating aspect.\textsuperscript{145}

The Convention, theoretically at least, has been quite successful in achieving compromises on many important aspects of the law of arrest of vessels. Thus, it has broadened the right of arrest, created a unity of jurisdiction, eliminated plurality of arrests, and recognised competent courts with jurisdictions to deal with situations demanding both the provisional remedy, and in some cases, the decision on merits of the case. To this extent, within the convention-states—and as the hypothetical cases of Kriz\textsuperscript{146} have shown, even in relation to non-convention states—there has been a considerable reduction of conflicts problems. It is hoped that with the adoption of a new convention on maritime liens and mortgages, discussed above, many more states would agree to become parties to this Convention also.

(E) NUCLEAR SHIPOWNER’S LIABILITY CONVENTION

The Convention on the Liability of Operators of Nuclear Ships, 1962,\textsuperscript{147} represents a new facet of unification of maritime law by the C.M.I. Unlike most areas of private maritime law, one finds here the possibilities of development of new legal principles since the traditional weight of national jurisprudence is absent.

The fact that the Convention has as yet not come into force and has not yet been ratified by the only two nuclear shipowning nations may seem at first sight to undermine the significance of unification activity in this area.\textsuperscript{148} But the potentialities for the increase in the nuclear power fleet are high\textsuperscript{149} and the evolution of legal principles governing the liability of the nuclear shipowner cannot be left to the future.\textsuperscript{150}

\textsuperscript{145} See Article 9.

\textsuperscript{146} Kriz, 82-91.


\textsuperscript{149} If nuclear propulsion realizes its promise, an international convention governing liability will be essential. However, instead of exerting leadership toward this goal, we have become bed-fellows of the Communist block, joining it in a refusal to sign because the convention covers warships... Our obduracy is not due to lack of safeguards in the convention; rather, we suffer from a not uncommon form of legal hypochondria...
The Convention establishes "absolute liability"151 for "nuclear damage"152 and limits the maximum liability for each nuclear incident to 1,500 million francs.153 The Convention applies to any nuclear damage, occurring in any part of the world, "involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State" (Article XIII) and in point of time to any nuclear ship from the date of her launching (Article XVI).

Many matters are left to the "applicable national law" and this term is defined to mean "the national law of the court having jurisdiction under the convention including any rules of such law relating to conflict of laws" (Article I, 12). The explicit mention of "rules relating to conflict of laws" is unusual and is the first of its kind in any Brussels convention. Article X of the Convention, further, gives an option to the claimant to bring an action for compensation "either before the courts of the licensing State or before the courts of the Contracting State or States in whose territory the damage is sustained."

The nuclear operator is entitled to avail of the limitation of liability in event of claims likely to exceed the amount specified in the Convention.154 This he may do by rendering the amount "available" to the court of the licensing state who may constitute a limitation fund. As a fund court, the court of the licensing state will have the exclusive competence to determine "all matters relating to the apportionment and distribution of the fund." 155

Other important provisions of the Convention pertain to the joint and several liability of the operators of the ship (Article VII), financial security and insurance (Article XII), and licensing provision (Article XV) and submission to arbitration of disputes arising out of the interpretation of the Convention (Article XX).

151 There is no compromise here of the principle of "absolute liability." The only exception is to be found in Article VIII: "No liability under this Convention shall attach to an operator in respect of nuclear damage caused by a nuclear incident directly due to an act of war, hostilities, civil war or insurrection." It is significant that "force majeure" clause is avoided and that nuclear damage arising out of the natural causes may still give rise to absolute liability.
152 Conventional damage is outside the scope of this Convention (Article II, 1) and the damage to the ship herself is also excluded (Article II, 3).
153 See Article III (1).
154 Article XI.
155 Article XI (3).

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But a distinct feature of this provision in contrast to its counterparts in other maritime conventions, is that if parties are unable to agree to the organisation of the arbitration, one of them may refer it to the International Court of Justice "by request in conformity with the Statute of the Court."

It seems obvious that the Convention does not seek to create a unity of jurisdiction in as much as the plaintiff will have the choice of the forum.156 But this may have some controversial possibilities because the incidents of the causal connection between the hazard and the damages to be awarded are not specifically described or defined. Again, the notion of nuclear damage is not invariable: the very article defining it leaves the "applicable national law" to provide for the "inclusion of any other loss, damage or expenses" in addition to those prescribed by the Convention. Cumulatively, the term "nuclear damage" may come to have different meanings, and, therefore, lead to different consequences even among the signatory countries. The claimant, in such an eventuality, has the undisputed advantage of choosing the forum which affords him the highest compensation.

Again, theoretically at least, the definition of "applicable national law" would seem to have this distinct disadvantage that it

156 Various proposals were put forward at the 1961 Conference, aimed at finding a practical compromise between the two extremes of unity of jurisdiction on the one hand and plurality of jurisdictions on the other. The Drafting Committee suggested that the Courts of the State in which the nuclear incident took place should have jurisdiction except where the incident occurred outside the territory of any Contracting State or on the territory of more than one State, or there was uncertainty over the location, in which case the courts of the licensing State alone were competent. The Belgian Delegate put forward a proposal for the establishment of an International Arbitral Tribunal, at the request of a claimant other than a national of the licensing State. The question of setting up an International Tribunal is to be studied further by a Standing Committee established by a Resolution of the Conference, adopted at its closure. The Soviet Union considered that the only acceptable system was for the matter to be handled by a conciliation commission; in the event that the agreement was not reached the Courts of the licensing State should have sole jurisdiction. France, Italy and the United Arab Republic suggested that actions might be brought either in the courts of licensing State or in those of a coastal State within fifty or 100 miles of the place where the incident occurred. The United States, together with Denmark, Norway and the United Kingdom, proposed that both the licensing State and any other State or States on whose territory damage has been sustained should have jurisdiction, and it was this solution which was finally adopted in 1962." Hardy, supra note 147 at 784.
may lead to a renvoi to the law of the non-contracting state and
the convention state may then be by its conflicts norms be bound to
apply the law of that state, thus obviously rendering the Convention
norms inapplicable to those very situations for which they
were so arduously formulated.

In contrast to the Limitation Convention where the incorpora-
tion of rules regarding the final effect of the judgment of the fund
courts was unsuccessfully urged, this Convention clearly provides
for the recognition of the judgments rendered by courts of com-
petent jurisdiction—viz, the courts of licensing states, or those of
the contracting state or lastly, the courts of those states in whose
territory the damage is sustained. Excepting the cases of fraud on
court or denial of fair opportunity to the defendant to present the
case, a final judgment of any of these courts shall be a) recognised
in the territory of all contracting states, b) enforceable, upon com-
pliance with local rules, “as if it were a judgment of a court of
the state,” and finally, shall not be “subject to further proceed-
ings” on merits. Thus, the above-mentioned provisions of
Article X and XI have the effect of establishing the ‘res judicata’
effect for the judgments of the courts of Contracting States. One
wonders why difficulties were experienced in formulating
similar rules in the 1957 Limitation Convention.

Three more conflicts aspects of this Convention may also be
noted. The nuclear operator is absolutely liable for damage arising
out of a “nuclear accident.” But in certain specified cases, he has
the right of recourse, and recourse “expressly provided by the con-
tract” is recognised as forming exception to the general rule of
absolute liability. In this sense, even this Convention continues to
respect the tradition of party autonomy. Second, the time limit
for the institution of suits for cause of action recognised or created
by this convention is ten years “from the date of nuclear incident.”
If the insurance policies are coextensive, the applicable national
law may grant extension of such a period and may also establish a

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181 Article V, this extension cannot exceed the period for which the
liability is covered by the Contracting State. But see sub-section 2
which would allow a period of 20 years in cases where the damage
is caused by “nuclear fuel, radio-products or waste” which were
“stolen, lost, jettisoned or abandoned.”

182 Article XII, 3 read with Article XIII, would seem to imply that the
benefits of Convention are to be extended to all persons.

183 In fact, the Convention does not justify the apprehension of some
Governments that it would lead to an infringement of their sovereignty.
See supra note 150. Some of several safeguards ensuring respect for the
sovereignty of the States may be traced in Articles XX and XVII.
Article VII also removes the effect of the Convention as regards “war,
novilites, civil war or insurrection” — circumstances in which warships
may be put to most use. Nuclear warships are liable then according to
this Convention for their operations during the times of peace only
and in view of their number, and the magnitude of the risk involved
it is only fair that they should fall within the ambit of the Convention.

184 Incidentally, the Convention is open for accession only for “States
Members of the United Nations, Members of the specialized agencies
and of the International Atomic Energy Agency not represented at the
Eleventh Session of the Diplomatic Conference of the Maritime Law”
(F) MARITIME CONTRACTS OF CARRIAGE

(I) The Bills of Lading Convention

The 1924 Brussels Convention on the Bills of Lading, more commonly known as the Hague Rules, has been one of the most widely accepted of all the maritime conventions and has, unlike most conventions, been the subject matter of great scholarly study.

For the text of the Convention see Nagendra Singh, 1080. The Convention will be referred to as the Bills of Lading Convention or more simply as the Hague Rules. The Convention was originally in form of rules devised by the International Law Association and later by the C.M.I., and meant to be incorporated in the commercial contracts of carriage, like the General Average rules. But there was almost an unanimous demand for an international Convention on the subject and hence the rules were, with some modifications, embodied in a Convention. See The Report of the Thirty-First Conference of the International Law Association, Vol. 2, 149-160 (1923). Also see for a very interesting survey of the historical background leading to the Bills of Lading Convention, Knauth, Ocean Bills of Lading, 115 (1933) hereafter referred to as Knauth. See for more analytic survey, with abundant references to source-material, Yiannopoulos, Negligence Clauses in Ocean Bills of Lading, 3-10 (1962).

The Convention has been ratified by almost all the leading maritime nations of the world as well as by a large majority of the nations of the world. For the list of ratifications and accretions see Nagendra Singh, 1085-86 and the discussion thereof although a bit dated, in Knauth 451-456. For a more detailed and up-to-date discussion, see Tettly, Marine Cargo Claims, 278 (1965).

Many South American countries, Canada, Greece, the U.S.S.R. and China have yet to ratify the Convention. As to Greece, it would seem that her law on the subject is materially different from the salient principles of the Convention, see Lolis, "Notes on International Maritime Law as Applied by the Law of Greece," in Revue Hellenique de Droit International, 126, (1965). For the possible similarities between the Convention law on the subject and the present U.S.S.R. law, see the reply of the U.S.S.R. representative on the notion of "due diligence" to Mr. R. H. Arnold's question, in the Chairman's Address to the Association of Average Adjusters, 13 (1963); see also the detailed surveys by Garnofsky, "Soviet Private International Law Relating to carriage by Sea," 27 Mod. L. Rev. 412 (1964), and Dorbin, "A Propos the Soviet Maritime Code," 49 L.Q. Rev. 249 (1933).

Although Canada has not ratified or acceded to this Convention, the Canadian Water Carriage of Goods Act, 1936 enacts the salient features of this Convention. See Tettly Inc. cff.

The literature on this subject is immense — a fact that has greatly assisted formulation of additional Rules, see our discussion of the proposed Visby Rules, infra.

(i) We may note the following useful studies (in English): Axel, Shipowners' Liabilities and Immunities (1951); Carver, Carriage of Goods by Sea, (1961); Dor, Bill of Lading Clauses and the International Convention of Brussels, 1924 (The Hague Rules) — Study In Comparative Law (1956); Knauth, Ocean Bills of Lading (1953); Kraft, Carriage of Goods by Ship in Indian Law, (1963); Weekly Notes Publ.; Calcutta, India; 3 Rabel, "Maritime Transportation of Goods," in the Conflict of Laws—A Comparative Study, 256-310 (second edition, 1964); Sivety, Sorett's Laufhflker: Conflict of Laws in Maritime Matters, with a summary in English (1965); Tettly, Marine Cargo Claims (1965); and Yiannopoulos, Negligence Clauses in Ocean Bills of Lading: Conflict of Laws and the Brussels Convention of 1924 — A Comparative Study (1962). These works will be cited by authors hereafter.


For a systematic survey of the Convention Jurisprudence see The Uniform Law Cases periodically published by the Rome Institute of Unification of Private Law.

See Knauth, 119.

See text of the Act see Knauth, 419. The Bill of Lading underwent several accepted forms. See Knauth, 119.
clearly defined, with the desired result that the diversity among national laws as to the exoneration of carrier by suitable contractual provisions can be avoided.

The Bills of Lading Convention then represents a compromise between maritime interests of the shipowners and the cargo owners and at a more abstract doctrinal level between party autonomy in international commerce and the need for clearly defined imperative rules which would inhibit the prevalence of pseudo-autonomy. 168

The Convention seeks to regulate the bills of lading only as contracts of carriage, and does not deal with their negotiability. The Convention thus breaks the unity of contract of carriage by restricting the meaning of that term, only to that "period of time when the goods are loaded onto the time they are discharged from the ship." 169 This 'depection' of the contract has been considered artificial and unsymmetrical by some. 170

The Convention, however, applies to every aspect of the carriage of goods by sea within the period of carriage which it seeks to regulate. Thus, it determines the responsibilities and liabilities as well as the privileges and immunities of the carrier in relation to the loading, handling, storage, carriage, custody, care and discharge of goods. 171 The duties of the carrier are summed up by the talismanic phrase "due diligence." 172 The duty of due diligence pertains to both the seaworthiness (which includes both the manning and the technical equipment of the ship) and its cargoworthiness (which means its fitness and safety for the reception, carriage and preservation of the cargo.) 173

The carrier will issue, on demand, a bill of lading showing the necessary details and this document will serve as the prima facie evidence of the receipt of the goods by the carrier. 174 All clauses in the contract of carriage which have the effect of relieving or lessening the liability of the carrier with regard to damage to the goods arising from the "negligence, fault or failure in the duties and obligations" prescribed in this Convention are declared "null and void and of no effect." 175 The carrier is discharged from "all liability in respect of loss or damage" if no suit is brought within a year after the delivery of goods or from the date when such delivery would have been expected. 176

The carrier is exempt from liability once seaworthiness is ensured, for loss or damage to goods occurring due to the following: (a) force majeure situations (before the convention, the only ground of exemption in some maritime Countries) 177 (b) navigational or managerial errors on the part of the personnel; (c) acts or omissions of the shippers and their agents; (d) any acts necessary to "save life and property" at sea, including "reasonable deviation" 178 and lastly (e) "any other cause arising without either the fault or privity of the carrier" or its servants. 179 The burden of proof in this case will rest on the person seeking the benefit thereunder as the burden of proof in case of proving due diligence is on the carrier in cases of unseaworthiness. 180

In absence of a separate agreement stipulating a lesser amount, the maximum liability of the ship or the carrier for loss or damage to the goods will not exceed £ 100 "per package or unit," unless the excess value thereof has been stated by the shipper before shipment and is incorporated in the bill of

168 See for a discussion of antinomy between party autonomy and imperative rules in maritime conflicts law this writer's paper supra note 88.
169 See Article 1 (b) which defines the term "contract of carriage" and Article 7 which specifically removes from the operative ambit of this convention any agreement governing the legal relationship between and shipper with regard to custody care and handling of goods "prior to the loading on, and subsequent to, the discharge from the ship."
170 E.g. Bomgren, Konossemskonvention och konossemtslag 1 Handels- hogskolans i Gothenburg skiftserie (1951).
171 Vide Article 2.
172 Article 4, para 1, See Knauth who considers the discovery and use of this phrase as the most essential part of "American contribution" to the "development which culminated in the Hague Rules." Knauth at 116. And again the commendatory reference to the phrase which "spurred" the shipowners "to err on the side of diligence." But as to the complexities of this phrase see infra notes 192, 195 and 201.
173 See Article 3, Clause 1 (a), (b), (c).
174 See Article 5, 4, 5.
175 See Article 6.
176 See in general Dor; and 1 Carver, 9-13.
177 See in general Dor, and 1 Carver 705-745.
178 See for details there roughly classified Article 4, and Souling's analysis, see note 105, (ii) supra.
179 Article 4, clause 2 (q) and Article 4, cl. 1.
The parties to the contract of carriage, may, however, make a separate agreement fixing the minimum amount, but in no case can the amount prescribed by the Convention be reduced. The national law may reserve the right of a debtor to discharge his debt "according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge." The carrier may surrender his rights and immunities and increase any of its obligations and responsibilities, provided such surrender or increase is embodied by a suitable declaration in the bill of lading. Where either "the character or condition of the property to be carried or the circumstances or terms and conditions under which the carriage is to be performed" so require, a special agreement may be deemed to be reasonably justified, and the parties may enter into an agreement with respect to carriage and no bill of lading shall be issued.

The Convention does not apply to charter parties but when bills of lading have been issued thereunder, they shall be governed by the rules of the Convention. The Convention applies to "all bills of lading issued in any of the contracting States."

The Protocol of Signature to this Convention, inter alia, permits the contracting states to "give effect to this convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this convention."

From the text of the Convention itself it is quite clear that as a measure of unification, it was "half hearted" though it succeeded in achieving a "delicate" compromise. It was not the intention of the unifiers to create a complete code of the law of affreightment through these rules, though somewhat paradoxically this very idea hampered the formulation of the Hague Rules in its early stage. The unifiers sought, here, as in other conventions, a modicum of unity in the rules governing the international carriage of goods and this they ensured by some consensus on the basic policies as to the liability of the carrier. Again, the title here, as everywhere, shows that the scope of unification was limited to "certain rules." Therefore, it is no valid criticism of these rules to say that they are not comprehensive, however much one may desire them to be so.

But eminent students of this Convention have legitimately pointed out to some of its salient drawbacks which, among other things, have led to conflicts-creation as well. These drawbacks may well be summed up as outcomes of an uneasy compromise, incorporation of entrenched jurisprudence into the

187 See Kauthe, 124.
189 Some of these will be discussed in connection with the proposed Visby Rules. See infra 136 et seq.
187 See Graveson, supra note 165 at 67: "The Hague Rules themselves are a half-hearted measure, wavering between the principles of uniformity and free enterprise." Graveson points out to the following features of this compromise which have lessened the unifying impact of the rules: Article 4, clause 5 (maximum per package or unit liability may be increased by agreement); Article 8 (the Rules do not affect rights and obligations under any statute relating to the limitation of the liability of the owners); Article 6 (which reduces the B/L merely to a receipt in event of a special agreement).
Graveson complains that Article 5 is drawn in such wide terms that substance of the rules contained in Article 3 and 4 may be excluded by special agreement and observes: "So the uniformity is ensured on condition—the condition of the parties' free will and agreement not to vary standard provisions."
This criticism would logically lead to a denial of party autonomy in international contracts, a result that no one would want. The Convention cannot say that parties shall not enter in any special agreement for any reason. It cannot legislate for the illegality of certain contracts but can only exclude from its ambit and therefore from its benefits such special contracts. The purpose of the Convention was not to create a monolithic pattern of maritime contracts of carriage but to regulate the usual contracts of carriage within a certain regime of liability. Besides, factual investigation should surely reveal that such special agreements exempted from the ambit of the Convention do not constitute the vast bulk of maritime contracts of transportation. See also, infra note 207. Graveson's later writings show a slightly different position; see his "The Philosophical Aspects of the English Conflict of Laws," 78 L.Q. Rev., 337, 557 (1962).
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The result was that "the inner melody of the Hague Rules" gave way to such a jarring discord that reconsideration of the Rules was felt desirable. For the first time in the history of maritime law unification, special attention to the conflicts aspects of unification was evidenced when the consideration of the deficiencies of the Convention was entrusted to a special International Conlicts Sub-committee of the C.M.I.

The Committee on conflicts did recognise that "international uniformity has not even been secured between the states that have signed the and ratified the convention: a fortiori the situation is even less satisfactory as regards the states that have not signed." And yet the sub-committee did not consider it advisable for the C.M.I. to undertake the unification of conflict rules. It corresponding Scandinavian provisions are: "Package...or in case of goods not shipped in package, per customary freight unit," The Swiss law also substitutes the word "unit" by the term "freight unit." The resulting difference in jurisprudence is well analysed by Selving, 39-40. The Stockholm Conference, however, did not agree on reformulation of this phrase thus bestowed further vitality on these differences. See Selving, op. cit., n. 165 supra and the Proceedings of the Stockholm Conference, 1963. In fact, Selving’s work illustrates in great detail how almost every provision of Article 4 has given rise to incredible diversity of legal rules, most of which arising out of the different versions of the terms of the Hague Rules. See in particular the expression "fault" and "deviation" 116-134; "any loss" 81-83, 90-97.

Dr. Wustendorf greets the regulation of clauses relating to custody and care of cargo as the "inner melody of the Hague rules, to which we must listen." Knauth, Book Review of Neuestliches Seehandelsrecht (Tubingen: Verlag J.C.B. Mohr: 1950) in 46 Am. JI. of Int’l. L. 177 at 178. (1952).

Report of the International Sub-committee: Conflict of Laws—Preliminary Reports, Rijeka Conference, Comite Maritime International 68-81 (1959). The Committee fully recognized that "only way to obtain uniformity between the rules applied by the contracting states and those in force in a non-contracting state is to increase the number of signatures and ratifications." It acknowledged the variations between the Convention and the municipal legislations and attributing that to the liberal provisions of the Protocol, deplored the imprecision of Article 10 of the Protocol.

We quote here in full: The Sub-Committee considered whether it should endeavor to resolve all the conflicts of law which might arise between the different laws which had been adopted to give effect to the provisions of 1924 Convention. If the answer to this question is in the affirmative, it would be tantamount to an admission of the present divergences between the above mentioned laws. The C.M.I. has, of course, accepted the task of promoting international uniformity by maritime

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sistenly rejected several suggestions dealing with choice of law rules and jurisdictional rules and in relation to the latter emphatically stated:

"The majority of the sub-committee wants to express the view that a Convention designed to regulate the relationship of the carrier and the holder of the bill of lading is hardly the ideal vehicle for a special provision about conflict of laws laying down what jurisdiction is acceptable."

This much then for the notion of unification of conflict rules in the maritime law.199

(ii) The Proposed "Visby" Rules

The Stockholm Conference of the C.M.I. decided to recommend to the Diplomatic Conference a protocol for addition of the Convention and it was unanimously agreed to call the new rules the Visby Rules after the medieval Swedish city of that name where the protocol was signed by the members of the C.M.I. The protocol, if approved at the ensuing diplomatic conference on the subject, will become an integral part of the Bills of Lading Convention and the convention will, perhaps, be popularly known as "the Hague and Visby Rules."

The proposed protocol consisting of five articles, accepts without change five recommendations of the sub-committee, modifies to a certain extent two of the other recommendations, and rejects two of them and adds one rule not featuring in the sub-committee's recommendations.200

Article 1 of the Protocol, known as the Muncaster Castle amendment, adds to Article 3 of the Convention an exemption of liability from the "act or omission on the part of ... independent contractor, his servant or agents" if the shipowner has in appropriate circumstances appointed an independent contractor who is "one of repute as regards competence." This amendment is based on the need to mitigate the harshness with which the notion of due diligence seemed to have been applied in the Great Britain and the U.S.A.201 The amendment has, however, aroused considerable opposition and the signatories to this protocol have indicated they reserve the right to

199 For the text see Teily, 369; and for the entire text of the Convention, with proposed amendments see Report of The Association of Average Adjusters 23 (1964).

200 For details, see the Proceedings of the Stockholm Conference of the C.M.I. (1963). The approved clauses are discussed above. Recourse action clause was added by the Committee at Stockholm and was not considered worthy of recommendation for action by the Sub-Committee. The Himalaya and the Muncaster Articles of the Protocol were modified by the C.M.I. meeting, whereas those recommendations which pertained to Article 3, clause 2 (carriers liability for negligent stowage, etc.) were dropped. So these matters, where the Sub-Committee saw a conflicts-potential, were ultimately left to the jurisprudence of the Convention-countries.

201 The Amendment reads as follows:
1. In Article 3, of the Convention shall be added: Provided that if in the circumstances in which it is proper to employ an independent contractor (including a Classification Society), the Carrier has taken care to appoint one of repute as regards competence, the Carrier shall not be deemed to have failed to exercise due diligence solely by reason of an act or omission on the part of such and independent contractor, his servants or agents (including any independent sub-contractor and his servants and agents) in respect of the construction, repair and maintenance of the ship or any part thereof or of her equipment. Nothing contained in this provision shall absolve the Carrier from taking such precautions by way of supervision or inspection as may be reasonable in relation to any work carried out by such an independent contractor as aforesaid. (Emphasis added).

202 The Muncaster Castle decision, cited supra note 192, is not easy to summarize. But the House of Lords there noted that the carrier was responsible because the ship repairs were not diligent. The "ratio decidendi" does not appear to be clear, more so in view of the fact that the reparers, in a lower court, admitted that they were not diligent; and in a later case, also decided by the House of Lords, Union of India
reconsider the proposed amendment. It seems obvious that the amendment is hasty and will create more problems than it would solve, but it holds most interesting lessons in the technique of unification for the student of unified law.\footnote{203}

The protocol contemplates several other modifications to Article 3. Under Article 3 of the Bills of lading Convention, the bill of lading shall be a prima facie evidence of the receipt of the goods by the carrier and it will contain necessary statements about the number, quantity and weight as also of the “apparent order and condition of the goods.” It is not obligatory on the carrier to make such statements, and these need be made like the bill of lading itself, upon demand from the shipper. The meaning of the term “prima facie” created a few difficulties in some countries and it was felt necessary to introduce an amendment making “proof to the contrary” inadmissible “when the Bill of Lading has been transferred to a third party acting in good faith.”\footnote{204} Likewise, the question of recourse actions, not considered action-worthy by the International Subcommittee, was peculiar to some countries, especially France. The problem arose because in some countries a recourse action by a through carrier against a part-way carrier was treated as a “suit” under the Hague Rules. Thus, if the suit was brought on the last day of the one-year time limit set by the Rules, it may not be possible for a through carrier to sue the on-carrier within that time limit; and in cases where a through carrier makes the delivery of goods itself, it may not find it possible to sue the part carrier in time. The French delegation succeeded in reviving this question and as a result, an amendment is now proposed to the Rules enabling the carrier to have a recourse action even after the expiration of the one-year period and the carriers have at least three months to take their recourse action.\footnote{205}

Finally, clause 6 of Article 3 discharged the carrier of all liability in respect to loss or damage to goods after a period of a year. This was construed by some convention-courts as “extinguishing” the right rather than “barring” a remedy. Therefore, the protocol now provides that “Such a period may, however, be extended should the parties concerned so agree.”\footnote{206} This would seem consistent with the spirit of respect to party autonomy in which the Bills of Lading Convention was formulated. Conflicts problems will undoubtedly arise through the operation of this amendment, but the answer to these may well be found in the judicial response to the norms of unification.\footnote{207}

\footnote{203} See for details the C.M.I. Proceedings, Stockholm Conference (1960); and also, Doc. 469 of the Maritime Law Association of the U. S. 5057 (1963). The text is as follows:

In Article 3, after paragraph there shall be substituted the following paragraph (c) (i): “Recourse actions may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such recourse action has settled the claim or has been served with the process in the action against himself.”

\footnote{204} See Telly for a succinct critique of the decisions and the proposed amendment, at pp. 101-02 and 371-74 respectively. There is much force in Telly’s comment that the amendment seems to be “a case of the tail wagging the dog” in as much as it aims to ratify the decisional law of only one Convention State, and that too in a state of affairs where the meaning and significance of the particular decision on which the amendment is based is not at all clear. See Telly, 372.

\footnote{205} See Chapter V of the Bills of Lading,” in Studi In Onore Di Giorgio Berlingieri, 49 (1964). The Amendment does not seem to make any changes in either the law of the U. K. (see Reynolds, 60-61) or the U.S.A. (see Document 469) of the American Maritime Law Association, 2015-26 (1963). But the latter considers the present formulation of the amendment inadequate and would condition the estoppel rule only when the “Bill of Lading has been transferred for value to a third party relying on good faith on its description of the goods under the foregoing section 3 (a), (b) and (c) hereof.”

\footnote{206} The crucial question is posed by the diversity of laws. If to it the free exercise of party autonomy were to be added, it may be appreciated that unification will be more apparent than real. But see our objection to similar view of Gravey, supra note 191. The convention-judges will have to examine the extension of time both in the light of the conflicts policy of convention and also by their notions of international public policy and adhesion contracts. For a conceptual framework of invalidation of such clauses see this writer’s paper op. cit., supra note 68.
Of great importance is the proposed addition of a new Article 4b to the Convention, dealing with what is known as the "Himalaya" problem. Ways were found by the claimants of by-passing the Hague Rules by suits against the agents and the contractors of the carrier in tort. The amendment, therefore, makes the Hague Rules applicable to "any action against the carrier "in respect to loss or damage to goods covered by a contract of carriage whether such action be founded in contract or tort." 208 Excepting the "independent contractor," all servants and agents of the carrier are entitled to invoke the defences and limits of liability which a carrier is entitled. And in no case, the aggregate of the amount of recovery is to exceed the limit provided by the Convention. 209

The extension of the benefits of the Convention to the agents and servants of the carrier seems to follow the extension of the privilege of limiting liability to the ship's personnel in the 1957 Limitation of Liability Convention; 210 nonetheless, the exclusion of "independent contractors" from the ambit of the new provision here has been very much resented and it is not unlikely that the present text may undergo some modification at the Diplomatic Conferences dealing with the approval of this protocol. 213

An additional article (the new Article 9) stipulates that the Convention does not affect anything provisions of the nuclear liability convention. 212 And the necessary amendment to Article 4, Clause 5, makes the long due changes in the monetary unit of liability which by recommending Poincare France. The date of conversion, however, is left as before to the national law of the court seized of the case. 213

And lastly Article 10 will be amended, the new article reading as follows:

The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another under which bill of lading the port of loading, of discharge, or one of the optional ports of discharge, is situated in a Contracting State, whatever be the law governing such bill of lading and whatever be the nationality of the ship, the carrier, the shipper, and the consignor or any other interested person.

This amendment is certainly the most comprehensive field of application provision in the existing maritime conventions, and it takes into account the situations of conflict created by the...
national versions of the convention, giving rise to such decisions as The Vita Foods case where it has been rightly pointed out the "substance of uniformity" gave way to its "shadow."  

Many delegations urged inclusion of specific conflicts rules at this point. The Norwegian delegation formulated a

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Falconbridge, cited herein. See for the differences in national legislations, Vianopoulos, 45-88.

See Vita Food Products v. Unis Shipping Co. (1939) A. C. 27. The literature on this decision is vast but reference may be made to the following: J. Cook, The Logical and Legal Basis of Conflict of Laws, 410-32 (1942); Cheshire, International Contracts, 31-33 (1964); Falconbridge, Essays on Conflict of Laws, 400 (1954); Graveson, op. cit. note 165, supra. Rabé's analysis is slightly different, 3 Rabé, The Conflict of Laws: A Comparative Study 427-29 (1960).

Almost all the leading commentators on this decision lamented it from the unification perspective. Gutteridge felt that if appropriate steps were not taken "the unified system of law represented by this body of legislation may break down, and a serious check would have been imposed on the unification of maritime law," Gutteridge, "Comment on the Vita Foods case," 55 L.Q. Rev. 523, 526 (1939).

We may also note the following comments:

It may be argued that the rules of the conflict of laws relating to contract are designed to promote freedom of contract, and their object will be frustrated if the parties are not at liberty to select the governing law. The answer seems to be that businesses generally are willing to make some sacrifices in order to achieve that certainty which is so important in commercial matters. The Hague Rules themselves were drafted in order to meet the desire of the maritime business world for greater uniformity and certainty in the law concerning the immunities of the carrier... Nor do they limit freedom of contract to any undesirable extent, for in the first place there is no dictation as to the rate of freight... and in the second place, Article VI provides that the parties can contract out of the responsibilities and immunities conferred by the Rules, so long as no bill of lading has been issued...

The Judicial Committee say that it would be a serious matter if businessmen could not take Bills of Lading at their face value and had instead to inquire into the law prevailing at the port of shipment. The significant language of Article VI indicates that it would be a far more serious matter if the business man could not take the Hague Rules at their face value and had instead to scrutinise individual rules and in this case obfuscate forms of bills of lading. The Hague Rules are so well known that businessmen are likely to be far more familiar with their standardised term than they could be with any individual aberrations therefrom.


We have found from the British and especially Canadian replies to the Report that there may be different understandings of the scope of this Rijeka Amendment... The Norwegian delegation will very much like to maintain our proposal that this "scope" rule in Rijeka amendment should be followed by a system of choice of

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... A sub-system of choice of law rules to follow this Article whereby the precise enacted version of the Hague Rules will be followed, since it will not be permissible for parties to contract out of this set of rules. It is true that the present amendment ensures the application of the convention to all contracts of carriage within the contracting states, and eliminates the "outward/inward" distinction. But it still fails to specify as to which of the national versions of the convention should apply in a given situation. This is a major failure as substantial differences still exist in enactment of the Convention and the jurisprudence of each convention state.

It was also urged that proration clauses should be made impermissible because that was one way in which the parties to a contract of carriage can indirectly escape the obligations of the convention. As we saw earlier, this was considered beyond the

law rules. We... consider that forum shopping is no at good thing and we do not see why we should not try to deal with that very uncertain and difficult at field present and seek further unanimity...

Remarks of Mr. P. Gram of Norway, at the Stockholm Conference, Stockholmr Report 459.

cf. also the following comment of Morris:

All these difficulties could have been avoided, and contracting out of the Hague Rules could have been effectively prevented, if the various statutes had laid down a general choice of law rule to the effect that contracts for the carriage of goods by sea should be governed by the law of the place of shipment notwithstanding any contrary stipulation in the Bills of Lading, instead of the particular choice of law contained in the Carriage of Goods by Sea Act, 1924. It is significant that the International Convention scheduled to the Carriage by Air Act, 1932, seeks to avoid these difficulties in another way by providing that any clause contained in the contract... by which the parties support to infringe the rules laid down by this Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void.


It was proposed that the Rijeka Amendment be followed by the addition:

The Rules of this Convention shall take effect as enacted in the country of the agreed port of discharge. If no such enactment is in force, then the Rules of this Convention shall take effect as enacted in the country of the port of loading. If no such enactments are in force, the Convention shall take effect as enacted in the country where the carrier has his principal business. It shall not be permissible to contract out of the above provisions.

Stockholm Report, 134.
present scope of the unifying endeavour. Nonetheless, it is
submitted, that the language of the present amendment would
have the effect of invalidating both the professio juris and the
prorogation stipulations as a matter of substantive law governing
the case.

The formulation of the Visby Rules raises a number of
interesting problems as to the nature and technique of unification
and reunification of private maritime law. The impulse towards
the amendment now comes from the deficiencies of the earlier
convention on the subject. We have noticed that almost all
amendments to Article 3 were generated by the need to avoid
certain consequences flowing from the convention-jurisdiction
of the adhering countries. The only provisions of shared inter-
national concern seemed to be the gold standard and the scope of
the Convention. In the opinion of many delegates and a few
writers on the Visby Rules, amendments to an international
convention of the basis of judicial decisions of Convention
countries seemed a perilous procedure. The point is certainly
of great importance: should we amend an international convention
to avoid the difficulties arising from national jurisdication,
instead of amending to the national law to make it more consistent
with the international legislation? Without being dogmatic, one
may submit that the latter will be a more apt and easy procedure,
and that the amendment of an established convention should only
be based on grounds of international concern.

Another question pertaining to the technique of unification was
whether the Convention should be amended or a new Convention
be drafted. In view of the nature of compromise of maritime poli-
cies herein involved, it was certainly a wiser choice to have resor-
ted to the amending process. The question is still unresolved as to
the way in which these amendments shall be made effective—as a
protocol or as a supplementary convention. So long as there is
agreement to adhere to the rules formulated at Visby, it is not of
much importance whether they are embodied in one form or
another. It may be, however, that some states who have as yet not
agreed to some rules, may have second thoughts about the entire
affair, and not sign or adhere to the new protocol or Convention,
with much more confusing results. The protocol at present does
not say as to how it is to be implemented, but should it be, as it is
likely, be implemented through national enactments, it might be
subject to both Editorial changes and deliberate improvements
with the result that an unforeseeable conflicts-creation may occur.
These, unfortunately, are the problems that beset the unifiers
at the international legislative level and, one hopes that the
national legislatures and the convention-courts will contribute to
the realization of the ultimate goal of uniform law of contracts of
carriage.

III. PASSENGER CONVENTION

Maritime contracts of transportation of goods were dealt with
by the Bills of Lading Convention, but these pertaining to carriage
of passengers and their luggage were not sought to be removed

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[*10] Vide the Report of the International Sub-Committee, op cit., supra note
19. The French Maritime Association supported this view and also
desired that some provision be made regarding recognition of arbitral
awards. But the U. S. delegation, among others, opposed confictual
rules in the Protocol on the ground of "practical reasons." See the
Stockholm Report, 213, also see the comment of Morris, note 215, supra.

[*9] The Article applies to all Bills of Lading for convention-ports what-
ever be the law governing them and whatever be the nationality of the
parties. Thus, even if the parties were to choose a law different
from the Convention-countries' law their preference will be disregarded
under this article if the transportation is within the convention-ports.

[10] In this connection a comparative study needs to be undertaken. The
Mortgages and Lien Convention as well as the Limitation of Liability
Convention of 1957 were totally reformulated. Which presents a better
legislative technique? Much work, though far from satisfactory, has
been done on the context of unified maritime law by way of both textual
analysis and comparative jurisprudence but little has been done to
study the complex problems of the technique of unification and reunifi-
cation. At the conferences, no erudite discussions on this are to be
found. The following remark is illustrative of the businessman's lack
of legalism which certainly dominates the work of C.M.I.

Now it has been said by one of the representatives of a National
Association that...you will get tremendous difficulties if a protocol
is added forty years after the treaty was originally entered into. What
are the judges going to make out of it? There are two answers to it.
First of all it will be our duty in the Diplomatic Conference to make
drafting clear, and secondly I am not going to weep tears over the diffi-
culties of the Judges, because it is what they are there for... it is use-
less to say that you are creating a big burden over Judicary. That is
what they are paid for.

Mr. C. Miller, United Kingdom, Stockholm Report, at 450. (Emphasis
added)
The Indian Year Book of International Affairs

from the pale of varying national laws till 1953 when the impetus was provided by the Rome Institute for Unification of Private International Law. The present text of the Passengers' Convention, in a total departure from earlier drafts on this subject, was formulated at the Diplomatic Conference at Brussels in 1957.221

The Convention only deals with "international carriage" contracts of passengers and the subject of their luggage has been left to the future work of the committee. This Convention provides us with interesting examples of craftsmanship and, in some matters, indicates a sophisticated conflict awareness.

The Convention establishes the liability of the carrier for personal injury or death to a passenger when these are caused by fault or neglect of the carrier or his employees. (Article 6).222 The liability is fixed per passenger and is not to exceed 250,000 Poincare francs (Article 6). This is a significant departure from the jurisprudence of some countries where the liability is per ton and not per capita. The limitation of liability will not apply in cases of intentional and reckless conduct on the part of the carrier (Article 7). Simultaneously, the national law of the Convention state will determine the exonerations, either wholly or partly, of the carrier in cases where the fault or neglect of the passenger caused or contributed to the injury (Article 5). Contractual provisions purporting to relieve or reduce the liability of the carrier or shifting the burden of proof as well as the prorogation clauses are declared "null and void" (Article 9).224

The time-limit for giving the notice for personal injury is fifteen days from the date of disembarkation failing which the presumption of safe disembarkation would arise. Actions for death or personal injury are barred after a period of two years. While the law of the court seized of the case will govern the suspension or interruption of the time-limit periods, in no case will the limitation be an action brought after the expiration of three years from the date of disembarkation (Article 11). The benefits of this Convention are also extended to the servants and agents of the carrier (Article 12).225

The protocol provides for the exception in situations where the parties involved are both "subjects" of the Convention state and in cases where the national law of such a country does not regard a given "carriage" as "international carriage." The parties to this Convention have the usual option to enact it by national legislation or give it the force of law directly.

Unfortunately, the system of liability sought to be established by the Convention is considerably weakened by some in-built reservations. Thus, the Convention states may by suitable legislation, raise the per capita damage liability for the carriers who are their "subjects" and the carrier and the passenger may agree to a higher per capita liability by a contract. While the latter may be a justifiable deference to party autonomy in international contracts, the former "practically empties the Convention of its meaning."226 This reservation if widely practised will inevitably

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222 See Nagendra Singh, 1067.

223 See Article 1 (1) for the definition of the term international carriage.

224 Article 4 (3) provides that the burden of proof as the "fault or neglect of the carrier, his servants or agents shall be on the claimant." But in cases of "shipwreck, collision, stranding, explosion or fire," Article 4 (2) provides that the "fault or neglect of the carrier or his servant shall be presumed, unless contrary is proved." (Emphasis added). An interesting point can here be raised because Article 6 of the Collisions Convention states that "All legal presumptions of fault in regard to liability for collisions are abolished." Would this not be a "legal presumption" within the meaning of that provision? There is bound to be some conflict in the decisional law of Convention countries on this aspect.

225 See our discussion supra. One hopes that a similar provision will be made in the forthcoming Baggage Convention, thus paving way to a much-needed insertion of a similar provision in the Bills of Lading Convention. The Committee certainly is inconsistent in its approach to conflicting problems.

226 Cf. Article 6 (2) 1, The Liability Convention of 1957.

227 Giannini, cited by Hennebicq, fn. 2 at p. 295. He rightly points out that the unwillingness of the United Kingdom to accept the regime of liability and its possible modification through this Article contrasts with the U. K.'s agreement to a similar provision in the Warsaw Convention. That this criticism was made in regard to the draft Convention does not minimize the validity thereof as the provision has appeared in the final convention with the addition of clause (2) of the Article 6. If anything, the addition would seem to reinforce this criticism.
lead to the pre-unification diversity in the amounts available in a damage action and consequently, both forum-shopping and the resultant conflict-situations may continue to exist as before.

At the same time, this Convention holds for us an interesting comparison with the Bill of Lading Convention. We have noticed that even when the revision of the latter was under way, the unions firmly refused to declare proration clauses invalid, but here they have clearly done so. The rationale of this is not easy to discover, because both Conventions deal with the contracts of transportation and aim at establishing a single regime of liability.

The Convention, signed by many Plenipotentiaries at the conference has yet not received any ratifications or accessions, though the maritime jurisprudence of some countries is already influenced by the present formulation.\textsuperscript{227} The present state of affairs is in striking contrast to the attempts at unification of the same subject in air law and in absence of comparative study of this aspect the present indifference of interests involved continues to remain mystifying.

\section*{(G) THE STOWAWAYS CONVENTION}

The Convention relating to stowaways was undertaken with a full awareness that the subject was the proper concern of public international law and was primarily formulated out of humanitarian reasons.\textsuperscript{228} The Convention, though ratified by four countries so far, has not come into force as a minimum of ten adhesions is required to make it operative.

The Convention mainly deals with the procedure that the master of the vessel should adopt on finding at stowaway in the ship. The master is empowered to deliver the stowaway at the first port of call in the contracting state at which the ship calls after the discovery of such a person. Excepting in cases of deportation, the appropriate port authorities must accept the stowaway and try to send him to the nation to which he belongs; or in cases of statelessness, return him to the port of embarkation or return him to the last port of the call prior to his being found. If he cannot be returned to any of these places, the port authorities are to deliver him to the state whose ship first brought the stowaway to them and that state is bound to accept him, unless it is the deporting state. But in applying these provisions both the Master and the other authorities concerned are to take into account any reasons which the stowaway may put forward for not being sent to any particular place. The Convention does not affect the power or obligation of contracting states to grant political asylum.

The value of this Convention as a maritime convention is that it specifies appropriate internationally acceptable procedures for handling stowaways and, thus removes the undue hardships caused to merchant marine in this matter. With its growing acceptance, one can eventually foresee the possibility of a uniform law of obligations of owners and port authorities on this subject.

\section*{(H) IMMUNITIES OF STATE OWNED SHIPS}

Maritime commerce witnessed an increased proliferation of state-owned mercantile marine steadily since the end of the first quarter of this century. Partly, this may be attributed to the emergence of socialist states; partly, to the fact that in some nations, as in India today, balanced growth of mercantile marine seems to depend on the state initiative and participation in private enterprise. An appropriate regulation of state immunities was considered essential for the world maritime community and the C.M.I. prepared a convention on the subject simultaneously with the Mortgages and Liens Convention, but much before the law of arrest was to some extent unified.\textsuperscript{229}

The basic principle of this Convention subjects the State-owned or operated ships to the same rules of liability which govern the non-governmental, private merchant vessels. All shipping operations of the state involving ownership of the cargo or the


\textsuperscript{228} For its text, see Nagendra Singh, 1064, and for a general background, see Hennebiqu, op. cit. n. 229 supra.

\textsuperscript{229} See Nagendra Singh, 1121, and cur discussion of the maritime mortgages, liens and arrest conventions supra.
ship, operation of the ship or carriage of both cargo and passengers on the ship are subject to the "same rules of liability and the same obligations as those applicable in the case of privately owned ships, cargoes and equipment" (Article 1) and to the same "rules relating to jurisdiction of the Courts, rights of actions, and procedure" (Article 2). The defence of immunity of the state with regard to a few claims (collision or navigational incidents, salvage or general average claims; and lastly, repairs, supply or other ship contracts) is abolished (Article 3). Correspondingly, the state has the same rights as a private carrier and can avail of all "defences prescriptions and limitations of liability" available to a private carrier (Article 4).

At the same time, necessary exception in case of the "sovereign" and non-commercial shipping of the state is made. Thus, warships, patrol ships, hospital ships (Article 3 (1)) cannot be made subject to an in rem proceeding, arrest or detention. The Convention may also be suspended in times of war (Article 7). Nor does the Convention affect any measures necessitated by "the rights and duties of neutrality" (Article 8).

An additional protocol, signed by the same countries which signed the Convention, was appended to this Convention in 1934. The Protocol, recognizing the necessity of making clearer certain provisions of the Convention. Briefly, this Protocol excludes the ships chartered by the states from the Convention (Cl. 1); ensures the right of interested governments to appear before the courts, notwithstanding the rule of Article 5 of the Convention which makes statement of the diplomatic representative relating to the character of the ship a "conclusive evidence." reserves the right of the national governments not to produce any documents considered to be in detriment to its national interests (Cl. VI); and exempts from the Convention the jurisdiction of the Prize Courts (Cl. IV).

The Protocol further clarifies that the "rules of procedure prescribed by the national law with regard to which the State is a party" are not affected by the present Convention." (Cl. V). And, clause II of the Protocol now requires that for the provisions of the Article 3 of the Convention to apply not merely the ship in question should not have been engaged in non-commercial operation at the time when the cause of action arose but, in addition, it should also not be non-commercially engaged at the time when the action is brought.

Through these provisions, it would seem that the Protocol extends the area of application of national laws and in general, seeks to sharply limit the scope of the Convention. At the same time, the Protocol also remedies the misunderstandings created by the text of the Convention. The structure and the phraseology of the Protocol make an interesting study for a student of international legislative drafting as well as of the technique of unified law.

The Convention was signed by many countries including the Eastern European nations. Neither Britain nor the United States of America for any common law country has yet adhered to this Convention.

Part Three: CONCLUSIONS

"In one word, we think that if diversity of laws did not exist, it would be created." —Pilet

"The field of conflict of laws is infinite." —Offerhaus.

"ego audiem quidem mundi dominus ex autem maris"

I am the master of the world, but the master of the sea is the law. —Antonious

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See for the list of ratifications and accessions Nagendra Singh 1124-25. The Eastern European countries are: Hungary, Poland and Roumania.

Pilet: "Le Droit international privé 20 Journal du privé International privé 1, 17 (1899); quoted by Valladao, op. cit., note 3 supra.


Cited by Giannini, op. cit. n. 4, at 855.
the shipping and shipbuilding industry necessitates removal of obsolete rules of maritime law, sometimes embodied in a convention, and, at times, requires rerationalisation of maritime policies.\textsuperscript{237} In this sense, the complexity of unification of maritime law arises from change and progress in the industry requiring concomitant revision in norms of unified maritime law.

This complexity is further accentuated by the fact that maritime conventions have their origin in mixed motives. The initiation, formulation and final acceptance may all be result of different motives, often contradictory.

Thus, the Collision Convention was urged on the Great Britain on the grounds that it did not adversely affect any “vested interests” and “provided opportunity for reform”—the very grounds of its rejection in the United States.\textsuperscript{238} Some conventions are accepted because they did not seem to alter the national laws on the subject or to alter them very slightly, e.g. the Salvage Convention.\textsuperscript{239} Humanitarian motives shaped the Stowaways Convention \textsuperscript{242} and are partly responsible for accelerating the proposed Baggage Convention, now under the active consideration of the C.M.I.\textsuperscript{241} Interestingly enough, there seems to be a competitive aspect to unification also. Thus, maritime law unifiers often seem to feel that they are lagging behind, as it were, the air law unifiers and should have corresponding unification measu-
res as well. And more recently, some maritime unifiers seem afire with an altruistic zeal. They have been frankly, if not quite judiciously, motivated in seeking unified maritime law by some dimly perceived obligations to provide a "maritime jurisprudence" to the new nations of the world.

In some difficult areas, the unifiers have been shirking efforts unless the needs of the shipping enterprise make it imperative for them to undertake unification. Maritime lawyers seem glad to obey, rather than command, the maritime industrialists. Thus, academic motivation for unification is almost entirely absent.

"Another point is that we have an international regulation of the carriers liability for luggage in respect of the air and the railway transport. I cannot see, therefore, why we should not have an international regulation concerning liability for luggage in connection with voyages by sea."
See supra note 241.

"I feel, however, that it is of considerable utility, for we should not overlook in a stirring world we are presently living, a good many new nations have attained self government or are going to attain it in the coming years. These new nations have no maritime law. The will certainly need one:... we shall, therefore, have to face nations without past as far as jurisprudence is concerned, without maritime law principles and very often, without even the principles of liability as the old nations." Mr. Hollenfaltz du Troux, Belgium, Remarks in "Assessment of Damage in Collision Cases," C.M.I. XXV Conference, Athens, Proceedings, p.249 (1962) (Emphasis added).

Mr. Asser the chief architect of the proposed Liens and Mortgages Convention, 1965, observed:
"I repeat it is up to the business community and not to the lawyers to decide whether a real need for new international legislation exists. If so, then it will be the job of lawyers to consider the best ways and means to accomplish this object. . . ."

Jan Asser, Maritime Liens and Mortgages in the Conflict of Laws, 5 Handelshogskolan i Goteborg, Skifter, 71 (1965).

This would seem consistent with the general philosophy of the C.M.I. cf. the following remark of Louis Franck:
"But there was another reason why we succeeded. We made it a principle that the International Maritime Committee was not going to consider itself as a sort of legal prophet in maritime matters, trying to draft a perfect law, for all the rest of mankind to accept. We went to the businessmen themselves, in the various commercial and maritime countries and we brought them together with lawyers . . ."
The Address of Louis Franck, President of the C.M.I. No. 139, Maritime Law Association of the U.S.A. 1547, 1551 (1927).

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This lack of academic motivation is certainly desirable insofar as no unification project is undertaken purely for academic reasons. But once the need for unification has been perceived, lack of critical thinking and research on the basic aspects of unification and reunification results in a loss of efficiency. Consensus—gathering through questionnaires too often substitutes critical appraisal of unification-worthiness of a given area of maritime law. Little forethought goes into difficult aspects of techniques of unification. While no one would wish to convert the C.M.I. into a mere academic institution, it would seem essential to its functioning that it commission certain research on selected aspects of the un-unified and the unified world maritime law.

Thus, for example, studies of the world maritime jurisprudence would provide a more comprehensive and adequate foundation for the work of the C.M.I. than the categorical—and only occasionally annotated 'yes' and 'no'—responses to the questionnaires and necessarily brief discussions at the General and Diplomatic Conferences of the C.M.I. Studies of the methods of unification—treaty and model rules—used in the unification of maritime law may lead to a scientific assessment of the efficacy

This is very important. Unification should never become purely academic. See Graverson's remark:

"Merchant and shippers have for centuries demonstrated their ability to create uniform practices and customs to meet their commercial needs. They have a tradition of living under the law which they create for themselves, and it may be that the attempts made in the various Carriage of Goods by Sea Acts and similar: legislation to inovate from above rather than to codify the various regulations which have developed from below, as in the case of sales of goods and Bills of Exchange could not be expected to meet with full success.

Graverson, op. cit. note 165 supra at 67. Also see Giannini's comment, supra note 248.

See supra notes 57, 127, 131, 162, 195, 200 illustrating the proposition of the text.

No doubt wherever such studies exist, they are utilized by the C.M.I. Sometimes individual members prepare comparative studies on some aspects of the Convention—jurisprudence. (See our reference to van Ryssel's study of 'due diligence,' note 195 supra.) But these, it is submitted, are not enough. Institutionalized or commissioned research on a comparative basis will be far more comprehensive. Also see Graverson, "General Principles of Conflicts of Laws" 109, Recueil des Cours, 38 (1963)."
of these methods. Comparative studies of unification of transportation laws in land and air, may also be of great assistance. This institutionalised research will have no preemptive effect on individual research: in fact, it would foster a tradition of learning, provide a badly needed body of literature on unified maritime law, and add to the scientific studies of unified law. At present, we have to recognise that institutional initiative in this area is lacking.

Equally important is the total design of unification. Surely, the experience of more than half a century of maritime law unification endeavours should suggest a systematic scheme of unification. The hit-and-run type of unification may well give way to a planned effort at the unification of all important sectors of maritime law. This is, we may repeat, not to suggest that a grandiose scheme be evolved for the ultimate unification of private maritime law. It is rather a plea for preparation of a nautical chart to guide the future voyages of the unifiers.

(ii) Unification of Private Maritime International Law

If all unification endeavours are a “search for compromise,” then we must acknowledge that enduring compromises of maritime policies have been achieved already in

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248 Both these techniques have been employed in the unification of maritime law; hence the matter cannot be dismissed as merely academic—e.g., the York-Antwerp Rules. At present, the C.M.I is also considering model rules on Demurrage and Despatch. Which technique has proved more easy to adopt and more effective? cf. Giannini’s observations:

In order to complete our conception, we will point out that the promulgation of Maritime Codes and still more of occasional fragmentary provisions has slackened the natural and universal proclivity towards uniformity. It is significant that the most successful of all maritime agreements is the one which deals with the adjustment of averages in a field where nearly everywhere laws are silent.

Giannini, supra note 4 at 848. (Emphasis added).

249 The C.M.I. is presently considering the following aspects of maritime law: (a) Mortgages and Charterer’s Rights (draft Convention already discussed at the 1965 New York Conference); (b) Letters of Marque and Marginal Clause Convention; (c) Legal status of ships in foreign ports; (d) Registration of the charter party; (e) Model rules regarding demurrage and dispatch; (f) Registration of ships under construction; (g) Revision of York-Antwerp Rules.

250 This phrase is used by Dr. Lilijé, President, Comité Maritime International, in Lilijé and Bosch, op. cit. note 47, supra.

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The nature of compromises already achieved, and of those for which considerable effort is now being made, may be open to question. The solution may not be ideal, and the efforts in some cases half-hearted. But these are the features of the nascent international legislative process that the unified maritime law is heir to. Whatever unanimity has been achieved is valuable in itself as befitting the maturity of this process.

The efforts at unification have undoubtedly added a new dimension to the policies of international maritime community. The vaunted impulse of maritime law, as a part of commercial law, to seek unification as a measure of expediency and need is at last a conscious process, possessing features of a purposeful search for unity of laws.

This, in our estimation, is a gain that is too often overlooked. The dogmatic apathy to unification of maritime laws has given way to a new climate of international cooperation. It is no longer a “sufficient reason” for a dissent from a proposed maritime norm to say that it differs from a particular system of national law, as it used to be in the early days of unification. Now maritime

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251 This can be illustrated by any of the C.M.I. Conventions. In some cases, the compromises are merely theoretical since the Conventions have not come into force. In other cases they operate on a limited scale as they have not won a large adherence. Nonetheless, the formulation of such compromises may indicate clearly the broad base of consensus on important matters of international maritime law and policy.

252 As in the case of Passenger Convention, see supra note 227. We may also note that the norms of the Bills of Lading Convention were followed much before the Convention was formulated.

253 e.g. The unification law is an ideal foreign to the English mind... The Congress at Antwerp brought out this difference very clearly. “You English seem to think it negotiating to grant us your gracious permission to adopt your laws telles cuites,” exclaimed an exasperated Frenchman in reply to an Englishman who thought that he had given a sufficient reason for his dissent in saying that a proposal differed from English law. “But we have come here to make compromises in the interests of harmony...”

nations have to seek more cogent justifications for their dissent, based on the grounds of international maritime policies or superior rationale of their counter-proposals. And this climate of unification has undoubtedly influenced if not inspired, similar movements in important aspects of world law. More often than not, unification of maritime law has been invoked in support of other unification endeavours.

And yet, our criteria of assessment do not allow us to admit that a uniform law of seas or a world code of affreightment has already been achieved. We are far from that goal, if that is indeed our goal. The sole practical aim of the unification endeavours in maritime law can merely be attaining maximum agreement on the basic minimum aspects of maritime policies. And success of this may readily be admitted though the manner and the extent of achievement may be judged by perfectionist criteria. The latter provide valuable insights into tools for future unification efforts, but, the actual achievement should only be assessed in the context of the global maritime milieu in which the unification occurred.254

(iii) Unification of Maritime Conflicts Law

We have seen that the C.M.I. has never attempted to unify private maritime international law through a unification of conflict rules. Even when conflicts problems arose out of the systems that its conventions had established, as in the case of the Hague Rules, the unifiers have not seen it fit to adopt any specific conflict unification strategy.255

Indeed, we do not share the view that unification of conflict rules, would have been a better methodology for the unification of maritime law.256 The rules of the law of conflict of laws would only establish formal principles of applicable law but so long as gross divergences persist in the legal systems as regards the incidents of the same maritime occurrences, the multiplicity of outcomes will continue unabated. Besides, unifying choice of law principles in maritime conflicts is particularly difficult because there is an undue abundance of connecting factors and policy reasons often justifying simultaneous application of conflicting laws.257

And yet, it will be a mistake to suppose that the maritime conventions formulated by the C.M.I. do not contain any choice of law rules or jurisdictional norms. These abound but only as appendages to the main policy compromises and not as cornerstones of the convention-édifice. These rules may have been of some

254 See our criteria of assessment outlined in note 12 supra.

255 See our discussion of the Visby Rules. Also see supra notes 198 and 214.

256 We may note here two diametrically opposite views which represent the range of present doctrinal controversy: "Unification of conflicts rules will never be complete; and even if it were complete the problem of knowing and interpreting a foreign law could not be solved." "Unification of conflict rules is only a part of the general problem of the international unification of law: the two activities are interdependent and must develop along parallel lines. . . . The principal task should be the unification of substantive law; as far as unification proves impossible or incomplete conflict rules should apply." Matteucci, Unification of Conflict Rules in Relation to International Unification of Private Law, in "The Conflict of Laws and International Contracts": 150, at 159 and 157 respectively (1951).

257 See Rabel, op. cit. n. 165; Jan Asser, op. cit. n. 244, supra and the literature cited in supra note 7.
value in furthering the unification of substantive maritime law, and as compared to the unification process in the air law, may have been as Rabel observes, "well worked out."

At the same time, the reluctance to consciously adopt unification of conflict rules as a collateral methodology, has in our opinion, considerably detracted from the total achievement of the work of the C.M.I. This reluctance is all the more puzzling, since in some conventions, we find specific formulation of conflict rules which were rejected as being inappropriate when urged for some other conventions.

If the past is any guide, greater attention to the possibility of unification of conflicts rules is certainly a sine qua non of success of future unification projects and the added usefulness of the one already accomplished. Certainly, the cavalier attitude towards conflict realities has to be abandoned. The C.M.I. need not weep tears over the difficulties of judges, but it should accord sufficient deference to them lest they record an undue gleam at the rejection of what unifiers think they have already accomplished.

We are aware that in seeking unification of conflict rules perhaps, the area of disagreement may be so wide as to swallow the very compromise broadly achieved on the main principle of the maritime policy. Thus, for example, the notion of party autonomy itself may prove a stumbling-block to a unification attempt. But once a broad compromise on maritime policies has been arrived at, one wonders whether it will be appropriate to leave the prorogation and professio juris stipulations to flourished even though their effect is to weaken, if not destroy, the unifying effect of the Convention, and at best leave to the convention judges to declare such stipulations as void being against the public policy.

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Supra, Part Two.

See Rabel, Conflict of Laws, A Comparative Study, 342 (2nd ed. 1960). Referring to Warsaw Convention, Rabel observes: "But the remaining conflicts are even more important and less well worked out than the traditional maritime questions."

See, as to the n. 21, supra, as to C.M.I. Committee on Conflicts.

See Miller's remarks, n. 219 supra.

For these aspects in the context of the Bills of Lading Convention see Yianoupolos, n. 165, op. cit. supra.

See our notes cited in n. 256, supra. As to prescribing jurisdictional rules in the Conventions see, n. 55, 156, supra.

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This is a broader question. Thus, the British Delegates opposed at the Athens Conference of the C.M.I. the formulation of the Baggage Convention on the ground that the matter was best regulated by party autonomy. That was the position of some nations in the early days of the unification of the law of the bills of lading as well.

This was suggested by Rabel, see supra note 259.

See this writer's paper, op. cit. supra note 88. Also see Ehrenzeig, A Treatise on The Conflict of Laws, 453-50 (1962).

See our analysis of "party autonomy" provisions of each convention, supra and in particular, supra notes 72, 164, 191, 214, and the text accompanying them.