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

Grigorieff, C.I.

2 Uniformity as a Predominant Aim of the 1999 Montreal Convention

2.1 Introduction

This chapter will analyse the *ratio legis* of the 1999 Montreal Convention in order to determine to what extent uniformity is a principal aim of the Convention that must be pursued in its application.

In order to answer this essential question, I will review the situation before the adoption of the 1929 Warsaw Convention (section 2.2). This historical review will reveal the difficulties encountered in the absence of common principles, and will permit a determination on the main purposes for the creation of an international regime (section 2.3). From there, the reasons for which the drafters of the Conventions adopted techniques of unification may become clear (section 2.4). This could hopefully aid in the determination of any specific characteristics envisaged by the drafters to assist this aim (section 2.5). This exercise carried out, conclusions will be drawn on the aim of uniformity of the 1999 Montreal Convention (section 2.6).

2.2 Historical Context

As described in Chapter 1, the emergence of aviation in the early 20th century substantially reduced the notion of distance and the speed of communication. But at that time, the liability regime of air carriers in the case of fatalities was only governed by domestic legislations. The air carrier liability regime could either be regulated by general tort or contractual law, or by specific air legislations such as in France.[1] As one might anticipate, none of these legal provisions were identical. Therefore, in the case of international flights, the question of applicable law was raised, with the consequence that no certainty existed as to which legislation would apply in the absence of specific international rules of conflict of laws.

In addition, not only were the rules different in each domestic legislation, they also substantially varied when it came to the level of passenger protection.[2] Hence, depending on the result of the applicable rules of conflict of laws, the applicable substantive law may have offered a more protective regime for the carrier or for the passenger.

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1 *See*, section 1.1.1.

2 *Ibid.*

In 1922, the League of Nations expressed its concerns regarding the lack of an international air carrier liability regime:

> En ce qui touche le droit privé aérien, aucun effort international officiel ne s'est jusqu'ici exercé. Les diverses législations nationales se constituent ou sont appelées à se constituer sans aucun contact organisé les unes avec les autres; il semble qu'un tel manquement de coordination peut être préjudiciable au développement de la navigation aérienne. Si aucune action ne s'exerce dans un délai assez court, des législations et des traditions divergentes se formeront dans les différents pays, et les difficultés qui se sont présentées depuis si longtemps par suite du manque d'unification en droit maritime se reproduiront et seront peut-être très préjudiciables en navigation aérienne, par suite de l'extrême mobilité des transports aériens.[3]

There was therefore a serious international call for a rapid regulatory response with respect to international air carrier liability. As noted by Professor Daniel Goedhuis a few years later, uniformity of laws governing carriage by air was at that time an 'absolute necessity'.[4]

2.3 Purposes

2.3.1 A Multiplicity of Purposes

In light of the context described, the following analysis is designed to determine the purposes of the 1929 Warsaw Convention and whether the drafters of the 1999 Montreal Convention had the same purposes in mind. The *Travaux Préparatoires* will be used to inform an understanding of the establishment of these Conventions.

2.3.2 Solving the Lack of Legal Certainty

As previously mentioned,[5] the existence of different legislations across the globe regulating identical situations created an undesirable and harmful situation. In the absence of approximation of legislations, both the airlines and their customers could not anticipate with any certainty which rules would apply to them in the case of international carriage. As noted during

3 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p.28.

4 Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 3 (Springer, 1937).

5 *See*, section 2.2.

the 1925 Paris Conference, the passenger must be able to know his rights, as must the carrier in order to respectively insure their risks.[6]

This anticipation is best known in legal theory as 'legal certainty' and is considered internationally to be included in the concept of 'rule of law' as pointed out here by the United Nations:

> The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[7]

This principle of legal certainty has further been recognized at an international level by the International Court of Justice in *Ahmadou Sadio Diallo*;[8] and at a regional level, by the European Court of Human Rights in its *Sunday Times*[9] decision, by the Inter-American Court of Human Rights in *Cayara*,[10] and by the Court of Justice of the European Community in *Bosch*.[11]

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6 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 12: 'Il importe en effet que le voyageur et l'expéditeur puissent, au cas d'accident ou de dommage, connaître l'étendue de ses droits et le moyen d'exercer son recours, et il importe aussi que les Compagnies de navigation aérienne puissent calculer l'étendue de leur responsabilité et la faire garantir. Il serait peu logique que la solution de ces questions dépendît du pays traversé ou du tribunal saisi et que la diversité des lois modifiât la solution applicable'.

7 United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, (UN Doc. S/2004/616), 23 August 2004, para. 6. *See also*, International Court of justice, Inaugural Hilding Eek Memorial Lecture by H. E. Judge Peter Tomka, President of the International Court of Justice, at the Stockholm Centre for International Law and Justice – *The Rule of Law and the Role of the International Court of Justice in Word Affairs*, 2 December 2013, Source: International Court of Justice, <https://www.icj-cij.org/files/press-releases/8/17848.pdf> (accessed 29 May 2019).

8 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgements*, I.C.J. Reports 2010, p. 639,

9 ECHR, 26 April 1979, *Sunday Times v. United Kingdom (No 1)*, ECLI:CE:ECHR:1979:0426JUD000653874.

10 ICHR, 3 February 1993, *Cayara v. Perú (Excepciones Preliminares)*, Serie C No 14.

11 CJEC, 6 April 1962, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der firma Willem van Rijn*, C-13/61, ECLI:EU:C:1962:11. *See also*, Jeremy Van Meerbeeck, *Le principe de sécurité juridique dans la jurisprudence de la Cour de justice de l'Union européenne – de la certitude à la confiance* (thesis, 2013), Source: UCLouvain, <http://hdl.handle.net/2078.3/128500> (accessed 29 May 2019).

At a national level, the importance of this concept was acknowledged in several States such as in Canada,[12] in France[13] and in the United Kingdom.[14] In other common law jurisdictions, the concept is covered more under the doctrine of precedent.[15]

Despite the lack of a commonly agreed definition, it can be said that the main requirement for the law is that it must be made public, clear, understandable and predictable.[16]

The *Travaux Préparatoires* of the 1929 Warsaw Convention confirm that the goal of achieving a high level of legal certainty was of paramount importance. For instance, France voiced how important it was to have a clear regime:

> Si vous adoptez le régime prévu à l'article 22, vous aurez un régime qui permettra toutes les controverses, qui permettra à toutes les victimes d'entamer un procès. […] Vous aurez en un mot, un régime qui ne sera pas un régime claire.[17]

The French delegation added that the upcoming regime should be without legal uncertainties:

> Le système primitif était celui des 'mesures raisonnables'; on y a substitué un régime complexe qui fait une certaine part à la faute, une certaine part au risque, qui peut être le résultat d'un compromis mais qui, pour des juristes, donne ce résultat peu satisfaisant d'une convention basée sur des principes différents et qui, pour les praticiens, laisse place à une foule d'incertitudes juridiques et ruine l'unité de droit que nous voulions établir par notre convention.[18]

Switzerland also underlined that the public should be able to predict and anticipate the rules: 'Nous devons donner au public des règles qu'il

12 *R. v. Daoust*, (2004) 1 R.C.S. 217, quoted in: Pierre-André Cote, *Le souci de la sécurité juridique dans l'interprétation de la loi au Canada*, 110 Revue du notariat 685-692 (2008).

13 CE, 24 March 2006, ECLI:FR:CEASS:2006:288460.20060324.

14 *See*, UK Supreme Court, <https://www.supremecourt.uk/docs/speech_111011.pdf> (accessed 29 May 2019); *see also*, for example in commercial law: *Golden Straight Corporation v. Nippon YKK*, (2007) UKHL 12.

15 In the United States, according to some scholars, the concept appears to have declined in favour of the concept of legal indeterminacy. *See*, James Maxeiner, *Some Realism about Legal Certainty in the Globalization of the Rule of Law*, 31 Houston Journal of International Law 27-46 (2008); *See also*, James Maxeiner, *Legal Certainty and Legal methods: A European Alternative to American Indeterminacy?*, 15 Tulane Journal of International & Comparative Law 541-607 (2007); Offer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 Public Interest Law Journal 175-191 (2010).

16 The first articulation of this concept can be dated back to the Hammurabi Code, which consists of a list of private law rules engraved on a column, *circa* 1754 BCE.

17 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 28-29.

18 *Ibid*., p. 33-34.

connaisse'.[19] In parallel, the Rapporteur underlined that carriers should be able to determine their financial exposure.[20]

During the 1955 Hague Conference, legal certainty was considered of equal importance by the participants. For instance, in the discussions about information to be provided to passengers, the Portuguese delegation emphasized that uncertainty should be avoided:

> It had been said that the passenger should not be left in a state of uncertainty concerning the rules applicable to the liability of the carrier, since, if the passenger considered it to be necessary, he might take out supplementary insurance.[21]

The need for certainty in the application of the text was also raised on several occasions by the International Union of Aerospace Insurers, during discussions on the revision of limits[22] and what constituted a delay.[23] In turn, the Belgian delegation highlighted that it was particularly important for the carriers and passengers to be fully aware of what they should pay and receive.[24]

At the time of the 1999 Montreal Conference, the question of legal certainty and its corollary, predictability, remained of paramount importance in the discussions,[25] as notably reported in the Minutes as follows:

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19 *Ibid*., p. 103.

20 *Ibid.*, p. 165: 'Quant à la limitation de responsabilité, la somme de dix mille francs-or prévue primitivement pour les voyageurs, et celle de cinq cents francs-or par colis pour les marchandises ont été remplacées respectivement par les limites de vingt-cinq mille francs-or et de cent francs-or par kilo. Cette dernière modification a été apportée au texte primitif pour permettre au transporteur de connaître exactement l'étendue de son risque par le maximum de poids qu'il peut transporter'.

21 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 63.

22 *Ibid*., p. 178: 'The attitude of the insurers towards the problem could be summed up in a very few words. They were able and willing to insure any reasonable limits of liability that the Conference might adopt. But the cost of that insurance would depend to a large extent on the certainty of those limits. Every insurer wanted to know what he was being called upon to insure and the unfortunate stage had been reached where Article 25 had been subjected to different decisions so that there was no longer any certainty in its interpretation'.

23 *Ibid*., p. 244: '[…] the insurers were left in position of considerable uncertainty as to what was the liability that they were called upon to insure'.

24 *Ibid*., p. 188: 'There was a unanimous feeling in the Conference in favour of a convention which would have a broad and uniform application. What was important was not the fear to increase the present limits of the Warsaw Convention. It was not particularly important if the limits were increased even more than the limits of the Protocol, if the carriers, as well as the passengers, were fully aware of what was to be paid and received'.

25 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. 37, 43, 66, 94, 95, 111, 129, 131, 132, 140, 141, 142, 159, 161, 165, 200, 202, 206, 221, 245; 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, p. 24.

> What the Group was attempting to do was to see whether it could have a greater degree of predictability and certainty so that passengers would not be even more than they currently were the victims of uncertainties of a judicial system which might be unable to offer any predictability as to results, certain that carriers would be able to organize their activities and insurance on a basis which would also bring a greater degree of predictability.[26]

In substance, the drafters of the 1999 Montreal Convention were focused on attaining 'a degree of certainty and uniformity'.[27]

The importance of the principle of legal certainty which guided the drafting of the Conventions may also be found in the national ratification memoranda. By way of example, the Explanatory Memorandum to the Australian Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008 provides that:

> Australian accession to the Montreal Convention would be a step towards the uniformity of international rules relating to carriage by air. Uniformity will remove uncertainty as to the rules that apply in any particular case. It will also remove inconsistency between rules applying at different stages of international carriage, or to different passengers or cargo on the same flight (eg. where the original departure and/or ultimate destination are different). This is expected to provide the benefit to both consumers and carriers of improving efficiency and reducing litigation.[28]

Since the ratification of the Conventions, the highest Courts have regularly made references to the need of legal certainty governing the Conventions. In the United States, Justice O'Connor highlighted in *Franklin* that the purposes of the Convention were to '[…] set a stable, predictable, and internationally uniform limit […]'.[29] In *Tseng*, the US Supreme Court confirmed that: 'Such a reading would scarcely advance the predictability that adherence to the treaty has achieved worldwide'.[30] In Canada, the Supreme Court highlighted in *Thibodeau* that the purposes of the Conventions were to respond to:

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26 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. 129.

27 *Ibid*., p. 111.

28 Point 4.15 of the Explanatory Memorandum to the Australian Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008, Source: Australian Federal Register of Legislation, <www.legislation.gov.au/Details.C2008B00098/Explanatory%20Memorandum/Text> (accessed 19 February 2019).

29 *Trans World Airlines, Inc. v. Franklin Mint Corp. et. al*., 466 U.S. 243 (1984), at. 256.

30 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at 171.

> […] concerns that many legal regimes might apply to international carriage by air with the result that there could be no uniformity or predictability with respect to either carrier liability or the rights of passengers and others using the service. Both passengers and carriers were potentially harmed by this lack of uniformity.[31]

The CJEU also regularly referred to the principle of legal certainty in relation to air law litigation.[32] In *Guaitoli*, the European Court particularly recognized that the purpose of the 1999 Montreal Convention was to 'ensure, in the interests of both parties to the dispute, greater predictability and greater legal certainty'.[33]

2.3.3 Creating a Level Playing Field between Different Interests and Actors

2.3.3.1 Prior to the 1999 Montreal Convention

The disparity between national legislations also raised an obstacle for the development of a level playing field between carriers,[34] or in other words, a legal environment that allowed carriers from different origins an equal opportunity to compete on the market, regardless of their financial strength.[35] The *Travaux Préparatoires* of the 1925 Paris Conference are clear on this point:

> Il serait d'autre part utile que toutes les Compagnies de transports fussent placées à ce point de vue sous un régime d'égalité.[36]

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31 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 41.

32 *See*, CJEC, 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; CJEC, 2 July 2009, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v. Condor Flugdienst GmbH* and *Stefan Böck and Cornelia Lepuschitz v. Air France SA*, C-402/07, ECLI:EU:C:2009:416 (Opinion); CJEU, 23 October 2012, *Emeka Nelson e.a. v. Deutsche Lufthansa AG and TUI Travel plc and Others v. Civil Aviation Authority*, C-581/10 and C-629/10, ECLI:EU:C:2012:657; CJEU, 28 January 2016, *Heli Flight v. EASA*, C-61/15, ECLI:EU:C:2016:59; CJEU,6 June 2018, *Flightright GmbH v. Iberia Express SA*, C-186/17, ECLI:EU:C:2018:399 (Opinion); CJEU, 22 November 2018, *Germanwings GmbH v. Wolfgang Pauels*, C-501/17, ECLI:EU:C:2018:945 (Opinion).

33 CJEU, 7 November 2019, *Adriano Guaitoli, e.a. v. easyJet Airline Co. Ltd*, C-213/18, ECLI:EU:C:2019:927, at 54.

34 Jean-Pierre Tosi, *Responsabilité aérienne* 12 (Litec, 1978).

35 The concept of 'Level Playing Field' is regularly used in Competition law, despite the absence of a clear legal definition. Black's Law Dictionary provides the following definition, which will be used in this study: 'All competitors follow the same rules to get equal opportunity to compete regardless of size or financial strength. Economic and legal environment', Source: Black's Law Dictionary, <https://thelawdictionary.org/level-playing-field/> (accessed 2 September 2020).

36 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 12.

In addition, it was necessary to find an equilibrium between the rights of the carriers and their customers.[37] The task was therefore, in the absence of any pre-existing custom,[38] to agree on a set of rules that would be applied internationally to protect, through insurance mechanisms,[39] both the airlines and their passengers. In 1933, this balanced approached was recalled by Dr. Yvonne Blanc-Dannery, in her study on the 1929 Warsaw Convention:

> […] il s'agissait de niveler les différences entre les législations nationales et d'égaliser les conditions d'exploitation entre les compagnies aériennes, en posant une règle uniforme. La difficulté consistait à concilier l'intérêt du transporteur avec celui de l'usager, en évitant d'avantager l'un au détriment de l'autre, de manière à favoriser le développement d'un moyen de locomotion encore nouveau et rempli d'avenir.[40]

This point of equilibrium between industry and passengers' rights has, however, moved over time as technologies have evolved. In 1929, rules were adopted to protect passengers, but did not too heavily restrict the development of civil aviation.[41] In contrast, in 1955, the need to protect the industry started to be less important than the need for passenger compensation. This change of paradigm was highlighted in the *Travaux Préparatoires* of the 1955 Hague Protocol, as follows:

> Day by day an increase is justified, because this should preserve a just balance between the protection of the passenger and the shipper within reasonable limits and the interest of the development of aviation.[42]

This evolution notwithstanding,[43] this goal of equilibrium has also regularly been acknowledged by Courts, such as in the United States by the Supreme Court in *Tseng*, where the Court underlined that:

> A complementary purpose of the Convention is to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability.[44]

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37 Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 9 (Pedone, 1933).

38 *Ibid.*, p. 6

39 *Ibid.*, p. 10; ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 86.

40 Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 9 (Pedone, 1933).

41 Jean-Pierre Tosi, *Responsabilité aérienne* 8 (Litec, 1978).

42 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 174.

43 *See*, *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 546: 'Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers […]'.

44 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at 170.

Other Courts have also paid great attention to this equilibrium when interpreting the Warsaw Instruments.[45]

2.3.3.2 Under the 1999 Montreal Convention

It was only in 1999 that this purpose of balance was officially written in the fifth paragraph of the preamble of the 1999 Montreal Convention, as follows:

> Convinced that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests […].

The *Travaux Préparatoires* of the 1999 Montreal Convention regularly underline the importance of reaching an acceptable balance between the rights of the different actors, as highlighted here, for example, in the Minutes:

> […] to seek a balance between the interests of the passengers *i.e.* the users of international air transportation, the carriers, and the general public, to ensure that a great measure of equity would emerge which would command widespread and substantial support and which would enable a greater degree of uniformity and ratifiability,[46]

However, in comparison to the situation that existed beforehand, where carriers in particular needed to be protected as part of an emerging industry, the paradigm shift already initiated in the 1955 Hague Protocol went even further with the appearance of consumer protection as a notion in the preamble of the 1999 Montreal Convention. The third paragraph of the preamble reads:

> Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.

It is necessary to understand how the references to the importance of 'ensuring protection of the interests of consumers' (third paragraph of the preamble of MC99) and the need to achieve 'an equitable balance of interests'

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45 *See*, for example, in the United Kingdom, *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 66.

46 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. 110; *See also*, *Ibid.*, p. 94: '[…] in striking that delicate balance between the interests of the consumer, the interest of the air carrier, and the need to ensure that there were was certainty, predictability and, as far as possible, uniformity in the system, it was necessary to achieve a text which could command widespread and substantial support […] so that it would indeed be ratifiable'.

(fifth paragraph of the preamble of MC99) work together as they may otherwise create confusion. As translated by the fifth paragraph of its preamble, the 1999 Montreal Convention had a dual purpose of solving a lack of legal certainty and creating a level playing field between different actors and interests. In contrast, the third paragraph of the 1999 Montreal Convention merely mentions a change of paradigm since 1929. Together with the first two paragraphs of the preamble, this third paragraph essentially 'recognizes' the historicity and evolution of the previous instruments. There are, however, decisions that have recognized this third paragraph as a new, additional purpose of the 1999 Montreal Convention.[47]

2.3.4 Concluding Remarks

The analysis of the situation that existed prior to the 1929 Warsaw Convention shows that, *first*, the application of different national legislations created a situation of legal uncertainty that was harming both the airline industry and its customers; *second*, that the disparities between each domestic legislation prevented the development of a level playing field for the different carriers; and, *third*, that the substantial variations between each domestic law created an unsustainable situation, which required finding a balance between the rights of carriers and their customers.

These key issues were acknowledged by the drafters of both the 1929 Warsaw Convention and the 1999 Montreal Convention, and constitute the purposes of the Conventions.

2.4 The Object of the Conventions: Unification of Certain Rules Through Uniform Rules and *Renvois*

2.4.1 Preliminary Remarks

There remained the question of how to address these purposes in light of the different techniques of approximation of legislation described in Chapter 1. As a reminder, codification was not possible in 1929 due to the absence of extensive State practice, precedent and doctrine.[48]

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47 *See*, for instance, CJEU, 12 April 2018, *Finnair Oyj v. Keskinäinen Vakuutusyhtiö Fennia*, C-258/16, ECLI:EU:C:2018:252, at 34: 'In addition, in the light both of the third paragraph of the preamble to the Montreal Convention, which emphasises the importance of ensuring protection of the interests of consumers in international carriage by air, and of the principle of "an equitable balance of interests" referred to in the fifth paragraph of the preamble of that convention, the requirement of being in a written form cannot have the effect of excessively limiting the specific way in which a passenger may choose to complain, provided that that passenger remains identifiable as the person who made the complaint'.

48 *See*, section 1.1.2.1. The technique of codification may nevertheless apply to subsequent instruments, such as the 1999 Montreal Convention.

2.4.2 The Inadequacy of Most Approximation Techniques

A perusal of the *Travaux Préparatoires* shows the drafters never contemplated having recourse to harmonization techniques. The reason behind this may stem from the fact that, in 1929, there was no international organization competent enough to easily suggest specific private air law rules.[49] Indeed, the *Commission Internationale pour la Navigation Aérienne*, established by the 1919 Paris Convention, was not sufficiently competent to regulate private air law matters.[50]

Regarding the other techniques discussed above, recourse to convergence techniques would not have achieved the purposes described in section 2.3. When considering integration techniques, one can easily see how in the aftermath of World War I, it would have been extremely difficult to agree on an international application of the domestic rules of one determined State.

2.4.3 The Adoption of Unification Techniques

In light of the difficulties that other techniques may have entailed, the drafters of both the 1929 Warsaw Convention and the 1999 Montreal Convention opted to adopt certain rules relating to international carriage by air through techniques of unification.

Initially, the adoption of numerous rules of conflict of laws was contemplated by negotiators at the 1925 Paris Conference, which was organized on the initiative of the French government. Its Final Protocol anticipated, among other things, regulating international air carrier liability according to the domestic legislation of the deceased, subject to specific limitations.[51] However, this solution to common rules of conflict of laws was not entirely satisfactory. *First*, it would not have had the benefit of creating a fair level

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49 Michael Milde, *International Air Law and ICAO* 266 (Eleven International Publishing, 2008).

50 *See*, Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 9. The 1919 Paris Convention mostly aimed to recognize the sovereignty of each State in the airspace overlying its territories and waters. *See also*, Vincent Correia, "The Legacy of the 1919 Paris Convention Relating to the Regulation of Aerial Navigation", in Pablo Mendes de Leon, Niall Buissing (eds), *Behind and Beyond the Chicago Convention – The Evolution of Aerial Sovereignty* 3-24 (Wolters Kluwer, 2019).

51 Article 8 of the 1925 Final Protocol set out: 'Au cas de décès du voyageur transporté, l'action en responsabilité pourra être exercée par les personnes auxquelles cette action appartient d'après la législation nationale du défunt mais sous réserve de la limitation de responsabilité prévue à l'Article précédent'.

playing field between different interests and actors.[52] As underlined by Professor Antonio Malintoppi,[53] rules of conflict of laws could leave too much choice to the parties to the contract of carriage in the determination of the applicable law, with the consequence of a benefit to the strongest party, which was a situation that needed to be avoided.[54] *Second*, it would only have partially solved the issue of legal certainty, insofar as the applicable foreign law would not necessarily have been known to, or compatible with, the core values of the laws of the Court seized.[55]

When the preparation of an international convention was entrusted to the CITEJA,[56] it rapidly suggested adopting uniform rules.[57] As described above,[58] uniform rules require the adoption of common rules, but instead of setting common rules of conflicts of laws, common substantive rules are agreed instead.[59] The specificity of these uniform rules helps eliminate the question of determination of applicable law. Additionally, the benefits of this technique of unification through the adoption of uniform law had already been tested and acknowledged in the rail sector.[60]

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52 *See*, Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p.11: 'On atténuerait déjà beaucoup les difficultés naissant du conflit des lois si on parvenait à établir une règle commune de solution du conflit. […] Mais une telle solution serait bien insuffisante, car tout en supprimant l'incertitude de la solution du conflit des lois, elle laisserait subsister entre les intéressés une différence de traitement tenant à la différence des lois applicables'.

53 In addition to his academic merits, Professor Antonio Malintoppi is also known for being a member of the Italian delegation to the 1955 Hague Conference.

54 Antonio Malintoppi, *Droit uniforme et droit international privé*, 116 Recueil des cours de l'Académie de droit international 9 (1965).

55 *See*, Barry Spitz, *Assessment of the Unification of Private International Air Law by Treaty*, 83 South African Law Journal 176 (1966).

56 *See*, Michel Smirnoff, Le Comité International Technique d'Experts Juridiques Aériens (CITEJA) – Son Activité – son Organisation (Pierre Bossuet, 1936).

57 *See*, Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 42; Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 9 (Pedone, 1933).

58 *See*, section 1.1.2.1(3)(ii).

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

60 Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 5 (Pedone, 1933).

The choice made in favour of unification is also confirmed in the title of the Conventions: 'Convention for the Unification'. Although the Conventions contain a couple of rules on the conflict of laws, most of the unification materialized with the adoption of uniform rules.[61] The preamble of the 1929 Warsaw Convention is particularly clear on this point: '[…] ayant reconnu l'utilité de régler d'une manière uniforme […]'. The preamble of the 1999 Montreal Convention confirms that the same choice governed its adoption, although it uses a different wording: '[…] action for further harmonization and codification of certain rules […]'. However, the use of the word 'harmonization' in the preamble of the 1999 Montreal Convention was not designed to suggest that this was the solution which ought to be adopted. Indeed, the 1999 Montreal Convention and its predecessors do replace domestic legislations on specific issues, and as such could not be considered to be harmonization tools when recalling the distinction made earlier. This unfortunate new wording may be explained by the fact that, as seen above,[62] techniques of approximation of legislations are still fluid with respect to their terminology.

2.4.4 Concluding Remarks

Given their purpose and what needed to be achieved, the drafters of the 1929 Warsaw Convention and the 1999 Montreal Convention opted for unification to the exclusion of other techniques of approximation of legislations, such as harmonization. While the Conventions essentially contain uniform rules, the drafters also had recourse to rules of conflict of laws through occasional *renvois*. These elements may be considered to be the 'object' of the Conventions when reading the principles of interpretation of the 1969 Vienna Convention.

2.5 Specific Features of the Conventions

2.5.1 Determining the Scope of 'Uniformity'

The above being clarified and verified, I still need to ascertain what the adoption of uniform rules entailed in the minds of their drafters. Could I posit that, in order to fulfil the purposes and object of the Conventions, the unification contemplated demanded a uniform application of the adopted uniform rules?

There is no specific clear-cut provision for this in the Conventions, and the general definition of uniform rules described in Chapter 1 does not *per se* entail their uniform application.

61 *See*, section 1.1.3.2.
62 *See*, section 1.1.2.

The following analysis will therefore examine the *Travaux Préparatoires* of the Conventions in order to answer this question. The results of that analysis will be checked in the jurisprudence. Finally, should the answer be affirmative, the analysis will try to determine if, despite the lack of a clear provision, specific mechanisms were introduced in the Conventions to ensure their uniform application.

2.5.2 Uniform Application

2.5.2.1 Possible Approaches

The question is to determine whether the Parties' intent was only to create unification through rules that could evolve separately in each ratifying State or if, quite the opposite, in their mind their creation also entailed, as advocated by Professor Daniel Goedhuis in 1937,[63] uniformity of application. Put differently, the analysis should determine whether there was intent to see the rules evolve together into a uniform application;[64] or, similarly to different Civil Codes, they should be allowed to evolve separately despite strictly identical provisions.

2.5.2.2 Travaux Préparatoires

In 1929, particular attention was given to the wording to be used in order to avoid the already recognized risk of potential different interpretations,[65] which could lead to a lack of uniformity.[66] France, for example, voiced an

63 Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 10 (Springer, 1937): 'It is, however, not sufficient to have uniformity of text but one must have certain guarantees that there also will be uniformity of application'.

64 As developed by Professor Camilla Andersen under the concept of 'jurisconsultorium' alongside the 'textual uniformity'. *See*, Camilla Andersen, *Defining Uniformity in Law*, 12 Unif. L. Rev. 44 (2007).

65 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 41: 'Nous allons alors être soumis à des jurisprudences différentes, si nous n'arrivons pas à assurer l'unité dans un texte obligatoire'. *See also*, ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 28: 'Le plus grand reproche que j'adresse à la rédaction de l'article 22 tel qu'il est actuellement rédigé, c'est que l'usager ne saura jamais quels sont, à l'égard du transporteurs ses droits et ses recours. C'est en effet un régime très compliqué car, en vertu de l'article 22, il faudra qu'il fasse la preuve de la faute du transporteur. Le transporteur lui-même ne sera cependant pas à l'abri des différences de jurisprudence qui peuvent s'établir devant les tribunaux et les tribunaux peuvent, sous l'empire de certaines doctrines quelquefois nationales, interpréter les textes d'une manière différente. Il arrivera peut-être que ce texte de l'article 22, dans un pays aura une interprétation restrictive et, dans un autre pays, une interprétation libérale: de telle sorte que l'usager se trouvera garanti par telle législation et qu'au contraire il sera découvert dans tel autre pays'.

66 Acknowledging, however, that the interpretation of certain provisions could sometimes be acceptable, such as in the case of factual elements. *See*, section 3.2.4.

opinion that was strongly in favour of adopting rules that would not automatically result in potential divergent interpretations by Courts:

> Il y a là une chose qui me paraît impossible de préciser dans la pratique et il y aura certainement de la part de la jurisprudence tantôt une interprétation tantôt une autre. Ce que désire précisément la Délégation française, c'est éviter ces difficultés et elle désire que le vice propre disparaisse aussi bien pour les marchandises que pour les voyageurs.[67]

During the 1955 Hague Conference, while '[a]ir carriers sometimes felt restricted by the ties of that uniformity',[68] emphasis was given to the need to not undermine the existing high level of uniformity. Particular care was therefore requested when suggestions were made to amend the existing phraseology. The United States, notably, pointed out, as reported below, that ambiguity should be avoided as it could increase the risk of undesirable divergent jurisprudence:

> […] simplification should not be achieved at the expense of clarity. The new language should not be ambiguous and raise legal issues before the courts of different countries, thus placing the entire integrity of the Convention, or of the documentary provisions, in jeopardy.[69]

This objective 'to avoid the risk of having divergent interpretations',[70] was regularly repeated in 1955.[71]

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67 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 36.

68 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 60.

69 *Ibid*., p. 74.

70 *Ibid*., p. 78.

71 *See*, for example, *Ibid*., p. 183: '[…] it had to be borne in mind that the Conference was not drawing up national legislation, but an international convention. If the Conference had only to consider Scandinavian legislation, he would consider the Norwegian proposal to be very acceptable. However, he was not convinced that this proposal would be interpreted in the same way all over the world. He feared that the proposal would leave the door open to an escape from the limits in too many countries. That was mainly due to the use of the term "recklessly". What did this term mean in other languages? Was the Conference sure that judges and juries would reach the same decisions in dealing with recklessness?'. *Equally*, *Ibid*., p. 194: '[The Delegation of Egypt] considered that the drafting of Article 25 of the Convention was defective, since it took into account only the national law of the courts in order to establish wilful misconduct (dol) and ignored the other international sources of law, since wilful misconduct (dol) was not defined in the same way in each one of the national legislations and the Convention applied in 44 Contracting States'.

In 1999, the delegates acknowledged that many provisions received conflicting interpretations,[72] which 'did not promote unification of legal rules' and could hence substantially 'affect the victim's claim'.[73] In that sense, discussions and efforts were made to modernize the text to respond to existing fragmentation.[74]

2.5.2.3 Judicial Decisions

In parallel, from an early stage many Courts recognized the need for a uniform application of the Conventions.

In the United Kingdom, the importance of uniform application particularly emerged when the House of Lords ruled it was 'in the interest of uniformity'[75] to change their practice and to have recourse to the *Travaux Préparatoires* of the 1929 Warsaw Convention, as it was an interpretation means used in other jurisdictions. The Court also highlighted in *Morris* that: '[the Convention] was intended to be applicable in a uniform way across legal boundaries'.[76]

In turn, the CJEU highlighted in *Walz*, that given the essence of the 1999 Montreal Convention, the uniform rules should receive a uniform interpretation:

> Since the Montreal Convention does not contain any definition of the term 'damage', it must be emphasised at the outset that, in the light of the aim of that convention, which is to *unify* the rules for international carriage by air, that term

72 *See*, for instance, 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. 49: '[…] it would be possible to avoid situations such as those faced in a number of countries where different interpretations were given to the Warsaw Convention on this question'; *Ibid*., p. 71: 'The present draft did not promote unification of legal rules and the essential terms of the Convention were open to different interpretations that could substantially affect the victim's claim'; *Ibid*., p. 72: 'The Delegate of Bahrain took the view that in adding mental injury, a clear definition of that notion had to be included to avoid contradictions and conflicts in the interpretation of the text'.

73 *Ibid.,* p. 71.

74 *Ibid*., 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'; *Ibid.,* p. 83: 'Commenting on Article 18 *(Delay),* the Representative of China contended that, while some States might have national laws which contained a definition of the term "delay" and jurisprudence on which an interpretation of that term might be based, the lack of a standard definition could lead to a multiplicity of interpretations'; *Ibid*., p. 178: 'The meeting had tried to better define the concept of a "principal and permanent residence", because in fact this concept was very vague and gave rise to varying interpretations according to different countries. To leave this in the realm of the ambiguous would not be forwarding the cause of unifying international law'.

75 *Fothergill v. Monarch Airlines*, (1980) UKHL 6, at 68.

76 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 77.

> must be given a *uniform and autonomous interpretation*, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties to that convention.[77] (*italics added*)

On the other side of the Atlantic, the same view was shared by the Supreme Court of the United States in *Franklin*:

> Construction of treaties yielding parochial variations in their implementations are anathema to the *raison d'être* of treaties, and hence to the rules of construction applicable to them.[78]

This requirement was later restated by Justice Marshall in *Floyd*, as follows:

> […] We have no doubt that subjecting international air carriers to *strict* liability for purely mental distress would be controversial for most signatory countries. Our construction avoids this potential source of divergence".[79]

Later, in 2004, Justice Scalia[80] held in *Husain* that:

> When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight' […] True to that canon, our previous Warsaw Convention opinions have carefully considered foreign case law.[81]

In Canada, Justice Cromwell pointed out in *Thibodeau* that one should be: 'especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation'.[82]

2.5.2.4 Concluding Remarks

Although no specific provision in the Conventions explicitly provides that they should be uniformly applied, it can legitimately be concluded from their *Travaux Préparatoires*, jurisprudence, and from this analysis of the purposes and object of the Conventions, that they should. As noted by Professor Camille Andersen in her study on uniform law:

> […] practitioners applying any international uniform convention must recognise that they share it with colleagues in other jurisdictions, and that its development is a communal evolution requiring a unique approach very different from the (differing) applications of domestic law in varying jurisdictions.[83]

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77 CJEU, 6 May 2010, *Axel Walz v. Clickair SA.*, C-63/09, ECLI:EU:C:2010:251, at 21.
78 *Trans World Airlines, Inc. v. Franklin Mint Corp. et. al.*, 466 U.S. 243 (1984), at 263.
79 *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 552.
80 Dissenting.
81 *Olympic Airways v. Husain, Individually, and as Personal Representative of the Estate of Hanson, Deceased, et al.*, 540 U.S. 644 (2004), at 658.
82 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 50.
83 Camilla Andersen, *Defining Uniformity in Law*, 12 Unif. L. Rev. 44-45 (2007).

A uniform application hence entails: *first*, determining existing case law in one's jurisdiction but also abroad and *second*, refraining from departing from any existing internationally endorsed jurisprudence.

2.5.3 Mechanisms Used to Ensure a Uniform Application

2.5.3.1 The Selection of Mechanisms

Despite the fact that no specific provision in the Conventions clearly lays out that each of them should be uniformly applied across their ratifying States, one could wonder if any specific mechanisms were nevertheless foreseen by their drafters.

The following analysis will be dedicated to the concepts of exclusivity and autonomy that might be found in the Conventions. In order to give these concepts shape in the framework of the Conventions, I will particularly refer to their *Travaux Préparatoires*, and judicial decisions.

2.5.3.2 Exclusivity

(1) Introduction

The 1929 Warsaw Convention and 1999 Montreal Convention both contain provisions which aim to guarantee the exclusive application of certain of their provisions. Article 24 of the 1929 Warsaw Convention reads as follows:

> 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights;[84]

The text was slightly amended in the 1971 Guatemala City Protocol, as set out here:

> 1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
> 2. In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who

84 In the French version: '1. Dans les cas prévus aux articles 18 et 19 toutes actions en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention. 2. Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs'.

> have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.[85]

It was later changed again in the 1975 Montreal Protocol No 4, as follows:

> 1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
> 2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.[86]

Finally, Article 29 of the 1999 Montreal Convention now sets out that:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Similar provisions may also be found in various Uniform Instruments. This is the case, for example, in the 1952 Rome Convention,[87] in the CMR,[88]

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85 1971 Guatemala City Protocol, Article IX.

86 1975 Montreal Protocol No 4, Article VIII.

87 1952 Rome Convention, Article 9: 'Neither the operator, the owner, any person liable under Article 3 or Article 4, nor their respective servants or agents, shall be liable for damage on the surface caused by an aircraft in flight or any person or thing falling therefrom otherwise than as expressly provided in this Convention. This rule shall not apply to any such person who is guilty of a deliberate act or omission done with the intent to cause damage'.

88 CMR, Article 28: '1. In cases where, under the law applicable, loss, damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability or which fix or limit the compensation due. 2. In cases where the extra-contractual liability for loss, damage or delay of one of the persons for whom the carrier is responsible under the terms of article 3 is in issue, such person may also avail himself of the provisions of this Convention which exclude the liability of the carrier or which fix or limit the compensation due'.

and in the 1974 PAL.[89] But such provisions are not found in every Uniform Instrument. For instance, no such provision was included in the Hamburg Rules or in the Rotterdam Rules. Moreover, there exist Uniform Instruments that specifically reject any automatic exclusivity to their rules, such as the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the '***CISG***')[90] which, under its Article 6, provides that:

> The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

The presence of such provisions in the 1929 Warsaw Convention and in the 1999 Montreal Convention therefore raises the question of their role. In other words, could it be that, in the mind of their drafters, the principle of primacy of international law over domestic legislation[91] was not deemed sufficient to achieve the aim of uniformity?

(2) Travaux Préparatoires

(i) Prior to the 1999 Montreal Convention

Whereas the final Protocol to the 1925 Paris Conference provided under its Article 8 that:

> Au cas de décès du voyageur transporté, l'action en responsabilité pourra être exercée par les personnes auxquelles cette action appartient d'après la législation nationale du défunt, mais sous réserve de la limitation de responsabilité prévue à l'Article précédent.[92]

No explicit indication on the reasons behind the adoption of such an exclusivity clause can be found in the *Travaux Préparatoires* of the 1929 Warsaw Convention.

During the 1971 Guatemala City Conference, the possibility of breaking the pecuniary limits was discussed and eventually rejected.[93] As reproduced below, the IATA Observer underscored that the new wording of Article 24 particularly aimed to prevent this situation from happening:

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89 1974 PAL, Article 14: 'No action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention'.

90 United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, Vienna, UNTS, 1489, I-25567, entry in force 1 January 1988.

91 *See*, section 2.5.3.2.

92 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 79.

93 ICAO Doc 9040, International Conference on Air Law, Guatemala City, February-March 1971, volume I, *Minutes*, Montreal, 1972, p. 144.

> He thought, however, that the Drafting Committee might consider the insertion of a clause, perhaps in Article 24, along the following lines: 'The liability of carrier as established under Articles 17 to 22 of this Convention shall be the sole and exclusive liability of carrier under all circumstances in respect of damage arising out of an event giving rise to liability for the death or injury or delay of a passenger or destruction, loss, damage or delay of baggage.[94]

The same fear appeared during the 1975 Montreal Conference:

> The Director of the Legal Bureau, in explaining the background, said that the basic question was whether the limits should be unbreakable under all circumstances. The Legal Committee, meeting prior to the Conference at Guatemala City by which the principle of unbreakability was enshrined in the Guatemala City Protocol, had examined up to eight different formulas for consecrating the unbreakability of limits and it was concluded that the best formula was the one that appeared in the text of the Guatemala City Protocol. Consequently, the Legal Committee, in drawing up the draft text on the cargo provisions, was inspired by this solution and considered it necessary to cover all kinds of suits – in contract, or in tort or otherwise – and to maintain the last phrase in draft Article E to the effect that the limits may not be exceed 'whatever the circumstances which gave rise to the liability.[95]

The reason behind the new formula adopted during this Conference may be found in this statement, made by the delegate of the United Kingdom as follows:

> As to the proposal made by the Delegate of the Czechoslovak Socialist Republic, its acceptance would certainly destroy the Warsaw Convention for the common law countries, because an action for loss of or damage to cargo could, at the choice of the claimant in those countries, be founded on contract, or in tort or delict. Therefore, if it were left open to the claimant to escape the provisions of the Convention by basing his action on tort or delict, then one might as well have no convention at all so far as the common law countries were concerned, which might also be true for some other countries.[96]

The analysis of the *Travaux Préparatoires* suggests that the reasons for such a principle of exclusivity existing may be that the respective drafters wished to ensure domestic law would not jeopardize the uniform rules, and particularly the liability limits set out in the text. It can also be deduced that they did not wish for domestic legislations to threaten the purposes of the 1929 Warsaw Convention.

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94 *Ibid.*, p. 142.

95 ICAO Doc 9154, International Conference on Air Law, Montreal, September 1975, volume I, *Minutes*, Montreal, 1977, p. 164.

96 *Ibid.*, p. 165.

(ii) Under the 1999 Montreal Convention

The *Travaux Préparatoires* of the 1999 Montreal Convention give a more detailed explanation of the *raison d'être* of this principle of exclusivity. In the Minutes, the Chairman observed that:

> […] the Convention, which primarily addressed the liability question of limits, had been careful to provide in Article 23 (Basis of Claims) that an action for damages – however founded – could only be brought on the condition and subject to the limits of liability without prejudice to the question as to who were the persons who had the right to bring the suit and what were their respective rights. Article 23 in effect put fences around how great an exposure the carrier would be liable to, by ensuring that whatever may be the nature of the action and however brought, it was subject to the conditions of the Convention. The more delicate issues as to the persons who had the right to bring the action were not really governed as such by the Convention, but were left to national law, subject only to the provision that one remained within the limits set by the Convention and the conditions subject to which the claims may be brought.[97]

Later, he recalled that:

> The purpose behind Article 28 was to ensure that, in circumstances in which the Convention applied, it was not possible to circumvent its provisions by bringing an action for damages in the carriage of passengers, baggage and cargo in contract or in tort or otherwise. Once the Convention applied, its conditions and limits of liability were applicable.[98]

The Minutes of the 1999 Montreal Convention also confirm that the rules laid down in the Convention may be different from those established under domestic law, but in the case of competition between these rules, the uniform rules should prevail:

> The Chairman observed that it was quite true that, in domestic jurisdictions, the system of evidence which was required and the burden of proof would be provided for under national legislation. However, if the draft Convention were adopted, then its provisions would have to be applied in relation to this question. The provisions contained in Article 23 (*Basis of Claims*)[99] made it clear that an action which was brought for damages, however founded, whether under the new Convention or in contract or tort or otherwise, could only be brought subject to the conditions and such limits of liability as were set out in the Convention. There was indeed jurisprudence which suggested that it was exclusive. It was not possible to get around the provisions of the Convention regarding the burden of proof, etc., by bringing an action in tort or by attempting to bring an action outside the Convention, if one were a party to the Convention – it would

97 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. 189.

98 *Ibid*., p. 235.

99 Renumbered in the adopted text.

> be expected that every party, in order to implement the Convention, would introduce domestic legislation which would be applicable in its Courts. Thus whereas it was quite true that in most jurisdictions the burden of proof would lie on those who asserted claims, when the new Convention was adopted its rules would apply so as to modify whatever might be the system in domestic legislation in terms of claims which were brought under the Convention, even claims which were brought outside of the Convention, insofar as they were based on damage sustained in the carriage of passengers, which would be covered by the Convention. […].[100]

Therefore, the principle of exclusivity may have been adopted in order to guarantee a uniform application of the international air carrier liability regime, and to ensure the primacy of the Conventions over domestic legislation.[101] But this explanation may not be sufficient, given that the risk of domestic law overriding the 1999 Montreal Convention is already partially foreseen under Article 49, which provides that:

> Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Consequently, it cannot be ruled out that application of the principle of exclusivity may also imply that the carrier liability could be limited to the situations covered by their Article 17, 18 and/or 19,[102] provided the Conventions apply pursuant to their Article 1.[103] It would then follow that if the Conventions apply, but a claim for bodily injury, damage to cargo or even a delay does not meet each of the conditions set forth respectively in these 3 latter Articles, the carrier could then not be held liable, under the Conventions or domestic law. This 'strict application of the principle of exclusivity' may be seconded by the facts that such a principle is not found in every Uniform Instrument and that, otherwise, it would be a duplicate of

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100 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. 137.

101 These provisions nevertheless leave a certain role to domestic law. Article 29 of the 1999 Montreal Convention makes a *renvoi* to domestic law with respect to the determination of persons who have the right to bring suit, for instance the legal representative of a minor; and, regarding the extent of their rights, such as whether non-economic damages can be claimed provided the compensation does not exceed the limits established in the 1999 Montreal Convention.

102 *See*, Chapter 3.

103 1929 Warsaw Convention, Article 1(1): 'This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking'; 1999 Montreal Convention, Article 1(1): 'This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking'.

Article 49 and the principle of *pacta sunt servanda*.[104] This view may also be supported by the purposes of the Conventions, which are to provide for an international air carrier liability regime that is predictable and balanced. It is, however, unclear as to how this view may accommodate the existence of the exclusions clauses as described in Chapter 1.[105]

(3) Judicial Decisions

The exclusivity of the Conventions is a powerful protection against the risk of undesirable interferences made by Courts with domestic legislations. Such interferences could lead to a significant fragmentation of the envisaged uniform rules.

However, Courts hold divergent views on how the exclusivity should be understood. This point will be explored in Chapter 4.

(4) Concluding Remarks

In light of the preceding analysis, it may be concluded that, despite the different possible readings of Article 24 of the 1929 Warsaw Convention and Article 29 of the 1999 Montreal Convention, the principle of exclusivity may have been envisaged by their drafters at least as a powerful tool to guarantee the consistency of the system and to prevent the undesirable intrusion of domestic law. Its role as a mechanism to ensure a uniform application of the Conventions may be deduced from this.

2.5.3.3 The Autonomy of the Terms Used

(1) Introduction

In legal theory, the autonomy of certain international instruments *vis-à-vis* the international legal order was discussed at the turn of the millennium by the International Law Commission.[106] Amongst others questions was a discussion of whether 'Self-Contained Regimes'[107] did exist, and whether they were a source of fragmentation of international law. However, insofar as the 1969 Vienna Convention provides a unifying frame for every treaty, the existence of fully self-contained regimes appears unlikely. Notwith-

104 1969 Vienna Convention, Article 26.

105 *See*, section 1.1.3.2(4)(ii).

106 *See*, United Nations, "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).

107 Although there is no generally accepted definition of a Self-Contained regime, Professor Eckart Klein suggests that they intend to replace and, in doing so, exclude the application of general international law. *See*, Eckart Klein, *Self-Contained Regime*, Max Planck Encyclopedias of International Law 2 (2006).

standing the above, one can wonder whether the Conventions could be qualified as a *lex specialis*[108] that depart from general international law to such a degree that the terms and concepts used therein should be interpreted independently from any potential meaning under domestic law, and from any possible definition given in other international instruments, with the exception of those laid out in the 1969 Vienna Convention.

The following examination will try to determine how the drafters of the Conventions intended the terms used to be interpreted; if they were supposed to be interpreted in an autonomous manner and if so, to what extent.[109]

(2) Travaux Préparatoires

The *Travaux Préparatoires* of the 1929 Warsaw Convention show that the aim of uniformity was probably one of the most difficult tasks to achieve. It required each participant to negotiate and to settle on points of law that departed from their domestic law and to accept a common international rule. This mission of compromise was described by the Rapporteur as follows:

> Une convention n'est faite et n'existe que par des concessions mutuelles. Une convention serait absolument inutile si tous les systèmes nationaux étaient équivalents. Dès lors, le CITEJA a compris qu'en cette matière toute nouvelle les législations sont jeunes et rares, que l'on pouvait déjà rédiger des textes sans parti pris, sans vouloir faire accepter tel ou tel système juridique, mais construire une œuvre moderne, dans l'équilibre et la liberté![110]

This difficult exercise was, however, guided by the will to reach uniformity, even if this entailed a departure from domestic law and customs, as recalled by the United Kingdom in these words:

> En ce qui concerne le Gouvernement britannique, la seule raison qu'il ait d'entrer dans cette convention est le désir d'atteindre l'uniformité. […] Le projet de convention est contraire, sur plusieurs points à nos lois et à nos coutumes, mais nous sommes décidés à faire des sacrifices pour obtenir cette uniformité de régime. [111]

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108 *See*, Vincent Correia, "L'adage lex specialis derogat generali – Réflexions générales sur sa nature, sa raison d'être et ses conditions d'application", in Muriel Ubéda-Saillard (eds), *La mise en œuvre de la lex specialis dans le droit international contemporain* 27-47 (Pedone, 2017).

109 *See*, for the autonomy of air law in general, Pablo Mendes de Leon, *Introduction to Air Law* 4 (10th edition, Wolters Kluwer, 2017).

110 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 14.

111 *Ibid*., p. 25. *See also*, *Ibid*., p. 58: 'L'objet de cette convention est d'assurer l'uniformité du droit et si on insère une clause de ce genre, il y aura quantité d'évasions de la convention qui se produiront'.

In 1955, the same dynamic drove negotiations.[112] Speaking for the Netherlands, Professor Daniel Goedhuis stated that uniformity was 'vital' even if 'conflicting views have been expressed as to how the conditions of a uniform application of the rules can best be maintained'.[113] The need for an autonomous dimension of the concepts and terms used therein was notably voiced by Portuguese delegation, as follows:

> […] since in making reference to the notion of diligence, it destroyed, to a certain extent, the unity of the law of air transport. There were differences concerning this notion, in internal laws, particularly in the field of proof.[114]

In order to ensure the autonomous dimension, the representative for Italy set out that any reference to domestic concepts should be avoided, with the consequence that, for instance, the notion of 'dol / wilful misconduct' must be explained rather than quoted *expressis verbis*.[115] The representative for Germany also endorsed this view, arguing that: '[…] it was necessary to omit the reference to national laws in order to obtain a uniform substantive rule'.[116]

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112 For example, on the discussion over the concept of contributory negligence that could sometimes lead to a reduction of liability, the United States expressed opposition to any change, since: '[…] a change requiring uniformity in the form proposed would have the effect of changing the laws of his country', ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 262.

113 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 8: '[…] there is nobody here who does not realize that, unless uniformity in the matter of the air carrier's liability can be maintained, the sound development of international aviation will be retarded. Though opinion is unanimous that uniformity is vital, conflicting views have been expressed as to how the conditions of a uniform application of the rules can best be maintained'.

114 *Ibid*., p. 96.

115 *Ibid*., p. 168: 'Those proposals adopted approximately the Anglo-Saxon concept of "wilful misconduct" which, in his opinion, represented a happy meeting of the Roman notions of *dol* and *faute lourde* (gross negligence) which could be compared with *dol*, that is, only the most serious cases of *faute lourde* (gross negligence). In that regard, the President of the Conference in his excellent work on the Warsaw Convention had rightly written that there should be an assimilation to *dol* only in the case where the *faute lourde* (gross negligence) gave the same impression of immorality as *dol*. Consequently, he was in principle in favour of the old text of the Warsaw Convention which referred to serious default and *dol*, however, with the deletion from Article 25 of the Convention of all reference to national laws for reasons of uniformity'. *See also*, the comments made by Spain, *Ibid*., p. 195: 'If it succeeded in finding a formula which was sufficiently explanatory, there could be no criticism from the point of view of legislative systems, since the Conference would have succeeded in a labour of uniformity and achieved a text which national judges would have to follow whatever might be the concept which existed in their respective national legislations concerning wilful misconduct (*dol*) and gross negligence (*faute lourde*)'.

116 *Ibid*., p. 171.

Forty-five years later, the need for uniformity had not changed. However, further efforts were requested in light of increased regime complexity in 1999, as highlighted by the President of the Council of the ICAO:

> […] it is the shared desire of the parties involved that legal certainty and uniformity be restored, while implementing, in a globally-coordinated fashion, the long overdue modernization and consolidation for the system.[117]

The efforts to ensure that air law, as universal law, be uniform,[118] required yet again a distancing from domestic laws.[119] The Chairman expressed the view that the upcoming regime had to be '*sui generis*',[120] that is to say:

> […] a unique regime, taking into account all passengers-related considerations. It was not trying to approximate, or making it equivalent to, any regime which existed in domestic jurisdictions. The draft Convention had its own regime of liability, different from domestic jurisdiction; it had its own limitations as to the time within which an action could be brought and its own defences. It was different.[121]

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117 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. 37.

118 *See*, *Ibid*., p. 46.

119 A striking example of the changes entailed by the adoption of uniform rules can be found in the Chairman's speech on the possible adoption of a fifth jurisdiction and its interaction with the common law principle of *forum non conveniens*: '[…] it remained to be determined whether or not the principle of *forum non conveniens*, as formulated, would only be applicable to the fifth jurisdiction. One side of the coin was that it might be appropriate to codify the rather general provision in relation to the entire jurisdictional issue. To the point raised by the Delegate of the United States that the imposition of that alien concept […] might pose jurisdictional problems, […] the Group was involved in the process of seeking uniformity. It therefore seemed inadmissible to devise a special scheme of liability predicated on the fact that ultimately adjustments would have to be made in domestic jurisdictions. […] the need to decide whether or not, in the search for predictability and uniformity, it was necessary to forge those bridges of understanding which would be required. It was a difficult matter, as all Delegates, in their search for common solutions, would be faced with the question of how to modify their respective domestic legislation. […] in some jurisdictions the concept of *forum non conveniens* might not exist in a particular form, as well as that many of the elements of the Convention relating to the burden of proof, what was required to be proved and the limits of liability also did not exist in the domestic legislation of many countries, […] it would be necessary to make adjustments to such legislation in order to achieve uniformity', *Ibid*., p. 159-160.

120 *Ibid*., p. 142: 'However, in terms of the practical negotiations of what the Conference was attempting to achieve in arriving at a proposal which would command the widespread and substantial support required for a package, there was a sense of creating a regime which was *sui generis* having within it, elements which, taken in isolation, might raise even more difficult problems for the jurisprudential purity of the document, but nonetheless would satisfy the ultimate objective of ensuring that a balance would be achieved'.

121 *Ibid*., p. 115.

It results therefrom that the autonomy of the terms used in the Conventions was clearly a special feature envisaged by their drafters to encourage their uniform application.

(3) Judicial Decisions

Courts have regularly confirmed the autonomous dimension associated with the wish of uniformity of the Conventions.

In *Thibodeau*, the Supreme Court of Canada summarized, the reasons for the creation of uniform rules:

> The *Warsaw Convention* (and therefore its successor the *Montreal Convention*) had three main purposes: to create uniform rules governing claims arising from international air transportation; to protect the international air carriage industry by limiting carrier liability; and to balance that protective goal with the interests of passengers and others seeking recovery. These purposes responded to concerns that many legal regimes might apply to international carriage by air with the result that there could be no uniformity or predictability with respect to either carrier liability or the rights of passengers and others using the service. Both passengers and carriers were potentially harmed by this lack of uniformity.[122]

In the United Kingdom, the House of Lords confirmed in *Morris* that: '[…] the basic concepts it employs to achieve its purpose are autonomous concepts'.[123] In *Re Deep Vein Thrombosis*, Lord Scott of Foscote pointed out that the: '[…] the language of the Convention should not be interpreted by reference to domestic law principles or domestic rules of interpretation'.[124]

In Ireland, the Supreme Court highlighted that: '[…] terms in the Convention should receive, as far as practicable, an autonomous Convention meaning'.[125]

The Court of Justice of the European Union also recognized the specific nature of the 1999 Montreal Convention in several decisions.[126] In *Walz*, it held notably that:

> […] in the light of the aim of that convention, which is to unify the rules for international carriage by air, that term must be given a uniform and autonomous interpretation, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties to that convention.[127]

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122 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 41. This decision however does not distinguish the objectives and the purposes of the Conventions as done in this study.

123 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 16.

124 *Re Deep Vein Thrombosis and Air Travel Group Litigation*, (2005) UKHL 72, at 11.

125 *AHP Manufacturing B.V. t/a Wyeth Medica Ireland v. DHL Worldwide Network N.V., DHL Worldwide Express GmbH, DHL International (Ireland) Limited*, (2001) IESC 71.

126 *See*, as examples, CJEU, 7 November 2019, *Adriano Guaitoli, e.a. v. easyJet Airline Co. Ltd*, C-213/18, ECLI:EU:C:2019:927, at 47; CJEU, 19 December 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:1127, at 32.

127 CJEU, 6 May 2010, *Axel Walz v. Clickair SA.*, C-63/09, ECLI:EU:C:2010:251, at 21.

The Supreme Court of the United States, however, has not explicitly confirmed the autonomous dimension of unification rules used in the Conventions. Yet it could be implicitly deducted from the reasoning of several of its decisions such as in *Floyd*[128] or in *Tseng*.[129]

Chapter 4 will carry out a more detailed examination of the interpretation and application of 'autonomy' in judicial decisions.

(4) Concluding Remarks

This analysis indicates that the drafters of the Conventions expected that the terms used therein would receive an autonomous interpretation in order to guarantee their uniform application.

From this, I can conclude that the drafters considered the liability regime of the Convention as *sui generis*, meaning the terms set out therein should be considered to be 'autonomous' – if we refer to the vocabulary used by the Courts – from those used in domestic law. This also confirms the fact that the origin of uniform rules should not be sought in any legal system, such as continental or common law or even in Sharia,[130] even though their drafters may have been educated in such systems.[131]

In my opinion, the fact that the *Travaux Préparatoires* described the liability regime of the Conventions as *sui generis* also implies that the terms used in the Conventions should not be interpreted with reference to other international instruments. This view is strengthened by the conclusions of the International Law Commission, which indicated that the interpretation and applications of special regimes should particularly reflect their own purposes and object.[132]

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128 *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 552: 'Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation'.

129 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at 169: 'Given the Convention's comprehensive scheme of liability rules and its contextual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations'.

130 *See*, on this topic, Hamid Kazemi, *Carrier's Liability in Air Transport with Particular Reference to Iran* (Thesis, Universiteit Leiden, 2012).

131 *See*, Michel de Juglart, Emmanuel du Pontavice, Jacqueline Dutheil de la Rochère, Georgette Miller, *Traité de droit aérien* 942 (2nd edition, LGDJ, 1989).

132 *See*, United Nations, "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): '(13) *Effet of the "Speciality" of a regime.* The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose'.

2.5.3.4 *The Applicability of These Mechanisms to the Rules of Renvois*

The examination started from the postulation that exclusivity and autonomy mechanisms applied to both uniform rules and the rules of *renvois*, but is this really the case for the latter? The answer is not self-evident. Nevertheless, the purposes and object of the Conventions, together with the analysis carried out of their special features, show how much uniformity was a predominant aim for the drafters of the Conventions.

Authoritative authors confirm the autonomy of terms and concepts used in other international private law instruments containing rules of *renvois*.[133] The *Travaux Préparatoires* of the 1999 Montreal Convention also demonstrate, as quoted below, that efforts were made to provide for autonomous terms and concepts when rules of *renvois* would be at stake:

> […] on the one hand, there had been an American notion, memorialized in prior instruments, of 'domicile' of the passenger while, on the other hand, there had been the French concept of *domicile*, which was also reflected in prior instruments. It had been apparent to all Members of the Special Group that the use of those terms in the identical location had been producing a non-uniform result. They had thus worked diligently to try to find a suitable formulation of words which was not based on nationality and which would bridge the gap between 'domicile' and *domicile*. With great good will on both sides, the Special Group had come up with 'principal and permanent residence', considered by both sides at the time to be a reasonable compromise, although not an ideal solution from their respective perspectives.[134]

For these reasons, it is not unreasonable to consider that the terms and concepts used in the rules of *renvois* of the 1999 Montreal Convention must also be uniformly applied.

The question of the exclusivity of the rules of *renvois* is somewhat more delicate. At first glance, the lack of such exclusivity would result in opposing the *renvois* set out in the 1999 Montreal Convention to other rules of *renvois* foreseen in domestic legislation or another international convention. However, the wording of Article 29 of the Montreal Convention suggests the non-application of the exclusivity of its rules only with respect to 'the question as to who are the persons who have the right to bring suit and what are their respective rights'. The determination of their respective rights is, however, limited by the existence of the 1999 Montreal

133 *See*, for example, Karine Parrot, *L'interprétation des conventions de droit international privé* (Dalloz, 2006); Richard Gardiner, *Treaty Interpretation* 33 (2nd edition, The Oxford International Law Library, 2017); François Rigaux, Marc Fallon, *Droit international privé* 185, 340 (Larcier, 2005).

134 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. 153.

Convention.[135] A confirmation of this view may be found in the *Travaux Préparatoires*, where they indicate that:

> The more delicate issues as to the persons who had the right to bring the action were not really governed as such by the Convention, but were left to national law, subject only to the provision that one remained within the limits set by the Convention and the conditions subject to which the claims may be brought.[136]

Considering if exclusivity did not apply to the rules of *renvois*, it would undermine the purposes and object of the 1999 Montreal Convention, it is therefore reasonable to conclude that the exclusivity clause is a mechanism also used to guarantee the uniformity in the application of the rules of *renvois* established by the 1999 Montreal Convention.

2.6 Conclusions

The disparities between the legislations on air carrier liability that existed before the adoption of the 1929 Warsaw Convention led to a lack of legal certainty and the lack of a level playing field between the different parties involved in international air carriage. Amongst the different options that could have been contemplated to rectify this undesirable situation, the CITEJA and delegates to the 1929 Warsaw Conference opted for a unified regime through essentially the adoption of uniform rules.

These unification rules can be defined as particularly distinct from any harmonization rules, insofar as they do not merely adapt domestic rules but jointly create new rules under the form of an international convention, which prevails over domestic legislation, notably through an exclusivity clause and the use of autonomous terms. They should be considered as evolving distinctly from domestic, international or other uniform law frameworks. The sustainability of their existence is, however, dependent on their uniform application by Courts.

As has now been demonstrated, the drafters intended to provide a uniform application of the Conventions. The question that remains is whether the exclusivity clause and the principle of autonomy were sufficient to achieve this predominant aim of uniformity.

Chapters 3 and 4 will determine whether specific factors may have prevented the Conventions from being uniformly applied.

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135 *See*, for example, 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* 133, 210 *et seq.* (Schulthess, 2012).

136 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, pp. 189-190.