The regime for international air carrier liability: to what extent has the envisaged uniformity of the 1999 Montreal Convention been achieved?

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1 Introduction

1.1 Legal Context and Definitions

1.1.1 The Emergence of Aviation and the Need for an International Air Carrier Liability Regime

In the early 20th century, travel between China and Europe took approximately eight weeks by car for the most courageous travellers,[1] six weeks by boat, and two weeks by train.[2] The emergence of aviation in that era drastically impacted our notion of distance and quickened the speed of communication. As aviation reduced the distance between people, it also brought the promise of innovation in trade, information, leisure and the military.[3]

However, aviation was still an adventure. The feeling of being a pioneer when boarding an aircraft in the 1920s unavoidably included the acceptance of risk, given the relatively low safety level of this new mode of transport.[4] Between 1925 and 1929, the ratio of fatal accidents from air travel per hundred million passengers-kilometres was 28[5] compared to 0,02 in 1999.[6]

While the general liability regime was applied in the absence of a specific regime in many jurisdictions, States such as France, Germany and Italy started to adopt specific domestic rules governing air carriers' liability,

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1 Le Figaro, <http://www.lefigaro.fr/histoire/archives/2017/06/09/26010-20170609ARTFIG00288-pekin-paris-en-automobile-un-prodigieux-defi-en-1907.php> (accessed 28 May 2019).

2 Numa Broc, *Les voyageurs français et la connaissance de la Chine (1860-1914)*, t. 276, Fasc. 1 (559) Revue Historique 90 (Presses Universitaires Françaises, Juillet – Septembre 1986).

3 It is reported that while the American airline industry only carried 6 000 passengers in 1930, this figure rose to more than 450 000 in 1934, and up to 1 200 000 in 1938, Source: National Air and Space Museum, <https://airandspace.si.edu/exhibitions/america-by-air/online/innovation/innovation15.cfm> (accessed 1 September 2020).

4 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 55.

5 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 162.

6 Statistical Abstract of the United States, volume 125, Part 2006, p. 699 quoting ICAO, Source: Civil Aviation Statistics of the World, United States Census Bureau, <https://www2.census.gov/library/publications/2005/compendia/statab/125ed/tables/trans.pdf> (accessed 29 May 2019).

particularly in the case of death or injury to passengers.[7] The existence of various domestic regimes became problematic, however, when international carriage was involved. As noted by Leiden Professor of Air Law Daniel Goedhuis in 1937, difficulties arose when the applicable regimes were particularly different across the globe.[8] A simple review of the existing applicable air carriers' liability regimes during the infancy of aviation shows the disparity between them. For example, while one domestic legislation could allow an action to be brought against the carrier on the grounds of the contract of carriage, another enabled the passenger to sue in tort.[9]

Difficulty also arose when one State legislation, such as the United Kingdom's, considered a clause in the contract of carriage exonerating the carrier from all liability to be perfectly valid, whereas another, such as France's, did not.[10] In such a context of legal disparity, a passenger who was the victim of an accident between two States could hence have a claim that could be subject, depending on the conflicts of law rules of the Court seized, alternatively or cumulatively to:

- the laws of his or her nationality;
- the laws of his or her country of residence;
- the laws of the nationality or domicile of the carrier;
- the laws where the contract of carriage was signed;
- the laws of the country of departure or arrival or where the loss occurred;[11] and so forth.

The coexistence of several liability regimes therefore created an undesirable situation that needed to be addressed. If a new era of aviation could reduce barriers to travelling, an approximation of legislations should be able to do the same for legal difficulties.

7 *See*, Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* (Springer, 1937); Jean Constantinoff, *Le droit aérien français et étranger – droit interne et droit international* (Librairie de Jurisprudence Ancienne et Moderne, 1932); Max Litvine, *Précis élémentaire de droit aérien* (Bruylant, 1953); Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 28; Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 5 (Pedone, 1933).

8 *See*, Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* (Springer, 1937).

9 *See*, *Ibid.*, p. 3.

10 *See*, Fernand de Visscher, *Les conflits de lois en matière de droit aérien*, 48 Recueil des cours de l'Académie de droit international 325 (1934).

11 *See*, Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 11.

1.1.2 Possible Techniques of Approximation of Legislations

1.1.2.1 Harmonization and Unification Techniques

(1) Preliminary Remarks

Although the literature sometimes uses unclear wording,[12] there exist two major categories of techniques of legislative approximation: *Harmonization* and *Unification*. This distinction was notably used in the United Nations Resolution 2205 (XXI) of 17 December 1966 on the Establishment of the United Nations Commission on International Trade Law,[13] and in the Unidroit Statute.[14]

Due to the existence of several nuances, each instrument must receive an *ad hoc* analysis. This study will focus particularly on the distinction made between harmonization and unification, and assumes that harmonization entails changes in domestic legislations to 'produce more or less similar law in different countries',[15] while unification concerns the 'creation of identical rules'.[16]

These concepts should not, however, be confused with *codification*, which consists of a 'more precise formulation and systematization of rules of international law in fields where there already has been extensive State

12 *See*, for example, Innocent Fetze Kamdem, *Harmonisation, unification et uniformisation en droit des contrats: plaidoyer pour un discours affiné sur les moyens d'intégration juridique*, 13 Unif. L. Rev. 715-716, 722 (2008); Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* 32 (Pocketbooks of The Hague Academy of International Law, 2010); Hans Henrik Edlund, 'The Concept of Unification and Harmonization', in Morten Fogt (eds), *Unification and Harmonization of International Commercial Law – Interaction or Deharmonization* 7 (Wolters Kluwer, 2012); Camilla Andersen, *Defining Uniformity in Law*, 12 Unif. L. Rev. 5-54 (2007); Mireille Delmas-Marty, *Trois défis pour un droit mondial* 104-134 (Seuil, 1998).

13 Article 1: 'Decides to establish a United Nations Commission on International Trade Law […], which shall have for its object the promotion of the progressive harmonization and unification of the law on international trade, […]'. The meaning of these concepts is explained on the UNCITRAL's website as follows: '"Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international glevel', UNCITRAL, <https://uncitral.un.org/en/about/faq/mandate_composition/history> (accessed 12 February 2020).

14 Article 12(1): 'Any participating Government, as well as any international institution of an official nature, shall be entitled to set before the Governing Council proposals for the study of questions relating to the unification, harmonisation or coordination of private law'.

15 Martin Gebauer, *Unification and Harmonization of Laws*, Max Planck Encyclopedias of International Law para. 4 (2009).

16 *Ibid*.

practice, precedent and doctrine'.[17] Codification is therefore not possible in the absence of pre-existing international law in the sector.

(2) Harmonization Techniques

Harmonization of rules is a multifaceted process. In air law, the most commonly known method consists of the adoption of Standards and Recommended Practices (hereinafter the 'SARPs')[18] which are essentially organized under Articles 37, 38 and 90 of the Convention on International Civil Aviation (hereinafter the '***1944 Chicago Convention***').[19] Article 37 of the 1944 Chicago Convention sets out that each contracting State undertakes to collaborate to secure 'the highest practicable degree of uniformity' in regulations, standards, procedure and organization. The SARPs, however, are 'legally weak',[20] as they are not 'hard law'.[21] These statements stand by themselves with respect to Recommended Practices,[22] and are equally valid regarding Standards insofar as Article 38 of the 1944 Chicago Convention allows States to depart from them under certain conditions.[23]

(3) Unification Techniques

(i) Conflict of Laws Rules

The most habitual unification technique is to adopt common rules of conflict of laws in an international convention. At the end of the 19th century, the Hague Conference on Private International Law, the first world

17 *See*, Statute of the International Law Commission, Article 15.

18 A definition can be found in ICAO Resolution A 36-13, Appendix A: 'Standard – any specification for physical characteristics, configuration, materiel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of air navigation and to which contracting States will conform in accordance with the convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention'; 'Recommended Practice – any specification physical characteristics, configuration, materiel, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which contracting States will endeavor to conform in accordance with the Convention'.

19 Convention on International Civil Aviation, 7 December 1944, Chicago, ICAO Doc 7300, entry in force 4 April 1947.

20 Michael Milde, *International Air Law and ICAO* 161 (Eleven International Publishing, 2008).

21 *Ibid*., p. 164.

22 *See*, Jacques Naveau, Marc Godfroid, Pierre Fruhling, *Précis de droit aérien* 41 (2nd edition, Bruylant, 2006).

23 The domestic reception of the Annexes to the 1944 Chicago Convention, in which the SARPs are established, is subject to different views. *See*, Mendes de Leon Pablo, *Introduction to Air Law* 25 (10th edition, Wolters Kluwer, 2017); Vincent Correia, Béatrice Trigeaud, "Transport, navigation et sources du droit international – Remarques générales", in Saïda El Bouhoudi (eds), *Les transports au prisme du droit international public* 55 (Pedone, 2019); Federico Bergamasco, *The ITU and ICAO Regulating Aeronautical Safety Services and Related Radio Spectrum* 251-290 (Thesis, Université de Luxembourg, 2021).

organization for cross-border co-operation in civil and commercial matters, developed an arsenal of international conventions to set international rules of conflict of laws in various fields.[24] The application of domestic legislation determined by the common rules of conflict of laws, however, is not always convenient, as it can result in the application of a foreign law that conflicts with the core values of the seized State, or may merely be difficult to establish with certainty.

(ii) Uniform Rules

Another unification technique consists of the adoption of 'uniform rules', generally established in the form of an international convention (hereinafter '***Uniform Instruments***'). These uniform rules do not set common rules of conflict of laws but common substantive rules of private law. Professor Antonio Malintoppi compared these two techniques of unification as follows:

> C'est justement par rapport à l'unification des règles de fond que l'on préfère utiliser l'expression 'droit uniforme', bien que l'unification des règles de droit international privé donne lieu elle aussi à un droit uniforme constitué justement par des règles de droit international privé. En effet, l'adoption de règles uniformes de fond (règles matérielles) assure l'uniformité de la réglementation juridique des faits ou des rapports qui relèvent de l'activité humaine, alors que l'adoption de règles uniformes de droit international privé aboutit seulement à l'uniformité des critères visant le choix de la loi applicable sans pourtant garantir que la réglementation juridique des faits ou rapports envisagés soit elle aussi la même dans les divers systèmes juridiques intéressés. Dans ces conditions, c'est à juste titre que nous pensons devoir utiliser l'expression *droit uniform*e pour désigner les seules règles unifiées de fond.[25]

The first characteristic of these uniform rules is to eliminate the issue of determining the applicable domestic legislation, by establishing common substantive private rules.[26] The second, as pointed out by the same author, is that the effectiveness of uniform rules relies on their primacy over domestic legislation:

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24 *See*, for example, the Convention du 12 juin 1902 pour régler les conflits de lois en matière de mariage, and the Convention du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière de divorces et de séparations de corps; Convention on the Law Applicable to Traffic Accidents, 4 May 1971, The Hague, UNTS, 965, I-13925, entry in force 3 June 1975; Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, 5 July 2006, The Hague, UNTS, I-54441, entry in force 1 April 2017.

25 Antonio Malintoppi, *Droit uniforme et droit international privé*, 116 Recueil des cours de l'Académie de droit international 12 (1965).

26 *See*, Massimiliano Rimaboschi, *L'unification du droit maritime – Contribution à la construction d'un ordre juridique maritime* 57 (Presses Universitaires d'Aix-Marseille, 2006).

> […] le droit uniforme prime toute loi nationale et entraîne l'application d'un texte de droit spécial originairement arrêté dans une convention internationale.[27]

In essence, uniform rules could be defined as substantive private law rules, distinct from rules of conflict of laws. They are jointly elaborated with a view to unify the law, are adopted in the form of an international convention, and prevail over domestic rules.

Uniform Instruments were initially adopted for the rail sector and later for other modes of transportation.[28] Gradually, States enacted uniform rules in multiple areas such as: agency law, the international sale of goods, illegally exported objects, and collateral.[29]

However, in light of the diversity of Uniform Instruments and in the absence of a generally agreed definition of what constitutes 'uniform rules', each Uniform Instrument must be individually assessed.

(4) Distinction with Respect to the Techniques Used in European Union Law

Despite similarities, the techniques of approximation of legislations used in an international context should not be compared to those used in European Union law, through notably directives and regulations. European directives are defined particularly in Article 288 para. 3 of the Treaty on the Functioning of the European Union[30] as follows:

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

European directives and harmonization techniques are therefore similar in that they both modify domestic legislations, while offering a certain margin

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27 Antonio Malintoppi, *Droit uniforme et droit international privé*, 116 Recueil des cours de l'Académie de droit international 59 (1965). *See* also, Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 31-32 (Schulthess, 2012).

28 *See*, for instance, for the rail sector: the International Convention Concerning the Carriage of Goods by Rail, 14 October 1890, Bern; International Convention Concerning the Transport of Passengers and Luggage by Rail, 23 October 1924, Bern.

29 *See*, for example, under the auspices of Unidroit: Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1 July 1964, The Hague; Convention Relating to a Uniform Law on the International Sale of Goods, 1 July 1964, The Hague; International Convention on Travel Contracts (CCV), 23 April 1970, Brussels; Convention Providing a Uniform Law on the Form of an International Will, 26 October 1973, Washington; Convention on Agency in the International Sale of Goods, 17 February 1983, Geneva; Unidroit Convention on International Financial Leasing, 28 May 1988, Ottawa; Unidroit Convention on International Factoring, 28 May 1988, Ottawa; Unidroit Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, Rome; Convention on International Interests in Mobile Equipment, 16 November 2001, Cape Town.

30 Treaty on the Functioning of the European Union (2016 version), *Official Journal*, 7 June 2016, C 202/1.

of manoeuvre.[31] But, they are notably distinct insofar as European directives, unlike harmonization techniques, use autonomous concepts proper to European law, and their creation, implementation and uniform application are regulated by European Institutions.[32] In parallel, European regulations share some common features with uniform rules as defined above. Article 288 para. 2 of the Treaty on the Functioning of the European Union (in short the 'TFEU') provides that:

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

Both may thus contain substantive rules that should prevail over domestic legislation.[33] Nevertheless, they are different because European regulations are directly applicable in all Member States, and again, are embedded in the larger specific autonomous[34] legal framework of European Union law, and their uniform application is guaranteed by the Court of Justice of the European Union.[35] While European directives and regulations may appear at first sight similar to the approximation of legislation techniques described above, they are in reality quite distinct as they are incorporated into the specific legal system that is European law. The parallels are therefore limited.[36]

1.1.2.2 Other Techniques

Several other techniques for the approximation of legislation exist, and they vary according to their methods and results. Amongst these other techniques, two in particular have been used in international private air law.

One consists in 'cooperation' or 'coordination', or even 'convergence', pursuant to the terminology used. Under this approach, two or more States jointly decide not to adopt conflicting legislation and, wherever

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31 The EU also makes a distinction between 'minimum' and 'maximum' harmonization. The latter sets the floor or ceiling of harmonization, while the former allows Member States to adopt more stringent rules. *See*, Craig Paul, Búrca (de) Gráinne, *EU Law – Text, Cases and Material* 661 (7th edition, Oxford University Press, 2020).

32 *See*, Craig Paul, Búrca (de) Gráinne, *EU Law – Text, Cases and Material* 139, 236 (7th edition, Oxford University Press, 2020).

33 *See*, CJEC, 15 July 1964, *Flaminio Costa v. E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66; CJEC, 19 June 1990, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd*, C-213/89, ECLI:EU:C:1990:257.

34 *See*, CJEC, 5 February 1963, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Bestelingen*, C-26/62, ECLI:EU:C:1963:1.

35 *See*, CJEC, 22 October 1987, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, C-314/85, ECLI:EU:C:1987:452. It should also be mentionned that the European Commission is the guardian of the treaties. *See*, Treaty on the Functioning of the European Union, Article 258.

36 The analysis of the European Union, as a *sui generis* organization, is outside the scope of this study. Therefore, I will not elaborate further on techniques of approximation of legislation developed in the EU.

possible, each adopt compatible legislations. This approach is often found in advanced air service Agreements. For example, the 2007 Agreement on air transport between the European Union, its Member States, and the United States, amended in 2010, includes specific provisions in its Annex 2 on cooperation in competition issues, such as the enhancement of mutual understanding of each competition regime, the reduction of potential conflicts and the promotion of compatible regulatory approaches.[37]

The other method that could qualify as an 'integration' technique has notably been used by the European Union. Essentially, it consists in incorporating the existing legislation of a determined State into the legal order of another State.[38] Such a mechanism of integration or 'substitution' has been used, for example, in the 1999 Agreement on air transport between Switzerland and the European Union, as variously amended. In this agreement, the parties consented that specified European legislation would apply in Switzerland.[39] However, this solution does not prevent each State or jurisdiction from modifying their domestic law over time. This is why, in the case of the Agreement between the EU and Switzerland,[40] in order to ensure continuing adequacy as much as possible, the agreement also provides that the European legislation listed, in the Annex thereto, which would potentially be interpreted by the Court of Justice of the European Union (also referred hereinafter as the '***CJEU***') after the signing of the agreement, would be communicated to a Joint Committee in order to determine

37 Air Transport Agreement between the United States of America and the European Community and its Member States, 25-30 April 2007, Brussels and Washington, *Official Journal*, 25 May 2007, L 134/4. Annex 2, Article 2: 'The purpose of this cooperation is: 1. to enhance mutual understanding of the application by the Participants of the laws, procedures and practices under their respective competition regimes to encourage competition in the air transportation industry; 2. to facilitate understanding between the Participants of the impact of air transportation industry developments on competition in the international aviation market; 3. to reduce the potential for conflicts in the Participants' application of their respective competition regimes to agreements and other cooperative arrangements which have an impact on the transatlantic market; and 4. to promote compatible regulatory approaches to agreements and other cooperative arrangements through a better understanding of the methodologies, analytical techniques including the definition of the relevant market(s) and analysis of competitive effects, and remedies that the Participants use in their respective independent competition reviews'. *See*, Vincent Correia, *L'Union européenne et le droit international de l'aviation civile* 637-642 (Bruylant, 2013); Kate Markhvida, "Antitrust and Competition Law", in Paul Dempsey, Ram Jakhu (eds), *Routledge Handbook of Public Aviation Law* 328 (Routledge, 2017).

38 *See*, Vincent Correia, *L'Union européenne et le droit international de l'aviation civile* 525-529, 547 (Bruylant, 2013). In the absence of clear, generally agreed on terminology, it should be highlighted that the term 'convergence' is occasionally used to describe this technique of substitution.

39 Agreement between the European Community and the Swiss Confederation on Air Transport, 21 June 1999, Luxembourg, *Official Journal*, L 114/73 (regularly amended).

40 This is not the case for every agreement concluded by the European Union. Each agreement must receive an *ad hoc* analysis.

whether or not the interpretation given by said Court would also apply in Switzerland.[41]

1.1.3 Solutions Adopted for the International Air Carrier Liability Regime

1.1.3.1 Adopted International Conventions Governing the International Air Carriage Liability Regime

In light of previously established practice in the rail sector, several States chose to organize elements of the international air carriage liability regime by way of international conventions that would contain, amongst others, uniform rules.

On 12 October 1929, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter the '***1929 Warsaw Convention***' or '***WC29***') was adopted.[42] The 1929 Warsaw Convention has since then been regularly amended and supplemented by the following instruments:

– in 1955, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (hereinafter the '***1955 Hague Protocol***' or '***HP55***');[43]

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41 So far, the Joint Committee has not published any communication on this point. In parallel, the Swiss Civil Aviation Authority considers that European case law handed down after the signing of the bilateral agreement in 1999 does not bind Swiss Courts: 'These subsequent rulings and decisions can provide guidance to the Swiss federal authorities and Courts for interpreting EU aviation law, but they are not automatically binding. The independence of Swiss jurisdiction is therefore not affected', source: Swiss Federal Office of Civil Aviation, <https://www.bazl.admin.ch/bazl/en/home/good-to-know/air-passenger-rights/qestions-and-answers-pax-rights.html> (accessed 5 February 2020). This position also appears to be adopted by local Courts, such as the district Court of Bülach, which, in a decision on 2 February 2016, denied the application of an interpretation of the EU Regulation 261/2004 made by the Court of Justice of the European Union. *See*, Heinrich Hempel, *Keine Ausgleichsleistungen gemäss Fluggastrerechteverordnung bei Verspätung: Urteil des Bezirksgerichts Bülach vom 2. Februar 2016 mit Anmerkungen*, 148 Schweizerische Vereinigung für Luft- und Raumrecht 52-65 (2016). On 16 December 2019, a request for a preliminary ruling was lodged to the Court of Justice of the European Union by the Landgericht of Hamburg. The request concerned the scope of European case law regarding the interpretation of EU Regulation 261/2004 in the context of the Agreement on air transport between Switzerland and the European Union (*See*, *Official Journal*, 23 March 2020, C 95/17). The reference was however withdrawn from the roll. *See*, CJEU, 11 March 2020, *GDVI Verbraucherhilfe GmbH v. Swiss International Air Lines AG*, C-918/19, ECLI:EU:C:2020:281 (Order).

42 Convention for the Unification of Certain Rules Relating to International Carriage by Air, 12 October 1929, Warsaw, LNTS, 137, p. 11, entry in force 13 February 1933.

43 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, 28 September 1955, The Hague, ICAO Doc 7632, entry in force 1 August 1963.

– in 1961, the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter the '***1961 Guadalajara Convention***');[44]

– in 1971, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 (hereinafter the '***1971 Guatemala City Protocol***');[45]

– in 1975, the Additional Protocol No 1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (hereinafter the '***Additional Protocol No 1***');[46] the Additional Protocol No 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (hereinafter the '***Additional Protocol No 2***');[47] the Additional Protocol No 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (hereinafter the '***Additional Protocol No 3***');[48] and the Montreal Protocol No 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw

44 Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, 18 September 1961, Guadalajara, ICAO Doc 8181, entry in force 1 May 1964.

45 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, 8 March 1971, Guatemala City, ICAO Doc 8932, not in force.

46 Additional Protocol No 1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, 25 September 1975, Montreal, ICAO Doc 9145, entry in force 15 February 1996.

47 Additional Protocol No 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, 25 September 1975, Montreal, ICAO Doc 9146, entry in force 15 February 1996.

48 Additional Protocol No 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, 25 September, ICAO Doc 9147, not in force.

on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 (hereinafter the '***Montreal Protocol No 4***').[49]

These international instruments will be collectively referred to as the '***Warsaw Instruments***'.

In addition to these international instruments, the 1929 Warsaw Convention has been amended by several private agreements, such as the IATA Intercarrier Agreement on Passenger Liability (hereinafter the '***1995 IATA Agreement***');[50] some of which were eventually incorporated into the domestic legislation of certain States, such as the Inter Carrier Montreal Agreement (hereinafter the '***1966 Montreal Agreement***').[51] These instruments, together with the Warsaw Instruments, form what will be referred to as the '***Warsaw System***'.

In 1999, the existing multilayered system was recast by the Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter the '***1999 Montreal Convention***' or '***MC99***').[52] The 1999 Montreal Convention is the last adopted International Convention in force that aims particularly to regulate, at a global level, elements of carrier liability when performing international carriage by air, particularly with respect to delay, injury and death of passengers, and related matters.

Despite the fact that Article 55 of the 1999 Montreal Convention provides that it shall prevail over its predecessors,[53] there might still exist connections between at least the 1929 Warsaw Convention and the 1999 Montreal Convention. Therefore, for the purpose of this study, the 1929 Warsaw Convention and the 1999 Montreal Convention will be collectively referred to as the '***Conventions***'.

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49 Montreal Protocol No 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, 25 September 1975, Montreal, ICAO Doc 9148, entry in force 14 June 1998.

50 Also known as 1995 IIA. This Agreement was accompanied by an agreement adopted in 1996, the Agreement on Measures to Implement the IATA Intercarrier Agreement (also known as 1996 MIA), which had 116 international carriers signatories by 2020. *See*, IATA, <https://www.iata.org/contentassets/b7fc716af6a94192b1889420c7d573ce/mia-signatory-list.pdf> (accessed 15 April 2021).

51 13 May 1966 Inter Carrier Montreal Agreement, also known as CAB Agreement 18900. Made mandatory under American law. *See*, US 14 CFR Part 203.

52 Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, Montreal, UNTS, 2242, I-39917, entry in force 4 November 2003.

53 *See*, section 1.3.1.1(2).

1.1.3.2 *The Topology of Conventions Governing the International Air Carrier Liability Regime*

(1) Topology

A close look at the content of the Conventions shows that different categories of provisions are contained therein: final clauses, uniform rules, and referrals to domestic legislation clauses.

(2) Final Clauses

As in any international convention, final clauses are also included in the Conventions. In the 1999 Montreal Convention, final clauses are mostly found in Article 53 to 57. These final clauses organize questions regarding the signing, ratification, entry into force, denunciation, relationships with other instruments, territorial application and reservations. These final clauses confirm the international status of the Conventions and, as such, international law governs their interpretation and application.

(3) Uniform Rules

Uniform rules are widely spread throughout the Conventions, particularly from Article 1 to 52 in the 1999 Montreal Convention. They are the essence of the Conventions, as they govern the liability of carriers performing international carriage by air. Chapter 2 will examine the exact nature of these uniform rules as contained in the Conventions.

(4) Referrals to Domestic Legislation Clauses

(i) The Difference between Exclusions and Renvois
In addition to final clauses and uniform rules, the Conventions may also call on the application of domestic rules. This call can be divided into two sub-categories: exclusions and what will be known as *renvois* in this study. These notions will be discussed in the next two sections.

(ii) Exclusions
The sub-category pertaining to exclusion is infinite as it relates to all situations that are not governed by the Conventions. The title of the Conventions is clear in that respect, as they only concern 'the Unification of *Certain* Rules' (*italics added*). These Conventions are unambiguous on this point, confirming their ambition is not to regulate every potential air carrier's liability issues, and therefore leave undiscussed topics to domestic law.[54]

54 *See*, Antonio Malintoppi, *Droit uniforme et droit international privé*, 116 Recueil des cours de l'Académie de droit international 66-67 (1965).

The exclusions may be explicitly stated in the Conventions: for example, Article 2(3) of the 1999 Montreal Convention provides that:

> Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

They can also be implicit, as they cover elements that are not dealt with by the Conventions. In that regard, examples of implicit exclusions can be found in the *Travaux Préparatoires*.[55] The Minutes of the 1929 Warsaw Convention confirm, for instance, that said convention does not regulate ticket assignment:

> Et puis, il y a une question qui se pose; c'est celle de savoir si le billet de passage peut être cédé ou non. Nous ne voulons pas imposer ici l'incessibilité; mais nous voulons réserver au transporteur la possibilité d'exiger que le billet soit nominatif, avec la conséquence d'être incessible.[56]

They also underscore that flight cancellation is not governed by the Convention:

> Si vous avez l'inexécution totale, il n'y a aucun intérêt à avoir une convention internationale; l'expéditeur est dans son pays, il a toujours les ressources du droit commun. Comment et pourquoi voulez-vous appliquer ici la responsabilité limitée et ses conséquences?[57]

This exclusion is repeated in the Minutes of the 1999 Montreal Convention as follows:

> […] matters such as the non-fulfilment of a contract of carriage, denied boarding and refunds were not covered by the Warsaw Convention, [the Delegate of Sri Lanka] indicated that he would not wish it to be construed that such matters were within the ambit of the new Convention under the said Article, especially as more cases were anticipated involving matters of that nature as a result of the increased usage of codesharing and other similar arrangements.[58]

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55 *See*, section 1.3.3 on the use of the *Travaux Préparatoires*.

56 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 101.

57 *Ibid*., p. 52. *See also*, *Ibid*., p. 115: 'M. Ambrosini (Italie) – La convention ne prévoit pas le cas de non-exécution du contrat de transport. La Conférence devra le prévoir. Il faut savoir si on doit appliquer la convention ou non, c'est-à-dire le régime auquel le cas de non-exécution devra être soumis. M. De Vos –Rapporteur – C'est la loi nationale qui régit ce cas'.

58 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 235.

As will be seen further on, exclusions, and particularly implicit exclusions, may be a source of confusion when exclusivity is at stake.[59]

(iii) Renvois

The second sub-category of referrals encompasses *renvois* to domestic law made by the Conventions. References to a determined domestic law can be found, for example, in the jurisdiction clause of Article 33(4) of the 1999 Montreal Convention, which sets out that: 'Questions of procedure shall be governed by the law of the court seised of the case'. Similarly, Article 35(2) provides that: 'The method of calculating that period shall be determined by the law of the court seised of the case'. Article 45, regarding the addressee of claims, states: '[…] the procedure and effects being governed by the law of the court seised of the case'. Article 28 also sets out: 'In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments […]'.

Renvois are therefore not uniform rules. Rather, they are associated with conflict of laws rules. Their function is in contradiction to uniform rules, and they were often adopted when it was impossible to agree on a uniform rule.[60]

1.1.3.3 Concluding Remarks

Chapter 2 will discuss the choice to regulate the international air carriage liability regime mostly through uniform rules. The analysis will hopefully shed light on a clearer definition of uniform rules, as envisaged by the drafters of the Conventions.

1.2 Research Questions, Study Structure and Interest For Legal Science

1.2.1 The Formulation of Research Questions

This analysis sets out to determine whether the regime for international air carrier liability established by the 1999 Montreal Convention can be uniform, and to what extent it has achieved its aim of uniformity.

In order to better answer this question, the analysis is divided into three sub-questions:

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59 *See*, section 2.5.3.2.

60 *See*, for example: Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 57: '[…] comme il est à peu près impossible de fixer dans une formule unique les diverses conceptions juridiques des divers Etats, il a paru plus simple de préciser dans l'article 8 que les ayants-droit seraient déterminés par la loi nationale du défunt, mais que les droits de ces personnes seraient limités à la somme maximale admise à l'article 7'.

1° Is uniformity a predominant aim of the 1999 Montreal Convention?
2° If so, are there factors preventing this aim from being achieved?
3° In cases where such factors would be detected, could a higher degree of uniformity be achieved, and should it? And, if so, how?

1.2.2 Study Structure

1.2.2.1 Is Uniformity a Predominant Aim of the 1999 Montreal Convention?

The first step is to determine the reasons for the adoption of uniform rules in the 1999 Montreal Convention, and to sketch the contours of these uniform rules, especially with respect to their application. In other words, the analysis will start by verifying if the 1999 Montreal Convention aims not only to have uniform rules, but also expects them to be uniformly applied by Courts across ratifying States.

Chapter 2 will therefore analyse the regulatory environment that existed prior to the adoption of uniform rules, in order to determine the reasons that led governments to adopt them. If the analysis reveals the expectation of a uniform application of the Conventions, it will then search for the introduction of specific elements to facilitate this uniform application.

1.2.2.2 If so, are there Factors Preventing this Aim from Being Achieved?

(1) Categorization

Once the aim of uniformity of the Conventions has been analysed, this study will explore whether any factors prevent or may have prevented achieving uniformity. This question will be divided into 2 sub-questions. *First,* whether elements exist that might affect uniformity in the rulemaking process, that is to say, from the adoption of the Conventions. These potential factors will be referred to as 'internal' factors. *Second*, whether there are factors that are likely to affect uniformity as envisaged by the respective drafters over time, after the signing of the Conventions. This second category of potential factors for fragmentation will be referred to as 'external' factors.

(2) Internal Factors

Chapter 3 will examine the internal factors. This analysis will distinguish between drafting factors and other factors that may have existed at the time of the signing of the Conventions but are not related to semantic choices.

The drafting factors will be identified on the basis of examples of terms and concepts used in the Conventions. These examples will be selected from judicial decisions and *Travaux Préparatoires* that suggest their potential power to induce fragmentation.

(3) External Factors

Chapter 4 will focus on external factors. *First*, it will discuss whether regulatory changes have affected the Conventions' envisaged aim of uniformity; and if this is the case, to what extent. The regulatory changes will be assessed in light of both revisions to the initial text, and the emergence of new consumer rights at regional and domestic levels, as exemplified by the adoption in the European Union in 2004 of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (hereinafter '***EU Regulation 261/2004***').[61]

Second, it will review the response formulated by Courts to the possible elements found in Chapter 2. The outcome of this analysis is designed to apply the interpretation principles detailed in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the '***1969 Vienna Convention***')[62] to the possible aim of uniformity of the Conventions.

Third, it will assess the potential consequences of having the Conventions drafted in and translated into different languages.

1.2.2.3 Which Methods Can Enhance Uniformity?

Chapter 5 will seek to identify methods that are likely to achieve greater uniformity in the application of the 1999 Montreal Convention. The analysis will conduct a comparative examination of what is being and has been achieved in other sectors that are regulated by uniform rules, in order to determine methods that could be transposed into the framework of the 1999 Montreal Convention.

Particular attention will also be given to Artificial Intelligence mechanisms. The benefits of these new technologies, which promise to bring further uniformity to the way decisions are handed down globally in the near future, will be explored in the context of the 1999 Montreal Convention. The risks associated with these technologies will also be assessed in light of elements causing fragmentation, identified in the previous chapters. For the sake of providing context, a brief description of how Artificial Intelligence may aid the judicial decision-making process will be appended to this study. This ***Appendix*** will outline the concepts of Artificial Intelligence and Predictive Justice, and will offer a short illustration of how the principles of interpretations laid down in the 1969 Vienna Convention might be translated into an algorithm.

61 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *Official Journal*, 17 February 2004, L 046/1.

62 Vienna Convention on the Law of Treaties 1969, 23 May 1969, Vienna, UNTS, 1155, I-18232, entry in force on 27 January 1980.

1.2.2.4 Concluding Remarks

Chapter 6 will summarize the findings of this study and will contain personal recommendations for lawyers applying the 1999 Montreal Convention; for the ICAO, for States Party to the 1999 Montreal Convention; and for designers of applications using Artificial Intelligence. These recommendations may also contribute to amendments, or the drawing up of a new convention, should such steps be required by the conclusions drawn in this study.

1.2.3 Interest for Legal Science

From a scientific perspective, the purpose of this study is to analyse the application of the 1999 Montreal Convention by Courts in its particularity of containing uniform rules. To achieve this, five major legal points will be discussed.

First, this study will evaluate the importance of having uniform rules governing international air carrier liability, and the need for these rules to be uniformly applied.

Second, it will seek to determine the factors that may have contributed to a fragmentation of the 1999 Montreal Convention. From an early stage, authoritative authors acknowledged the existence of fragmentation in the context of the 1929 Warsaw Convention,[63] yet no such study has been carried out with respect to the 1999 Montreal Convention, which aimed to reduce fragmentation.[64] In addition, interest in the fragmentation of international law has grown recently, but from an international public law perspective,[65] not yet in the context of international private law.

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63 *See*, Peter Sand, *The International Unification of Air Law*, 30 Law and Contemporary Problems 400-424 (1965); Huib Drion, *Toward a Uniform Interpretation of the Private Air Law Conventions*, 19 J. Air L. & Com. 423-442 (1952); Euthymene Georgiades, *De la méthodologie juridique pour l'unification du Droit aérien international privé*, RFDAS 369-389 (1972); René Mankiewicz, *La Convention de Varsovie et le Droit Comparé*, RFDAS 136-150 (1969); Michel Pourcelet, *A propos d'un accident d'avion: la diversité des solutions données par les tribunaux*, Revue Générale de l'Air 211 (1973).

64 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 205: 'Since that time the Warsaw Convention had been fragmented into different protocols and into different views, interpretations and jurisdictions. The Conference was making history in consolidating, for the first time, what had been fragmented and by introducing new elements to cope with the vision for the 21st century'.

65 *See*, International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", in *Report of the International Law Commission on the Work of its Fifty-Eighth Session*, II (2) Yearbook of the International Law Commission 179 (2006); Anne-Charlotte Martineau, *Une analyse critique du débat sur la fragmentation du droit international* (Thesis, Université Panthéon-Sorbonne – Paris I, 2013), Archives Ouvertes, <https://tel.archives-ouvertes.fr/tel-01259489> (accessed 3 February 2019).

Third, the analysis aims to assess different means of enhancing uniformity in the near future, notably through a pioneering examination of the impact of Artificial Intelligence on Private Air Law. It will present suggestions for increasing the uniformity of the 1999 Montreal Convention by adopting new interpretation measures, either by way of amendments, or by the drawing up of a new convention.

Fourth, this study wishes to provide updates on topics that continue to animate the scientific literature with recent Court decisions from various jurisdictions.

Fifth, I shall assess the effectiveness of Articles 31 and 32 of the 1969 Vienna Convention with respect to the interpretation of the provisions of the 1999 Montreal Convention.

1.3 Methodological Framework

1.3.1 Legislative Instruments, International Customary Law and General Principles of Law

1.3.1.1 The 1999 Montreal Convention and the Warsaw Instruments

(1) The 1999 Montreal Convention

The analysis of the international air carrier liability regime will essentially focus on the 1999 Montreal Convention. This choice is predicated on the fact that the 1999 Montreal Convention is the most recent instrument in force governing the air carrier liability regime, and that it has been ratified by a considerable number of States and Regional Economic Integration Organizations. On 1 January 2021, 137 of them were Parties to the 1999 Montreal Convention.[66]

(2) The Warsaw Instruments

Nevertheless, to understand an analysis of the 1999 Montreal Convention, references to its predecessors are required. References will therefore also be made to the 1929 Warsaw Convention, which was also ratified by a significant number of States[67] and enjoys significant long-time application, and to its subsequent amendments.[68]

66 *See*, ICAO, <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 1 January 2021).

67 On 1 January 2021, 152 States ratified the 1929 Warsaw Convention, Source: ICAO, <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 1 January 2021).

68 *See*, section 1.1.3.1.

It could be argued that there is no need to analyse the previous applicable instruments, as Article 55 of the 1999 Montreal Convention stipulates that it prevails over its predecessors:

> This Convention shall prevail over any rules which apply to international carriage by air:
> 1. between States Parties to this Convention by virtue of those States commonly being Party to:
> (a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);
> (b) the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
> (c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);
> (d) the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol Done at The Hague on 28 September 1955, Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);
> (e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol, Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or
> 2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

However, the preamble of the 1999 Montreal Convention underlines the connections between them as follows:

> […] modernize and consolidate the Warsaw Convention and related instruments.

Moreover, while the 1999 Montreal Convention is a deep recast of the previous instruments, an important number of its provisions mirror those of the previous instruments.[69] The *Travaux Préparatoires* of the 1999 Montreal Convention also highlight the historical and substantive links between

69 *See*, George Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States – from Warsaw 1929 to Montreal 1999* 32 (Kluwer, 2010).

these instruments.[70] For these reasons, the 1999 Montreal Convention will be examined along with its predecessors.

1.3.1.2 Methodology for Treaty Interpretation

(1) Authentic v. Judicial Interpretations

The Conventions are regularly interpreted by Courts. Throughout this study, the methods used to interpret the Conventions will be examined in detail particularly in Chapter 4. Two categories of interpretation exist: authentic and judicial. The authentic interpretations are made directly by the drafters of the texts. They are of course rather rare. One example may nevertheless be found in the Final Act of the 1955 Hague Protocol, which confirms that an air waybill may be negotiable:

> The Conference, being of the opinion that nothing in the Warsaw Convention, as now in force, prevents the issue of a negotiable air waybill, Declares that Article IX of the Protocol to Amend the Warsaw Convention has been inserted therein only for the purpose of clarification.[71]

In the past, the French *Cour de cassation* considered authentic interpretation as the only acceptable interpretation:

> Et alors enfin qu'en tout état de cause la Cour d'appel a cru devoir se fonder sur une interprétation donnée par elle de la Convention de Varsovie; qu'elle était incompétente pour interpréter une convention diplomatique, acte de haute administration qui ne peut être interprété, s'il y a lieu, que par les puissances entre lesquelles elle est intervenue.[72]

However, after authentic interpretation, the judicial interpretation made by Courts is the most usual category of interpretations. The interpretation mechanisms are various. Among other things, they can be: literal, teleological, analogical, evolutionary, constitutionally oriented, equitable, and *ad absurdum*. Each jurisdiction has its own method(s) to interpret a legal text.

The next session shall shed light on interpretation methods under international law particularly with regards to those established by the 1969 Vienna Convention.

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70 *See*, for example, ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 217-220.

71 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 29-30.

72 Cass., 17 May 1966, 65-92986. *See also*, Cass., 3 June 1985, 84.94-404.

(2) Judicial Interpretations: Articles 31, 32 and 33 of the 1969 Vienna Convention

(i) The Scope of the 1969 Vienna Convention

As per its preamble, the 1969 Vienna Convention recognizes the increasing importance of treaties as a source of international law. As such, said convention created, but also codified, pre-existing rules of international customary law. With respect to the scope of this work, the 1969 Vienna Convention codified several preexisting principles of treaty interpretation. Recourse to these principles, which will be covered in the following section, can therefore either be made directly from the treaty or, as recognized by the International Court of Justice in *Guinea-Bissau v. Senegal*,[73] from international customary law.

(ii) The Principles of Interpretation

The general principles of treaty interpretation are established under Articles 31 and 32 of the 1969 Vienna Convention. Article 31 of the 1969 Vienna Convention provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

73 International Court of Justice, *Arbitral Award of 31 July 1989, Judgement, I.C.J. Reports 1991*, p. 53, at 44: 'These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point'.

And Article 32 sets out that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> *(a)* Leaves the meaning ambiguous or obscure; or
> *(b)* Leads to a result which is manifestly absurd or unreasonable.

The 1969 Vienna Convention also foresees the following specific provision, under its Article 33, for treaties authenticated in two or more languages:

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

This last provision may therefore be applicable to treaties such as the 1999 Montreal Convention which was drawn up in 5 authentic languages, namely: Arabic, Chinese, English, French, Russian and Spanish; and translated in several languages.

(iii) The Application of these Principles to the 1999 Montreal Convention

The application of these principles of interpretation to the 1999 Montreal Convention is confirmed by Article 1 of the 1969 Vienna Convention, which stipulates that '[it] applies to "treaties between States"'. With respect thereof, Article 2(1)(a) defines a treaty as follows:

> […] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The possibility of applying the principles of interpretation of the 1969 Vienna Convention to the 1999 Montreal Convention is also acknowledged, as reproduced hereinafter, by the *Travaux Préparatoires* of the latter:

> In echoing the Delegation of Peru's concern regarding the absence of any provision regarding the amendment of the Convention, the Delegate of Bangladesh enquired as to what procedure would be followed in the event that States Parties wished to take such action. The Chairman noted that, while there was no express provision in the Convention relating to its amendment, the over-arching legal régime established by the *1969 Vienna Convention on the Law of Treaties*, which codified the rules of international law relating to international treaty-making, would govern.[74]

The authoritative literature also confirms this point. Dr. Laurent Tran noted that, in the absence of specific international rules in the 1999 Montreal Convention, the principles set out in the 1969 Vienna Convention apply.[75] This view is shared by Professors Paul Dempsey and Michael Milde.[76] Dr. Laurent Chassot also considers that the *1969* Vienna Convention applies to the 1999 Montreal Convention, but highlights that its methodology is not exhaustive.[77]

(iv) The Application of these Principles to the Warsaw Instruments

The application of the interpretation principles of the 1969 Vienna Convention to the Warsaw Instruments is less obvious. Pursuant to Article 4 of the 1969 Vienna Convention, its principles do not apply to treaties concluded before its entry into force:

> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

In practice, this would mean that the interpretation principles established by the 1969 Vienna Convention would only apply to treaties concluded after its entry in force on 27 January 1980.

Nevertheless, this provision only concerns the 1969 Vienna Convention as a treaty under international law. Looking at the 1969 Vienna Convention as international customary law allows for a different approach and permits

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74 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 237.

75 Laurent Tran, *Le régime uniforme de responsabilité du transporteur aérien de personnes* 16 (Schultess, 2013).

76 Paul Dempsey, Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 45 (Centre for Research in Air & Space Law, McGill University, 2005); *See also*, Richard Gardiner, *Treaty Interpretation* 21-22 (2nd edition, The Oxford International Law Library, 2017); Olivier Cachard, *Le transport international aérien de passager* 143 (Les livres de Poche de l'Académie de droit international de La Haye, 2015).

77 Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 36-37 (Schulthess, 2012).

reference to the interpretation principles for the Warsaw Instruments. In a case before the House of Lords regarding the interpretation of 1929 Warsaw Convention as amended by the 1955 Hague Protocol, Lord Diplock noted, that despite the 1969 Vienna Convention only being applicable to treaties concluded after it came into force, it did no more than codify already existing public international law.[78] Therefore, for the purpose of this study, the principles of interpretation established under the 1969 Vienna Convention will not automatically be excluded when discussing Warsaw Instruments' judicial decisions. I have opted for the terms 'principles of interpretation' to reflect this reality.

(v) Understanding Articles 31 and 32 of the 1969 Vienna Convention in the Context of the Conventions

As seen above,[79] Articles 31 and 32 of the 1969 Vienna Convention are broadly drafted in order to encompass many different sorts of international conventions. While they do specifically aim to assist in the interpretation of international conventions, it should nevertheless be pointed out that their language is not easily accessible.

This section will try to give an indication as to the meaning behind each sentence of Article 31 and 32 of the 1969 Vienna Convention when applying the Conventions.

Article 31(1) of the 1969 Vienna Convention provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

It refers to four concepts, namely: ordinary meaning, context, object and purpose. With regards to the Conventions, the 'ordinary meaning' may be a tricky concept if one considers the terms used in the Conventions as autonomous, discussed in Chapter 2. The 'context' should not be understood as the *ratio legis* of the Conventions, but rather as the surrounding environment of a provision, such as its headings and the immediate words next to the concept that need to be compared and or interpreted.[80] Also discussed in Chapter 2, the 'object' and 'purpose' are specific to each treaty.

Article 31(2) of the 1969 Vienna Convention sets out additional elements to understand the previously enumerated concept of context. It reads as follows:

78 *Fothergill v. Monarch Airlines Ltd*, (1980) UKHL 6, at 88.

79 *See*, section 1.3.1.2(2)(ii).

80 *See*, Richard Gardiner, *Treaty Interpretation* 197 (2nd edition, The Oxford International Law Library, 2017).

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The preamble of the 1999 Montreal Convention is not free from vagueness about the purpose of the Convention and the continuity of Warsaw jurisprudence, as discussed in Chapters 2 and 4.

Point (a) is not particularly useful for the interpretation of the Conventions, as no agreement, for instance an explanatory report, accompanies the Conventions.[81]

Point (b) may however be useful as it makes references to ratification acts and reservations,[82] which will be discussed in Chapter 3.

Article 31(3) of the 1969 Vienna Convention does not, at first glance, assist much either with respect to the interpretation of uniform rules in particular, as it provides that other elements are to be taken together with the context:

> There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.

Point (a) refers to a subsequent agreement regarding the interpretation of the Conventions. In practice, with respect to the 1999 Montreal Convention none have been agreed so far.[83]

Point (b) does not particularly apply in the framework of the Conventions.[84]

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81 *See*, *Ibid.*, p. 235.

82 *See*, *Ibid.*, p. 239-240.

83 The 1999 Montreal Convention, however, has been used to interpret the Warsaw text. *See*, *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 155.

84 This provision concerns, for instance, applicable permits relating to traffic rights in cases of non-scheduled flights, required by subsequent practice despite the wording of Article 5 of the 1944 Chicago Convention: 'without the necessity to obtain prior permission'. *See*, International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* 39 (2018), Source: United Nations, <https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF> (accessed 21 February 2020). *See also*, the development below on Article 32 of the 1969 Vienna Convention, regarding the value of foreign decisions.

Point (c) triggers the question of whether an identical and constant interpretation given in different jurisdictions may eventually be considered as international custom, which by application of Article 38 of the Statute of the International Court of Justice, would be considered as international law. Unfortunately, in international law, a constant interpretation is not *per se* an international custom.[85]

Article 31(4) provides that:

> A special meaning shall be given to a term if it is established that the parties so intended.

This provision interferes with the 'ordinary meaning' set forth in Article 31(1). This study will therefore question whether the terms used in the Conventions should be interpreted as having 'ordinary' or 'special' meaning.[86]

In accordance with the *Travaux Préparatoires* of the 1969 Vienna Convention, there is no hierarchical order between the different tools provided under Article 31. As indicated hereinafter, their interaction should be regarded as a 'single combined operation':

> The Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article [27][87] would be a single combined operation. […] Once it is established – and on this point the Commission was unanimous – that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned.[88]

Article 32 supplies supplementary tools in limited circumstances:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

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85 *See*, Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit International Public* 437-439 (8th edition, LGDJ).

86 *See*, section 4.3.3.1.

87 Adopted as Article 31 with minor changes.

88 United Nations Conferences on the Law of Treaties, First and second sessions, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, Official Records, *Documents of the Conference*, United Nations, New York, 1971, p. 39-40, Source: United Nations, <https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf> (accessed 2 August 2019).

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

Textually, it refers to the *Travaux Préparatoires* and the 'circumstances' of the conclusion of the Conventions, but, as underscored by the International Law Commission, Article 32 should be understood as a non-exhaustive list.[89] The International Law Commission[90] and authoritative authors[91] have therefore considered foreign case law as a supplementary means of interpretation. This point is disputed, however, to the extent that Court decisions may be considered as falling under Article 31(3)(b) of the 1969 Vienna Convention. The trigger point seems to be the determination of foreign case law as a practice sufficiently extensive to demonstrate a common understanding of the Parties.[92]

(vi) Domestic Recognition of these Principles

Not all Parties to the 1999 Montreal Convention ratified the 1969 Vienna Convention. Amongst Parties to the 1999 Montreal Convention, the United States signed the 1969 Vienna Convention, but did not ratify it;[93] France did not even sign it;[94] and the European Union was not even allowed to sign it since its ratification is not open to regional organizations.[95]

As already mentioned,[96] the principles of interpretation of the 1969 Vienna Convention may nevertheless apply in these States as international customary law.

The goal of this study is not to examine if these principles are effectively applied in every single jurisdiction. However, because interpretation tools

89 *See*, International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* 6 (2018), Source: United Nations, <https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF> (accessed 21 February 2020).

90 *See*, *Ibid*., p. 26-28. However, the ILC's position seems to be different p. 36.

91 *See*, for example, Olivier Corten, *Méthodologie du droit international public* 233, 249 (Editions de l'université de Bruxelles, 2017). *Contra*, suggesting that judicial decisions may be considered as falling under Article 31(3)(b) of the 1969 Vienna Convention, Olivier Dörr, Kirsten Schmakenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary* 596 (2nd edition, Springer, 2018); Gilber Guillaume, *Du caractère impératif des dispositions de l'article 28 de la Convention de Varsovie*, RFDAS 227-239 (2006).

92 *See*, Richard Gardiner, *Treaty Interpretation* 256 (2nd edition, The Oxford International Law Library, 2017).

93 United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> (accessed 5 September 2020).

94 *Ibid.* France was essentially opposed to the notion of *jus cogens* as established in the 1969 Vienna Convention. *See*, Olivier Deleau, *Les positions françaises à la Conférence de Vienne sur le droit des traités*, 15 Annuaire français de droit international 7-23 (1969).

95 1969 Vienna Convention, Article 81.

96 *See*, section 1.3.1.2(2)(i).

used by Courts cannot be ignored, it will touch on their application by several selected Courts.[97]

1.3.1.3 Other International Conventions

In addition to the 1999 Montreal Convention, the Warsaw Instruments, and the 1969 Vienna Convention, this study might also, when necessary or for illustration purposes, make regular references to:

– other private air law conventions such as: the Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface (hereinafter the '***1933 Rome Convention***');[98] the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (hereinafter the '***1952 Rome Convention***');[99]

– other Uniform Instruments, particularly those relating to the transport sector, such as: the International Convention concerning the Carriage of Goods by Rail (hereinafter the '***1924 Bern CIM***');[100] the International Convention concerning the Carriage of Passengers and Luggage by Rail (hereinafter the '***1924 Bern CIV***');[101] the Convention concerning International Carriage by Rail (hereinafter the '***COTIF***');[102] the Protocol for the modification of the Convention concerning International Carriage by Rail (hereinafter the '***1999 Vilnius Protocol***');[103] the Convention on the Contract for the international Carriage of Goods by Road (hereinafter the '***CMR***');[104] the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (hereinafter the '***1974 PAL***');[105] the United Nations Convention on the Carriage of Goods by Sea (hereinafter the '***Hamburg Rules***');[106] or the United Nations Convention on the

97 *See*, section 1.3.2.3.

98 Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface, 29 May 1933, Rome.

99 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 7 October 1952, Rome, ICAO Doc 7364, entry in force 4 February 1958.

100 International Convention concerning the Carriage of Goods by Rail, 23 October 1924, Bern.

101 International Convention concerning the Carriage of Passengers and Luggage by Rail, 23 October 1924, Bern.

102 Convention concerning International Carriage by Rail (COTIF), 9 May 1980, Bern, UNTS, 1396, I-23353, entry in force 1 May 1985.

103 Protocol for the modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (Protocol 1999), 3 June 1999, Vilnius, UNTS, 2828, I-23353, entry in force 1 July 2006.

104 Convention on the Contract for the International Carriage of Goods by Road (CMR), 19 May 1956, Geneva, UNTS, 399, p. 189, entry in force 2 July 1961.

105 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 13 December 1974, Athens, UNTS, 1463, I-24817, entry in force 28 April 1987.

106 United Nations Convention on the Carriage of Goods by Sea, 31 March 1978, Hamburg, UNTS, 1695, I-29215, entry in force 1 November 1992.

Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter the '***Rotterdam Rules***');[107]

– and other international public law conventions, such as: the Convention Relating to the Regulation of Aerial Navigation (hereinafter the '***1919 Paris Convention***')[108] and the 1944 Chicago Convention.

1.3.1.4 Regional Legislations

This study may also use regional instruments regulating the international liability regime of air carrier and consumer rights, with particular reference to EU Regulation 261/2004, in the context of their interactions with the Conventions.

1.3.1.5 International Customary Law and General Principles of Law

International customary law and general principles of law will also be addressed, mostly in connection with hermeneutics issues.

1.3.1.6 Domestic Legislations

References to domestic legislations are required, because the Conventions occasionally proceed to *renvois* to domestic legislation. This recourse may also be justified insofar as certain domestic legislations, like regional legislations, develop consumer protection provisions that may interfere with the Conventions.

1.3.2 Judicial Decisions

1.3.2.1 Preliminary Remarks

Significant attention will be paid to international, regional and domestic judicial decisions. The importance of judicial decisions is recognized in international law by Article 38(1)(d) of the Statute of the International Court of Justice,[109] which reads as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> […]

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107 United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea, 11 December 2008, New York, not yet in force.

108 Convention Relating to the Regulation of Aerial Navigation, 13 October 1919, Paris, LNTS, 11, p. 173, entry in force 29 March 1922.

109 United Nations, <https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf> (accessed 6 September 2020).

> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[110]

This study will thus examine the jurisprudence produced by domestic and regional Courts regarding the 1999 Montreal Convention and its previous instruments.

In order to gain as broad a set of insights as my language skills and research tools will allow, I will try to identify highly regarded decisions in the most prominent jurisdictions in the sector, as well as in jurisdictions less commented on in English.

I will also occasionally have recourse to extensive abstracts of judicial decisions, when I deem them necessary for illustration purposes, or when specific points need to be verified. As much as possible, the abstracts used across this study will be quoted in their original language, or in the official language of the Conventions, with a personal translation when required.

1.3.2.2 Notions on the Implementation of International Conventions in Domestic Regimes

(1) A Variety of Implementation Methods

As this study will pay great attention to the interpretation of the Conventions given by Courts, it is important to highlight *ab initio* that different systems of reception of international conventions exist across the globe, and that their differences might influence the methods or the outcome of the interpretation of the terms used in the Conventions.

The signing of an international convention, or its entry in force at the international level, does not mean that the convention automatically becomes part of the legal system of a determined State.[111] The process of implementation depends on the law of each State. The national procedures vary from one State to another. Traditionally, three major systems of national reception of international instruments are considered: monist, dualist and mixed.

(2) The Monist System

In a monist system, the international rule generally becomes binding in the national legal order by a mere act of parliament or government.[112] This

110 Statute of the International Court of Justice, Article 59: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

111 *See*, Malcolm Shaw, *International Law* 689-692 (8th edition, Cambridge University Press, 2017).

112 The possibility for nationals to rely on international conventions may, however, depend on the self-executing character of the international convention at stake. *See*, Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit International Public* 753 (8th edition, LGDJ).

is the case in France and Belgium, where international conventions enter into their legal order as an international rule by a ratification Act generally consisting of only a few lines. The consequence is that the rule laid down in an international convention will retain an international dimension and will be considered superior in the hierarchy of norms to a domestic rule.[113]

In France, this principle of primacy is written into the Constitution and was upheld by the *Cour de cassation* in 1975[114] and by the *Conseil d'Etat* in 1989.[115] In Belgium, the *Cour de cassation* also confirmed this primacy in 1971.[116]

(3) The Dualist System

In a dualist system, by contrast, the international rule needs to be incorporated into a national statutory instrument for it to become binding. As a typical example, the United Kingdom required the 1999 Montreal Convention to be written into a domestic legislation instrument.[117] In this system, the international rule, once accepted, becomes a domestic rule, and has no inherent superiority in the pyramid of norms.

In theory, with exception of a few particularities, this means that the international rule may be overridden by a posterior domestic rule on the principle of *lex posterior derogat legi priori*. Consequently, in dualist systems, while a domestic legislation may technically override a pre-existing treaty, doing so would infringe on the principle of *pacta sunt servanda* established under Article 26 of the 1969 Vienna Convention.[118] Courts therefore must try to interpret the texts in a way that reconciles the two.[119]

(4) Mixed Systems

There are also mixed systems, such as the United States,[120] where in addition to treaties like the 1999 Montreal Convention, which require the advice and consent of the Senate, other types of international agreements – known as 'executive agreements' – are concluded by the executive without being submitted to the Senate. These executive agreements have a distinct signifi-

113 The question of the primacy of international conventions over Constitutions is disputed, however. An *ad-hoc* analysis is required for each jurisdiction.

114 Cass., 24 May 1975, 73-13.556, Bull., 1975, no 4, p. 6.

115 CE, 20 October 1989, no 108243.

116 Cass., 27 May 1971, Pasicrisie 886 (1971), ECLI:BE:CASS:1971:ARR:19710527.16.

117 The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002.

118 1969 Vienna Convention, Article 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. *See also*, 1969 Vienna Convention, Article 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. […]'.

119 *See*, American Society of International Law, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law> (accessed 29 May 2019).

120 *See*, Paul Dubinsky, *International Law in the Legal System of the United States*, 58 (Supplement) The American Journal of Comparative Law 455-478 (2010).

cance in domestic law.[121] Unlike in the United Kingdom, the 1999 Montreal Convention was not reproduced in a domestic instrument in the United States but was incorporated into the American legal order by way of a consent to ratification by the Senate.[122]

(5) The Potential Effects of the Variety of Implementation Methods

The distinctions amongst systems may not be without practical significance.[123] Their potential effects will be analysed, particularly with respect to consequences for Chapter 4's interpretation methodology.

1.3.2.3 Examined Jurisdictions Regarding Autonomy

(1) Preliminary Remarks

Where different mechanisms of interpretation used by Courts in the application of the Conventions must be compared to assess the contours of the autonomy of the terms used therein,[124] the selection of judicial decisions is narrowed to the jurisprudence of the highest Courts of 6 Parties to the 1999 Montreal Convention,[125] namely: the *Cour of cassation* of Belgium, the *Cour of cassation* of France, the Court of Justice of the European Union, the Supreme Court of Canada, the Supreme Court of the United Kingdom and the Supreme Court of the United States. This selection is justified in order to examine:

- jurisdictions that have ratified the 1969 Vienna Convention and those, that have not;
- monist, dualist and mixed systems of domestic reception of international conventions;
- and civil law, common law and hybrid jurisdictions.

In this selection, the ambition is to try to determine whether one or several of these distinctive elements play a significant role in the interpretation of the Conventions. A brief presentation of each of these jurisdictions is required in order to understand the legal environment in which the decisions to be explored were delivered.

121 *See*, US Senate, <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (accessed 29 May 2019).

122 *See*, US Department of State, <https://2001-2009.state.gov/r/pa/prs/ps/2003/23851.htm> (accessed 4 May 2021).

123 Even though this distinction does not reflect the nuances of each and every jurisdiction.

124 *See*, section 4.3.3.4.

125 ICAO, <https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> (accessed 7 September 2020).

(2) Selected Jurisdictions

(i) Belgium

Belgium is a monist State grounded in civil law. The *Cour de cassation* is the highest Court in the country regarding civil and commercial matters. Only appeals on points of law can reach its level.

The *Cour de cassation* historically held that, to interpret a term of private law in a provision of an international treaty, judges were allowed to refer to its usual legal definition under domestic law.[126] To this end, the Court has regularly given the *Travaux Préparatoires* an important role for interpretation purposes,[127] but has not accorded a high value to the title and preamble of legal instruments.[128] However, the Court fine-tuned its position and held in a 1977 decision regarding the interpretation of the 1929 Warsaw Convention that the following principles had to be applied:

> The interpretation of an international convention the purpose of which is the unification of the law cannot be done by reference to the domestic law of one of the contracting States. If the treaty text calls for interpretation, this ought to be done on the basis of elements that actually pertain to the treaty, notably, its object, its purpose and its context, as well as its preparatory work and genesis. The purpose of drawing up an international convention designed to become a species of international legislation would be wholly frustrated, if the courts of each State were to interpret it in accordance with concepts that are specific to their own legal system.[129]

Notwithstanding the above, the *Cour de cassation* handed down in 2000 an intriguing decision regarding the application of the CMR, but which could potentially be transposed *mutatis mutandis* to the Conventions. While confirming that the interpretation principles established in the 1969 Vienna Convention should be applied – which is consistent with Belgium being bound by said convention since 1992[130] – the Court held that, in substance, the mere violation of the objective of a treaty, in this case the aim of uniformity, was not sufficient to rule against the decision of an inferior Court.[131]

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126 Cass., 4 May 1972, 1 Pasicrisie 806-820 (1972), ECLI:BE:CASS:1972:ARR.19720504.5.

127 *See*, Cass., 18 September 1978, Pasicrisie 66 (1979), ECLI:BE:CASS:1978:ARR.19780918.1.

128 *See*, Cass., 3 November 1986, Pasicrisie 285 (1987), ECLI:BE:CASS:1986:ARR.19861103.9.

129 Cass., 27 January 1977, 1 Pasicrisie 574 (1977), ECLI:BE:CASS:1977:ARR.19770127.2. Source of translation: Bin Cheng, *Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris*, 2 Annals Air & Space Law 61 (1977).

130 *See*, United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> (accessed 15 September 2020).

131 Cass., 30 March 2000, C.9.70.176.N, ECLI:BE:CASS:2000:ARR.20000330.4: 'Que la seule invocation de la violation du but visé par le traité ne saurait davantage entraîner la cassation'.

(ii) Canada

Canada is a dualist State,[132] and one of the few jurisdictions that combines common law and civil law.[133] This specificity is known as Bijuralism. In 1970, the country became party to the 1969 Vienna Convention.[134]

Its application was confirmed by the Supreme Court in *Thibodeau*.[135] In this case, Justice Cromwell held that the methodology laid down in the 1969 Vienna Convention was applicable when it came to the interpretation of the 1999 Montreal Convention.

The Supreme Court of Canada has not often been seized on the interpretation of the Conventions, but three decisions notably stand out: namely, *Montreal Trust Company*, *Ludecke* and the already mentioned *Thibodeau* judgement.[136] These will be further discussed below.[137]

(iii) France

France is a monist State[138] and one of the most commented on civil law jurisdictions.

The role of highest Court is shared by the *Cour de cassation*, for civil and commercial law matters, the *Conseil d'Etat*[139] and the *Conseil Constitutionnel*[140] which respectively deal with administrative and constitutional law matters. As in Belgium, the *Cour de cassation* is not *per se* a fully competent higher degree of jurisdiction, as it can only confirm or reject an inferior decision on a point of law without creating *erga omnes* binding precedents. In order to understand the decisions of the *Cour de cassation*, a distinction should be made between *in specie* decisions (*arrêt d'espèce*) and principle decisions (*arrêt de principe*). The latter more substantially affect the law in practice.

The right to seize the *Cour de cassation* is less stringent than the right to appeal before the Supreme Court of the United States or the Supreme Court of the United Kingdom, with the consequence that approximately 25 000

132 *See*, on the matter, Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 Valparaiso University Law Review 927-934 (2010).

133 *See*, Canada Department of Justice, <https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/aboutb-aproposb.html> (accessed 15 September 2020).

134 *See*, United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> (accessed 15 September 2020).

135 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 365.

136 *Montreal Trust Company et al. v. Canadian Pacific Airlines*, (1977) 2 SCR 793; *Ludecke v. Canadian Pacific Airlines*, (1979) 2 SCR 63; *Thibodeau v. Air Canada*, (2014) 3 SCR 340.

137 *See*, sections 4.2.1.2, 4.3.2.2 and 4.3.3.4.

138 French Constitution, Article 55.

139 Competent notably in airport contentions. *See*, for example, CE, 9 October 2019, 430538, ECLI:FR:CECHR:2019:430538.20191009.

140 Competent notably for constitutional questions. *See*, for example, in matters of carriage of alien by air, CC, 25 October 2019, n°2019-810, ECLI:FR:CC:2019:2019.810.QPC.

decisions are handed down every year by the *Cour de cassation*,[141] with more than 20 decisions handed down on the 1999 Montreal Convention.[142]

When it comes to interpretation mechanisms, there is no general guidance under French law on how to proceed except in specific cases, such as criminal or contract law.[143] In case of ambiguity, Courts generally tend to stick to the literal meaning read together with the legislator's intent. Most decisions from the *Cour de cassation* are generally rather succinct, with the hermeneutical methodology used by the judges rarely being explained in the decisions. This is a response to the fact that a decision is supposed to be a logical deduction of the law, and that the Civil Code prohibits Courts from creating law[144] and prevents them from refusing to deliver a decision on the grounds that the law is silent or unclear.[145] The concise content of the decisions, based on the *imperatoria brevitas*, has slowly been changing since 2019, as Court's decisions have progressively presented more detailed reasoning.[146]

Since 1991, inferior Courts can request that the *Cour de cassation* give a non-binding opinion in the case of serious interpretation difficulties. However, so far, no opinion has ever been delivered with respect to air transport law.

Regarding the interpretation of international conventions, although France did not ratify the 1969 Vienna Convention, the *Cour de cassation* has recognized that some of its provisions were to be considered as interna-

141 Pascale Deumier, *Les principes Unidroit comme cadre de référence pour l'interprétation uniforme des droits nationaux*, 24 Revue Internationale de Droit Comparé 413-430 (2019).

142 There are *circa* 200 decisions on the Warsaw Instruments.

143 *See*, for instance, Cass., 26 April 1984, 82-12048, on the interpretation of a Groundhandling Agreement mirroring the provisions of the 1929 Warsaw Convention as amended. The Court held that a reference to the liability provisions of said convention remained a contractual agreement and therefore did not encompass its time limitations: 'Que c'est par voie d'interprétation de cette clause imprécise que la Cour d'appel a estimé qu'elle avait pour objet d'appliquer à la responsabilité du manutentionnaire la limitation de la réparation édictée au profit du transporteur aérien mais non d'étendre à la société France X… les règles particulières à l'action née du contrat de transport aérien et à sa prescription; que le moyen n'est donc pas fondé'.

144 French Civil Code, Article 5.

145 French Civil Code, Article 4.

146 *See*, Cour de cassation, *Rapport de la Commission Réflexion sur la Réforme de la Cour de cassation* (April 2017), Source: Cour de cassation, <https://www.courdecassation.fr/IMG///Rapport%20sur%20la%20réforme%20de%20la%20Cour%20de%20cassation.pdf> (accessed 22 January 2021); Cour de cassation, *Note relative à la structure des arrêts et avis et à leur motivation en forme développée* (December 2018), Source: Cour de cassation, <https://www.courdecassation.fr/IMG///NOTE%20MOTIVATION%2018%2012%202018.pdf> (accessed 22 January 2021). Under point 15 of this last document, the Court justified this change on the grounds that once translated, its decisions could more easily be understood by foreign law professionals: 'C'est ainsi qu'en pratique, un arrêt traduit dans une langue étrangère, devrait être aisément compris. A défaut, la Cour se priverait *ipso facto* des moyens d'influer sur l'opinion des juges et des juristes étrangers, comme elle est légitime à y prétendre dans un esprit de compétition des systèmes juridiques en confrontation (dialogue des juges)'.

tional customary law,[147] including Article 31, as explained by Professor Gilbert Guillaume, former President of the International Court of Justice.[148] However, the Court regularly avoids directly interpreting the Conventions itself[149], as it would rather proceed with the analysis of procedural or contractual provisions governed by domestic law under the vague domestic concept of 'sovereign interpretation'.[150] For example, in a 2014 cargo claim, the Court was asked to determine whether a person who was not party to a contract of carriage by air, but who was mentioned on the airway bill as the consignee together with the party to the contract, could be considered as the 'destinataire'/ 'person entitled to delivery' pursuant to the Conventions. In this case, the *Cour de cassation*, rather than analyse the term 'destinataire', held that the Court of Appeal had rightly and sovereignly interpreted the common intentions of the parties to the contract when it determined that the final consignee was the person entitled to delivery.[151]

This being said, when the *Cour de cassation* cannot avoid directly interpreting the Conventions, it generally tends to stick to a purely literal interpretation. In a decision pertaining to the value to be given to the word 'avarie', in a case where four out of sixteen boxes were missing at their destination and no complaint had been made within the required time limit, the Court confirmed that the word 'avarie' used under Article 26(2) of the 1929 Warsaw Convention did not encompass 'partial loss'. The

147 *See*, Cass., 16 October 2012, 11-13658. *See also*, Emmanuel Decaux, Olivier de Frouville, *Droit International* Public 44 (11th edition, Dalloz).

148 *See*, Cass., 8 July 2003, 99-10.590. *See also*, Guillaume Gilbert, *Du caractère impératif des dispositions de l'article 28 de la Convention de Varsovie*, RFDAS 233 (2006).

149 As mentioned in section 1.3.1.2(1), a widespread understanding was that international conventions could only be interpreted by way of authentic interpretations.

150 The same applies in most civil jurisdiction. In a decision regarding a catastrophe at Luxembourg airport, the Court of Appeal of Luxembourg confirmed that: 'En appliquant la Convention de Varsovie à l'accident du 6 novembre 2001 et en interprétant cette convention à la lumière de la jurisprudence française en la matière pour adopter les solutions retenues par les juges français, les juges de première instance ont exhaustivement motivé leur décision et leur choix de s'aligner sur la solution retenue par la Cour de Cassation française quant à la compétence matérielle de la juridiction répressive dans le cadre de l'application de la Convention de Varsovie est l'expression de leur pouvoir souverain d'appréciation' (CA, 29 January 2013, 61/13). This case concerned, *inter alia*, the possibility that family of air disaster victims could claim compensation before criminal Courts in Luxembourg. In the First instance, the Court held that, in line with French practice, criminal Courts were not competent to hear their claim (*Tribunal d'arrondissement*, 27 March 2012, 1344/12). The decision was reversed by the Court of Appeal (CA, 29 January 2013, 61/13 and CA, 21 January 2014, 44/14 V) and not further appealed before the *Cour de cassation*, which, however, was seized on a time limitation issue (*see*, section 3.2.5.2).

151 Cass., 8 July 2014, ECLI:FR:CASS:CO00655: 'Mais attendu qu'après avoir relevé que le nom de la société Régional CAE figurait dans la case "destinataire" de la lettre de transport aérien sous la mention "regional c/o bax global", c'est par une interprétation souveraine de la commune intention des parties et sans méconnaitre l'objet du litige, que la cour d'appel a estimé que la société Régional CAE avait la qualité de destinataire de la marchandise; que le moyen n'est pas fondé'.

Court disregarded the arguments raised by the airline, which referred to other provisions of the text and to the fact that 'avarie' was a generic term encompassing any damage suffered.[152]

Nevertheless, there is currently a trend towards an application of interpretation methods that is more in line with those established by the 1969 Vienna Convention. Notably, the objectives of the 1999 Montreal Convention have been taken into consideration in a number of decisions. When American Courts decided to refer claims emanating from the West Caribbean Airways catastrophe to French Courts on the grounds of the doctrine of *forum non conveniens*, the *Cour de cassation* held that French Courts were not competent as their seizure was not made according to the wishes of the claimants. The Court justified its decision with an the examination of the purposes and object of the 1999 Montreal Convention.[153] In addition, the *Cour de cassation* seems to have more and more implicit regard for foreign case law. This trend is particularly apparent in the evolution of the application of Article 17 of the Conventions.[154]

The decisions discussed below have been selected for their importance or relevance.

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152 Cass., 6 October 1992, 90-19667: 'que, la même distinction étant reprise au 2e alinéa de l'article 26 de cette convention, le terme "avarie" qui y est utilisé est un terme générique s'étendant de tout dommage subi, et, ce, d'autant plus que les trois termes "avarie", "destruction", "perte" ne correspondent pas à des événements spécifiques distincts et que le destinataire est, dans les trois cas, pareillement en mesure de constater le dommage lors de la réception de la marchandise […]'. This decision also reflects the disparity between French and English Courts. In *Fothergill*, the House of Lords was seized on approximately the same question as the French Court. While looking at the French version of the Convention, the English Court finally came to a divergent interpretation.

153 Cass., 7 December 2011, 10-30919: 'Attendu que l'option de compétence ouverte au demandeur par les textes susvisés s'oppose à ce que le litige soit tranché par une juridiction, également compétente, autre celle qu'il a choisie; qu'en effet, cette option, qui a été assortie d'une liste limitative de fors compétents afin de concilier les divers intérêts en présence, implique, pour satisfaire aux objectifs de prévisibilité, de sécurité et d'uniformisation poursuivis par la Convention de Montréal, que le demandeur dispose, et lui seul, du choix de décider devant quelle juridiction le litige sera effectivement tranché, sans que puisse lui être opposée une règle de procédure interne aboutissant à contrarier le choix impératif de celui-ci; Attendu que, pour refuser de se dessaisir du litige, l'arrêt retient, par motifs adoptés, que la juridiction de Fort-de-France tire son pouvoir de juger d'une application rigoureuse des règles de compétence de la Convention de Montréal et, par motifs propres, que, parmi les chefs de compétence résultant de cette Convention, figure le tribunal du lieu de destination du vol, soit celui de Fort-de-France, dont le titre de compétence ne saurait être remis en cause sous couvert d'un défaut de pouvoir juridictionnel; Qu'en statuant ainsi, alors que les demandeurs avaient choisi une autre juridiction compétente pour trancher le litige, la cour d'appel a violé les textes susvisés'.

154 *See*, section 3.2.2.

(iv) The United Kingdom

The United Kingdom is a dualist State,[155] where common law is applied by English Courts.

The interpretation of law is historically governed by three rules: the Mischief Rule, the Golden rule and the Literal Rule.[156] However, even before the ratification of the 1969 Vienna Convention in 1971,[157] English Courts regularly acknowledged that principles other than domestic interpretations should be applied with respect to the 1929 Warsaw Convention.[158]

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155 *See*, for the 1929 Warsaw Convention: Carriage by Air Act 1932 – with a translation in English of the 1929 Warsaw Convention in the Schedule; for the 1999 Montreal Convention: The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002.

156 *See*, The Law Commission and the Scottish Law Commission, The Interpretation of Statutes, 9 June 1969, points 23-28, Source: <https://www.scotlawcom.gov.uk/files/3912/7989/6877/rep11.pdf> (accessed 3 July 2019): 'The classic statement of the mischief rule is that given by the Barons of the Court of Exchequer in *Heydon's Case* [(1584) 3 Co.Rep. 7a]: "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), four things are to be discerned and considered:
1st. What was the Common Law before the making of the Act,
2nd. What was the mischief and defect for which the Common Law did not provide,
3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth,
And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico."*
[…]
The judges were, however, prepared to some extent to consider Coke's "cases out of the letter of a statute" under the so-called golden rule. This rule was attributed to Lord Wensleydale by Lord Blackburn in *River Wear Com- missioners v. Adamson* [(1877) 2 App. Cas. 743 at pp. 764-5] in which he said: "I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear." […] There was, however, a strong current of judicial opinion in favour of an approach rather stricter than that of the golden rule; this is commonly given the label of the literal rule. […]'.

157 *See*, United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> (accessed 15 September 2020).

158 Prior to the adoption of the 1969 Vienna Convention, the House of Lords already ruled on the interpretation of a shipping international convention that: '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' (*Stag Line Ltd v. Foscolo Mango & Co Ltd*, (1932) AC 328, at 350).

When it came to interpreting the Conventions, the House of Lords, whose judicial function was transferred to the Supreme Court in 2009,[159] regularly confirmed the application of the interpretation principles set out in the 1969 Vienna Convention. Concerning the interpretation of the 1929 Warsaw Convention, the Court notably held in *Morris*, that:

> The Convention must be considered as a whole, and it should receive a purposive construction […]. The ordinary and natural meaning of the words used in the English text in Part I of the Schedule provides the starting point. But these words must also be compared with their equivalents in the French text […] it should not be interpreted according to the idiom of English law. What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference. The exercise is not to be controlled by technical rules of English law or domestic precedent. It would not be right to search for the legal meaning of the words used, as the Convention was not based on the legal system of any of the contracting states. It was intended to be applicable in a uniform way across legal boundaries. In situations of this kind the language used should be construed on broad principles leading to a result that is generally acceptable […]. But this does not mean that a broad construction has to be given to the words used in the Convention. […] It is legitimate to have regard to the travaux préparatoires in order to resolve ambiguities or obscurities […]. But caution is needed in the use of this material, as the delegates may not have shared a common view. An expression by one of them as to his own view is likely be of little value if it was met simply by silence on the part of the other delegates. It will only be helpful if, after proper analysis, the travaux clearly and indisputably point to a definite intention on the part of the delegates as to how the point at issue should be resolved. It is also legitimate to have regard to subsequent practice in the application of the Convention, if this shows that the contracting parties were in agreement as to its interpretation, when it was entered into. General guidance to this effect is given, albeit only prospectively, in the Vienna Convention on the Law of Treaties […]. In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.[160]

Adherence to these principles in light of the 1999 Montreal Convention were lastly confirmed in the *Stott* judgement by Lord Toulson:

159 Supreme Court of the United Kingdom, https://www.supremecourt.uk/about/history.html (accessed 5 January 2021).

160 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 76-81.

> The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention, and that depends entirely on the proper interpretation of the scope of that Convention. The governing principles are those of the Vienna Convention on the Law of Treaties.[161]

The Supreme Court has been seized on the interpretation of the Conventions on a few occasions. The most highly regarded decisions are: *Fothergill*, *Sidhu*, *Herd*, *Morris*, *Re Deep Vein Thrombosis* and *Stott*.[162] This last one is the unique decision delivered by the Supreme Court regarding the interpretation of the 1999 Montreal Convention. I will analyse those decisions in greater detail in the next chapters.

(v) The United States

As described above, the United States employs a mixed system,[163] where common law is applied by Federal Courts. American Courts are used to handling distinct categories of law, which either spring from the Federal level or from each Federal State. Since the 1950's, the United States has also been familiar with private uniform law, such as the Uniform Commercial Code, which remains, however, within national boundaries.

The Supreme Court of the United States never attached a clear value to the Vienna hermeneutical principles,[164] despite the Federal government considering other provisions of the 1969 Vienna Convention as customary international law on the law of treaties.[165]

The Supreme Court has developed its own mechanisms of interpretation, which have slightly varied over time. The core principles can be found in *Floyd*, where the following methodology was adopted:

> When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used"'. […] 'Other general rules of construction may be brought to bear on difficult or ambiguous passages'. […] Moreover, 'treaties are construed more liberally than private agreements, and to ascertain their meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties'. […] We proceed to apply these methods in turn.[166]

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161 *Stott v. Thomas Cook Tour Operator Ltd*, (2014) UKSC 15, at 59.

162 *Fothergill v. Monarch Airlines*, (1980) UKHL 6; *Sidhu and Others v. British Airways Plc; Abnett (Known as Sykes) v. Same*, (1996) UKHL 5; *Fellowes or Herd and another v. Clyde Helicopters Ltd*, (1997) UKHL 6; *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7; *Re Deep Vein Thrombosis and Air Travel Group Litigation*, (2005) UKHL 72; *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15.

163 *See*, section 1.3.2.2(4).

164 *See*, Richard Gardiner, *Treaty Interpretation* 154 (2nd edition, The Oxford International Law Library, 2017).

165 United States Department of State, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (accessed 2 July 2019).

166 *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 534-535.

Seven important decisions regarding the interpretation of the Conventions filtered up to the level of the Supreme Court: the judgements *Franklin*, *Saks*, *Chan*, *Floyd*, *Zicherman*, *Tseng* and *Husain*,[167] though none of them interpreted the 1999 Montreal Convention. In order to determine the mechanisms used by American Courts to interpret the 1999 Montreal Convention, I have therefore chosen to include in this overview one of the most recent decisions delivered by a Circuit Court at the time of writing, that is to say the *Doe* decision delivered by the 6th Circuit Court in 2017.[168] All of these decisions will be further explored in the next chapters.

(vi) The European Union

The European Union is a Regional Economic Integration Organization. It is not bound by the 1929 Warsaw Convention,[169] but it is Party to the 1999 Montreal Convention.[170] Article 53 of said treaty indeed authorizes Regional Economic Integration Organizations such as the European Union to sign, ratify, accept, approve or accede to it. The European Union may therefore be considered as a 'State Party' to the 1999 Montreal Convention, with the exception of Articles 1(2); 3(1)(b); 5(b); 23; 24; 33; 46 and 57(b). The instrument of approval submitted to the ICAO by the European Community, which became the European Union from 1 December 2009, contained a declaration regarding the competence of the European Community with respect to certain matters governed by the 1999 Montreal Convention.[171]

The European legislator extended the scope of application of the 1999 Montreal Convention, normally limited by its Article 1 to 'international carriage', to flights operated inside the territory of a European Member State and set out that the liability of a Community air carrier for passengers

167 *Trans World Airlines, Inc. v. Franklin Mint Corp. et. al.*, 466 U.S. 243 (1984); *Air France v. Saks*, 470 U.S. 392 (1985); *Chan et. al. v. Korean Air Lines, Ltd*, 490 U.S. 122 (1989); *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991); *Zicherman, Individually and as Executrix of the Estate of Kole, et. al. v. Korean Air Lines Co, Ltd.*, 516 U.S. 217 (1996); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *Olympic Airways v. Husain, Individually, and as Personal Representative of the Estate of Hanson, Deceased, et al.*, 540 U.S. 644 (2004).

168 *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017). In 2018, the US Supreme Court denied the petition to proceed to a judicial review of the decision. *See*, US Supreme Court, <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/17-977.html> (accessed 5 May 2021).

169 *See*, CJEU, 22 October 2009, *Irène Bogiatzi, married name Ventouras v. Deutscher Luftpool, Société Luxair, société luxembourgeoise de navigation aérienne SA, European Communities, Grand Duchy of Luxembourg, Foyer Assurances SA*, C-301/08, ECLI:EU:C:2009:649.

170 Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), 2001/539/EC, *Official Journal*, 18 July 2001, L 194/38.

171 *See*, ICAO, <https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> (accessed 12 September 2020).

and their baggage should be governed by all provisions of the Montreal Convention relevant to such liability.[172]

The Court of Justice of the European Union is the highest Court for interpreting European Union law.[173] In contrast to decisions delivered by the French or Belgian *Cours de cassation*, those handed down by the CJEU are binding in each Court of the EU Member States, as confirmed by the CJEU itself, speaking with 'authority of an interpretation' about its decisions.[174] This gives the CJEU a paramount role when it comes to the interpretation of the 1999 Montreal Convention.

The reception of the 1999 Montreal Convention can be considered as falling into the category of monist systems. However, whereas the CJEU confirmed that international conventions concluded by the Union have primacy over secondary EU legislation – such as European regulations and directives[175] – it also consistently considers that international conventions concluded by the EU form an integral part of EU law.[176] Consequently, for the CJEU, international conventions concluded by the European Union bind Member States by virtue of their duties under EU law and not international law.[177]

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172 Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, *Official Journal*, 17 October 1997, L 285/1, as amended by Regulation (EC) No 889/2002 of the European Parliament and the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, *Official Journal*, 30 May 2002, L 140/2.

173 Known before 2009 as the Court of Justice of the European Community.

174 *See*, CJEC, 27 March 1963, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Nederlandse Belastingadministratie*, joined cases C-28/62, 29/62, 30/62, ECLI:EU:C:1963:6; CJEC, 5 March 1986, *Wünsche Handelsgesellschaft GmbH & Co v. Federal Republic of Germany*, C-69/85, ECLI:EU:C:1986:104 (Order). *See also*, Vincent Correia, *Air Passengers' Rights, 'Extraordinary Circumstances', and General Principles of EU Law: Some Comments After the McDonagh Case*, 13 Issues in Aviation Law and Policy 275 (2014); Craig Paul, Búrca (de) Gráinne, *EU Law – Text, Cases and Material* 507 (7th edition, Oxford University Press, 2020).

175 *See*, for example, CJEC, 10 July 2008, *Emirates Airlines - Direktion für Deutschland v. Diether Schenkel*, C-173/07, ECLI:EU:C:2008:400, at 43. There are explicit exceptions to this principle of primacy, but these exceptions do not stem from EU law but from the international convention itself. *See*, for instance, the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, which provides under its Article 2 that: 'Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned.' (*Official Journal*, 23 February 2013, L 51/8).

176 *See*, CJEC, 39 April 1974, *R. & V. Haegeman v. Belgian State*, C-181/73, ECLI:EU:C:1974:41.

177 *See*, Craig Paul, Búrca (de) Gráinne, *EU Law – Text, Cases and Material* 389 (7th edition, Oxford University Press, 2020).

With respect to interpretation mechanisms, the EU is not a Party to the 1969 Vienna Convention, as explained above.[178] The CJEU has nevertheless regularly considered the principles of interpretation laid down in the 1969 Vienna Convention as international customary law.[179] In *IATA*, the Court seized on the validity of EU Regulation 261/2004 with respect to the 1999 Montreal Convention confirmed, as reported below, that the principles of interpretation set out in Articles 31 of the 1969 Vienna Convention and of the 1986 Vienna Convention[180] should be applied as general customary of international law:

> It is to be noted with regard to the interpretation of those articles that, in accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose […].[181]

An application of this was notably reaffirmed in subsequent decisions, such as in *Walz*,[182] *Sanchez*,[183] and *Niki*.[184]

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178 *See*, section 1.3.1.2(2)(vi).

179 In an aviation case unrelated to the 1999 Montreal Convention, the CJEU also confirmed that the EU must respect international law, including customary international law, in the exercise of its powers. *See*, CJEU, 21 December 2011, *Air Transport Association of America e.a. v. Secretary of State for Energy and Climate Change*, C-366/10, ECLI:EU:C:2011:864.

180 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, Vienna.

181 CJEC, 10 January 2006, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, C-344/04, ECLI:EU:C:2006:10, at 40.

182 CJEU, 6 May 2010, *Axel Walz v. Clickair SA*., C-63/09, ECLI:EU:C:2010:251, at 22 and 23: 'In those circumstances, the term "damage", contained in an international agreement, must be interpreted in accordance with the rules of interpretation of general international law, which are binding on the European Union. In that connection, Article 31 of the Convention on the Law of Treaties, signed in Vienna on 23 May 1969, which codifies rules of general international law, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose […]'.

183 CJEU, 22 November 2012, *Pedro Espada Sánchez, Alejandra Oviedo Gonzáles, Lucía Espada Oviedo, Pedro Espada Oviedo v. Iberia Líneas Aéreas de España SA*, C-410/11, ECLI:EU:C:2013:747, at 21: '[…] even though the Vienna Convention on the Law of Treaties of 23 May 1969 does not bind either the European Union or all its Member States, that convention reflects the rules of customary international law which, as such, are binding upon the EU institutions and form part of the legal order of the European Union […]'.

184 CJEU, 19 December 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:1127, at 31.

So far, the CJEU has already interpreted the 1999 Montreal Convention in 10 major decisions:[185] *IATA*, *Walz*, *Sanchez*, *Wurcher*, *Air Baltic Corporation*, *Finnair*, *Guaitoli*, *Niki*, *Vueling* and *Altenrhein*.[186] These decisions will be examined more in detail in the following chapters.

1.3.2.4 Judicial Decisions Made under the Warsaw Instruments

I have chosen to refer to case law made under the Warsaw Instruments in this analysis. The *Travaux Préparatoires* of the 1999 Montreal Convention show that discussions on their continuity have taken place. The United States wished, for instance, for the preamble to include the following additional clause, making express reference to existing jurisprudence:

> […] in recognition of the frequently-cited objective of preserving, to the extent appropriate in these circumstances, the existing jurisprudence, standards and language which had been developed from 1929 onwards through many instruments.[187]

France, however, was opposed to this additional inclusion for the following reasons:

> Firstly, it would constitute an attack on the separation of powers to indicate to the judge what direction to take in the future. Judges must be free to take their decisions on the basis of the Convention itself, without having earlier jurisprudence imposed upon them. Secondly, the fact that jurisprudence varied substantially from State to State precluded the inclusion of a general reference to jurisprudence such as the one proposed. Thirdly, as the adoption of the Convention would entail the application of new law, there would necessarily be new juris-

185 Several other decisions have also delimited the scope of the 1999 Montreal Convention when interpreting the EU Regulation 261/2004. Certain of these decisions will be discussed in section 4.2.2.2.

186 CJEC, 10 January 2006, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, C-344/04, ECLI:EU:C:2006:10; CJEU, 6 May 2010, *Axel Walz v. Clickair SA.*, C-63/09, ECLI:EU:C:2010:251; CJEU, 22 November 2012, *Pedro Espada Sánchez, Alejandra Oviedo Gonzáles, Lucía Espada Oviedo, Pedro Espada Oviedo v. Iberia Líneas Aéreas de España SA*, C-410/11, ECLI:EU:C:2013:747; CJEU, 26 February 2015, *Wucher Helicopter GmbH, Euro-Aviation Versicherungs AG v. Fridolin Santer*, C-6/14, ECLI:EU:C:2015:122; CJEU, 17 February 2016, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba*, C-429/14, ECLI:EU:C:2016:88; CJEU, 12 April 2018, *Finnair Oyj v. Keskinäinen Vakuutusyhtiö Fennia*, C-258/16, ECLI:EU:C:2018:252; CJEU, 7 November 2019, *Adriano Guaitoli, e.a. v. easyJet Airline Co. Ltd*, C-213/18, ECLI:EU:C:2019:927; CJEU, 19 December 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:1127; CJEU, 9 July 2020, *SL v. Vueling Airlines SA*, C-86/19, ECLI:EU:C:2020:538; CJEU, 12 May 2021, *YL v. Altenrhein Luftfahrt GmbH*, C-70/20, ECLI:EU:C:2021:379.

187 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 218.

> prudence. To stipulate that reference should be made to existing jurisprudence would be tantamount to depriving the Convention of any legal force. The Courts must have the freedom to develop new jurisprudence with regard to the new legal instrument.[188]

Moreover, current jurisprudence is also divided on this point. For instance, the Supreme Court of the United Kingdom admitted in *Stott* a certain continuity with previous case law.[189] Saugmandsgaard Øe, Advocate General to the Court of Justice of the European Union, also opined in *Niki* that:

> […] in spite of the differences between Article 17 of the Warsaw Convention and Article 17(1) of the Montreal Convention, I am of the view that the Montreal Convention must nonetheless also be interpreted in the light of the decisions relating to the Warsaw Convention, given the essential equivalence between them.[190]

Taking an opposing view, Courts in the United States have sometimes adopted a different approach. In *Doe*, the 6th Circuit Court held that, given that the wording of Article 17 of the 1999 Montreal Convention was slightly different from the previous text, the decisions delivered under the previous instruments should not have any legal authority:

> […] the Montreal Convention is a new treaty that we interpret as a matter of first impression, and there is no legal authority that would require us to import *Erhlich*'s Warsaw Convention determination to govern this Montreal Convention claim.[191]

In light of the above elements, and in spite of Article 55 of the 1999 Montreal Convention,[192] as well as the discussions on the preamble,[193] the mere existence of divergent opinions in jurisprudence over continuity between the instruments calls for an analysis of the 1999 Montreal Convention that

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188 *Ibid.*, p. 220.

189 *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15, at 24-28 and 63.

190 CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), at 27.

191 *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017), at 415. That Court, however, later admitted, at 425-426, that national or foreign decisions rendered under the previous text were still valid precedent, insofar as they concerned similar provisions and were delivered before the ratification of the 1999 Montreal Convention: 'Because these Supreme Court cases analyzed aspects of the Warsaw Convention that we have no reason to believe have changed following the ratification of the Montreal Convention (and that neither party has argued have changed following the ratification of the Montreal Convention), it is reasonable to conclude that these cases form part of the "precedent" consistent with which, according to the Explanatory Note […], the drafters expected signatories to construe Article 17(1) of the Montreal Convention. Accordingly, we have adopted *Saks*' definition of "accident", and our discussion of damages […] will be guided by *Zicherman*'s deference to the forum jurisdiction's choice-of-law rules'.

192 *See*, section 1.3.1.1(2).

193 *See*, *Ibid*.

includes references to judicial decisions developed under the Warsaw Instruments.

1.3.3 *Travaux Préparatoires*

1.3.3.1 Their Relevance

As part of an analysis of the 1999 Montreal Convention, references may be made to the Working Documents or 'Travaux Préparatoires' of different international instruments. The *Travaux Préparatoires* mainly record work done prior to and during diplomatic conferences, which often leads to the adoption of international instruments. This analysis may make regular use of the *Travaux Préparatoires* of the following diplomatic conferences:

– *Conférence Internationale de Droit Privé Aérien,* held in Paris, in October and November 1925 (hereinafter the '***1925 Paris Conference***'),[194] which prepared the *II Conférence Internationale de Droit Privé Aérien,* held in Warsaw, in October 1929 (hereinafter the '***1929 Warsaw Conference***'),[195] which was concluded by the adoption of the 1929 Warsaw Convention;

– International Conference on Private Air Law, held in The Hague, in September 1955 (hereinafter the '***1955 Hague Conference***'),[196] which was concluded by the adoption of the 1955 Hague Protocol;

– International Conference on Air Law, held in Guatemala City, in February and March 1971 (hereinafter the '***1971 Guatemala City Conference***'),[197] which was concluded by the adoption of the 1971 Guatemala City Protocol;

– International Conference on Air Law, held in Montreal, in September 1975 (hereinafter the '***1975 Montreal Conference***'),[198] which was concluded by the adoption of the 1975 Additional Protocols No 1, 2 and 3 and the Montreal Protocol No 4;

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194 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926.

195 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930.

196 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956; ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956.

197 ICAO Doc 9040, International Conference on Air Law, Guatemala City, February-March 1971, volume I, *Minutes*, Montreal, 1972; ICAO Doc 9040, International Conference on Air Law, Guatemala City, February-March 1971, volume II, *Documents*, Montreal, 1972.

198 ICAO Doc 9154, International Conference on Air Law, Montreal, September 1975, volume I, *Minutes*, Montreal, 1977; ICAO Doc 9154, International Conference on Air Law, Montreal, September 1975, volume II, *Documents*, Montreal, 1977.

– International Conference on Air Law, held in Montreal, in May 1999 (hereinafter the '***1999 Montreal Conference***'),[199] which was concluded by the adoption of the 1999 Montreal Convention.

As discussions at the 1925 Paris Conference and the 1929 Warsaw Conference were reported in French only, I will quote the *Travaux Préparatoires* in their original language, with an accompanying translation when required.

1.3.3.2 Their Limitations

The value of the *Travaux Préparatoires* is limited under international law. As seen earlier,[200] Article 32 of the 1969 Vienna Convention only grants them a subsidiary rank for interpretation purposes.

The reason the 1969 Vienna Convention limits their use to specific situations may stem from the fact that the *Travaux Préparatoires* are not always clear, and certainly are not exhaustive. Indeed, not all preparatory work leading to the conferences is even recorded. For the 1929 Warsaw Convention, the *Comité International Technique d'Experts Juridiques Aériens* (hereinafter the 'CITEJA') did four years of preparation work to adopt the draft text. While submitted to the 1929 Warsaw Conference, it was not recorded in full in the official *Travaux Préparatoires*. Even if the 1999 Montreal Convention's *Travaux Préparatoires* are more detailed and contain most of the preparatory work, they still are not exhaustive.

I have also noted that not every formal or informal discussion that took place during the conferences could have been recorded. For example, when the subject required long political negotiations, only the outcome of the compromise was recorded in the *Travaux Préparatoires*.[201] In addition, the work of the drafting committee established by the conferences is rarely recorded. It is particularly missing in the *Travaux Préparatoires* of the 1929 Warsaw Convention. Yet, a recording of the drafting committee's work could have provided useful insights into the choice of words, such as 'accident'.[202] The 1999 Montreal Convention's *Travaux Préparatoires* are more exhaustive with some of the drafting committee's discussions being made publicly

199 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999; ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume II, *Documents*, Montreal 1999; ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume III, *Preparatory Material*, Montreal 1999.

200 *See*, section 1.3.1.2(2).

201 *See*, section 3.2.4.3.

202 *See*, section 3.2.2.

available.[203] Nevertheless, there is no full record of such discussions, and this study will only highlight, when deemed necessary, the delegates' participation when they are quoted.

Additionally, the limited value of the *Travaux Préparatoires* in a legal context may be explained by the fact that the conferences were attended not only by legal experts but also by civil servants, such as diplomats. The content of the Minutes must therefore be approached with care as they may express not only legal views from experts but also political views from individuals not familiar with legal matters.

1.3.3.3 Their Importance for Research Questions

Taking into account these limitations, the *Travaux Préparatoires* still have a significant importance in this study.

First, they may occasionally provide a clear indication of the Conventions negotiators' intentions, bearing in mind that the Minutes were sometimes sent to delegations for approval prior to their publication.[204]

Second, their paramount role was acknowledged during the negotiations with respect to future interpretation of the provisions of the 1999 Montreal Convention:

> Thus whatever position the Conference arrived at with regard to the issue of mental injury, its intentions regarding the scope of liability must be made clear in the 'travaux préparatoires' of the Conference for the future interpretation of the Convention;[205]
>
> […] it could not be left to the Courts to subsequently interpret the text of Article 16, paragraph 1, independently of the Conference's 'travaux préparatoires';[206]
>
> […] [the Delegate of the United States] noted that the conclusion which they had reached, and which they now proposed to the Group, was that the latter put together a series of hypothetical cases to illustrate how paragraph 2, subparagraph (a), would work in practical terms and include them in the 'travaux préparatoires' of the Conference. The Delegate of the United States averred that

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203 *See*, ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume II, *Documents*, Montreal 1999.

204 *See*, for example in the Minutes of the 1955 Hague Conference: 'The President suggested – and the Conference agreed – that the minutes of the Conference be approved by the President and that the draft minutes be sent to the various Delegates so that they might make amendments which they considered appropriate before final publication', ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 414.

205 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 111.

206 *Ibid.*, p. 116.

> that would be of great assistance to Courts, probably more so than if the Group were to spend several days trying to perfect the language of sub-paragraph (a).[207]

Third, because Courts have occasionally referred to them.[208]

1.3.4 Other Sources

In addition to the tools used to answer the questions posed by this study, references will also be made to the most authoritative scientific literature available. Particular care will be taken to diversify the linguistic origins of the sources to the best of my skills and the availability of sources. For consistency, references to scientific literature may not always appear according to their original system in this study, but key information allowing them to be easily retrieved are kept in a format generally admitted in the English-speaking world.

Some references will also be made to private instruments, such as the 1995 IATA Agreement, and to industry practices.

Other information may also be taken from public websites and contacts with practitioners, the International Civil Aviation Organization, the International Air Transport Association, National Civil Aviation Authorities, UNIDROIT and developers of applications of Artificial Intelligence.

1.3.5 Concluding Remarks

A more standard presentation could have been used to describe the methodology, using Article 38(1) of the Statute of the International Court of Justice, which provides that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Despite the merits of the identification of the above sources, doing so in this study would not have allowed me to explain soon enough the close ties between the Warsaw Instruments, related judicial decisions, and the 1999 Montreal Convention.

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207 *Ibid.*, p. 154.
208 *See*, section 4.3.3.3.

It would also have minimized the importance of the *Travaux Préparatoires*, domestic legislations and private law commentators, which all together are essential to conduct this study.

The ambition here is not to step into the shoes of an international judge. Rather, it is to determine whether the regime for international air carrier liability established by the 1999 Montreal Convention can be uniform, and if so, to what extent this aim has been achieved.

For these reasons, this methodology uses an order of presentation that might appear to some as non-standard.