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

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4 External Factors of Fragmentation

4.1 Introduction

Alongside internal factors preventing a uniform application of the Conventions from an early stage, this analysis has yet to indicate whether other factors, which only appeared during the lifespan of the Conventions, may have created hurdles to their aim of uniformity.

With this in mind, this chapter will examine the behaviour of ratifying Parties in order to determine whether a modification of the regulatory environment might have affected the aim of uniformity (section 4.2). Subsequently, it will scrutinize the behaviour of Courts that have to apply the Conventions, in order to ascertain how they have responded to the characteristics described in Chapter 2, that is to say exclusivity and autonomy (section 4.3). Finally, this chapter will explore whether the existence of various linguistic versions of the Conventions may have impacted their aim of uniformity (section 4.4).

4.2 Regulatory Modifications

4.2.1 Evolution of the Regime

4.2.1.1 A Multi-Layered System

Uniform rules are the outcome of compromise, and can easily be affected through a modification to the regulatory environment. In the case of the Conventions, modifications notably occurred when decisions were made to successively amend the original text.

The major role of revisions is to modernize the text in order to fit actual needs. This task is an opportunity for adapting provisions of the initial text when their substantive aspect was too fragmented across jurisdictions and a common need for further re-unification was expressed. However, revisions have a double impact. While they may proceed to necessary adjustments to respond to technical, social and/or legal needs;[1] the co-existence of rival texts attacks the effectiveness of unification.[2]

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1 *See*, Otto Riese, *Une juridiction supranationale pour l'interprétation du droit unifié?*, 13 Revue Internationale de Droit Comparé 717-735 (1961).

2 *See*, Barry Spitz, *Assessment of the Unification of Private International Air Law by Treaty*, 83 South African Law Journal 179 (1966).

The international air carrier liability regime as established by the Conventions was modified on numerous occasions on the initiative of States, via protocols or a supplementary convention,[3] as well as through private initiatives and domestic/regional interventions. These modifications will be discussed in the next sections against the backdrop of the principal research question, the envisaged uniformity in private international air law.

4.2.1.2 International Conventions

(1) Numerous Modifications

The 1929 Warsaw Convention was first amended by the 1955 Hague Protocol. Through this passengers were offered a greater protection with new provisions. As an example, their ticket would no longer contain a mere 'statement'[4] of their rights, but from that point onwards would include a 'notice'[5] informing them that their journey was regulated by the uniform rules. The carriers also saw their situation improve. For example, the 1955 Hague Protocol authorized carriers to alleviate their liability with respect to inherent defects to cargo.[6] In addition to these changes, former controversies, such as the negotiability of the airway bill, were also solved.[7]

Moreover, the concepts of 'dol'[8] and 'faute équivalente',[9] which were used in the 1929 text,[10] and which had given rise to many misunderstandings in common law jurisdictions, were redrafted to lower the potential connections with domestic law and therefore enhance the autonomy of the concepts. While the idea remained the same, the two concepts were respectively redrafted as follows: '[…] done with intent to cause damage […]' and '[…] recklessly and with knowledge that damage would probably result'.[11] This redrafting toward further autonomy faced resistance as references to concepts known under domestic law were preferred by certain negotiators, particularly when it came to matters of translation. The *Travaux Préparatoires* report, to that effect, that the delegate for Belgium expressed the view that it was important to have a French text which would be abso-

3 For a description of the relationship between these instruments and the 1999 Montreal Convention, *see*, section 1.3.1.1(2).
4 1929 Warsaw Convention, Articles 3 and 4.
5 1955 Hague Protocol, Articles III and IV.
6 1955 Hague Protocol, Article XII.
7 1955 Hague Protocol, Article IX: 'Nothing in this Convention prevents the issue of a negotiable air waybill'.
8 Translated as 'willful misconduct' in the English translation.
9 Translated as 'default equivalent to' in the English translation.
10 1929 Warsaw Convention, Article 25.
11 1955 Hague Protocol, Article XIII. In the French version: 'avec l'intention de provoquer un dommage', 'soit témérairement et avec conscience qu'un dommage en résultera probablement'.

lutely clear for French-speaking jurisdictions. He noted that the suggested word 'recklessly' could not be satisfyingly translated into French with the word 'témérairement', as recklessly would refer, in his understanding, to a 'total lack of care', which would correspond more closely in French to 'insouciance totale'.[12] But as pointed out above, this comment did not result in any changes.[13]

Although the 1955 Hague Protocol improved the text of the 1929 Warsaw Convention in many ways, delegates were aware that the new text could not depart too drastically from the original one insofar as ratifiability was at stake as underlined here by the Soviet delegation:

> […] the introduction of a large number of amendments in the Warsaw Convention would make it very difficult to accept and ratify the Protocol which might be adopted by the Conference, and this would result in the destruction of the provisions of the Convention which brought about the unification of the rules of international air transport.[14]

Successive waves of improvements later occurred with the 1961 Guadalajara Convention, the 1971 Guatemala City Protocol, the 1975 Montreal Additional Protocols and the 1974 Montreal Protocol No 4, which all also contributed to the fragmentation of the uniform regime, although to a lesser extent.

The 1961 Guadalajara Convention supplemented the 1929 Warsaw Convention and, as such, did not substantially modify the existing uniform regime. The 1961 Guadalajara Convention organized the liability regime in the case of charter arrangements that were developing at the time.[15] It created a distinction between contractual and actual carriers. Most of its provisions were later reflected in the 1999 Montreal Convention.

Later, neither the 1971 Guatemala City Protocol, which had ambitions to modernize provisions of the system and to introduce unbreakable liability limits, nor the 1975 Additional Protocol No 3, entered into force.

The 1975 Additional Protocols No 1 and 2 and 1975 Montreal Protocol No 4 entered in force only a few years before the adoption of the 1999 Montreal Convention, and did not therefore have much opportunity to widely impact the existing system. These two Additional Protocols primarily aimed at replacing the currency unit established in francs in the prior instruments by Special Drawing Rights (hereinafter also referred to as

12 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 280.

13 On the linguistic issues, *see*, section 4.4.

14 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 56.

15 *See*, Isabella Diederiks-Verschoor, Pablo Mendes de Leon, *An Introduction to Air Law* 210 (9th edition, Wolters Kluwer, 2012).

'SDR') which had been recently created.[16] In parallel, the Montreal Protocol No 4 essentially aimed to modernize the provisions of the 1955 Hague Protocol regarding carriage of cargo and mail.[17]

(2) Consequences

In 2021, amongst States that have ratified the 1929 Warsaw Convention, 22 still have not ratified the 1955 Hague Protocol.[18] This shows the risk of having several acting liability regimes.[19] The absence of symmetrical ratifications creates a situation of fragmentation of the uniform regime.

Although the goal of the successive changes was to improve the liability regime set forth in the 1929 Warsaw Convention – in order amongst other things, to more adequately respond to the interests of the travelling public – these changes resulted in a fragmentation of the rule due to the different levels of ratification.

An example of such fragmentation can be found in the litigation that followed the crash of Canadian Pacific Airlines flight CP 402 in Tokyo in 1966. The actions of two different families of deceased passengers went to the Supreme Court of Canada. The discussions essentially focused on the limit of liability of the carrier insofar as the reference to the applicable liability regime was drafted in small print on the ticket. With respect to one family, the Supreme Court held that the carrier was entitled to the limitation of liability, given that, in light of the passenger routing, only the 1929 Warsaw Convention applied.[20] With regards to the other family, it held that the carrier was not entitled to the limitation of liability given the passen-

16 A Special Drawing Right is a unit of accounting created by the International Monetary Fund in 1969. Its value is based on the basket of several currencies used in international trade and finance, namely in 2021: US Dollar (41.73%), Euro (30.93%), Chinese Yuan (10.92%), Japanese Yen (8.33%), Pound Sterling (8.09%), Source: International Monetary Fund, <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR> (accessed 17 February 2021).

17 *See*, ICAO Doc 9154, International Conference on Air Law, Montreal, September 1975, volume I, *Minutes*, Montreal, 1977, p. 2, 250.

18 ICAO, <https://www.icao.int/secretariat/legal/LEB%20Treaty%20Collection%20Documents/composite_table.pdf>, (accessed 5 January 2021).
Some have ratified the 1999 Montreal Conference. Five States have ratified only the 1929 Warsaw Convention, namely: Comoros, Liberia, Mauritania, Myanmar, and Turkmenistan; 24 States have ratified neither the 1929 Warsaw Convention, the 1955 Hague Protocol or the 1999 Montreal Convention: Andorra, Antigua and Barbuda, Bhutan, Burundi, Central African Republic, Djibouti, Dominica, Eritrea, Guinea-Bissau, Haiti, Kiribati, Marshall Islands, Micronesia, Niue, Palau, Saint Kitts and Nevis, Saint Lucia, San Marino, Sao Tome and Principe, Somalia, South Sudan, Tajikistan, Timor-Leste and Tuvalu. In total, 152 States have ratified the 1929 Warsaw Convention, 137 the 1955 Hague Protocol and 137 (including the European Union) the 1999 Montreal Convention in 2021.

19 The 1955 Hague Protocol sets forth that its ratification or adherence by any State which is not a Party to the 1929 Warsaw Convention has the effect of adherence to the latter in its version amended by the Protocol. *See*, 1955 Hague Protocol, Articles XXI and XXIII.

20 *Ludecke v. Canadian Pacific Airlines*, (1979) 2 SCR 63.

ger's specific routing triggered the application of the 1955 Hague Protocol. The consequence of the application of the 1955 Hague Protocol was that the carrier had to comply with the new 'notice' requirement,[21] which, in this case, was not considered as correctly fulfilled by the Court.[22] This example perfectly illustrates how different ratification stages may lead to undesirable fragmentation.

(3) Concluding Remarks

Despite the existence of specific provisions in the Conventions governing how they should interact, the various changes and disparities in the ratification's stages impacted the uniformity of the international air carrier regime established by the 1929 Warsaw Convention. The same is true for initiatives adopted by non-State actors, that is, private initiatives, which the next section will cover at greater length.

4.2.1.3 Private Initiatives

In parallel to the waves of international conventions unravelling the uniform system, carriers were developing many international private initiatives. Some tended to bring further uniformity, such as the IATA Recommended Practices, and particularly their recommended general conditions of carriage[23] that provided common definitions. But they did not modify the uniform regime established by the 1929 Warsaw Convention.

In contrast, right when the United States was dissatisfied with the low limits of the 1955 Hague Protocol and was about to denounce the 1929 Warsaw Convention, numerous international carriers agreed under the 1966 Montreal Agreement[24] to raise the limit of indemnification in case of death, wounding or other bodily injury up to USD 75 000 of proven damage for services to and from the United States.[25] This voluntary agreement entered into by air carriers to save as much as possible of the uniform regime, was accepted by the American Civil Aeronautics Board,[26] and ultimately became domestic law.[27]

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21 *See*, section 4.2.1.2(1).

22 *Montreal Trust Company et al. v. Canadian Pacific Airlines*, (1977) 2 SCR 793.

23 *See*, Rishiraj Baruah, IATA Conditions of Contract and Carriage (Passengers And Baggage): A Constant Tussle between Regulatory Authorities and Airlines, Source: International Law Square, <https://ilsquare.org/2016/03/25/iata-conditions-of-contract-and-carriage/> (accessed 22 August 2019).

24 Also known as CAB Agreement 18900. *See*, section 1.1.3.1.

25 *See*, Andreas Lowenfeld, Allan Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard Law Review 497-602 (1967).

26 *See*, Allan Mendelson, *Warsaw: In Transition or Decline?*, 21 Air & Space Law 183 (1996); Michael Milde, *International Air Law and ICAO* 275 (Eleven International Publishing, 2008).

27 *See*, US 14 CFR Part 203.

Two decades later, in Japan on 20 November 1992, ten Japanese airlines voluntarily relinquished the limits of the Warsaw Convention using Article 22(1) of the 1929 Warsaw Convention, which allowed to opt for higher limits.[28]

A few years later, on 30 and 31 October 1995 in Kuala Lumpur, an impressive number of international carriers also voluntarily modified the limits of the 1929 Warsaw Convention and 1955 Hague Protocol under the 1995 IATA Agreement.[29] This Agreement provides that:

> The undersigned carriers agree
> 1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention [the 1929 text or its version as amended in 1955 which ever may be applicable] as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
> 2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant. […].

In 1996, the Air Transport Association of America mirrored the changes made in 1995 in its own text, known as the 1996 ATA Intercarrier Agreement.[30]

Despite their necessity, and their provisions essentially targeting pecuniary measures,[31] all of these carrier initiatives gradually chipped away at the uniform regime initially established in a single instrument.[32] The next section will look at domestic and regional initiatives that created similar issues for the envisaged uniformity of rulemaking.

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28 This modification was made with the approval of the Japanese government. *See*, Michael Milde, *International Air Law and ICAO* 280 (Eleven International Publishing, 2008); Naneen Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. Air L. & Com 437 (1995).

29 *See*, section 1.1.3.1.

30 Also known as 1996 IPA. This last text was modified after the adoption of the 1999 Montreal Convention. *See*, George Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States – from Warsaw 1929 to Montreal 1999* 14 (Kluwer 2010).

31 The 1929 Warsaw Convention authorizes higher limits of liability in the carriage of passengers under specific conditions. *See*, 1929 Warsaw Convention, Article 22(1).

32 *See*, with respect to the erosion of the uniform system by the 1966 Montreal Agreement, Michael Milde, *International Air Law and ICAO* 275 (Eleven International Publishing, 2008).

4.2.1.4 Domestic and Regional Initiatives

Amendments were also adopted pursuant to domestic and regional initiatives. In 1988, the Italian government unilaterally enacted legislation that increased the liability limit in case of death or injury to 100 000 SDR for all Italian carriers and foreign carriers operating stopovers on the Italian territory.[33]

In 1997, the then European Community, developing its legal arsenal in the field of air transport, adopted Regulation 2027/97 on air carrier liability in the event of accidents (hereinafter the '***EU Regulation 2027/97***').[34] Said regulation modified the content of the existing Warsaw Instruments. On the grounds that the limit on liability in the case of accident in the 1955 Hague Protocol was too low with respect to European economic and social standards, EU Regulation 2027/97 set forth that the liability of a Community air carrier for damage sustained in the event of passenger death, wounding or any other bodily injury due to accident would not be subject to any financial limit.[35] For any damage up to SDR 100 000, the Community carrier would no longer be in a position to exclude or limit its liability[36] by proving that all necessary measures to avoid damage had been taken, or that it was impossible to take such measures.[37] As an innovative measure, EU Regulation 2027/97 also provided that 'immediate economic needs' should be rapidly covered. To that effect, Article 5 established that a Community air carrier should without delay, and in any event not later than fifteen days after the identity of the natural person entitled to compensation had been established, make advance payments, as may be required, of not less than SDR 15 000 per passenger in case of death,[38] in order to meet those needs on a basis proportional to the hardship suffered. Although advance payments are not a recognition of liability, they create some expectations from victims, which contributes to the destruction of the uniform regime.[39]

33 Legge 5 iuglio 1988 n. 274 – Limite di risarcimento nei trasporti aerei internazionali di persone, GU Serie Generale n. 168 del 19-07-1988.

34 Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, *Official Journal*, 17 October 1997, L 285/1.

35 EU Regulation 2027/97, Article 3(1)(a).

36 A defence grounded in passenger negligence still remains possible.

37 EU Regulation 2027/97, Article 3(2).

38 Following the adoption of the 1999 Montreal Convention, this amount was increased to SDR 16 000 in the EU Regulation 889/2002.

39 Recital 4 of EU Regulation 2027/97 indicates that one of the aims of the regulation is indeed to have the 'same level and nature of liability in both national and international transport'. This stems from the fact that Member States have variously increased the liability limits with the consequence that different limits existed in the European internal market. This vow of further uniformity within the European Community was indeed a positive step, but again participated in the uravelling of the system.

In 2002, EU Regulation 2027/97 was amended in consideration of the adoption of the 1999 Montreal Convention by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 on air carrier liability in the event of accidents (hereinafter the '***EU Regulation 889/2002***').[40]

Although the revision was not supposed to become a cause of fragmentation, the wording adopted by the European legislator is not exactly in line with that used in the 1999 Montreal Convention. For example, Article 17 of the 1999 Montreal Convention uses the following wording in its English version: '[…] upon condition only that the accident which caused the death or injury took place […]'; and in the French version: '[…] par cela seul que l'accident qui a causé la mort ou la lésion s'est produit […]'. In this abstract, the word 'injury' corresponds to 'lésion' in French. Notwithstanding this correspondence, EU Regulation 889/2002 does not use the term 'lésion' in its French version, but 'blessure', which is the term used in the 1929 Warsaw Convention and translated into English as 'wounding'. This discrepancy could be misleading, given that Article 1(3)(2) of Regulation 889/2002 provides that: 'Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Montreal Convention'. Yet, the term 'blessure' is not defined in the European text and has ceased to be used following the adoption of the 1999 Montreal Convention. This is the example of a text too hastily adopted without due consideration for changes made in the 1999 Montreal Convention.

4.2.1.5 Concluding Remarks

All of these successive modifications to the uniform regime adopted in the 1929 Warsaw Convention, and their co-existence, be it through international instruments, carrier initiatives or domestic/regional law, appear to have eroded the uniformity of the international air carrier regime itself.[41] As argued in Chapter 2 above, the co-existence of various regimes is exactly what the drafters of the 1929 Warsaw Convention wanted to avoid.

4.2.2 The Development of Consumer Rights at Regional and Domestic Levels

4.2.2.1 Preliminary Remarks

Only a few years after the signing of the 1999 Montreal Convention, legislators in several parts of the world decided to increase general consumer protection. Among other concerns, this extended to the improvement of air passenger protection.

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40 Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, *Official Journal*, 30 May 2002, L 140/2.

41 *See*, Bin Cheng, *A New Era in the Law of International Carriage by Air: from Warsaw (1929) to Montreal (1999)*, 53 International & Comparative Law Quarterly 858 (2004).

The following analysis will look at whether the development of air passengers' rights at regional and domestic levels potentially conflicted with the uniform regime established by the Conventions. If so, it will explore to what extent these regional and domestic laws might have affected the uniformity of 1999 Montreal Convention.

4.2.2.2 European Union

(1) Introduction to EU Regulation 261/2004

(i) Scope

After the adoption of the 1999 Montreal Convention, the *credo* of protecting air passengers took new shape in the European Union. Recognizing the improvements made in case of air accidents, the European Parliament and Council acknowledged that denied boarding and cancellation as well as long flight delays caused serious troubles, and were an inconvenience to passengers that had to be addressed. The solutions proposed were translated into EU Regulation 261/2004, which entered in force in 2005.[42]

EU Regulation 261/2004 governs situations of denied boarding, downgrading, flight cancellation and long delays. Most of these situations are not regulated by the Conventions. EU Regulation 261/2004 applies to passengers departing from an airport located in a Member State territory, whether they travel with a European Union carrier or not, and to passengers departing from an airport in a non-EU State and travelling to an airport in a Member State territory, if they travel with a European Union carrier and under the condition that they do not receive benefits, compensation or assistance from the third country.[43]

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42 For a detailed description of the EU Regulation 261/2004, *see*, Michal Bobek, Jeremias Prassl (eds), *Air Passenger Rights – Ten Years On* (Hart Publishing, 2016). Because a substantial number of claims are introduced daily against air carriers pursuant to EU Regulation 261/2004, it is worth noting the case law is constantly developing. The reader is therefore invited to follow the evolution of judicial decisions with particular care.

43 In an early decision following the adoption of EU Regulation 261/2004, the Court of Justice of the European Union held (in a case involving a non-European air carrier) that said regulation, in opposition to the 1999 Montreal Convention, does not apply to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight from an airport located in a non-Member State. According to the Court, the fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision. *See*, CJEC, 10 July 2008, *Emirates Airlines - Direktion für Deutschland v. Diether Schenkel*, C-173/07, ECLI:EU:C:2008:400. Moreover, it should be underscored that EU Regulation 261/2004 also applies to any scheduled and non-scheduled flights, including package tours, except when the package tour is cancelled for reasons other than the cancellation of the flight.

(ii) Denied Boarding and Downgrading

With respect to denied boarding,[44] EU Regulation 261/2004 provides that, when an operating carrier reasonably expects to deny boarding to a passenger, it will first call for volunteers to surrender their reservation in exchange for commonly agreed benefits, and at least a right to reimbursement or rerouting. If none or an insufficient number of passengers surrenders, the operating carrier may then deny boarding to passengers against their will.

In this situation, EU Regulation 261/2004 provides that the air carrier will have to compensate the concerned passengers according to the chart set out in Article 7, which sets a fixed compensation between EUR 250 and EUR 600, depending on the destination. The air carriers will also be required to offer reimbursement or rerouting to the passengers denied boarding, and to provide them with assistance, which may include food, hotel accommodation and communication tools such as calls. Passengers denied boarding are obviously those who are denied the right to board the aircraft against their will, but to fall within the definition of EU Regulation 261/2004, they should have a confirmed reservation on the flight and have presented themselves for check-in at the agreed time or, if no time was agreed, at least 45 minutes before the published departure time.[45] Passengers without valid travel documentation or other related reasons exemplified in EU Regulation 261/2004 may be denied boarding without any rights to compensation.[46]

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44 In the United States, certain Courts have considered denied boarding as a form of delay. *See*, George Tompkins, *Bumping – Denied Boarding – And Article 19 of the 1999 Montreal Convention*, 32 Air & Space Law 231-232 (2007). *Contra*, Supreme Court of the Philippines, *Philippine Airlines, Inc. v. Simplicio Griño*, 579 Phil 344 (2008).

45 The CJEU held that the concept of 'denied boarding' included a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denied boarding to some passengers on the grounds that the first flight included in their reservation was subject to a delay attributable to that carrier and that the latter mistakenly expected those passengers not to arrive in time to board the second flight. *See*, CJEU, 4 October 2012, *Germán Rodríguez Cachafeiro and María de los Reyes Martínez-Reboredo Varela-Villamor v. Iberia, Líneas Aéreas de España SA*, C-321/11, ECLI:EU:C:2012:609. On the same day, the CJEU considered in another case that this regime related not only to cases where boarding was denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons. The Court noted that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose 'cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation […] to compensate a passenger to whom it denies boarding on such a flight'. *See*, CJEU, 4 October 2012, *Finnair Oyj v. Timy Lassooy*, C-22/11, ECLI:EU:C:2012:604. The regime described above does not apply when there are reasonable grounds to deny boarding, for instance for health, safety, security or inadequate travel documentation reasons.

46 *See*, EU Regulation 261/2004, Article 2 (j).

EU Regulation 261/2004 also provides that in the case of downgrading, the operating carrier shall reimburse the passenger from 30 per cent to 75 percent of the price of the ticket, according to the flight distance.[47]

(iii) Cancellation

Regarding cancellation, which is not a situation regulated by the 1999 Montreal Convention,[48] EU Regulation 261/2004 provides that the affected passenger should be offered the choice between reimbursement and rerouting under comparable transport conditions, and the possibility to eat and place calls where appropriate. In the event of rerouting, when a stay of at least one night becomes necessary, the passenger should also be offered hotel accommodation and transport from and to the airport.

One particularity of this legislation is the automatic and standardized financial compensation offered to passengers whose flight was cancelled. Article 7 sets this compensation between EUR 250 and EUR 600, depending on travel distance. These amounts may, however, be decreased by 50 percent in a rerouting situation, when the arrival time does not exceed the scheduled arrival time originally booked by more than two to four hours, depending on the distance. This standardized compensation may nevertheless be avoided if the passenger is informed of the cancellation within a

47 The CJEU ruled that where a passenger is downgraded on a flight, the price to be taken into account in determining the reimbursement for the passenger affected is the price of the flight on which he or she was downgraded, unless that price is not indicated on the ticket entitling him or her to transport on that flight, in which case, it must be based on the part of the price of the ticket corresponding to the quotient resulting from the distance of that flight and the total distance that the passenger is entitled to travel. The Court added that the price of the ticket to be taken into consideration for the purpose of determining the reimbursement is solely the price of the flight itself, with the exclusion of taxes and charges indicated on that ticket, as long as neither the requirement to pay those taxes and charges nor their amount depends on the class for which that ticket has been purchased. *See*, CJEU, 22 June 2016, *Steef Mennens v. Emirates Direktion für Deutschland*, C-255/15, ECLI:EU:C:2016:472.

48 *See*, section 1.1.3.2(4)(ii). The EU Regulation 261/2004 gives the following definition of cancellation: 'non-operation of a flight which was previously planned and on which at least one place was reserved'. The CJEU ruled that the term 'cancellation' also covers cases in which a flight departs but then returns to the airport of departure and does not proceed further. *See*, CJEU, 13 October 2011, *Aurora Sousa Rodríguez and Others v. Air France SA*, C-83-10, ECLI:EU:C:2011:652. *Compare*, Audiencia Provincial de Madrid, 1 February 2008, ECLI:ES:APM:2008:10106, discussed in fn 151 in chapter 3. The CJEU also ruled that a flight in respect of which the places of departure and arrival adhered to the planned schedule but during which an unscheduled stopover took place could not be regarded as cancelled. *See*, CJEU, 5 October 2016, *Ute Wunderlich v. Bulgarian Air Charter Limited*, C-32/16, ECLI:EU:C:2016:753 (Order).

certain time limit[49] or if the cancellation results from 'extraordinary circumstances'.[50]

(iv) Delay

The EU Regulation 261/2004 also sets forth specific provisions in case of long delay. Although it does not provide a definition of the concept of delay, it sets out that when an operating carrier reasonably expects a flight to be delayed beyond its scheduled time of departure by a certain time, which varies depending on the travel destination, passengers shall be offered meals and refreshments, the ability to place two calls and, accommodation and transfer between the airport and a hotel under certain conditions. If the delay is at least five hours, the concerned passengers should also be offered the choice of a reimbursement and, when relevant, of a return flight to the first point of departure.

(2) The Possible Overlap with the Principle of Exclusivity of the 1999 Montreal Convention

The existence of an additional European regime on delays, in parallel to that of the 1999 Montreal Convention, was immediately challenged before English Courts, which sought a preliminary ruling from the CJEU.

In the *IATA* decision,[51] the CJEU ruled, as reported below, that there was no overlap between the two instruments insofar as there existed two different kinds of damages in the case of delay. That is to say, one was general and one was more personal; and each was respectively regulated by EU Regulation 261/2004 and the 1999 Montreal Convention:

> First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned […] Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.[52]

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49 *See*, EU Regulation 261/2004, Article 8(1)(c). The CJEU ruled that the operating air carrier was required to pay compensation when a flight was cancelled and that information was not communicated to the passenger at least two weeks before the scheduled time of departure, including in the case where the air carrier, at least two weeks before that time, communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within that period. *See*, CJEU, 11 May 2017, *Bas Jacob Adriaan Krijgsman v. Surinaamse Luchtvaart Maatschappij NV*, C-302/16, ECLI:EU:C:2017:359.

50 *See*, section 4.2.2.2(3).

51 *See also*, section 1.3.2.3(2)(vi).

52 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, point 43.

On these grounds, the Court affirmed the validity of EU Regulation 261/2004 with regards to European law and the 1999 Montreal Convention. The adoption of EU Regulation 261/2004 and the confirmation of its validity had two major consequences. *First*, with regards to the vow of uniformity of the 1999 Montreal Convention, the jurisprudence of the CJEU departs from the general interpretation given by the highest Courts in other jurisdictions regarding the principle of exclusivity.[53] *Second*, this deviation from foreign jurisprudence opened the door to further erosion of the uniformity of the 1999 Montreal Convention.

The CJEU later ruled in *Sturgeon* that passengers whose flight was delayed by three or more hours were in position comparable to those whose flight had been cancelled, with the consequence that they could also obtain standard compensation.[54] This unexpected interpretation was later reaffirmed by the Grand Chamber of the CJEU on 23 October 2012 in *Nelson*.[55] The argument of the primacy of the 1999 Montreal Convention over European secondary legislation,[56] despite being acknowledged by the Court,[57] could not have been of great assistance once the Court had previously ruled in *IATA* that two different kinds of damage could exist in case of delay. The potential violation of the principle of legal certainty[58] was also rejected by the Court on the grounds that, in its view, the preamble of the 1999 Montreal Convention recognized the importance of ensuring consumer protection.[59]

(3) The Potential Impact of EU Regulation 261/2004 on the Autonomy of the Terms in the 1999 Montreal Convention

The carriers' means of defence granted by the 1999 Montreal Convention may also be affected by European case law interpreting EU Regulation 261/2004. Indeed, the 1999 Montreal Convention provides that, under Article 19:

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53 *See*, section 4.3.2.2.

54 CJEC, 19 November 2009, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v. Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v. Air France SA*, Joined cases C-402/07 and C-432/07, ECLI:EU:C:2009:716. *See*, for commentary, Robert Lawson, Tim Marland, *The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon – in Harmony or Discord?*, 36 Air & Space Law 99-108 (2011); Cyril-Igor Grigorieff, *Arrêts Condor et Air France: une protection accrue des passagers aériens*, 165 Journal de Droit Européen 7-9 (2010).

55 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.

56 *See*, section 2.5.3.2.

57 CJEC, 22 December 2008, *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*, C-549/07, ECLI:EU:C:2008:771, point 28: '[…] it must be stated that that convention forms an integral part of the Community legal order. Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation […]'.

58 *See*, section 2.3.2.

59 *See*, section 2.3.3.

> […] the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

EU Regulation 261/2004 appears to offer the same means of defence to air carriers in case of flight cancellation, as its Article 5(3) provides that:

> An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

Recitals 14 of EU Regulation 261/2004 also recall that:

> *As under the Montreal Convention*, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. (*Italics added*).

The desire for EU Regulation 261/2004 to mirror the means of defence organized in the 1999 Montreal Convention is therefore unambiguously expressed.

However, the CJEU held in *Wallentin* that the 1999 Montreal Convention's rules on limitation and exclusion of liability were not decisive for the interpretation of liability provisions in EU Regulation 261/2004.[60]

The concept of 'extraordinary circumstances' has since then been widely interpreted by domestic Courts and the CJEU.[61] A few illustrations of interpretations given by the CJEU, also referred to as the 'EU Court' in this section, are given below.

On a restrictive side, the EU Court ruled in *Wallentin* that a technical problem with an aircraft that leads to the cancellation of a flight is not covered by the concept of extraordinary circumstances, unless that problem stems from events which, by their nature or origin, are not inherent to the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The EU Court further held that the fact that an air carrier complied with minimum aircraft maintenance rules is not in itself sufficient to establish that the carrier had taken all reasonable measures.[62] Later, in *Eglītis*, the EU Court decided that, since an air carrier is obliged to imple-

60 CJEC, 22 December 2008, *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*, C-549/07, ECLI:EU:C:2008:771, point 33: '[…] the Montreal Convention cannot determine the interpretation of the grounds of exemption under that Article 5(3)'.

61 Since it may be used also for flight delays.

62 CJEC, 22 December 2008, *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*, C-549/07, ECLI:EU:C:2008:771.

ment all reasonable measures to avoid extraordinary circumstances, it must reasonably, when organizing the flight, take into account the risk of delay connected to the possibility of such circumstances arising and, consequently, must provide for a certain reserve time to make it possible for the flight to be operated in its entirety, if feasible, once the extraordinary circumstances have come to an end.[63] In *McDonagh*, the EU Court also decided that even if circumstances such as the partial closure of European airspace as a result of an Icelandic volcano eruption, constituted extraordinary circumstances, the concept of 'extraordinary circumstances' did not release air carriers from their obligation to provide care as described above, such as hotel accommodation in case of rerouting.[64] In *Siewert*, the EU Court held that mobile stairs colliding with an aircraft did not automatically constitute 'extraordinary circumstances'.[65] In *Krüsemann*, departing from the recital of EU Regulation 261/2004, the Court further held that a wildcat strike was not constitutive of an 'extraordinary circumstance'.[66] The Grand Chamber further held, in *Airhelp v. SAS*, that strike action entered into upon by a trade union of the staff of an operating air carrier, in compliance with the conditions laid down by domestic legislation, did not qualify as extraordinary circumstances.[67] In *van der Lans*, the EU Court once again reduced the scope of the defence founded on 'extraordinary circumstances', ruling that a delay resulting from an unexpected technical problem that was not attributable to poor maintenance and that was also not detected during routine maintenance checks, did not fall within the concept of 'extraordinary circumstances'.[68]

However, not all EU Court decisions have rejected the carrier's defence based on 'extraordinary circumstances'. The EU Court often recognized the existence of 'extraordinary circumstances' when the event's origins were external to the carrier. In *Pešková*, the EU Court ruled that a bird strike fell in that category, and when a delay resulted from both an extraordinary circumstance and another circumstance that did not qualify as extraordinary, the delay caused by the first event must be deducted from the total delay in arrival of the flight concerned before assessing whether compensation for the delay must be paid.[69] In the same vein, in *Pauels*, the EU Court

63 CJEU, 12 May 2011, *Andrejs Eglītis and Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija*, C-294/10, ECLI:EU:C:2011:303.

64 CJEU, 31 January 2013, *Denise McDonagh v. Ryanair Ltd*, C-12/11, ECLI:EU:C:2013:43.

65 CJEU, 14 November 2014, *Sandy Siewert and Others v. Condor Flugdienst GmbH*, C-394/14, ECLI:EU:C:2014:2377 (Order).

66 CJEU, 17 April 2018, *Helga Krüsemann and Others v. TUIfly GmbH*, C-195/17, ECLI:EU:C:2018:258.

67 CJEU, 23 March 2021, *Airhelp Ltd v. Scandinavian Airlines System Denmark-Norway-Sweden*, C-28/20, ECLI:EU:C:2021:226.

68 CJEU, 17 September 2015, *Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, C-257/14, ECLI:EU:C:2015:618.

69 CJEU, 4 May 2017, *Marcela Pešková and Jiří Peška v. Travel Service a.s.*, C-315/15, ECLI:EU:C:2017:342.

held that damage to an aircraft tyre caused by a foreign object lying on an airport runway, such as loose debris, must also be considered as extraordinary circumstances.[70] In *TAP*, the EU Court admitted that a flight diversion to disembark an unruly passenger qualified as an extraordinary circumstance unless the carrier contributed to the occurrence of that behaviour or failed to take appropriate measures in the face of warning signs of such behaviour.[71] In *Airhelp v Austrian Airlines*, the EU Court considered that a collision between the elevator of an aircraft in a parked position and the winglet of another airline's aircraft, caused by the movement of the second aircraft, fell under the concept of extraordinary circumstances.[72]

In order to mitigate the risk of fragmentation from EU Regulation 261/2004, National Enforcement Bodies (in short 'NEBs'), created pursuant to EU Regulation 261/2004, established a non-exhaustive list[73] of what they considered to be 'extraordinary circumstances'.[74] The European Commission also tried to shed some light in its Guidelines.[75]

The concept of 'extraordinary circumstances' and its various interpretations may affect the way Article 19 of the 1999 Montreal Convention is construed by domestic Courts. Some of them may be tempted to consider that the concept of 'extraordinary circumstances', as interpreted by the EU Court with respect to EU Regulation 261/2004, also applies in cases governed by the 1999 Montreal Convention, despite the fact that the distinction between the two had been made clear by the EU Court.

(4) Concluding Remarks

In conclusion, even if the decisions of the CJEU are consistent with European law, in *IATA* the CJEU lost sight of the uniform ambition of the 1999 Montreal Convention and the crucial role of said Court in ensuring its

70 CJEU, 4 April 2019, *Germanwings GmbH v. Wolfgang Pauels*, C-501/17, ECLI:EU:C:2019:288.

71 CJEU, 11 June 2020, *LE v. Transportes Aéreos Portugueses SA*, C-74/19, ECLI:EU:C:2020:460.

72 CJEU, 14 January 2021, *Airhelp Limited v. Austrian Airlines AG*, C-264/20, ECLI:EU:C:2021:26 (Order).

73 The list is no longer publicly available. A very similar one was established by the UK Civil Aviation Authority. *See*, United Kingdom Civil Aviation Authority, <https://www.caa.co.uk/Commercial-industry/Airlines/Guidance-on-consumer-law-for-airlines/> (accessed 18 December 2020).

74 For an analysis of the concept of 'extraordinary circumstances' in the context of a pandemic, *see*, Chrystel Erotokritou, Cyril-Igor Grigorieff, *EU Regulation No 261/2004 on Air Passenger Rights: The Impact of the COVID-19 on Flight Cancellation and the Concept of Extraordinary Circumstances*, 45 (Special Issue) Air & Space Law 123- 142 (2020).

75 Commission Notice — Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, C/2016/3502, *Official Journal*, 15 June 2016, C 214/5.

uniform application by having due regards for foreign jurisprudence. The provisions of EU Regulation 261/2004 regarding delay, and its subsequent interpretations by the CJEU, harm the uniformity of the 1999 Montreal Convention.

The proposal to revise EU Regulation 261/2004 does not augur well for further uniformity.[76] The existence of parallel regimes set out in EU Regulation 261/2004 and in the 1999 Montreal Convention, particularly regarding compensation in case of delays, does not seem to raise concerns for the European legislators.

In a nutshell, the coexistence of parallel regimes in the case of delays creates a situation which favours a fragmentation of the uniform regime established at an international level in the 1999 Montreal Convention.

As the next section will analyse, other regional organizations have adopted specific consumer rights legislations that may also jeopardize the uniformity of the Conventions.

4.2.2.3 Other Regional Legislations

(1) The African Union

In order to boost the implementation of the 1999 Yamoussoukro Decision concerning the liberalization of air transport market access in Africa,[77] and to increase the protection of consumers on the African continent,[78] in 2018 the African Union adopted the Regulations on the Protection of Consumers of Air Transport Services.[79]

The Regulations established, amongst other points, that when the reasonably expected time of departure is at least six hours later than the previously announced time of departure, the airline must inform passengers of their right to obtain immediate reimbursement for the full cost of

76 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, 13 March 2013, COM (2013) 130 final. This proposal is still under discussion in 2021 despite several attempts to make it progress in the political agenda.

77 Decision Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa, 14 November 1999, Yamoussoukro, Source: African Civil Aviation Commission, <https://afcac.org/en/images/Documentation/yd_eng.pdf> (accessed 7 November 2020). *See*, for a commentary, Adejoke Adediran, *Implementation of the Single African Air Transport Market Legal Regime: Challenges of the Interface Between the Yamoussoukro Decision and Domestic Regimes*, 43 Annals of Air & Space Law 23-54 (2018).

78 For a detailed analysis of African air law, *see*, Hamadi Gatta Wagué, *Droit aérien africain* (Pedone, 2019).

79 African Union Regulations on the Protection of Consumers of Air Transport Services – Annex 6 to the Yamoussoukro Decision (Assembly/AU/Dec 676 (XXX) – Decision on Legal Instruments), adopted on 28-29 January 2018 at Addis Ababa.

the ticket, if the flight is no longer serving any purpose.[80] It becomes immediately apparent that, depending on the reading of the exclusivity clause of the 1999 Montreal Convention,[81] such provisions potentially infringe the liability limit established by the Conventions in case of delays.

(2) The West African Economic and Monetary Union

The same risk of fragmentation also exists in the West African Economic and Monetary Union (hereinafter 'UEMOA'). The UEMOA is an organization of eight States established in 1994 with the ambition of creating a common market amongst its members. From an early stage, the UEMOA showed a deep interest in aviation policy.

On 20 March 2003, the UEMOA adopted a regulation establishing rules regarding compensation in the case of denied boarding, cancellation and long flight delays.[82] Although said UEMOA regulation has not yet been interpreted by the UEMOA Court, it would be interesting to observe whether this Court will rule any potential claim in the same direction as the CJEU or will adopt a different approach.

In parallel, the UEMOA also adopted another regulation that, on one side reflects the content of EU Regulation 2027/97 and, on the other, supplements the 1929 Warsaw Convention insofar as said UEMOA regulation provides a definition[83] of 'accident' under its Article 1(1)(a) as follows:

> Accident: événement, lié à l'utilisation d'un aéronef, qui se produit entre le moment où une personne monte à bord de l'aéronef avec l'intention d'effectuer un vol et le moment où toutes les personnes qui sont montées dans cette intention sont descendues, et au cours duquel:
> 1) une personne est mortellement ou grièvement blessée du fait qu'elle se trouve:
> – dans l'aéronef, ou

80 Regulations on the Protection of Consumers of Air Transport Services, Article 11(c)(i): 'When an airline reasonably expects a flight to be delayed beyond its scheduled time of departure: when the reasonably expected time of departure is at least six hours after the time of departure previously announced, the airline shall: inform the passengers of their right to immediate reimbursement of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity'.

81 *See*, sections 2.5.3.2 and 4.3.2.

82 Règlement N° 03/2003/CM/UEMOA établissant les règles relatives aux compensations pour refus d'embarquement des passagers et pour annulation ou retard important d'un vol, fait à Ouagadougou le 20 mars 2003, *Bulletin Officiel*, n° 31, premier trimestre 2003, p. 12-14.

83 The same definition can also be found in the UEMOA Civil Aviation Code. *See*, Règlement N° 01/2007/CM/UEMOA portant adoption du Code communautaire de l'aviation civile des Etats membres de l'UEMOA, fait à Lomé le 6 avril 2007, *Bulletin Officiel*, n°56, premier trimestre 2007, p. 1-36.

– en contact direct avec une partie quelconque de l'aéronef, y compris les parties qui s'en sont détachées, ou
– directement exposée au souffle des réacteurs, sauf s'il s'agit de lésions dues à des causes naturelles, de blessures infligées à la personne par elle-même ou par d'autres ou de blessures subies par un passager clandestin caché hors des zones auxquelles les passagers et l'équipage ont normalement accès, ou
2) l'aéronef subit des dommages ou une rupture structurelle:
– qui altèrent ses caractéristiques de résistance structurelle, de performances ou de vol, et
– qui devraient normalement nécessiter une réparation importante ou le remplacement de l'élément endommagé,
sauf s'il s'agit d'une panne de moteur ou d'avaries de moteur, lorsque les dommages sont limités au moteur, à ses capotages ou à ses accessoires ou encore de dommages limités aux hélices, aux extrémités d'ailes, aux antennes, aux pneumatiques, aux freins, aux carénages ou à de petites entailles ou perforations du revêtement ou
3) l'aéronef a disparu ou est totalement inaccessible.[84]

This definition is substantially similar to the one provided in Annex 13 of the 1944 Chicago Convention.[85] As a result, it is likely that said definition could be taken into consideration where the term 'accident' under the Conventions would have to be interpreted.[86]

84 Règlement N° 02/2003/CM/UEMOA relatif à la responsabilité des transporteurs aériens en cas d'accident, fait à Ouagadougou le 20 mars 2003, *Bulletin Officiel*, n°31, premier trimestre 2003, p. 10-12.

85 'Accident. An occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which:
a) a person is fatally or seriously injured as a result of:
— being in the aircraft, or
— direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
— direct exposure to jet blast,
except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or
b) the aircraft sustains damage or structural failure which:
— adversely affects the structural strength, performance or flight characteristics of the aircraft, and
— would normally require major repair or replacement of the affected component,
except for engine failure or damage, when the damage is limited to the engine, its cowlings or accessories; or for damage limited to propellers, wing tips, antennas, tires, brakes, fairings, small dents or puncture holes in the aircraft skin; or
c) the aircraft is missing or is completely inaccessible'.

86 *See*, section 3.2.2.

(3) The Economic and Monetary Community of Central Africa

The Economic and Monetary Community of Central Africa (hereinafter 'CEMAC') also expressed interest in passengers' rights and in 2007 developed its own piece of legislation. CEMAC Regulation No 06/07[87] foresees that, in the case of long delays, passengers should be offered the cost of a phone call, the option to eat, and accommodation if required.

So far, the provisions of this CEMAC Regulation have not been subject to any interpretation by the CEMAC Court. Again, it would be instructive to observe if any Court seized on this question would rely on existing foreign jurisprudence or would adopt a regional approach.

(4) The Andean Community

Latin America has also shown interest in developing its own regional air legislation. The wish to have common aviation rules in Latin America is not recent as several attempts have already been made in this regard, notably in 1985 with the *Proyecto Código Aeronáutico Latino Americano*.[88]

At a more intra-regional level, the Andean Community, which was created in 1969, voted on several pieces of legislation affecting its members' air transport industry.[89] The Andean Community *Decisión 619*[90] establishes several new passenger rights.[91] Its Article 8(e) provides, for instance, that in the case of delays of more than six hours, the carrier will have to compensate the passenger with a minimum of 25 percent of the value of the unfulfilled journey.[92] Again, such a provision may contradict those of the Conventions.

87 Règlement N° 06/07-UEAC-082-CM15 du 11 mars 2007, signé à N'Djamena le 19 mars 2007, *Bulletin Officiel*, Source: Droit-Afrique, <http://www.droit-afrique.com/upload/doc/cemac/CEMAC-Reglement-2007-06-responsabilite-transporteur-aerien.pdf> (accessed 18 December 2020).

88 ALADA, <https://alada.org/2017/04/27/proyecto-codigo-aeronautico-latino-americano/> (accessed 19 June 2019).
See, Mario Folchi, *El Proyecto Código Aeronáutico Latinoamericano y la uniformidad legislativa en la región*, 35 Revista Latino American de Derecho Aeronáutico (2017).

89 Namely: Bolivia, Colombia, Ecuador and Peru.

90 Decisión 619 – Normas para la Armonización de los Derechos y Obligaciones de los Usuarios, Transportistas y Operadores de los Servicios de Transporte Aéreo en la Comunidad Andina, 15 de Julio de 2005, dada en Lima, Source: Comunidad Andina, <http://www.comunidadandina.org/StaticFiles/DocOf/DEC619.pdf> (accessed 29 September 2020).

91 *See*, for instance, Manuel Guillermo Sarmiento García, *Los derechos del pasajero derivados del convenio de Montreal de 1999 y del derecho comunitario Andino*, 93 Revista Brasileira de Direito Aeronáutico e Especial 50-57 (2010).

92 'El transportista aéreo deberá compensar al pasajero con una suma mínima equivalente al 25% del valor del trayecto incumplido […]'.

(5) The Association of Southeast Asian Nations

The Association of Southeast Asian Nations (hereinafter 'ASEAN'), created in 1967,[93] took measures to create a common aviation market amongst its members in 2010.[94] While public law integration is generally the first step of a deeper integration, at this stage there is no common ASEAN air passenger legislation although common consumer protection rules are being developed.[95]

4.2.2.4 Domestic Legislations

The adoption of specific air passenger rights is not limited to regional organizations. Individual States have also adopted their own air passenger protection legislation. Certain of these domestic legislations set out specific provisions in the case of delays.

This is, for example, the case of Canada, which in 2019 adopted its own air passenger regulations. The Canadian Air Passenger Protection Regulations[96] provide, for instance, that if a delay is due to a situation outside the carrier's control, and passengers were informed 14 days or less before departure time that the arrival of their flight at its final destination would be delayed, the carrier must offer a minimum compensation for the inconvenience.[97] This compensation varies between CAN 125 and CAN 1 000, depending on the duration of the delay, and on whether domestic legislation considers the carrier to be large or small.[98]

93 Its members in 2021 include: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

94 ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services signed at Bandar Seri Begawan on 12 November 2010.

95 *See*, for example, Handbook on ASEAN Consumer Protection Laws and Regulations, Source: ASEAN, <https://asean.org/wp-content/uploads/2018/05/Handbook-on-ASEAN-Consumer-Protection-Laws-and-Regulation.pdf> (accessed 27 October 2019).

96 Air Passenger Protection Regulations, SOR/2019-150, *Canada Gazette*, Part II, Volume 153, Number 11. At the time of writing, these regulations are being challenged before the Canadian Federal Court of Appeal. *See*, the following press articles, Canadian Broadcasting Corporation, <https://www.cbc.ca/news/business/canadian-airlines-fight-passenger-rights-bill-in-court-1.5201985> (accessed 22 March 2021); Le Devoir, <https://www.ledevoir.com/economie/560781/la-cour-d-appel-federale-entendra-la-contestation-des-transporteurs-aeriens> (accessed 22 March 2021).

97 Canadian Air Passenger Protection Regulations, Section 12.

98 *Ibid.*, Section 19.

Other States have also adopted domestic legislation on air passenger rights,[99] such as: Algeria,[100] Brazil,[101] China,[102] India,[103] Indonesia,[104] the Philippines,[105] South Korea,[106] the United Kingdom[107] and Vietnam.[108]

This being said, each legislation deserves an *ad hoc* analysis as it cannot be assumed that all of them would necessarily be in contradiction with the principle of exclusivity of the 1999 Montreal Convention.[109]

4.2.2.5 Concluding Remarks

The development of consumer law led States and regional organizations to consider the adoption of an additional regime for the protection of their air passengers.

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99 For a description of several domestic legislations on air passenger rights, *see*, European Commission, *Study on the current level of protection of air passenger rights in the EU*, January 2020, 168-184, Source: Publications Office of the European Union, <https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1> (accessed 29 September 2020). *See also*, the ICAO database on aviation specific consumer protection regulations, Source: ICAO, <https://www.icao.int/sustainability/Pages/ConsumerProtectionRules.aspx> (accessed 23 March 2021).

100 Décret exécutif no 16-175 du 9 Ramadhan 1437 correspondant au 14 juin 2016 fixant les conditions et les modalités d'application des droits des passagers de transport aérien public, *Journal Officiel de la République Algérienne*, no 36, p. 7.

101 Resolução No 400, de 13 de Dezembro de 2016, Diário Oficial da União, 14 Dezembro 2016, Pág. 104, *erratum* 15 Dezembro 2016, Pág. 111.

102 CCAR-300, 航班正常管理规定 (Provisions on the Management of Flight Regularity, 2016), Source: Civil Aviation Administration of China, <http://www.caac.gov.cn/XXGK/XXGK/MHGZ/201706/t20170621_44917.html> (accessed 6 January 2021).

103 CAR, Section 3, Series M, Part IV, Source: India Directorate General of Civil Aviation, <http://dgca.nic.in/rules/car-ind.htm> (accessed 20 June 2019).

104 Ministerial Regulation No 89/2015, Source: Direktorat Jenderal Perhubungan Udara, <http://hubud.dephub.go.id/?en/permen/index/page:7> (accessed 20 June 2019).

105 DOTC-DTI Joint Administrative Order No. 1, s. 2012, Source: Philippines Official Gazette, <https://www.officialgazette.gov.ph/2012/12/10/dotc-dti-joint-administrative-order-no-1-s-2012/> (accessed 20 June 2019), which also provides with the following definition of delay under section 2.8: ' "delay" is the result of the deferment of a flight to a later time […]'.

106 항공사업법 (Aviation Business Act), Article 61-2, Source: National Law Information Center, <https://www.law.go.kr>, (accessed 6 January 2021). On the subject, *see*: Kyeong-Won Baeck, Ho-Won Hwang, *Article 61bis of the Aviation Business Act and the Legal Principles for the Aviation Consumers Protection – Comparison with the U.S. "Tarmac Delay Rule"'*, The Korean Journal of Air & Space Law and Policy 169-195 (2020).

107 In the United Kingdom, after the Brexit, the provisions of EU Regulation 261/2004 were essentially retained but slightly amended in the new domestic regulations named The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019. For a description of the new regime and the value of the case law developed by the CJEU, *see*, *Lipton v. BA City Flyer Limited,* (2021) EWCA Civ. 454.

108 Circular 14/2015/TT-BGTVT, Source: Civil Aviation Authority of Vietnam, <https://caa.gov.vn/van-ban/14-2015-tt-bgtvt-68.htm> (accessed 20 June 2019).

109 *See*, Vincent Correia, Noura Rouissi, *Global, Regional and National Air Passenger Rights: Does the Patchwork Work?*, 40 Air & Space Law 123-146 (2015).

These regional and domestic legislations all create a risk of harming the uniform regime established in the Conventions either, with respect to their autonomous nature, by supplementing them with definitions or, with respect to their primacy and exclusivity, by creating competing regimes in the case of delay.

The somewhat disorganized emergence of various air passenger rights across the globe may echo the situation that existed prior to the adoption of the 1929 Warsaw Convention. Indeed, the existence of various domestic and regional legislations means that, on certain occasions, different domestic or regional legislations overlap in the patchwork of regulations.[110] Such a scenario would eventually require the application of conflicts of laws rules, which do not exist on this matter at a global level. Consequently, both carriers and passengers could end up in a situation of legal uncertainty.

4.3 Courts' Responses to Uniformity

4.3.1 Preliminary Remarks

While it has been seen that modifications to the regulatory environment have caused a fragmentation to the uniformity wished by the drafters of the Conventions, it remains to be determined how Courts have responded, even in the absence of regulatory changes, to the specific features of the Conventions described in Chapter 2, namely the exclusivity of the Conventions and the autonomy of the terms used therein.

4.3.2 Exclusivity

4.3.2.1 A Large Spectrum of Variations

As discussed in Chapter 2, Article 24 of the 1929 Warsaw Convention and Article 29 of the 1999 Montreal Convention are supposed to ensure the primacy of the Conventions and their exclusivity *vis-à-vis* domestic law. Nevertheless, the exact extent of exclusivity may be subject to different views. The following developments will provide an overview of the different applications Courts made of these provisions.

110 *See*, European Commission, *Study on the current level of protection of air passenger rights in the EU*, January 2020, 177-178, Source: Publications Office of the European Union, <https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1> (accessed 29 September 2020).

4.3.2.2 A Strict Application

Several Courts have retained a strict application of the principle of exclusivity as described earlier,[111] that is to say they deemed that once the Conventions applied, they excluded the application of domestic law, even if the conditions set out in either Articles 17, 18 or 19 of the Conventions were not met.

Such a perception was first endorsed by the highest Court of the United Kingdom. In 1997, the House of Lords was asked in *Sidhu*[112] to analyse the interaction between domestic remedies and the exclusivity of the 1929 Warsaw Convention as amended by the 1955 Hague Protocol. The question was to determine whether a passenger, who due to a potential fault of the carrier, sustained damage in the course of international carriage by air, but who had no claim against the carrier under its Article 17, was left without remedy or could still rely on domestic law. The response of the House of Lords was that the liability rules of the 1929 Warsaw Convention – in this case its Article 17 – were absolutely exclusive, as it held that:

> The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law. An answer to the question which leaves claimants without a remedy is not at first sight attractive. […] Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract.[113]

Later, under the wording of the 1999 Montreal Convention, the Supreme Court of the United Kingdom confirmed its earlier position. In *Stott*, the Court was asked whether a claimant could be awarded damages for discomfort and injury to feelings, caused by a breach of the UK Disability Regulations implementing EU Regulation 1107/2006[114] in light of the provi-

111 *See*, section 3.2.2.

112 *Sidhu and Others v. British Airways Plc; Abnett (Known as Sykes) v. Same*, (1996) UKHL 5.

113 *Ibid.*, conclusions.

114 Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, *Official Journal*, 26 July 2006, L 204/1; *Corrigendum*, *Official Journal*, 26 January 2013, L 26/34.

sions of the 1999 Montreal Convention.[115] As the claimant argued that he suffered bad treatment both before and after boarding, the Court went even went further in its strict application of the principle of exclusivity and ruled that:

> In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention, but that was not the claim advanced. Mr Stott's subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention. […] Many if not most accidents or mishaps on an aircraft are capable of being traced back to earlier operative causes and it would distort the broad purpose of the Convention […] to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.[116]

A similar reasoning was adopted by the Supreme Court of the United States in 1999. In *Tseng*, the Court was asked to determine whether a passenger who could not fulfil the requirement of Article 17 of the 1929 Warsaw Convention, as her claim related to an allegedly traumatizing preboarding security check, could validly ground her claim against the carrier in domestic law, which in this case was tort under New York law. The Court dismissed the passenger's claim holding that:

> […] the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.[117]

The question of compatibility between provisions of the 1999 Montreal Convention and a domestic quasi-constitutional act was also analysed by the Supreme Court of Canada in *Thibodeau*.[118] The Canadian Supreme Court was seized by passengers who claimed compensation under domestic law for moral prejudice after they did not receive services in French on several Air Canada flights, allegedly in violation of the Canadian Official

115 *See*, Ingrid Koning, *The Disabling of the EC Disability Regulation: Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*, 5 European Review of Private Law 786-796 (2014). *See also*, Andrea Buitrago Carranza, *Exploring the Compatibility Between the Air Carrier Liability Regime and International Human Rights Law*, 44 Annals of Air & Space Law 205-260 (2019).

116 *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15, point 60.

117 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at 176.

118 *See also*, section 2.5.3.3(3) regarding the autonomy of the terms of the 1999 Montreal Convention discussed in this decision.

Languages Act.[119] The Canadian Supreme Court aligned itself with the American and English jurisprudence and held that:

> Permitting an action in damages to compensate for 'moral prejudice, pain and suffering and loss of enjoyment of [a passenger's] vacation' that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. As the international jurisprudence makes clear, the application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it. To decide otherwise would be to permit artful pleading to define the scope of the *Montreal Convention*.[120]

In France, the interpretation of the principle of exclusivity has evolved. In 1981, the *Cour de cassation* held that any action against a carrier that fell within its scope was exclusive, with the consequence that a claim lodged by the pension fund of the victim of an air disaster was compelled by the two-year limitation.[121] In 1999, in the *Sidhu* mirroring case, the *Cour de cassation* adopted a different approach, which allowed passengers to be compensated under domestic law on the grounds that, in the Court's view, the 1929 Warsaw Convention did not apply since the damage occurred after disembarking.[122] In 2007, the *Cour de cassation* seems to have endorsed a strict application of the principle of exclusivity when it essentially held that

119 *See*, Carlos Martins, *The 'Strong Exclusivity' Consensus Interpretation of the Montreal Convention*, 28:3 The Air and Space Lawyer 4-8 (2015).

120 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, point 64. On a side note, the plaintiffs continued their quest for the equal use of French. In a 2019 decision, the Federal Court of Canada ordered Air Canada to indemnify Mr. and Ms. Thibodeau for the violation of their rights established by the Canadian Official Languages Act. In substance, they claimed that some signs, such as the 'exit' sign, were not translated into French or were only indicated in smaller print. They also claimed that the boarding announcement at Fredericton Airport was shorter in French than in English. In this case, the question of the exclusivity of the 1999 Montreal Convention was not discussed. *See*, *Thibodeau c. Air Canada*, (2019) CF 1102.

121 Cass., 2 July 1981, 80-11.234: '[…] que la responsabilité du transporteur de voyageurs par air ne pouvant être recherchée que dans les conditions et les limites prévues par la Convention de Varsovie, quelles que soient les personnes qui la mettent en cause et quel que soit le titre auquel elles prétendent agir'.

122 Cass., 15 July 1999, 97-10268: '[…] que la cour d'appel, qui a constaté que les dommages subis par les passagers s'étaient produits hors de l'aéronef et après leurs débarquement, alors qu'ils étaient regroupés dans un hôtel, en a exactement déduit que cette convention n'avait pas vocation à s'appliquer au litige'.

in the absence of an 'accident', the carrier could not be held liable.[123] This view was later implicitly confirmed in 2014, in a claim governed by the 1999 Montreal Convention.[124] Another important decision from the same Court regarding the scope of the principle of exclusivity, in the case of an action directed by a manufacturer against a carrier, will be discussed below.[125]

This strict application of the principle of exclusivity has been recognized in many other jurisdictions, such as in Australia,[126] China (Hong Kong),[127] Ireland,[128] New Zealand,[129] South Africa,[130] and Tonga.[131]

However, the cases listed in this section are mostly related to a combined interpretation of Article 17 of the Conventions. I am not aware of any final decision from a highest Court, with the exception of the decisions delivered by the CJEU, which would have been seized on the validity of coexisting regimes with respect to delays. A decision on this is, however, expected from the Canadian Federal Court.[132]

4.3.2.3 A Liberal Application

Alongside the strict application above, a more liberal approach has been adopted by the CJEU. Although the case concerned Article 19 of the 1999 Montreal Convention and not Articles 17 of the Conventions as detailed above, the Court adopted a pro-consumer approach in *IATA* holding that, as discussed in section 4.2.2.2, the 1999 Montreal Convention and EU Regulation 261/2004 could validly coexist, in the Court's view, as each addressed

123 Cass., 14 June 2007, 05-17248: 'Mais attendu que la cour d'appel a, à bon droit, relevé qu'il résulte, tant de l'article 24 de la Convention de Varsovie que de l'article L. 322-3 du code de l'aviation civile, que toute action en responsabilité, à quelque titre que ce soit, à l'encontre du transporteur aérien de personnes, ne peut être exercée que dans les conditions et limites de la dite Convention qui, dans son article 17, déclare ce transporteur responsable de plein droit en cas de décès, de blessures ou de toute autre lésion corporelle subie par un voyageur, lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef; que la cour d'appel a, à cet égard, constaté qu'il ne résultait d'aucun des éléments produits que l'embolie pulmonaire, survenue plusieurs jours après la fin du voyage, puisse être imputée à un événement extérieur à la personne de Mme Y… qui se serait produit à bord de l'avion ou au cours des opérations d'embarquement ou de débarquement qui seul, serait de nature à faire jouer la présomption de responsabilité édictée par l'article 17 de la Convention de Varsovie; que dès lors, elle a pu en déduire, sans encourir les griefs du moyen, que la responsabilité du transporteur aérien ne pouvait être retenue'.

124 Cass., 14 January 2014, ECLI:FR:CCASS:2014:C100009.

125 *See*, section 5.2.2.

126 *Parkes Shire Council v. South West Helicopters Pty Limited,* (2019) HCA 14.

127 *Ong v. Malaysian Airline System Berhad,* (2008) HKCA 88.

128 *Hennessey v. Aer lingus Ltd,* (2012) IEHC 124.

129 *Emery Air Freight Corp v. Nerine Nurseries Ltd,* (1997) 3 NZLR 723.

130 *Potgieter v. British Airways plc,* (2005) ZAWCH 5.

131 *Cauchi v. Air Fiji & Air Pacific Ltd*, (2005) TOSC 7.

132 *See*, fn 96 in this chapter.

different kind of damages.[133] This decision led to further flexibility permitting, in *Sturgeon*,[134] passengers whose flight has been delayed by three or more hours to claim standardized compensation pursuant to EU Regulation 261/2004. Invited to possibly overturn its position in *Nelson*, the Grand Chamber of the CJEU however reaffirmed the earlier point of view of the Court and held that:

> In paragraph 45 of *IATA and ELFAA*, the Court held that it does not follow from Articles 19, 22 and 29 of the Montreal Convention, or from any other provision thereof, that the authors of that convention intended to shield air carriers from any form of intervention other than those laid down by those provisions, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.[135]

The CJEU's stance is therefore clear. Without ruling on the possibility of applying domestic law when all conditions of Article 17 of the 1999 Montreal Convention are not met, the CJEU still held that parallel regimes could exist. As far as the Court held that the 1999 Montreal Convention and EU Regulation 261/2004 concerned different kinds of damages, the reasoning of the Court may be seen as coherent. Nevertheless, it seriously impairs the purposes and object of the 1999 Montreal Convention.

4.3.2.4 A Defective Application

Other jurisdictions adopted an attitude which is different from the two priorly described and denied any primacy of the Conventions over domestic law.

For instance, in Brazil, judges admitted that the Consumer Defence Code prevailed over the 1999 Montreal Convention. It was only in 2017 that the Brazilian Federal Supreme Court held that the 1929 Warsaw Convention and 1999 Montreal Convention prevailed over domestic consumer protection legislation:

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133 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.

134 CJEC, 19 November 2009, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v. Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v. Air France SA*, Joined cases C-402/07 and C-432/07, ECLI:EU:C:2009:716.

135 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, point 46.

> Nos termos do art. 178 da Constituição da República, as normas e os tratados internacionais limitadores da responsabilidade das transportadoras aéreas de passageiros, especialmente as Convenções da Varsóvia e Montreal, têm prevalência em relação ao Código de Defesa do Consumidor.[136]

Another example of defective application of the principle of exclusivity of the Conventions may be found in India. In 2011, the Indian Supreme Court ruled that at least equal value should be granted to domestic consumer protection legislation and to the Carriage by Air Act, which incorporates the 1929 Warsaw Convention:

> In our view, the protection provided under the C[onsumer] P[rotection] Act to consumers is in addition to the remedies available under any other Statute.[137]

Other Courts have rejected the application of the Conventions, as illustrated by the decision of the 11th District Court of Panama. This Court disregarded the limitation of liability set in the 1999 Montreal Convention, with respect to damage to cargo, preferring to rule in favour of the claimant with an argument of equity.[138]

4.3.2.5 Conclusions

Although the predominant view seems to favour a strict application of the principle of exclusivity of the Conventions, these examples demonstrate that the diversity in interpretations of the exclusivity of the Conventions given by Courts weakens the aim of uniformity and undermines the purposes of the Conventions.

4.3.3 Autonomy

4.3.3.1 Preliminary Remarks

While the autonomy of the terms and concepts used in the Conventions was confirmed in Chapter 2, Chapter 3 showed that attempts made by Courts to give a definition to un-defined terms and concepts resulted in divergent interpretations. One could wonder whether the autonomy of the terms used

136 Supremo Tribunal Federal, 25 May 2017, RE 636331/RJ. *See*, Carolina Castro Costa Viegas, Marco Fábio Morsello, *Seguridad jurídica vs. nueva caja de Pandora – Breves apuntes acerca de la reciente sentencia del Supremo Tribunal Federal en Brasil*, 42 Revista Latino Americana de Derecho Aeronáutico (2018).

137 *Trans Mediterranean Airways v. M/s Universal Exports & Anr.*, (2011) 10 SCC 316, at 32.

138 Juzgado Undécimo de Circuito de lo Civil del Primer Circuito Judicial de Panamá, 27 October 2017, *Caisa c. KLM*, Sentencia N° 25-2017, not published. This decision was overruled in Appeal. *See*, Primer Tribunal Superior del Primer Distrito Judicial, 25 April 2019, *Caisa c. KLM*, 18SA.069, not published.

in the Conventions entails that each term should be interpreted according to a 'special' meaning pursuant to Article 31(4) of the 1969 Vienna Convention, or if the 'ordinary' meaning developed under its Article 31(1) may be applicable.[139]

I understand that a 'special' meaning is not limited to terms that are defined in the Conventions, as exemplified in section 3.2.2.1, but also covers broader situations where the intent of the parties would have to be assessed and demonstrated.[140] I also understand that the reading of Article 31(4) of said convention permits to consider that in a special regime, such as that of the Conventions, the 'special' meaning is essentially the 'ordinary' meaning in the particular context'.[141] I think therefore that, in the case of the Conventions, the 'special' meaning may be limited to the terms that are defined, and to those whose meaning clearly transpires from the *Travaux Préparatoires*.

The following section will examine the different elements mostly used by Courts to interpret the terms and concepts of the Conventions, and will scrutinize the interpretative role of the preamble, *Travaux Préparatoires*, case law, external laws,[142] and literature. This analysis will hopefully permit an identification of the specific reasons why Courts adopted distinct interpretations. It may also allow us to verify whether the hermeneutical principles of the 1969 Vienna Convention are sufficient to interpret the Conventions in a uniform manner.

For the reasons explained in Chapter 1,[143] the examination of interpretation methods employed by Courts will be limited to those used by the highest Courts of Belgium, Canada, France, the EU, the United Kingdom and the United States. As a reminder, the Supreme Court of the United States has not yet handed down any decision interpreting the 1999 Montreal Convention. Therefore, this study will also refer to the most recent decision delivered by a Circuit Court in the United States at the time of writing.

139 *See*, section 1.3.1.2(2)(v).

140 *See*, United Nations Conferences on the Law of Treaties, First and second sessions, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, Official Records, *Documents of the Conference*, United Nations, New York, 1971, p. 42, Source: United Nations, <https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf> (accessed 2 August 2019).

141 *See*, Oliver Dörr, Kristen Schmalenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary* 613 (2nd edition, Springer, 2018). *See also*, Richard Gardiner, *Treaty Interpretation* 339 (2nd edition, The Oxford International Law Library, 2017).

142 As defined below in section 4.3.3.5(1).

143 *See*, section 1.3.2.3.

4.3.3.2 Preamble

As seen in Chapter 2, the preamble of the 1999 Montreal Convention makes reference to both the concept of 'balance of interests' and 'protection of the interests of consumers', and this created confusion as certain Courts read this introduction of the notion of consumer protection as a new, additional purpose to the 1999 Montreal Convention.[144]

Like most Courts, the Supreme Court of Canada did not recognize any particular paradigm shift, and ruled in *Thibodeau* that the 'purposes' remained the same in both Conventions. As outlined by Justice Cromwell in these words:

> 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.[145]

In contrast, the CJEU has adopted a different view and regularly considers consumer protection as an additional purpose of the 1999 Montreal Convention, which would supplement the purpose of achieving an 'equitable balance of interests'. In *Air Baltic Corporation*, the Court ruled that the reference to consumers in the preamble was distinct from the concept of passengers.[146] Later, in *Finnair*, the Court clearly admitted that both elements – that is to say, the balance of interests between carriers and passengers, and then, protection of consumers – had to be taken into consideration when interpreting the Convention.[147] Ultimately, this position was confirmed in *Guaitoli* as follows:

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144 *See*, sections 2.5.3.2 and 4.2.2.2(2).

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

146 CJEU, 17 February 2016, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba*, C-429/14, ECLI:EU:C:2016:88, at 38: '[…] it being understood that the concept of "consumer" for the purposes of that convention should not be confused with the concept of "passenger", but may include persons who are not themselves carried and are therefore not passengers'.

147 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'.

> However, the interpretation that the purpose of Article 33(1) of the Montreal Convention is to designate not only the State Party competent to hear the liability action concerned, but also the courts of that State before which the action is to be brought, is such as to contribute to attaining the objective of enhanced unification, as expressed in the preamble to that instrument, and to protect the interests of consumers, while at the same time ensuring a fair balance with the interests of air carriers. The direct appointment of the territorially competent court is likely to ensure, in the interests of both parties to the dispute, greater predictability and greater legal certainty.[148]

The fact that certain Courts judged that a difference could be discerned in the purposes of the Conventions caused serious concerns about Article 31 of the 1969 Vienna Convention and, consequently, the emergence of uniform autonomous definitions that ultimately would ensure a uniform application. The use of a vague concept such as 'protection of the interests of consumers' may also lead to an evolutionary interpretation[149] of the 1999 Montreal Convention that could potentially re-write the text and further increase its fragmentation across ratifying Parties. Yet, as ruled in *Morris*, an evolutionary interpretation of the Conventions is not possible[150] as only an amendment can change them.[151]

Finally, assuming the Conventions have different purposes raises a question on the value of case law developed under the 1929 Warsaw Convention, as discussed below.[152]

4.3.3.3 Travaux Préparatoires

Although the 1969 Vienna Convention permits recourse to the *Travaux Préparatoires* as a supplementary interpretation aid in specific circumstances,[153] in

148 CJEU, 7 November 2019, *Adriano Guaitoli, e.a. v. easyJet Airline Co. Ltd*, C-213/18, ECLI:EU:C:2019:927, at 53-54.

149 *See*, section 3.2.4.3(5)(iv).

150 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 25: '[…] I accept that courts of law cannot ignore advances in scientific knowledge. […] statutes are generally always speaking, and ought therefore to be interpreted in light of the contemporary social and scientific world. This is not a rule of law but a principle of construction […] Given that the rationale of the principle is that statutes are generally intended to endure for a long time, one can readily accept that multilateral international trade conventions, which are by statute incorporated in our law, should be approached in a similar way'.

151 *Ibid.*, at 26: '[…] if cases of mental injuries and illnesses are to be brought within the Convention system, it must be done by amendment of the Convention system and not by judicial creativity'. *See also*, *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15, at 63: 'The underlying problem is that the Warsaw Convention long pre-dated equality laws which are common today. There is much to be said for the argument that it is time for the Montreal Convention to be amended to take account of the development of equality rights, whether in relation to race (as in *King v American Airlines*) or in relation to access for the disabled, but any amendment would be a matter for the contracting parties'.

152 *See*, section 4.3.3.4(2).

153 1969 Vienna Convention, Article 32. *See*, section 1.3.1.2(2)(ii).

many jurisdictions the *Travaux Préparatoires* have regularly been considered as major interpretation tools.[154]

In the United States, Justice O'Connor held in *Saks* that the *Travaux Préparatoires* were an important tool for clarification:

> In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiations. […] In part because the 'travaux préparatoires' of the Warsaw Convention are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text.[155]

In *Chan*, Justice Brennan considered that the *Travaux Préparatoires* deserved attention when several readings of a provision were possible:

> But it is disingenuous to say that it is the only possible reading. Certainly it is wrong to disregard the wealth of evidence to be found in the Convention's drafting history on the intent of the governments that drafted the document.[156]

More importantly, he emphasized their importance even with respect to Parties that did not participate in diplomatic conferences:

> Sometimes, of course, a state may become a party to an international convention only after it has entered into force, without having participated in its drafting. Thus, the United States was not represented at Warsaw and adhered to the Convention only in 1934. But to say that for that reason the drafting history of an international treaty may not be enlisted as an aid in its interpretation would be unnecessarily to forgo a valuable resource. We do not, after all, find it necessary to disregard the drafting history of our Constitution, notwithstanding that 37 of the 50 States played no role in the negotiations and debates that created it.[157]

The relevance of the *Travaux Préparatoires* was later reaffirmed in subsequent decisions, such as in *Zicherman* where Justice Scalia explained the reasons of their importance, as follows:

> Because a treaty ratified by the United States is not only the law of this land […], but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties.[158]

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154 This position may reflect the divergence of views in legal theory between a normative (*volontariste*) and a subjective (*objectiviste*) approach. The first is more inclined to interpret international conventions pursuant to the intentions of the States, and the latter is more favourable to a teleological interpretation. On this point, the 1969 Vienna Convention seems essentially to adopt a subjective approach.

155 *Air France v. Saks*, 470 U.S. 392 (1985), at 400.

156 *Chan et. al. v. Korean Air Lines, Ltd*, 490 U.S. 122 (1989), at 136.

157 *Ibid.*, at 137, fn 2.

158 *Zicherman, Individually and as Executrix of the Estate of Kole, et. al. v. Korean Air Lines Co, Ltd.*, 516 U.S. 217 (1996), at 226.

Historically in the United Kingdom, no substantial credit was granted to the *Travaux Préparatoires*, as they were generally not used under English law for interpretation purposes. However, this position changed in *Fothergill*. Lord Wilberforce submitted that it was in the interest of uniformity to not ignore them, given that international Courts used them as an aid, that the practice was endorsed by the 1969 Vienna Convention,[159] and that foreign Courts had recourse to them. He expressed his concern that their use, however, should be cautious and limited to conditions where they were publicly accessible and where they clearly and indisputably pointed to a definite legislative intention. He further noted that if these conditions were met, there would be no more room for the argument that the *Travaux Préparatoires* could not apply to acceding States, or more generally to individuals who might never have heard of them:

> My Lords, […] the use of travaux préparatoires in the interpretation of treaties should be cautious, I think that it would be proper for us, in the same interest, to recognise that there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled: first, that the material involved is public and accessible, and, secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention. […] If the use of travaux préparatoires is limited in this way, that would largely overcome the two objections which may properly be made: first, that relating to later acceding states […] and secondly, the general objection that individuals ought not to be bound by discussions or negotiations of which they may never have heard.[160]

The *Travaux Préparatoires* have since then occasionally been used by the highest English Court, such as in *Morris*.[161]

In France, it is generally standard to consult the *Travaux Préparatoires* when it comes to interpreting domestic legislation. However, when it comes to the interpretation of international conventions, the question is more delicate. As already discussed,[162] under the 1929 Warsaw Convention, several decisions were handed down regarding the possibility of interrupting the two-year limitation period established under Article 29. In a 1966 decision, the defendant argued that the time limitation foreseen in the 1929 Warsaw Convention was established 'sous peine de déchéance' and therefore required that any claim must be filed within said limit. The *Cour de cassation*, however, held that the time limitation only governed contractual liability and did not extend to criminal actions, with the consequence that, pursuant to domestic

159 Which was not in force yet, as underlined by Lord Fraser of Tullybelton, at 112.
160 *Fothergill v. Monarch Airlines*, (1980) UKHL 6, at 75.
161 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 103.
162 *See*, section 3.2.5.

law, any contractual claims were still possible during the limitation period of criminal proceedings.[163]

In a subsequent case, the fixed time limit was further discussed, as the claimant was a minor at the time of accident. This case came before the *Cour de cassation* twice, as the second Court of Appeal refused to follow the first position adopted by the *Cour de cassation*. On the second occasion, the Court of Appeal put forth that the claim was time barred in light of the wording, purpose and *Travaux Préparatoires* of the 1929 Warsaw Convention.[164] However, the plenary session of the *Cour de cassation* hearing the case the second time ruled that nothing in the explicit wording of said convention precluded the application of French law, and therefore implicitly rejected any reference to the content of the *Travaux Préparatoires*:

> Attendu, cependant, que si la Convention de Varsovie du 12 octobre 1929, à laquelle renvoie l'article L 322-3 du Code de l'aviation civile pour la détermination des règles de la responsabilité du transporteur aérien, prévoit que l'action en responsabilité doit être intentée à peine de déchéance dans un délai de deux ans, il n'existe dans ces textes aucune disposition expresse selon laquelle, par dérogation aux principes du droit interne français, ce délai ne serait susceptible ni d'interruption, ni de suspension.[165]

Since then, it still cannot be concluded with certainty that the French *Cour de cassation* always ignores the *Travaux Préparatoires* of the Conventions. As the decisions of this Court are quite succinct, it is impossible to say whether the *Travaux Préparatoires* of the Conventions are systematically considered by the Court.

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163 Cass., 17 May 1966, 65-92986: 'Que dès lors l'action civile était régie par l'article 10 du Code de procédure pénale et, conformément au droit commun, pouvait être mise en œuvre tant que l'action publique n'était pas prescrite; qu'elle échappait à la forclusion prévue par la loi du 2 mars 1957 qui, par adoption expresse des règles de la Convention de Varsovie, limite à deux ans le délai pendant lequel la responsabilité du transporteur par air peut être recherchée; que ces dispositions qui régissent l'action contractuelle de la victime ou de ses ayants cause sont étrangères à l'exercice de l'action civile devant le juge répressif'.

164 Cass., 14 January 1977, 74-15061: 'Attendu que, pour déclarer irrecevable comme tardive l'action en réparation engagée […] au nom de son fils mineur […] l'arrêt attaqué énonce que le délai de deux ans imparti sous peine de déchéance par l'article 2 de la loi du 2 mars 1957 comme par l'article 29 de la Convention de Varsovie pour intenter l'action en responsabilité contre le transporteur aérien est un délai préfix et que ce caractère résulte sinon de l'expression sous peine de déchéance, qui ne lui confère pas nécessairement, du moins de la finalité du texte telle que la révèle l'intention du législateur français qui s'est expressément référé aux seules dispositions de la Convention de Varsovie dont les travaux préparatoires expriment nettement l'intention de ses auteurs de ne soumettre le délai à aucune cause de suspension'.

165 Cass., 14 January 1977, 74-15061. *See*, Jean-Pierre Tosi, *Responsabilité aérienne* 183 (Litec, 1978).

In Belgium, it is general practice to refer to the *Travaux Préparatoires* in order to determine both domestic[166] and international legislators' intentions.[167] However, for the same reasons as those developed for the French *Cour de cassation*, it is not possible to assess whether they are automatically taken into consideration by the Belgian *Cour de cassation*.

In Canada, it appears that the Supreme Court clearly refers to the *Travaux Préparatoires*, as pointed out in *Thibodeau*,[168] when asked to interpret the 1999 Montreal Convention.

At the level of the Court of Justice of the European Union, the Court did not expressly refer to the *Travaux Préparatoires* of the 1999 Montreal Convention until 2020. In the past, only the opinions of Advocates General have occasionally referred to them.[169] However, in 2020, the Court of Justice of the European Union expressly referred to the *Travaux Préparatoires* in order to interpret the 1999 Montreal Convention in *Vueling*.[170]

In conclusion, despite some reluctance and uncertainty, most jurisdictions consider the *Travaux Préparatoires* useful tools for interpreting the Conventions, even if references to them have not always been systematic. Despite being considered as supplementary means of interpretation by the 1969 Vienna Convention, their role in finding a definition that respects the autonomy of the Conventions should probably be accorded a higher value.

4.3.3.4 Case Law

(1) Foreign Case Law

One of the most distinguishable elements dividing selected jurisdictions in two groups consists in the consideration given to foreign decisions.

In common law jurisdictions, as per the principle of *stare decisis*, there is a long-standing tradition to refer to foreign case law as an interpretation aid. It is therefore not a surprise that the highest Courts of the United Kingdom and the United States have regularly examined foreign jurisprudence. Furthermore, because the 1929 Warsaw Convention was written in French and originated from the French government, there was a trend to consider that French law carried substantial weight for interpretation purposes.

166 Axel de Theux, e.a., *Précis de méthodologie juridique – Les sources documentaires du droit* 164 (2nd edition, Publications des Facultés universitaires Saint-Louis, 2000).

167 *See*, Cass., 27 January 1977, 1 Pasicrisie 574 (1977); Cass., 30 March 2000, C.9.70.176.N.

168 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 38.

169 *See*, CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), at 38.

170 CJEU, 9 July 2020, *SL v. Vueling Airlines SA*, C-86/19, ECLI:EU:C:2020:538, at 32: 'Furthermore, it is apparent from the *travaux préparatoires* relating to the Montreal Convention that […]'.

In addition to these two reasons, common law jurisdictions have rapidly acknowledged the importance of having a uniform interpretation of the Conventions that required at least a review of foreign decisions. In the United States, Justice Ginsburg recalled in *Tseng* that:

> '[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties' […].[171]

The same view is reported in the United Kingdom as follows, in *Morris*:

> It really goes without saying that the international uniformity of interpretation of article 17 is highly desirable.[172]

However, the value credited to foreign decisions has not systematically been equal to that of domestic case law. In the United Kingdom, Lord Diplock ruled in *Fothergill* that the value of foreign decisions depended particularly on the Court's reputation, their binding nature and the reporting system in place. He held that:

> […] the persuasive value of a particular court's decision must depend on its reputation and its status, the extent to which its decisions are binding on courts of co-ordinate or inferior jurisdiction in its own country and the coverage of the national law reporting system.[173]

In *Sidhu*, the House of Lords added that the extent of the analysis given by foreign Courts was also to be taken into consideration when assessing the value of their decisions.[174] In this respect, and in light of the importance of having a uniform application of the Conventions, the Supreme Court of the United States notably disregarded a decision delivered by a foreign Court, on the ground that the position adopted by the latter created a potential source of divergence which was not compliant with the aim of uniformity.[175]

In civil law jurisdictions, there is no tradition to refer to foreign decisions or any compulsory duty to refer to domestic jurisprudence, given their relatively low legal value. In France, the rapprochement of the *Cour de cassation*, regarding the interpretation of the term 'accident' with respect to the one developed in other jurisdictions,[176] may lead us to believe that some

171 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at 167.
172 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 5.
173 *Fothergill v. Monarch Airlines*, (1980) UKHL 6, at 96.
174 On this basis, in *Sidhu*, Lord Craighead denied substantial weight to a French decision, as he considered that the French decision of the *Tribunal de Grande Instance* of Paris: '[…] does not contain a close analysis of the Convention, nor is there any reference to previous decisions on the issue in the French courts or elsewhere'. *See*, *Sidhu and Others v. British Airways Plc; Abnett (Known as Sykes) v. Same*, (1996) UKHL 5.
175 *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 551-552.
176 *See*, section 3.2.2.3.

consideration has been given to foreign law. In Belgium, equally, there is no clear evidence that any consideration would automatically be given to foreign case law.[177]

In Canada, the Supreme Court acted in a similar fashion as common law jurisdictions and confirmed in *Thibodeau* that the Court would be reluctant to depart from any 'strong international consensus'.[178]

The Advocates General of the CJEU may occasionally refer to foreign case law such as in *Niki*.[179] But none of the decisions of the European Court employ decisions delivered by other non-European jurisdictions for the sake of a uniform interpretation.

In conclusion, it seems that even if there could be a light general trend towards the perusal of foreign jurisprudence, many high Courts still do not systematically refer to the interpretations given abroad. This lack of interest undoubtedly hinders a uniform application of the Conventions.

(2) Case Law Developed Prior to the 1999 Montreal Convention

While the 70 years of existence of the 1929 Warsaw Convention have generated an impressive amount of case law, this study should verify whether Courts still rely on case law developed under previous instruments in cases governed by the 1999 Montreal Convention, in order to ascertain whether or not there is uniformity in the interpretation tools used by these Courts.

In the United States, the 6th District Court highlighted in *Doe* that the wording of the 1999 Montreal Convention was different to the one of the 1929 Warsaw Convention, with the consequence that previous case law did not have any authority:

> […] the Montreal Convention is a new treaty that we interpret as a matter of first impression, and there is no legal authority that would require us to import *Erhlich*'s Warsaw Convention determination to govern this Montreal Convention claim.[180]

The Court nevertheless admitted that domestic or foreign decisions rendered under the previous text were still valid precedent, insofar as they concerned similar provisions and were delivered before the ratification of the 1999 Montreal Convention:

177 However, more and more comparative analyses are being carried out by both *Cours de cassation*. *See*, Cour de cassation de Belgique, *Rapport annuel* 160 *et seq.* (2018), Source: Belgian Federal Public Service of Justice, <https://justice.belgium.be/sites/default/files/downloads/20180321_jp_31.pdf> (accessed 31 March 2020).

178 *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 50.

179 CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), at 44.

180 *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017), at 415.

> Because these Supreme Court cases analyzed aspects of the Warsaw Convention that we have no reason to believe have changed following the ratification of the Montreal Convention (and that neither party has argued have changed following the ratification of the Montreal Convention), it is reasonable to conclude that these cases form part of the 'precedent' consistent with which, according to the Explanatory Note […], the drafters expected signatories to construe Article 17(1) of the Montreal Convention. Accordingly, we have adopted *Saks*' definition of 'accident', and our discussion of damages […] will be guided by *Zicherman*'s deference to the forum jurisdiction's choice-of-law rules.[181]

The UK Supreme Court implicitly confirmed in *Stott* the continuity to a certain extent of the case law related to these instruments.[182] Interpreting the concept of exclusivity, Lord Toulson referred to jurisprudence established under the 1929 Warsaw Convention on the grounds particularly that Article 17 of both Conventions were formulated in materially identical terms.[183]

In Canada, Justice Cromwell in turn noted, in *Thibodeau*, that case law drawn up under the 1929 Warsaw Convention was only 'helpful' for interpretation purposes. He held that:

> The *Montreal Convention* was adopted in 1999 in Montreal and applies to all international carriage by aircraft of persons, baggage or cargo. It was the successor to the [Warsaw Convention] […] and its purpose was 'to modernize and consolidate the Warsaw Convention and related instruments': preamble of the *Montreal Convention*. To understand the purposes of the *Montreal Convention*, we therefore must go back to its predecessor, the *Warsaw Convention* […]. The purposes of the *Warsaw Convention* and of the *Montreal Convention* were the same and decisions and commentary respecting the *Warsaw Convention* are therefore helpful in understanding those purposes […].[184]

Looking at the CJEU, the same prudent approach was adopted by Advocate General Henrik Saugmandsgaard Øe in *Niki*, where he considered that only inspiration could be taken from foreign case law, including decisions delivered under the Warsaw Convention[185]:

> In that regard, I consider, as have both the referring court and all the parties which have submitted observations in the present case, that it is appropriate to take into consideration the interpretation of that concept employed by vari-

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181 *Ibid.*, at 425-426.

182 Later, in a case governed by the 1999 Montreal Convention, the High Court of England and Wales carefully confirmed the interpretation of the term 'accident' given under the 1999 Warsaw Convention. *See*, *Labbadia v. Alitalia*, (2019) EWHC 2013 (QB).

183 *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15, at 26.

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

185 As a reminder, the Court of Justice of the European Union is not competent to interpret the 1929 Warsaw Convention. *See*, CJEC, 22 October 2009, *Irène Bogiatzi, married name Ventouras v. Deutscher Luftpool, Société Luxair, société luxembourgeoise de navigation aérienne SA, European Communities, Grand Duchy of Luxembourg, Foyer Assurances SA*, C-301/08, ECLI:EU:C:2009:649.

> ous *courts of States Parties* to the Warsaw Convention and/or the Montreal Convention, in order to draw any inspiration from those judicial precedents, even though the Court is not bound by them.[186]

In a nutshell, Courts are in an uncomfortable position. They are supposed to consider the 1999 Montreal Convention as a new international instrument which prevails over prior instruments such as the 1929 Warsaw Convention,[187] but, at the same time, the connections between the Conventions are so numerous and important that they seem to be hesitant to depart from existing case law, except for a valid reason.

4.3.3.5 Legal Instruments External to the 1929 Warsaw Convention and the 1999 Montreal Convention

(1) Preliminary Remarks

During the interpretation process, Courts have also referred to domestic legislations and international agreements in order to interpret the terms of the 1999 Montreal Convention.

(2) French Law

As already mentioned,[188] the fact that the first legislative drive to regulate air carrier liability at an international level came from the French government, and especially that the only authentic language of the 1929 Warsaw Convention was French, led the American Supreme Court to consider the terms and concepts used therein were to be interpreted in accordance with French law. This was notably the case in *Saks*, where Justice O'Connor held that the term 'accident' was, in the absence of definition, to be examined for interpretation purposes in light of French law:

> To determine the meaning of the term 'accident' in Article 17 we must consider its French legal meaning. […] it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. […] We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.[189]

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186 CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), at 43.

187 *See*, section 1.3.1.1(2).

188 *See*, section 4.3.3.4(1).

189 *Air France v. Saks*, 470 U.S. 392 (1985), at 399. This position is not justified in the author's view, as the Convention was drafted not only by continental jurists but also by representatives of common law jurisdictions. In addition, continental law is not uniform, therefore what may be valid in one civil law jurisdiction is not necessarily the case in another.

Later in *Floyd*, Justice Marshall used the same interpretation method, referring to the French legal meaning of 'bodily injury'. But, not convinced by the elements found, he suggested that reference to French law should potentially be set aside:

> Since our task is to 'give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties' […], we find it unlikely that those parties' apparent understanding of the term 'lésion corporelle' as 'bodily injury' would have been displaced by a meaning abstracted from the French law of damages. Particularly is this so when the cause of action for psychic injury that evidently was possible under French law in 1929 would not have been recognized in many other countries represented at the Warsaw Convention.[190]

Ultimately, in *Zicherman*, the question whether damages for loss of society resulting from the death of a relative in a crash on high seas could be compensated was raised. In its interpretation of the word 'damage' under Article 17 of the 1929 Warsaw Convention,[191] Justice Scalia declined to adopt a solution that would be a mix of French and American law and stated that:

> When presented with an equally plausible reading of Article 24 that leads to a more comprehensible result – that the Convention left to domestic law the questions of who may recover and what compensatory damages are available to them – we decline to embrace a reading that would produce the mélange of French and domestic law proposed by petitioners.[192]

190 *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530 (1991), at 540.

191 It is also interesting to compare how the term 'damage' was interpreted by the Supreme Court of the United States and the Court of Justice of the European Union. In *Zicherman*, the Supreme Court, asked to interpret the term 'damage' under Article 17 of the Warsaw Convention, held that this notion was to be interpreted pursuant to domestic law applicable under the forum's choice-of-law rules. In contrast, in *Walz*, the Court of Justice of the European Union held that the term 'damage', which underpinned Article 22(2) of the 1999 Montreal Convention, required an autonomous interpretation. The autonomous dimension was nevertheless left aside, as the Court eventually referred to a definition used in international law rather than trying to offer a genuine autonomous definition. This being said, the comparison between these two decisions is limited. First, they concern different provisions in different instruments. Second, they raise serious translation issues as the French translation of the word damage is different. Under *Zicherman*, the sole authentic French text uses the word 'dommage', whereas under *Walz*, the non-exclusive authentic French version of the text uses, depending of the provision examined, either the word 'avarie', 'dommage' or 'préjudice'. For further discussions on linguistic issues, *see*, section 4.4.

192 *Zicherman, Individually and as Executrix of the Estate of Kole, et. al. v. Korean Air Lines Co, Ltd.*, 516 U.S. 217 (1996), at 225-226.

These examples demonstrate that the interpretation developed in American cases made under the 1929 Warsaw Convention was partly inspired by French law on the grounds that it would have been expected by the Parties in the concerned litigation.

(3) Other Domestic Laws

Several Courts have also considered that their domestic law could be a valid source of interpretation of the Conventions. For example, the French *Cour de cassation* ruled that the term 'act' described under 25 of the 1929 Warsaw Convention as amended by the 1955 Hague Protocol was identical to the inexcusable fault (*faute inexcusable*) set out in French legislation. This Court concluded that the interpretation of the inexcusable fault, which was previously given by the Court with respect to a labour accident, could be transposed into a case of aerial accident.[193] This reference to domestic legislation led to an objective appreciation of the fault, whereas in other jurisdictions a subjective appreciation was preferred[194] as more in line with the discussions reported in the *Travaux Préparatoires* of the 1955 Hague Protocol.[195]

In 2015, when the CJEU was asked to interpret the concept of 'passenger' under Article 17 of the 1999 Montreal Convention, it held an unclear reasoning in *Wurcher*. The Court mixed up the provisions of this convention with pure EU law concepts when it concluded that:

> It follows from the foregoing that Article 17 of the Montreal Convention must be interpreted as meaning that a person who comes within the definition of 'passenger' within the meaning of Article 3 (g) of Regulation No 785/2004, also comes within the definition of 'passenger' within the meaning of Article 17 of that convention, once that person has been carried on the basis of a 'contract of carriage' within the meaning of Article 3 of that convention.[196]

This Court view is puzzling, given that it refers to other sources of inspiration for interpreting the 1999 Montreal Convention earlier in *Walz*.[197]

In any case, referring to domestic law as a source of inspiration for the interpretation of the Conventions infringes on the concept of autonomy of the Conventions and prevents their uniform application. This is especially

193 Cass., 5 December 1967, vol. II JCP 15350 (1967) – a case known in the English literature as *Emery v. Sabena*. This position was later reaffirmed in Cass., 24 June 1968 RFDAS 453 (1968) – a case known in the English literature as *Air France v. Diop*.

194 *See*, René Mankiewicz, *L'origine et l'interprétation de la l'article 25 de la Convention de Varsovie amendée à La Haye en 1955*, 26 ZLW 175 (1977).

195 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 206 and 285.

196 CJEU, 26 February 2015, *Wucher Helicopter GmbH, Euro-Aviation Versicherungs AG v. Fridolin Santer*, C-6/14, ECLI:EU:C:2015:122, at 42.

197 *See*, section 4.3.3.5(4).

true when these Conventions do not refer to the applicability of domestic regulations through a *renvoi*.[198]

(4) Other International Legislative Instruments

In 2005, the CJEU, seized on the interpretation of the word 'damage' under the 1999 Montreal Convention, ruled in *Walz* that this concept should be understood pursuant to an international law definition. In this case, the Court ruled that the word 'damage' under the 1999 Montreal Convention should be interpreted in light of the *Articles on Responsibility of States for Internationally Wrongful Acts*[199]:

> Lastly, in order to determine the ordinary meaning to be given to the term 'damage' in accordance with the rule of interpretation referred to at paragraph 23 above, it should be recalled that there is a concept of damage which does not originate in an international agreement and is common to all the international law sub-systems. Thus, Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts, drawn up by the International Law Commission of the United Nations, and of which the General Assembly of that organisation took note in its Resolution 56/83 of 12 December 2001, provides that '[i]njury includes any damage, whether material or moral …[200]

This decision is to be put in perspective with the reasoning of the Supreme Court of the United States, which in *Saks* expressly denied recourse to the definition of 'accident' established in another international instrument.[201]

In short, to guarantee the autonomy of the terms used in the Conventions, the incorporation of a definition given in another international instrument should be avoided.

4.3.3.6 Literature

Finally, Courts have regularly tried to seek confirmation of their views in books and articles written by esteemed authors.

198 *See*, section 1.1.3.2(iii).

199 International Law Commission, *Responsibility of States for Internationally Wrongful Acts (2001)*, Source: United Nations, <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> (accessed 22 March 2021).

200 CJEU, 6 May 2010, *Axel Walz v. Clickair SA.*, C-63/09, ECLI:EU:C:2010:251, at 27.

201 *Air France v. Saks*, 470 U.S. 392 (1985), at 407: 'The definition in Annex 13 and the corresponding Convention expressly apply to aircraft accident *investigations*, and not to principles of liability to passengers under the Warsaw Convention'.

Regular references to scientific literature may be found in decisions handed down by the highest Courts in Belgium,[202] Canada,[203] United Kingdom[204] and the United States.[205]

In France, despite that the *doctrine* is considered an important source of law, the decisions of the *Cour de cassation* do not generally refer to them. However, it is more than likely that these Courts refer to the literature, as the Advocates General to said Court and lower Courts do.

Equally, the decisions of the CJEU do not explicitly refer to relevant literature, but the Advocates General generally do in their opinions.[206]

A review of scientific literature is therefore one of the tools that is commonly used in the selected Courts.

4.3.3.7 Concluding Remarks

As seen in the preceding sections, a large variety of tools have been used across time by Courts in selected jurisdictions, and there is no perfect symmetry in the tools each uses.

As each Court has developed its own mechanisms for interpreting the Conventions, which sometimes evolve across time, the fragmentation of the Conventions is therefore ineluctable. However, the analysis has highlighted elements that, in the absence of an international specialized Court, allow an interpretation of the Conventions with due respect to their autonomy.

It is not easy to determine whether the principles of interpretation laid down in the 1969 Vienna Convention have been, at least implicitly, applied by all selected Courts. However, it can be argued that all the elements described above may be considered as falling either under its Article 31 or 32.

This being said, the absence of a hierarchical order between the tools set out in Article 31[207] does not positively respond to the need for predictability of the Conventions. Moreover, the fact that Article 32 is non exhaustive, and

202 For example, *see*, Cass., 10 April 2008, ECLI:BE:CASS:2008:ARR.20080410.10.

203 For example, *see*, *Thibodeau v. Air Canada*, (2014) 3 SCR 340, at 368.

204 For example, *see*, *Fothergill v. Monarch Airlines*, (1980) UKHL 6, at 62-65.

205 For example, *see*, *Air France v. Saks*, 470 U.S. 392 (1985), at 404.

206 For example, *see*, CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), at 29-30.

207 International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* 7 (2018), Source: United Nations, <https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF> (accessed 21 February 2020).

that the review of *Travaux Préparatoires* are only supplementary means,[208] do not provide for a consistent interpretation of unification rules, notably with regards their uniform application. It can also be deplored that that perusal of foreign case law is not clearly encouraged by the 1969 Vienna Convention.

In short, the 1969 Vienna Convention is a useful general instrument but it does not explicitly provide clear tools to ensure the uniform application of specific Uniform Instruments such as the 1999 Montreal Convention.

It may therefore be concluded that, despite efforts made by most Courts to recognize the specific nature of the Conventions, the lack of common and clear interpretation rules in the Conventions constitutes a serious obstacle to the aim of uniformity.

4.3.4 Concluding Remarks

The analysis carried out regarding Courts' responses to the aim of uniformity of the Conventions has demonstrated that they have not systematically succeeded in ensuring a uniform application of the Conventions.

The specific features of the Conventions, their principle of exclusivity and the autonomy of the terms used therein, may hence be regarded as insufficient as currently drafted, for achieving the desired uniformity.

This examination has also shown that the dichotomy, as discussed above,[209] between monist and dualist States does not seem to have had any influence on the achievement of this aim.

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208 The *Travaux Préparatoires* of the 1969 Vienna Convention provide that: '*Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text. Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation' (United Nations Conferences on the Law of Treaties, First and second sessions, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, Official Records, *Documents of the Conference*, United Nations, New York, 1971, p. 40, Source: United Nations, <https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf> (accessed 2 August 2019). They also underline that: 'It also considered whether, in regard to multilateral treaties, the article should authorize the use of *travaux préparatoires* only as between States which took part in the negotiations or, alternatively, only if they have been published. […] A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding. […] Accordingly, the Commission decided that it should not include any special provision in the article regarding the use of *travaux préparatoires* in the case of multilateral treaties', Source: United Nations Conferences on the Law of Treaties, First and second sessions, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, Official Records, *Documents of the Conference*, United Nations, New York, 1971, p. 43, Source: United Nations, <https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf> (accessed 2 August 2019).

209 *See*, section 1.3.2.2(5).

4.4 Linguistic Elements

4.4.1 Preliminary Remarks

The third element that could create unwitting discrepancies and hence an additional source of fragmentation of the uniform regime envisaged by the drafters of the Conventions may be the existence of different linguistic versions of the Conventions.

As a reminder, the only authentic version of the 1929 Warsaw Convention is French, and the authentic versions of the 1999 Montreal Convention are Arabic, Chinese, English, French, Russian and Spanish.[210] The 1955 Hague Protocol was drafted in 3 authentic languages – English, French and Spanish – but its final clauses provide that in case of inconsistency, the French version shall prevail.

The following analysis will examine how the Conventions' translations and their drafting in multiple authentic versions potentially affected their uniformity.[211]

4.4.2 Translations

4.4.2.1 The Variety of Translation Issues

When applying the Conventions, one would expect Courts to refer to the authentic linguistic version to verify whether there is or not a discrepancy with their domestic translation. However, this is not always the case for several reasons:

First, Courts may not necessarily be fluent in any of the authentic versions of the text, with the consequence that they would limit the application of the Conventions to their own domestic translation.

Second, they may also be prevented from, or see no interest in, giving greater weight to authentic versions over their domestic text. This may potentially be more likely in dualist States that do not attach any authentic version of the Conventions to their domestic legislation.

Third, it may not occur to them to check for discrepancies between the different versions.

The following analysis will examine the major types of translation issues.

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

211 This last point could have been discussed as an internal factor. But for the sake of clarity and consistency, the risks of having a text drafted in several authentic versions will be analysed in parallel to translation issues.

4.4.2.2 Inaccurate Translations

Sometimes a discussion may arise from a non-accurate transcription of the original version. This was notably the case in the United Kingdom, where the English version of the 1929 Warsaw Convention originally replaced a comma by a conjunction under Article 8(i). While the authentic French text provided: 'La lettre de transport aérien doit contenir les mentions suivantes: (i) le poids, la quantité, le volume ou les dimensions de la marchandise', the English version read as follows: 'The air consignment note shall contain the following particulars: (i) the weight, the quantity and the volume or dimensions of the goods'. The absence of comma, and the subsequent insertion of 'and', led to a dispute.

In *Corocraft*, the Court of Appeal of England and Wales, seized on the controversy, rightly held that in case of discrepancy, the French version should prevail.[212] If this is in line with the provisions of the Convention, the question nevertheless had to be confirmed by a senior Court.

4.4.2.3 Various Translations in the Same Language

One might assume that the translation into a non-authentic language would be identical in each State sharing that language. But this is not always the case. Taking the example of Portuguese, which is not an authentic language, Article 17(1) of the 1999 Montreal Convention[213] is translated differently in at least three jurisdictions. The domestic translations read as follows in the Brazilian version of this provision:

> O transportador é responsável pelo dano causado em caso de morte ou de lesão corporal de um passageiro, desde que o acidente que causou a morte ou a lesão haja ocorrido a bordo da aeronave ou durante quaisquer operações de embarque ou desembarque.[214]

Whereas the Portuguese version reads as follows:

> A transportadora só é responsável pelo dano causado em caso de morte ou lesão corporal de um passageiro se o acidente que causou a morte ou a lesão tiver ocorrido a bordo da aeronave ou durante uma operação de embarque ou desembarque.[215]

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212 *Corocraft Ltd v. Pan American Airways*, (1969) 1 QB 616, at 653: 'The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it; and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it'.

213 'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking'.

214 Decreto N° 5.910, de 27 Setembro de 2006, Source: Brazilian Government, <http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Decreto/D5910.htm> (accessed 20 June 2019).

215 Decreto n.° 39/2002, Diario da República n.° 274/2002, Série I-A de 2002-11-27.

And the one of Macau presents this wording:

> O transportador só é responsável pelo dano verificado em caso de morte ou lesão corporal de um passageiro se o acidente que causou a morte ou a lesão tiver ocorrido a bordo da aeronave ou no decurso de quaisquer operações de embarque ou desembarque.[216]

The comparison between these three versions shows several variations:

First, grammatical distinctions are immediately apparent: with variations in the use of masculine and feminine words,[217] and the use of past subjunctive and future subjunctive tenses.[218]

Second, while these are only minor dissimilarities, some variations may have more significant differences. For instance, the translation of 'upon condition only that the accident', is expressed *as soon as the accident* in the Brazilian version, and *if the accident* in the Portuguese and Macau texts. In terms of causal effect, this may lead to distinct views. Equally, where the original English version provides that 'The carrier is liable for damage', the Portuguese and Macau versions add the adverb *only*, saying in substance that the carrier is only liable for damage. The liability for damage sustained in the Macau version is moreover translated as *verified damage*, adding a condition that was not textually foreseen by the original version.

Finally, where the Brazilian and Macau texts stick closely to the authentic passage of 'in the course of any of the operations of embarking or disembarking', the Portuguese merely mention one operation of embarking or disembarking, which could potentially lead to a stringent interpretation of this sentence.

4.4.2.4 Various Translations within the European Union

(1) The Example of the Use of the Dutch Language

Another example can be found within the European Union where the 1999 Montreal Convention is part of Belgian, Dutch and EU law.[219] Each linguistic service has therefore translated the text into Dutch, as the latter is one of their official languages, but not an authentic language of the 1999

216 *B.O.* n.°: 17, II Série, de 2006/04/26, Pág. 3412-3434.

217 Such as 'transportador' or 'transportadora'.

218 Such as 'haja ocorrido' or 'tiver ocorrido'.

219 *See*, in Belgium, loi du 13 mai 2003 portant assentiment à la Convention pour l'unification de certaines règles relatives au transport aérien international, faite à Montréal le 28 mai 1999, *Moniteur belge*, 18 mai 2004; in The Netherlands, Rijkswet van 3 februari 2004, *Staatsblad*, 21 juni 2004; in the European Union, Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), 2001/539/EC, *Official Journal*, 18 July 2001, L 194/38.

Montreal Convention.[220] Each translation, however, is slightly different from the others.

Most of the differences essentially concern typography questions such as the use or lack of spaces,[221] capital letters,[222] and – perhaps more problematic – commas.[223]

Nevertheless, in the Belgian and Netherlands translations, differences are more obvious as totally different words are used. If the word 'omission' is translated as 'nalaten' in Belgium and 'nalatigheden' in the Netherlands, these would however be considered as synonyms. More strikingly, to translate the concept of 'servants or agents', the words 'ondergeschikten of lasthebbers' are used in Belgium, whereas a unique word, 'hulppersonen', is used in the Netherlands. Each expression refers to concepts known under domestic law.[224] The question becomes even more complicated, and a source of potential imbroglio, when reference is made to the translation

220 Discrepancies also exist in other air law conventions, such as the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, which is drafted in three authentic languages: English, French and Spanish. When the text needed to be translated into Dutch, the source text selected in the Netherlands was the English version. This led to controversies on the application of the accession rule to engines in light of Article XVI of said convention. Indeed, this Article provides in its English version that: '"aircraft" shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom'. The question as to what was included under the terms 'intended' had a significant importance on the application of the accession rule in the Netherlands. The difficulties would probably have been less important if the Dutch translators had looked to the French version which uses the term 'destinées', clearly indicating that this refers to plural and feminine words. *See*, Berend Crans, "Aspect particuliers de la location de moteurs", in Cyril-Igor Grigorieff, Vincent Corriea (eds), *Le droit du financement des aéronefs* 115-142 (Bruylant, 2017).

221 'voorzover' and 'plaatsvond' in Belgium, compared to 'voor zover' and 'plaats vond' in The Netherlands.

222 'partij' and 'partijen' in Belgium, compared to 'Partij' and 'Partijen' in some cases in The Netherlands

223 Article 3(2) last sentence: 'If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved' is translated in Belgium as 'Indien een dergelijk ander middle wordt gebruitkt biedt de vervoerder aan de passagier een schrijftelijke verkaring te verstrekken van de aldus vastgelegde gegevens', and in The Netherlands as 'Indien een dergelijk ander middle wordt gebruitkt biedt de vervoerder aan, de passagier een schrijftelijke verkaring te verstrekken van de aldus vastgelegde gegevens'.

224 *See*, in the Netherlands, Burgerlijk Wetboek, Boek 6, Artikel 76. The situation in Belgium is less clear. The term 'ondergeschikten' is not defined in the Civil Code, but the word used in the authentic French version 'préposés' is also used under Article 1384 of said Code. The Dutch version of this Article uses the expression 'aangestelden'. In contrast, the word 'lasthebbers' is known under Article 1991 *et seq.* of the Civil Code and is translated in the French version of the Civil Code as 'mandataire' which corresponds to the word used in the authentic French version of the 1999 Montreal Convention.

made by the European Union,[225] whose primacy may be questioned. The European translation appears to be a compromise between the versions of its Member States. In the European version, 'omission' is sometimes translated as 'nalatigheid'[226] or as 'nalaten'[227] while the concept of 'hulppersonen', only known in the Netherlands, is used. This means in practice, that in the Netherlands one may be tempted to refer to a domestically elaborated and interpreted concept, whereas in Belgium, if priority is given to the European translation, the concept would be viewed as more autonomous.

(2) The Example of the Use of the Italian Language

Another European translation issue can be found in Italy. When the 1999 Montreal Convention was published in the Official Journal of the European Communities,[228] the Italian text translated Article 35 using the concept of 'prescrizione',[229] leading to the belief that the time limit could be interrupted or suspended.[230] This view could have been reinforced when the Italian 2004 Ratification Act[231] used the same translation. These translations raised concerns as the 1929 Warsaw Convention did not use this term.[232]

225 *Official Journal,* 18 July 2001, L 194/39.
226 Article 21(2)(a).
227 Article 41(2).
228 *Official Journal*, 18 July 2001, L 194/39.
229 'Articolo 35
Prescrizione
1. Il diritto al risarcimento per danni si prescrive nel termine due anni decorrenti dal giorno di arrivo a destinazione o dal giorno previsto per l'arrivo a destinazione dell'aeromobile o dal giorno in cui il trasporto è stato interrotto.
2. Il metodo di calcolo del periodo di prescrizione è determinato in conformità dell'ordinamento del tribunale adito'.
230 On this topic, *see*, section 3.2.5.
231 Legge 10 gennaio 2004, n. 12 – Ratifica ed esecuzione della Convenzione per l'unificazione di alcune norme relative al trasporto aereo internazionale, con Atto finale e risoluzioni, fatta a Montreal il 28 maggio 1999, GU Serie Generale n.20 del 26-01-2004 – Suppl. Ordinario n.11.
232 1929 Warsaw Convention, Article 29: '1. L'azione per responsabilità dev'essere promossa, sotto pena di decadenza, entro il termine di due anni a contare dall'arrivo a destinazione o dal giorno in cui l'aeromobile avrebbe dovuto arrivare o da quello in cui il trasporto fu interrotto.
2. Il modo di calcolare il termine è determinato dalla legge del tribunale chiamato a giudicare', Source: Italian Civil Aviation Authority, <https://www.enac.gov.it/la-normativa/normativa-internazionale/convenzioni-trattati-protocolli/convenzione-di-varsavia> (accessed 21 August 2019).

Only in 2014 did the Official Journal of the European Union[233] publish a rectification that replaced the concept of 'precrizione' with the stricter one of 'decadenza'.[234]

As the national Italian version has not been amended since then, this situation may be a source of conflicting decisions.[235]

4.4.3 The Plurality of Authentic Versions

An even more difficult situation arises when there is a discrepancy between authentic versions. In this scenario, Article 33(3) of the 1969 Vienna Convention[236] sets out that unless otherwise provided, the terms must be presumed to have the same meaning in each language.

This principle is nevertheless not always applied. For example, in 2000, the *Cour de cassation* of Belgium delivered a decision in a CMR matter that can be explored for comparison purposes *mutatis mutandis*.[237] In this cargo case, where the carrier had indemnified the claimant according to limits set out in the CMR, the claimant argued he was entitled to full compensation on the grounds that the loss was caused by 'willful misconduct' as set out in the English authentic version of the CMR.[238] The plaintiff further contended that the definition of 'dol' in the French version used by the inferior Court was more restrictive than the 'willful misconduct' term used in the English version, which was also authentic. In that regard, the claimant submitted that the inferior Court infringed on the aim of uniformity of said convention. The *Cour de cassation* held in substance that the definition of 'dol' as used in the French version of the CMR and as known under Belgian law

233 *Official Journal*, 24 December 2014, L 369/79 (Italian version only).

234 'Articolo 35
Decadenza
1. Il diritto al risarcimento del danno si estingue se non è proposta la relativa azione entro il termine di due anni decorrenti dal giorno di arrivo a destinazione, o dal giorno previsto per l'arrivo a destinazione, ovvero dal giorno in cui il trasporto è stato interrotto.
2. Ilmetodo di calcolo del predetto termine è determinato in conformità dell'ordinamento del tribunale adito'.

235 *See*, Enzo Fogliano, *L'art. 35 della Convenzione di Montreal: prescrizione o decadenza?*, 33 Diritto dei trasporti 115-117 (2020).

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

237 Cass., 30 March 2000, C.9.70.176.N.

238 Compare the French version of Article 29(1) of the CMR Convention: 'Le transporteur n'a pas le droit de se prévaloir des dispositions du présent chapitre qui excluent ou limitent sa responsabilité ou qui renversent le fardeau de la preuve, si le dommage provient de son dol ou d'une faute qui lui est imputable et qui, d'après la loi de la juridiction saisie, est considérée comme équivalente au dol'; to the English text: 'The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct'.

required an intentional element which was not present in this case. It further said that the fact that the English concept of 'willful misconduct' may not necessarily entail an intentional element, and that Article 29 was generally interpreted in that manner in other jurisdictions, made no difference.[239]

Moreover, Article 33(4) of the 1969 Vienna Convention sets out that the meaning that best reconciles the text must be adopted in the event of a discrepancy between different authentic versions. In *Air Baltic Corporation*, while trying to determine whether Article 19 of the 1999 Montreal Convention only applied to damage caused to passengers or also applied to damage suffered by an employer, the Court of Justice of the European Union, referring to various authentic versions of the 1999 Montreal Convention, noted that the French version of Article 22(1) restricted the concept of damage occasioned by delay to damage to 'each passenger'; whereas the English, Spanish and Russian versions only referred to damage occasioned by delay without restricting it to damage suffered by passengers.[240] Following a further examination of this provision, the Court eventually rejected the meaning of the French version.

Although the 1969 Vienna Convention gives clear guidance on how to handle discrepancies between authentic versions, that the 1999 Montreal Convention does not give priority to any of its authentic versions, one could wonder whether priority should not be given to the French version, as the 1955 Hague Protocol did, given the historicity of the terms adopted.[241]

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239 Cass., 30 March 2000, C.9.70.176.N., ECLI:BE:CASS:2000:ARR.20000330.4:'Attendu que le moyen reproche aux juges d'appel d'avoir incorrectement interprété la Convention CMR dès lors que, dans l'arrêt attaqué, ils excluent l'application de l'article 29.1 par le motif que le transporteur n'a pas commis de dol au sens d'intention méchante de causer un dommage, alors que le terme "dol" au sens de l'article 29.1 vise la notion de "wilful misconduct", qui vise tant l'intention méchante de causer un dommage ou une perte que l'intervention téméraire sans dessein réel de nuire; Attendu que les juges d'appel décident qu'à l'égard d'un juge belge, la faute grave ne peut être assimilée au dol et que, dès lors, ce juge est uniquement tenu d'examiner si le dol est requis; qu'ils décident ensuite "qu'il n'est pas contesté que le transporteur n'a pas commis de dol en l'espèce"; Qu'ils n'excluent pas que la faute intentionnelle puisse être une faute qui, dans les autres systèmes juridiques, correspondrait à une autre notion, telle que la notion de "wilful misconduct"; que, sans préciser davantage la notion de "dol", ils relèvent uniquement la nécessité d'un élément intentionnel qui, selon eux, fait défaut; Attendu que, dans la mesure où il invoque la violation des dispositions de la Convention CMR, le moyen est fondé sur la thèse que les juges d'appel ont appliqué une notion de "dol" qui déroge à la notion de "wilful misconduct"; que l'arrêt ne contient pas de décision de cette nature; Attendu que la violation des règles d'interprétation des traités ne donne lieu à cassation que si, ce faisant, le traité faisant l'objet de l'interprétation a été violé; […] Par ces motifs, […] Rejette le pourvoi'. However, it is possible that the Court thought the CMR offered a certain marge of manoeuvre for referring to domestic law.

240 CJEU, 17 February 2016, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba*, C-429/14, ECLI:EU:C:2016:88, at 29-34.

241 *See*, Bin Cheng, *The Labyrinth of the Law of International Carriage by Air – Has the Montreal Convention 1999 Slain the Minotaur?*, 50 ZLW 172 (2001).

4.4.4 Concluding Remarks

The existence of various authentic versions of the 1999 Montreal Convention and its multiple translations constitute additional sources of potential fragmentation of the uniform regime. This phenomenon is particularly problematic when Courts are not composed of judges fluent in one of its authentic languages.

4.5 Conclusions

The analysis confirms the fragmentation of the contemplated uniform regime as was already acknowledged by authoritative literature on the 1929 Warsaw Convention.[242] As Professor Michel Pourcelet emphasized in 1973, real anarchy surrounded the international air carrier liability regime:

> L'anarchie la plus complète triomphe en matière de transport aérien international de passagers et de marchandises, tant en ce qui concerne la détermination de la loi applicable au litige soumis au tribunal […] que l'interprétation donnée par les tribunaux des différents pays aux textes internationaux applicables.[243]

While, at the 1999 Montreal Conference, the President of the ICAO Council expressed the view that the adoption of a new convention would reestablish uniformity;[244] this analysis shows that the 1999 Montreal Convention is still subject to fragmentation by powerful external factors.

This study demonstrated that the successive waves of modifications of the Conventions by various international, regional and domestic instruments led to a fragmentation of the uniform regime. The emergence of regional and domestic consumer rights in parallel to the international air carrier liability regime also threatens the uniformity of the 1999 Montreal Convention and particularly with respect to the provisions governing delays.

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242 *See*, Peter Sand, *The International Unification of Air Law*, 30 Law and Contemporary Problems 400-424 (1965); Huib Drion, *Toward a Uniform Interpretation of the Private Air Law Conventions*, 19 J. Air L. & Com. 423-442 (1952); Euthymene Georgiades, *De la méthodologie juridique pour l'unification du Droit aérien international privé*, RFDAS 369-389 (1972); René Mankiewicz, *La Convention de Varsovie et le Droit Comparé*, RFDAS 136-150 (1969).

243 Michel Pourcelet, *A propos d'un accident d'avion: la diversité des solutions données par le tribunaux*, Revue Générale de l'Air 211 (1973).

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

Moreover, the exclusivity clause and the autonomy of the terms used in the Conventions, which were expected by their drafters to ensure their uniform application, did not fully achieve this aim. This chapter showed that the broadly formulated principle of exclusivity and the lack of clear indications as how to apply undefined autonomous terms resulted in heterogeneous judicial decisions.

Lastly, the coexistence of various authentic versions of the 1999 Montreal Convention and its numerous translations in different languages participate in the fragmentation of the uniform regime.

Chapter 5 will discuss possible ways to enhance the uniformity of the 1999 Montreal Convention.