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The system of liability of articles III and IV of the Hague (Visby) Rules

Margetson, N.J.

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Chapter 2
Construction of the Hague (Visby) Rules

2.1 Introduction

14. Uniform interpretation and construction of maritime law is of the essence. This has been recognised by courts worldwide for years. In the Lottowanna case (1874) the U.S. Supreme Court held:

‘The maritime law is part of the law of nations, one of the great beauties of which is its universality. Uniformity has been declared to be its essence. The worst maritime code would be one which should be dictated by the separate interest and influenced by the peculiar manner of only one people.’

The reference to the ‘maritime code’ was in fact to the maritime codes of various nations, both ancient and contemporary:

‘Such was the declaration of the civil law, which in the Roman ports furnished the role as well for the Roman ship as for the ship of the barbarian. Such was the declaration of the maritime codes (...) And when those great systems of law are referred to, the reference is in no proper sense to local law, but to the general law as known throughout the civilized world, including for a long period, England.’

15. This chapter will deal with the question of how uniform construction and interpretation of the H(V)R should be achieved. Before discussing that question however, I shall clarify some of the terminology used (§ 2.2).

2.2 Terminology

Treaty, convention, instrument

16. The word ‘treaty’ is usually, but far from consistently, reserved for the more solemn agreements such as treaties of peace, alliance, neutrality, arbitration. There is a tendency to describe certain multilateral law-making treaties such as e.g. treaties concluded under auspices of the League of Nations or under the auspices of the United Nations...
as a ‘convention’. But the term ‘convention’ is by no means confined to multipartite treaties. Kiantou-Pampouki notes that the terms ‘treaty’ and ‘convention’ are used interchangeably, without discrimination. The word ‘instrument’ is used in a broad sense to indicate any international agreement containing uniform law.

Protocol

17. This usually denotes a treaty amending or supplemental to another treaty. E.g. the Visby Protocol of 1968.

Construction and interpretation

18. The words ‘construction’ and ‘interpretation’ are often used synonymously. Black’s Law Dictionary says that this is incorrect: ‘In strictness, interpretation, is limited to exploring the written text, while construction goes beyond and may call in the aid of extrinsic considerations, ...’

The following makes the difference even clearer: ‘Construction’ is a term of a wider scope than ‘interpretation’. While the latter is concerned only with ascertaining the sense and meaning of the subject-matter, the former may also be directed to explaining the legal effects and consequences of the instrument in question. Hence interpretation precedes construction, but stops at the written text. On the other hand another dictionary treats the words as synonyms. Below I shall use the words construction and interpretation in the meaning given in Black’s Law Dictionary. This chapter will therefore deal with the problem of uniform construction and interpretation of the HI(V)R.

Rules of construction

19. Successive generations of writers, arbitrators and judges have elaborated rules for the interpretation and construction of treaties, borrowing mainly from the private law of contract. According to Jacobs modern approaches to interpretation can be classified in three broad groups: the subjective, the textual and the teleological. The subjective approach looks primarily to the actual intentions of parties. The principal question in this approach is concerned with the ‘real will’ of the parties. It attempts to elucidate the text of the treaty, which on this view is merely an expression of the will of the parties, by reference to the whole course of negotiations leading to the conclusion of the treaty, and seeks to investigate the actual intentions of the parties at the time of the adoption of the final text. The textual approach places the principal emphasis on
the actual words of the treaty. This approach is also known as the objective approach.\footnote{Kiantou-Pampuki 1991, 23.}

While the subjective approach deals with the question ‘what did the parties really mean?’ the textual approach deals with the question ‘what did the parties say?’

The teleological approach seeks to construe the treaty in the light of its objects and purposes. To a certain extent this approach is a combination of the subjective and textual approach.

**Uniform construction**

20. The necessity of uniform construction is often pointed out in case law. Regarding the principle of uniform construction and interpretation of the Hague Rules Lord Macmillan said in the *Stag Line* case:

'It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign Courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.'\footnote{Foscolo, Mango & Co., Ltd., and H.C. Vivian & Co., Ltd. v. Stag Line, 41 L.I.L.R. Rep. 165, 174. See also The Muncaster Castle case, [1961] 1 Lloyd’s Rep. 57, 88 and Bunga Seroja, [1999] 1 Lloyd’s Rep. 512.}

21. The necessity of uniform construction should be born in mind by anyone dealing with the Rules. Uniform construction is not an aid to construction or a rule of construction. It is a point of view which should always be taken into account regardless of the rule of construction applied.

**Autonomous**

22. In *Morris v. KLM Royal Dutch Airlines* Lord Steyn explained what is meant by autonomous construction and interpretation of an instrument. That case concerned the meaning of the words ‘bodily injury’ under the Warsaw convention. Lord Steyn said:

'It follows from the scheme of the Convention, and indeed from its very nature as an international trade law convention, that the basic concepts it employs to achieve its purpose are autonomous concepts. It is irrelevant what bodily injury means in other contexts in national legal systems. The correct inquiry is to determine the autonomous or independent meaning of “bodily injury” in the Convention: R. v. Secretary of State for the Home Department, ex p. Adan [2001] 2 A.C. 477. And the premise is that something that does not qualify as a “bodily injury” in the Convention sense does not meet the relevant threshold for recovery under it.'\footnote{Morris v. KLM Royal Dutch Airlines, [2002] UKHL 7, [2002] 2 A.C. 628, 636.}

23. In other words the instrument (here the Warsaw Convention) is to be seen as a separate source of law which exists besides the national law. That instrument should be
construed in its own light regardless of existing national law. This means that the case law and doctrine of other states should be compared to discover the prevailing construction of an instrument. If all parties to an instrument construe the instrument autonomously it may lead to a uniform construction of that instrument. That is however not always the case. It is possible that different autonomous constructions of a uniform instrument lead to various different solutions. Uniform construction can only be reached if the same solution is chosen in all the involved jurisdictions.

Uniformity

24. Uniform law creates legal certainty between those who are party to international contracts. An international instrument which applies instead of the domestic law of one state can greatly improve the required legal certainty. If all parties to the H(V)R construe the Rules as an autonomous instrument uniformity could be achieved. Autonomous construction does not however mean that all parties will reach the same construction. Indeed, different points of view on what the correct autonomous construction of a certain rule is can co-exist. Only if all parties apply the same (autonomous) construction of a rule it will lead to uniformity of law.

Application

25. Uniformity of law does not necessarily lead to uniform application of that law, i.e. the way the uniform law is applied in the various legal systems of the states who are parties to the convention. Uniform application will be impeded if certain aspects are not regulated by the convention. E.g. the division of the burden of proof is not regulated by the H(V)R. This means domestic law will apply. National concepts of law, such as e.g. the English doctrine of bailment will then impede the uniform application of the Rules.

2.3 Aids to the construction of the H(V)R

26. As was said in chapter 1, the task of any tribunal which is asked to apply or construe a treaty can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances. Rules of construction are points of view which can be used to ascertain what the parties meant by the words which they used. There are some who are sceptical ‘as to the value of these so-called rules and are sympathetic to the process of their gradual devaluation’ because these rules would create the danger of diverting a tribunal from its true task of ascertaining what the parties meant by the words which they used, into a wilderness of conflicting decisions of tribunals and opinions of writers. The example is given that one party invokes a rule of liberal construction and the other counters

34. See also Nieuwenhuis 1994, p. 205.
35. See Haak 2007, p. 163.
36. It has been said that legal certainty through unification is the main goal in international transport (Haak 2007, p. 156).
with a rule that an obligation created by a treaty should be construed restrictively that is, so as to impose the least restriction upon the freedom or sovereignty of the State undertaking this obligation. This warning should be heeded when applying rules of construction. Below I shall create a list of aids to construction which can help when applying one of the rules of construction mentioned above. The aids to construction have been derived from case law.

2.3.1 Stag Line

a) Plain meaning of the words

27. Lord Atkin said in the Stag Line case:

‘In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one’s interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law.’

b) Broad principles of general acceptation

28. And Lord Macmillan said:

‘It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign Courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.’

29. It has been said that the broad principles of general acceptation are rules based on a general theory of law. Van Delden created a list of 24 of such principles for his inaugural lecture in 1986. Examples are the principal that nobody may wilfully cause damage to another person without having to pay for the damage, the principle that a contract is only binding between parties to the contract and that third parties can not derive rights from that contract nor be harmed by that contract and the principle that a promise should be kept.

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43. Van Delden 1986, p. 16.
45. Van Delden 1986, p. 11 (example 7).
2.3 AIDS TO THE CONSTRUCTION OF THE H(V)R

30. If the meaning of the words is clear but lead to an absurd result then the objective construction has failed. Broad principles of general acceptation can be used to test if a result is absurd.47

2.3.2 Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.

c) The French text

31. French is the only authentic language of the Hague Rules. Though the preliminary work was done in the English language the official text is French, and the English version merely a translation of that. However, under the United Kingdom Act of 1924 the English wording has statutory force.48 It was held permissible to look at the French text by Devlin J in Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. Devlin J. said:

‘If there is any doubt, the French text (set out in Carver, 9th ed., p. 1065) makes it quite clear. Having regard to the preamble to the [Carriage of Goods by Sea Act, 1924] and the fact that the French text is the only authoritative version of the Convention, I think, notwithstanding [Counsel’s] objection, that it is permissible to look at it.’49

2.3.3 The Bunga Seroja

d) History of the Rules: compromise character and English roots

32. ‘The aim of the rules was to harmonize the diverse laws of trading nations and to strike a new arrangement for the allocation of risk between cargo and carrier interests. However, the Hague Rules were a compromise rather than a codification of any accepted and uniform practice of shippers. Consequently, one needs to be cautious about using the pre-existing law of any country in interpreting the rules. But that said, the fact is that the “immediate impetus for the Hague Rules came from the British Empire”. Furthermore, British lawyers and representatives of British carrier and cargo interests dominated the Committees responsible for the drafting of the rules which eventually became the Hague Rules. That being so, it seems likely that English law provided the conceptual framework for the Hague Rules – certainly the key terms of arts. III and IV are the subject of much common law doctrine. The rules should be interpreted with that framework in mind.’50

33. The history of the rules leads to two aids to construction: the Anglo-American/common law51 background and the compromise between shippers and carriers.

47. I have applied this method in § 3.9.5.
51. See also Nieuwenhuis 1994, p. 204.
52. See also Van der Ziel 2006, p. 205.
Reading the Hague Rules as a whole

34. ‘It is rudimentary to an understanding of the rules that they must be read as a whole so as to achieve the comprehensive objectives suggested by their language, history and purposes. Clearly, they are intended to strike a commercially practical and reasonable balance between the competing claims of cargo-owners, which have suffered loss, and carrier interests bound to standards of proper and careful conduct, but no more.’

35. E.g. in the Bunga Seroja case the construction of the perils of the sea exceptions was discussed in the light of the responsibilities of the carrier:

“The “perils of the sea” exception cannot be properly understood if it is divorced from its context. It is an immunity created in favour of the carrier and the ship and it is necessary, then, to consider what are the responsibilities of the carrier.”

2.3.4 The Jordan II

f) Purposive construction

36. The plain text of the convention may be construed literally or purposively. In Jordan II a purposive construction of the Rules was preferred above a literal construction.

g) Travaux Préparatoires

37. Regarding the Travaux Préparatoires Lord Steyn said:

‘It is, of course, a well established supplementary means of interpretation (...) It is, however, equally well settled that the Travaux can only assist if (...) they (...) clearly and indisputably point to a definite legislative intention, ...’

38. The Travaux Préparatoires may be used as an aid to construction. They may be useful to find out what the framers meant or intended with the words they used.

h) The views of the textbook writers

39. In Jordan II as well as in other cases the views of writers are taken into account. These views can help to find the intended construction.

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54. Ibid., par. 24.
56. See infra § 3.9.1.
2.3 AIDS TO THE CONSTRUCTION OF THE H(\text{v})R

\section*{i) The decisions in foreign jurisdictions}

40. Foreign decisions were discussed in the \textit{Jordan II} case to establish the international dominant point of view. Foreign decisions are an essential aid to achieve uniform construction.

\textit{Third party bill of lading holders?}

41. In \textit{Jordan II} the interests of third party bill of lading holders were considered. Lord Steyn said:

'It is true, as Counsel for cargo interests emphasized, that third party bill of lading holders will in practice often not have seen the charter-party or had advance notice of relevant charter-party clauses. This is a point of some substance. It is, however, an inevitable risk of international trade and cannot affect the correct interpretation of art. III, r. 2.'

\textit{Strict construction of the exceptions?}

42. Tetley is of the opinion that exceptions should be construed strictly.\textsuperscript{58} The main plank in Tetley's argument is the \textit{Gosse Millerd Ltd. v. Canadian Government Merchant Marine Ltd.}. In that decision Greer L.J. said:

'I think it is incumbent on the Court not to attribute to Art. IV (2) (a) a meaning that will largely nullify the effect of Art. III (2), unless they are compelled to do so clear words. The words “act, neglect, or default ... in the navigation or in the management of the ship”, if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III (2), would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation carefully to handle, carry, keep, and care for the cargo, which is imposed on shipowners by the last-mentioned rule. In my judgement, a reasonable construction of the rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV (2) (a).\textsuperscript{59}

43. I am of the opinion that the rule of strict construction of art. IV(2)a applies specifically for that exception and that it is not a general rule for all the exceptions. Art. IV(2)a must be strictly construed otherwise it would also cover incidents which cannot be qualified as either 'management of the ship' or 'management of the cargo'. If, in those instances, the exception were to be applied in favour of the carrier the duty contained in art. III(2) would be undermined.\textsuperscript{60} This is also Greer's argument for strict construction of art. IV(2)a. However, it does not mean that the rule of strict construction is a general rule which applies for all exceptions.

\textsuperscript{58} Tetley 2004, § VII.6.
\textsuperscript{60} See infra § 5.2.
44. A surprising rule of construction was formulated by professor Huybrechts in his valedictory address at Antwerp University on 2 March 2007. Huybrechts formulated the rule of construction that there is a presumption that the carrier is not liable for cargo damage. This presumption is based on the fact that the carrier can often rely on one of the exceptions of art. IV H(V)R. The rule is surprising because it is contrary to the French rule that there is a presumption of liability of the carrier in cases of cargo damage. The presumption of liability says that the carrier is liable for cargo damage unless he can successfully invoke an exception. The rule of Huybrechts however, says that the carrier is not liable as long as he can successfully invoke an exception. Both rules illustrate the system of the H(V)R. The rule of Huybrechts seems to emphasise that the carrier will be able to rely on an exception more often than not. However, both rules boil down to the same result; if the cargo interests prove cargo damage the carrier is liable unless he can successfully invoke an exception.

45. Before concluding how the rules of, and aids to construction are to be applied I shall discuss some problems regarding the uniform construction of the H(V)R and suggest some ways to expedite uniformity.

2.4 Problems regarding uniform construction of the H(V)R

2.4.1 Politics

46. In studying the liability of the carrier under the Hague Rules I encountered a number of recurring problems regarding uniform construction of the Hague Rules. The first major influence I encountered could be called ‘politics’. The clearest example of political views which intend to influence objective construction is the difference in application of the perils of the sea exception. The American construction of some of the exceptions seems to be based on political grounds which intend to protect cargo interests. This can be explained by the fact that in the past United States cargo interests relied on British ships that carried their goods under British bills of lading. The narrower view, more favourable to cargo interests, would favour nations of cargo-owners (such as the United States of America, Australia and many developing nations). The expansive notion of ‘perils of the sea’ for the purposes of the immunity provided by the Hague Rules, art IV(2) c might have developed in England reflecting the interest of great fleet-owning nations.

47. Although the American construction of the perils of the sea exception is so strict that the carrier usually cannot rely on it to escape liability the American construction of the fire exception is more in favour of the carrier. This can however be explained by the history of the fire exception which is based on the English Fire Statute. The English Fire Statute leads to the result that the carrier will rarely be responsible for damage by fire. In the 19th century this allowed English carriers to keep their freight rates down.

63. See also Berlingieri 2004.
64. See e.g. Bunga Seroja, sub point 11.
65. See also Bunga Seroja, sub 121.
66. Bunga Seroja, sub point 12.
2.4 Problems regarding uniform construction of the H(V)R

History shows that the American legislator was determined to give American shipowners the same benefit in order to be able to compete with the English shipowners.  

2.4.2 Older law dealing with the same issue

48. A second problem regarding uniform construction is the applicability of older (statutory) law dealing with the same issue. This problem becomes very clear when studying the different points of views regarding the application of the fire exception. The English and American Fire Statutes and the fire exception provided by art. IV(2)b H(V)R both deal with the exemption from liability of the carrier for damage caused by fire. The English and American Fire Statutes existed before the Hague Rules. The applicability of two different regulations to the same legal problem (is the carrier exempted from liability for damage caused by fire or not?) has led to controversy under US law. The controversy concerns the question if the carrier who wants to rely on the fire exemption is obliged to prove that he used due diligence to provide a seaworthy vessel or not. The answer to this question will influence the division of the burden of proof. The question is answered differently by the 9th Circuit on the one hand and the various circuit courts in the US. This is an example of an obstacle to uniformity caused by the existence and applicability of an older regulation for a problem which is also dealt with by the Hague Rules.

2.4.3 Manner of implementation

49. Another possible obstacle to uniformity could be the manner of implementation of the Hague Rules. As mentioned above the protocol of signature of the Hague Rules provides two options to contracting parties to give effect to the Rules. Either by giving the convention the force of law or by including the Rules in their national legislation in a form appropriate to that legislation. Art. 8:371 of the Dutch Civil Code is an example of the former option. That article defines the conditions under which the Hague Rules will be applicable to a Bill of Lading under Dutch law. Initially however the Netherlands had chosen for the latter option of codification of the Rules in their Commercial Code. This led to a problem. According to the legislative history and the Dutch Supreme Court this possibility to choose how the Rules should be implemented, meant that the Rules had no direct effect. The result was that the Rules were not directly effective in the Netherlands. Later the problem was solved when the Netherlands became party to the Visby Protocol. The Dutch legislator added article 8:371 par 3 to the Dutch Civil Code. That article regulates when article 1 to 9 of the Hague Visby Rules shall apply to a Bill of Lading.

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67. See infra § 5.3.2.
68. See infra § 5.3.
69. See infra chapter 5.
70. See Berlingieri 2004, p. 154.
2.4.4 National legal concepts

50. The existence of different legal concepts such as e.g. causality can also be an obstacle to uniformity. Also the existence of, or the use of, specific concepts of national law which are unknown in other jurisdictions. E.g. the contact of carriage of goods by sea is a contract of bailment under English law. The division of the burden of proof under a contract of bailment differs from the traditional division of the burden of proof under a contract of carriage of goods by sea under a Bill of Lading.\textsuperscript{72} There have been judgements rendered which apply the bailment division the burden of proof to a contract of carriage under a Bill of Lading.\textsuperscript{73} This has led to lack of uniformity with regard to the correct division of the burden of proof under the Rules.\textsuperscript{74}

51. In \textit{Bunga Seroja} Kirby identified this problem and pointed out that:

\begin{quote}
‘In construing a text such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion. That is a reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected in, or identical to, the equivalent law governing carriers’ liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition.’\textsuperscript{75}
\end{quote}

52. For the same reason uniform law should not be drafted in the idiom of any one legal system or family of legal systems.\textsuperscript{76}

53. Another problem arising from the incorporation of the Rules into the various legal systems is that different versions of the text exist which can lead to differences in the way they are construed.\textsuperscript{77} An example are the words ‘subject to the provisions of article 4’ in art. III(2) of the Rules. Under English law this led to the doctrine that the duty contained in art. III(1) is an overriding obligation and art. III(2) is not.\textsuperscript{78} Because the words ‘subject to the provisions of article 4’ were left out of the U.S. COGSA this distinction is not made in American law.\textsuperscript{79}

54. According to Mankabady the incorporation of the Rules into national legal systems caused states to treat that legislation as domestic law instead of as an international instrument. In his opinion the Rules should have been ‘adopted’ instead of ‘incorporated’ into the legal systems of each contracting state. Then the way would have been open for uniformity because the Rules would be considered international rules by

\begin{itemize}
\item \textsuperscript{72} See chapter 6 on the division of the burden of proof.
\item \textsuperscript{73} Ibid.
\item \textsuperscript{74} See also Mankabady 1974, p. 132.
\item \textsuperscript{75} \textit{Bunga Seroja}, sub point 138.
\item \textsuperscript{76} Clarke 2000, p. 127.
\item \textsuperscript{77} See also Yiannopoulos 1965, p. 387-388.
\item \textsuperscript{78} See infra § 4.3.1.
\item \textsuperscript{79} See infra § 4.3.2.
\end{itemize}
each contracting state. However, Mankabady wrote this in 1974 and since then the concept of autonomous construction has become widely accepted.

55. A last obstacle to uniformity which I shall mention is the problem that certain issues are not dealt with by the Rules. Issues such as the division of the burden of proof and the question if the duties of the carrier contained in art. III(1) and (2) are delegable or not. The first issue is dealt with in the draft UNCITRAL instrument for the carriage of goods by sea. Unfortunately the second question is not dealt with in the draft instrument.

2.5 Ways to improve uniform construction of the H(V)R

56. An easily accessible database containing cases and arbitral decisions in cases concerning the H(V)R is one way to improve uniform construction.

57. An important existing source for the H(V)R is Westlaw. Westlaw does however have a number of drawbacks. It only contains English, US and Canadian cases and materials. Because of the history of the Hague Rules these are of course important jurisdictions for the H(V)R. However it would be good to have a database which also contains Australian and continental cases. A good example of such a database is the CISG database of Pace Law School containing case law from numerous jurisdictions, translated to English and summarised. The database also contains legislative history and scholarly writings. A similar CISG database is the UNILEX database which is maintained by the Centre for Comparative and Foreign Law Studies in Rome. It would be ideal if such a database existed for the H(V)R.

58. Secondly it would be an improvement if unclear terminology were defined on a greater scale than the present definitions of art. I H(V)R. Art. 1 of the UNCITRAL draft convention on the carriage (wholly or partly) by sea is an improvement on art. 1 H(V)R. In that instrument the unclear exception concerning damage due to an error in the management of the ship has been deleted. However the ambiguous ‘perils of the sea’ has been kept without defining it.

59. It has been said that the use of regulations for the construction of an instrument could be incorporated in the instrument to improve uniformity. This would give judges a clear indication of the principles to adhere to when construing the instrument. An existing example is art. 7(1) CISG which reads:

‘In the interpretation of this convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.’

81. See the cases discussed below. See also Haak 2007, p. 163.
82. See also Mankabady 1974, p. 132.
83. See Kruisinga 2004, p. 16-17 on the development of such databases for cases concerning the CISG.
85. See <www.uncitral.org> under Working Group III.
The framers of the UNCITRAL draft instrument for the carriage of goods by sea incorporated the wording of art. 7(1) CISG into the UNCITRAL instrument. The Hamburg Rules contain a similar article. The article will remind courts and other tribunals that the international character and need to promote uniformity above national law. As is seen in numerous cases discussed in this book, this is already a generally accepted principal and I do not believe that the article will make a lot of difference.

60. Another method to counter divergence in the construction of an international instrument and to ensure that any tendencies towards divergence shall be corrected, would be the establishment of an international tribunal with ultimate jurisdiction to decide on questions arising out of the interpretation and construction of the international instrument. National courts could be required to suspend their decisions until after the judgement of this tribunal and then decide in accordance with that judgement. A similar procedure already exists within the framework of the European Community. It is probably unrealistic to suggest that such an international tribunal should be restricted to dealing with cases concerning the carriage of goods by sea. How would such a specialised commercial tribunal be financed? It is therefore suggested that an international commercial court is established, e.g. within UNCITRAL, which deals with questions with regard to all trade and transport treaties.

2.6 Conclusion

61. Although uniformity was intended there is diversity in the interpretation and construction of the Hague Rules. This diversity has a number of reasons, some of which were discussed in this chapter such as politics, different legal traditions, manner of implementation and art. VIII H(V)R. In my opinion the best solution to achieve real uniformity is the establishment of a supra national court such as the Court of Justice of the European Communities. The decisions of such a court would have to be binding otherwise the problems discussed above will continue to diversify the way an instrument is applied.

A second best solution would be the establishment of a database such as discussed above.

62. The object of the Rules is uniformity. This should always be the main rule regardless of which of the rules of construction are applied. The necessity of uniform construction means that foreign decisions and doctrine should also be consulted. In case of absence of uniformity it is necessary to give effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances. Rules of, and aids to construction are used to achieve this intended construction.

89. This is made clear by the formal name: ‘The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924’.

89. This is made clear by the formal name: ‘The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924’.
63. The three main rules of construction are the textual (or objective), the subjective and the teleological rule. The aids to construction which I derived from the cases discussed above are grouped under each main rule of construction.

Textual (or objective)

64. The plain text of the convention should prevail if it is clear. The Rules should be read as a whole. The French text should prevail if another language is unclear. If the objective construction leads to an absurd result a different rule of construction should be applied. Broad principles of general acceptation can be used to test if a result is absurd.

Subjective

65. If possible the Travaux Préparatoires can be used to find out what the framers meant by the words they used if the words are not clear. The common law background should be taken into account when necessary.

Teleological

66. The text of the convention can be construed so as to meet the object of the Rules. The compromise character of the Rules should be borne in mind.

67. These are the rules of and aids to construction which I shall apply in this thesis to discover the expressed intention of the parties to the Hague Rules, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances.