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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3 Internal Factors of Fragmentation

3.1 Introduction

This chapter is designed to determine whether, at the time of the signing of the Conventions, specific factors already existed that may have prevented them from being uniformly applied. In order to answer this question, the analysis will examine any drafting factors that could potentially have obstructed the uniform application of the Conventions (section 3.2). The discussion will then assess whether or not other factors may have prevented the Conventions' uniform application from the moment of signing (section 3.3).

3.2 Drafting Factors

3.2.1 Preliminary Remarks

The art of writing legal texts, or *légistique* as it is called in French, is complex. Many documents explain how a bill or legal texts should be written in order to avoid possible confusion, and the need for recourse to interpretation mechanisms. As the law must be clear and predictable to fulfil its role,[1] many techniques are applied during drafting.[2]

At the level of the European Union, the Joint Practical Guide for persons involved in the drafting of European Union legislation is a very useful kit that states:

> The drafting of a legal act must be clear, easy to understand and unambiguous; simple and concise, avoiding unnecessary elements; precise, leaving no uncertainties in the mind of the reader. This common sense principle is also an expression of general principles of law, such as […] legal certainty, in that it should be possible to foresee how the law will be applied.[3]

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1 *See*, section 2.3.2.

2 *See*, for example, in France, a more than 700-page compendium, the *Guide de Légistique* (Documentation française, 3rd edition, 2017); and in Belgium, the *Principes de techniques législatives – Guide de rédaction des textes législatifs et réglementaires* (Conseil d'Etat, 2008).

3 European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* 10 (2016), Source: Publication Office of the European Union, <https://op.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732> (accessed 22 December 2020).

This Practical Guide also emphasizes the importance of an autonomous perspective to the concept of European law:

> In addition, the use of expressions and phrases – in particular legal terms – that are too specific to a particular language or national legal system will increase the risk of translation problems. […] As regards legal terminology, terms which are too closely linked to a particular national legal system should be avoided.[4]

That being said, it is not always possible to respect these principles in every circumstance. As the rules contained in the 1999 Montreal Convention do not always speak for themselves, they sometimes need to be interpreted by Courts.

The following analysis of drafting factors may then require an analysis of the scope of certain terms and concepts of the Conventions as envisaged by their drafters, and their subsequent application by Courts. The selection of terms and concepts used in this analysis is a personal choice. The selection will mostly be grounded in information obtained from the *Travaux Préparatoires* and from the diverse judicial decisions produced by these terms and concepts.

The discussions below do not aim to give an exhaustive account of the former or current controversies surrounding the selected examples. Rather, I seek to discover if specific elements, embedded in the text of the 1999 Montreal Convention since its adoption, may have prevented or limited its uniform application.

3.2.2 The Lack of Autonomous Definitions: The Example of 'Accident'

3.2.2.1 'Accident' under Article 17 of the Conventions

One of the key provisions of the Conventions regarding international air carrier liability is established under Article 17.

Article 17 of the 1929 Warsaw Convention reads:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[5]

This provision was slightly amended in the 1999 Montreal Convention, setting out that:

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4 *Ibid.*, p. 18.

5 In the authentic French version: 'Le transporteur est responsable du dommage survenu en cas de mort, de blessure 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 ou au cours de toutes opérations d'embarquement ou de débarquement.'.

> 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.

Despite the use of the term 'accident' several times in the Conventions,[6] neither the 1929 Warsaw Convention nor the 1999 Montreal Convention provide a definition of 'accident', although they do define other terms, such as, for example, 'international carriage',[7] 'commercial agreement',[8] 'principal and permanent residence'[9] and 'days'.[10]

In the absence of definition in the Conventions, the following analysis will examine if any assistance can be found in the *Travaux Préparatoires* and if Courts have succeeded in applying this term in a uniform manner.

3.2.2.2 'Accident' in the Travaux Préparatoires

(1) Prior to the 1929 Warsaw Conference

In the pre-Warsaw negotiation time, the text prepared by the French government prior to the 1925 Paris Conference did not make reference to the concept of 'accident',[11] merely providing that:

> Le transporteur est responsable des pertes, avaries et retards qui résultent de ses fautes personnelles et du vice propre de l'appareil.[12]

The draft text adopted at the end of the 1925 Paris Conference did, however, include the term 'accident' in the list of damages that could trigger carrier liability:

> Le transporteur est responsable des accidents, pertes, avaries et retards. Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage; cette preuve est admise même dans le cas où le dommage provient d'un vice propre de l'appareil.[13]

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6 1929 Warsaw Convention, Articles 17 and 30(2); 1999 Montreal Convention, Articles 17, 30(2) and 36(2).
7 1999 Montreal Convention, Article 1(2).
8 1999 Montreal Convention, Article 33(3)(a).
9 1999 Montreal Convention, Article 33(3)(b).
10 1999 Montreal Convention, Article 52.
11 With the exception provided in Article 8, that an action could be brought in the place where the accident occurred.
12 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 12.
13 *Ibid*., p. 79.

The draft text finally submitted to the 1929 Warsaw Conference, though, did not require an accident to occur to trigger carrier liability. At that time the core provisions read:

> Le transporteur est responsable du dommage survenu pendant le transport: a) en cas de mort, de blessure ou de tout autre lésion corporelle subie par un voyageur; […].[14]

The word 'accident' was at that time only used in the list of possible fora as set out in the former Article 26:

> L'action en responsabilité devra être portée, au choix du demandeur, dans un des Etats Contractants soit devant le tribunal du siège principal de l'exploitation […] soit devant le lieu de destination ou, en cas de non arrivée de l'aéronef, du lieu de l'accident; […][15]

and in the provisions regarding successive carriage:

> […] le voyageur ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident s'est produit […].[16]

The initial references lead to the presumption that an 'accident' was understood to be a significant event in which the aircraft was still on the ground or ended up on it, excluding therefore minor events.

(2) The 1929 Warsaw Conference

During the negotiations in 1929, the core discussions surrounding Article 17 concerned the time period in which liability would apply. It was only at the end of the negotiations, when the drafting committee agreed to merge and renumber several draft provisions, that it introduced the term 'accident', without leaving any evidence or hint of the reason for its inclusion.

However, it is not unreasonable to speculate that the drafting committee took inspiration from the wording of Article 28(1) of the 1924 Bern Convention CIV regarding the carriage of passengers by rail,[17] which provided that:

> La responsabilité du Chemin de fer, pour la mort d'un voyageur ou pour les blessures résultant d'un accident de train, ainsi que pour les dommages causés par le retard ou la suppression d'un train ou par le manque d'une correspondance, reste soumise aux lois et règlements de l'Etat où le fait s'est produit. […].

14 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 171.

15 *Ibid*., p. 172.

16 *Ibid*., p. 173.

17 International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV), 23 October 1924, Bern. This convention was preceded by other international conventions on carriage by rail, notably with respect to carriage of goods.

On several occasions, the *Travaux Préparatoires* indicate[18] that inspiration was taken from rail conventions.[19]

This very late inclusion of the word 'accident' in the 1929 Warsaw Convention does not therefore give us clear guidance on how to define its meaning under Article 17.

While this term is not discussed *per se* in the context of Article 17, it appears nevertheless more than sixty times in the *Travaux Préparatoires*. My analysis unfortunately suggests that the term was used to mean different things. Whereas in a strict grammatical sense, the word in French refers to the notion of an unexpected event;[20] an analysis of its usage and occurrence shows it may also have been used in a narrower sense as a synonym for 'crash'.

This polysemy is not surprising, given that not all delegates spoke French as their mother tongue. The French version, it is worth remembering, is the unique authentic linguistic version of the 1929 Warsaw Convention;[21] it was also the sole language used during the 1929 Warsaw Conference.[22]

At the time, nobody seemed to notice these different uses of the term 'accident', or at least no one expressed the need to properly discuss its introduction. As a matter of fact, in his remarkable work on the limitation of liability in international air law, published slightly before the adoption of the 1955 Hague Protocol, Professor Huib Drion did not even deem it necessary to analyse the meaning of 'accident' in detail.[23] This leads us to believe that, at least during the first decades following the adoption of the 1929 Warsaw Convention, the lack of definition of 'accident' did not create any difficulties.[24]

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18 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, see for example: p. 78, 91, 105, 113, 116, 118, 131 and particularly p. 130 where it is clearly said that: 'La conclusion à laquelle nous sommes arrivés, c'est que nous devons nous en tenir à la Convention de Berne, parce que, autrement, il faudrait encore préciser le sens du mot valablement; […]. Comme la Convention de Berne a déjà une expérience d'un demi-siècle, nous avons préféré reprendre la formule de la Convention de Berne: la livraison des bagages a lieu contre la remise du bulletin de bagages'.

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

20 Larousse: 'événement fortuit qui a des effets plus ou moins dommageables pour les personnes ou pour les choses […]'; Littré: 'Ce qui advient fortuitement […]'; Dictionnaire de l'Académie française: 'Evènement qui arrive de manière imprévue en bien ou en mal'.

21 *See*, Article 36 of the 1929 Warsaw Convention: 'La présente Convention est rédigée en français en un seul exemplaire […]'.

22 At that time, French was indeed the diplomatic language.

23 Huib Drion, *Limitation of Liabilities in International Air Law* (Springer, 1954).

24 With the exception of Professor Daniel Goedhuis, who rapidly foresaw the risk of divergent interpretations. *See*, Daniel Goedhuis, *National Airlegislation and the Warsaw Convention* 200 (Springer, 1937).

(3) The 1955 Hague Conference

During discussions leading to the adoption of the 1955 Hague Protocol, the wording of Article 17 was not modified. Still, the term 'accident' was used on a few occasions, but essentially to illustrate situations involving the death of passengers or, more basically, air crashes.[25]

An interesting element is found in the comments made by the International Institute for the Unification of Private Law, which questioned the interest of keeping the term 'accident'. Although its comments were not discussed or retained by negotiators, it is enlightening to read that it considered that a definition would be useful:

> The texts prepared at the Brighton and San Remo meetings merely required that the damage be 'in relation with the carriage'. After considerable discussion it was decided to retain the accident concept, provided the accident was defined in the following manner: 'any factor unrelated to the person of the passenger which harms his physical or mental integrity'.[26]

However, no definition was added to the 1955 Hague Protocol.

(4) The 1971 Guatemala City Conference

In 1971, a suggestion was made to delete the word 'accident' and to replace Article 17 with the following text in the 1971 Guatemala City Protocol:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the *event* 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger […].[27] (*italics added*)

As suggested by Austria, this change aimed to widen the carrier's scope of liability:

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25 *See*, for example, ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 86, 94, 95, 96, 97, 98, 162; ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 96 with respect to the revision of the limits of liability: 'Another argument in support of this view was that the record of air safety had vastly improved since 1929 and therefore the carrier is now involved in lower risks than those prevailing in the earlier days of air transportation development, and consequently should be prepared to pay higher amounts on the fewer occasions of accidents'.

26 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 193.

27 1971 Guatemala City Protocol, Article IV.

> To date, the term 'accident' has been used, from which it may be deduced that the only type of damage that should be included would be damage having a direct connection with the accident resulting from the operation of the aircraft. It is now suggested that the term 'event' be substituted for the term 'accident'. This would mean that the air carrier would also be considered liable in the event, say, of a passenger killing another passenger on board the aircraft without that event having any relation to the service itself. The exception provided for in the second clause of the new Article 17 is not a remedy when the death is not exclusively ascribable to the infirmity of the passenger.[28]

Nevertheless, despite efforts made, the 1971 Guatemala City Protocol never came into force.

(5) The 1999 Montreal Conference

As already mentioned, although the 1999 Montreal Convention slightly changed the wording of Article 17, it kept the term 'accident'.

One of the working drafts, however, opened discussions on using the words 'accident' or 'event', as testified by a draft Article 16(1):

> The carrier is liable for damage sustained in case of death or [personal] [bodily] injury of a passenger upon condition only that the event [accident] which caused the death or injury […].[29]

As seen hereinafter, the subsequent preparatory work to the conference pointed out an emerging preference for the word 'accident', and a hope to define it:

> In consideration of the terms 'event' or 'accident', one delegation expressed a preference for the term 'accident' and suggested that this term could be defined for the purposes of this Convention. This preference for the term 'accident' was shared by a great number of other delegations. […] The Chairman also noted a considerable degree of preference for the use of the term 'accident' and noted the suggestion made by a number of delegates to define this term in the Drafting Group. […] In considering the use of the term 'accident' or 'event', one delegation observed that the term 'accident' had been the object of a number of judicial decisions and that this body of case law could be used to clarify the meaning of this term. Another delegate stated that the term 'accident' could be defined as a sudden, unpredictable event or occurrence. The subsequent discussion revealed a clear preference for the use of the term 'accident'.[30]

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28 ICAO Doc 9040, International Conference on Air Law, Guatemala City, February-March 1971, volume II, *Documents*, Montreal 1972, p. 144.

29 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume III, *Preparatory Material*, Montreal 1999, p. 37.

30 *Ibid*., p. 169-170.

Although the final text submitted to the conference eventually maintained the use of the term 'accident',[31] no genuine discussion took place during the 1999 Montreal Conference regarding its inclusion. The delegate for the United States merely expressed the following reason for keeping the term 'accident': 'The equitable balance which had been struck between the interests of passengers and carriers was that the word "accident" be used rather than the word 'event' which strongly favoured the carrier's interests'.[32]

(6) Concluding Remarks

Without a clear definition, it was left to Courts to interpret the term 'accident'. As the following section will examine, this state of affairs created the risk of reaching divergent solutions.

3.2.2.3 The Interpretation of 'Accident' in Judicial Decisions

(1) Three Major Views

The response of Courts to the lack of definition of 'accident' has unavoidably taken different forms.[33] Three major views profiled:

- recourse to an 'external definition', that is to say, a definition found in other legal instruments;
- a damage-based approach, which avoids giving any definition of accident but rather focuses on the existence of a damage and;
- an autonomous approach, which tries to come up with a specific definition of the term.

These three views will be explained in the next sections.

31 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume II, *Documents*, Montreal 1999, p. 18.

32 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. 119.

33 *See*, for example, René Mankiewicz, *The Liability Regime of the International Air Carrier – A Commentary on the Present Warsaw Convention System* 147-149 (Kluwer, 1981); annual publication of the International Air Transport Association, *The Liability Reporter*.

(2) The 'External Definition' Approach

The least common response encountered consists in adopting definitions used in other instruments.[34]

For example, in Spain, despite a case-by-case assessment,[35] there is a general tendency to refer to definitions found in other instruments, such as in Annex 13 of the 1947 Chicago Convention[36] or in EU Regulation 996/2010 on the investigation and prevention of accidents and incidents in civil aviation, or even domestic rules.[37]

In Member States of the West African Economic and Monetary Union,[38] the regional regulation on air carrier liability[39] provides a definition of accident that is substantially in line with the one laid down in Annex 13 of the Chicago Convention and which, in the absence of definition in the uniform text, is likely be used or at least taken into consideration by Courts.

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34 This recourse to external definitions has notably been used by the Court of Justice of the European Union in *Walz* to define the concept of damage under the 1999 Montreal Convention, pursuant to the definition given by the Articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commissions. *See*, CJEU, 6 May 2010, *Axel Walz v. Clickair SA*., C-63/09, ECLI:EU:C:2010:251, point 27. *See also*, section 4.3.3.5(4).

35 *See*, Belén Ferrer Tapia, *El contracto de transporte aéreo de pasajeros: sujetos, estatuto y responsabilidad* 166 (Dykinson, Madrid, 2013).

36 ICAO, Annex 13 to the Convention on International Civil Aviation – International Standards and Recommended Practices – Aircraft Accident and Incident Investigation, Chapter 1: '*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'.

37 Belén Ferrer Tapia, *El contracto de transporte aéreo de pasajeros: sujetos, estatuto y responsabilidad* 166 (Dykinson, Madrid, 2013).

38 Benin, Burkina Faso, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

39 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.

(3) The 'Damage-Based' Approach

Probably in light of the general tort law under continental law, which requires fault, damage and a connection between the two,[40] French Courts adopted a 'damage-based' approach in the past. Initially, it was not clearly necessary to demonstrate the existence of an accident. As underlined by French authoritative literature, the concept was viewed through the prism of domestic law. For example, when a passenger broke a bone while walking inside the aircraft, or was the victim of damage caused by another passenger, Courts deemed that the occurrence of a damage was sufficient to trigger application of Article 17.[41]

As explained by Dr. Georgette Miller,[42] given that liability limits were less important in France than in the United States, as the latter applied the 1966 Montreal Agreement,[43] liability issues were essentially judged through the mechanism of exoneration of Article 20. In other words, the focus was essentially on whether or not the carrier took all necessary measures to avoid the damage. This perception, however, evolved as it will be seen in the next section.

(4) The Autonomous Approach

(i) Identical Definitions?

The third approach consists in trying to give an autonomous definition[44] to the term 'accident'. To this end, Courts try to find a specific definition in line with the object and purposes of the Conventions, without copying definitions that exist in international or domestic law.

This section will examine several decisions delivered by Courts in Europe and in America, in order to determine whether this approach was successful in adopting a uniform definition of 'accident'.[45]

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40 Conférence Internationale de Droit Privé Aérien, 27 Octobre – 6 Novembre 1925, Paris, 1926, p. 55: 'L'opinion général est que, tandis que la responsabilité civile à l'égard des tiers, doit comporter l'application de la théorie du risque, en revanche, dans la responsabilité du transporteur à l'égard des passagers et des marchandises, il faut admettre la théorie de la faute. […] Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille'.

41 *See*, Michel de Juglart, Emmanuel du Pontavice, Jacqueline Dutheil de la Rochère, Georgette Miller, *Traité de droit aérien* 1:1116 and the notes (2nd edition, LGDJ, 1989).

42 Georgette Miller, *Liability in International Air Transport* 111(Kluwer, 1977).

43 *See*, section 1.1.3.1.

44 *See*, section 2.5.3.3.

45 The hermeneutical tools used by Courts will be analysed in Chapter 4.

(ii) Common Law Jurisdictions

Amongst common law jurisdictions, the Supreme Court of the United States was the first to be seized on the interpretation of the term 'accident' in 1985, in its *Saks* judgment. In this case, the Court acknowledged that this term should not be interpreted with reference to the definition that existed in Annex 13 to the 1947 Chicago Convention.[46] Having recourse to several hermeneutical tools,[47] the Court concluded that, in the context of the 1929 Warsaw Convention, an 'accident' was to be interpreted 'flexibly'[48] as an 'unexpected or unusual event or happening that is external to the passenger'.[49] Nearly 20 years later, in *Husain*, the same Court fine-tuned its definitions and held that omissions could also be considered as an 'accident'.[50] These decisions were ultimately followed in hundreds of published and reported cases in the United States, each giving a more extensive factual meaning to the definition elaborated by the Supreme Court.[51] For example, the 6th Circuit held in *Doe* that being pricked by a needle hidden in a seat pocket could be viewed as an accident.[52]

In the United Kingdom, in *Morris*[53] and *Re Deep Vein Thrombosis*,[54] the House of Lords adhered to the definition given by the American Supreme Court in *Saks*. In *Morris*, the Court furthermore acknowledged the flexible nature of this definition: '[…] it was not necessary to show that the event had any relationship with the operation of the aircraft or carriage by air […]'.[55] Since the entry in force of the 1999 Montreal Convention, the Supreme Court of the United Kingdom has not been seized yet on the inter-

46 *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'.

47 To be discussed in section 4.3.3.

48 *Air France v. Saks*, 470 U.S. 392 (1985), at 405.

49 *Ibid*.

50 *Olympic Airways v. Husain, Individually, and as Personal Representative of the Estate of Hanson, Deceased, et al.*, 540 U.S. 644 (2004).

51 *See,* for example, Lawrence Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (Kluwer Law International, 2000); George Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States – from Warsaw 1929 to Montreal 1999* (Wolters Kluwer, 2010); Paul Dempsey, Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Centre for Research in Air & Space Law, McGill University, 2005); Andrew Harakas, "Air Carrier Liability for passenger injury or death occurring during International Carriage by Air: An Overview of the Montreal Convention of 1999", in Andrew Harakas (eds), *Litigating The Aviation Case* 16-22 (4th edition, American Bar Association, 2017); annual publication of the International Air Transport Association, *The Liability Reporter*.

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

53 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 71.

54 *Re Deep Vein Thrombosis and Air Travel Group Litigation*, (2005) UKHL 72, at 18.

55 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 72.

pretation to be given to the term 'accident' under this new text.[56] The Court of Appeal, however, did in *Barclay* and confirmed the same interpretation.[57]

Despite the fact that there is a certain degree of uniformity in the autonomous interpretation adopted in common law jurisdictions, the risk of divergent decisions is not completely mitigated, as debates continue on what constitutes an 'unusual' event.[58]

(iii) Civil Law Jurisdictions

In France, as already mentioned,[59] the position of French Courts evolved from a 'damage based' approach. In 1979, the Court of Appeal of Paris[60] looked more closely at the wording of the 1929 Warsaw Convention as amended, in this case regarding hijacking, and implicitly confirmed that an 'accident' was required for the text to be applicable. In this matter, the Court defined this term as a material and fortuitous event of a mechanical

56 In *Stott*, the Court mostly focused on the interpretation to be given to terms 'bodily injury', the exclusivity and the temporal scope of the carrier's liability. *See*, *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15.

57 *Barclay v. British Airways*, (2008) EWCA Civ 1419. *See also*, the subsequent decision of the Court of Appeal, *Ford v. Malaysian Airline System Berhad*, (2013) EWCA Civ 1163, at 28. Later, the term 'accident' was fine-tuned by the High Court in 2019 in *Labbadia*. In this matter, the Court considered that an omission could also be understood as an 'accident', ruling that the fall of a passenger on snowy aircraft stairs was an accident insofar as the stairs were not covered by a canopy: 'the Claimant's fall was directly caused by acts and omissions by airport personnel which was an unusual or unexpected event and external to him. It was not a reaction to the normal operation of the aircraft or an immutable state of affairs'. *See*, *Labbadia v. Alitalia*, (2019) EWHC 2103 (QB), at 45.

58 An example can be taken from Australia, where a passenger sought compensation for an injury she claimed stemmed from the lack of crew reaction to her four requests for water. The Supreme Court of Victoria ruled that – pursuant to its case law where: 'Interpretation should be consistent across contracting states'– the claim should be interpreted in line with the *Saks* and *Husain* decisions of the American Supreme Court; and be analysed in light of the factual elements of the case. The Australian Court finally rejected the passenger's claim on the grounds that nothing unusual or unexpected occurred: 'In this case, the way in which the plaintiff's requests were dealt with were in accordance with the usual practice of attendants and were not in disregard of or contrary to airline policy' (*Di Falco v. Emirates (No 2)*, (2019) VSC 654, at 9 and 45). In another example in Turkey, the Supreme Court of Appeals overruled a decision that had considered as an 'accident' a situation in which a pilot did not divert a flight for a medical emergency after a doctor onboard advised that there was no emergency (Supreme Court of Appeals, 11th Chamber, 19 April 2018, quoted in: International Air Transport Association, 22 *The Liability Reporter* 8 (2019). In Italy, the *Corte de cassazione* held in 2015 that the notion of normal conditions of transportation should be taken into consideration when determining the possibility of an accident (Cass., 14 July 2015, ECLI:IT:CASS:2015:14666CIV, at 8). A parallel could be made to the potential for divergent interpretations between the 'unusual' notion and the 'inherent' one developed by the Court of Justice of the European Union regarding 'extraordinary circumstances' in EU Regulation 261/2004. On this topic, *see*, section 4.2.2.2(3).

59 *See*, section 3.2.2.3(3).

60 CA Paris, 19 June 1979, RFDAS 327 (1979). In this matter, hijacking was considered as an accident.

or technical order, affecting the aircraft during flight and/or trouble during the normal course of the journey that resulted from an unforeseeable intervention of badly intentioned third parties.[61] While the decision was appealed before the *Cour de cassation*, this definition was not disputed.[62] In a case regarding a pulmonary embolism, the *Cour de cassation* further added in 2007, that an 'accident' under the 1929 Warsaw Convention also had to be external to the passenger.[63] In 2014, the *Cour de cassation* implicitly admitted that an accident was an external, sudden and unforeseeable event.[64] On the same day, in another case, the Court annulled a decision of the Court of Appeal of Bordeaux that had held that the ear pain suffered by a passenger as the consequence of a flight was compensable under the 1999 Montreal Convention. According to the *Cour de cassation*, the mere existence of a causal link between the damage and the flight was not sufficient, because said convention required the existence of an accident.[65]

This evolution shows a tendency towards alignment with the definition initially suggested by the American Supreme Court in *Saks*. However, in

61 *Ibid*., 'Un événement matériel fortuit d'ordre technique ou mécanique affectant l'appareil pendant le vol', 'le trouble au cours normal du voyage résultant d'une intervention imprévisible de tiers mal intentionnés'.

62 Cass., 16 February 1982, 80-17009.

63 Cass., 14 June 2007, 05-17248: 'que la cour d'appel a, à cet égard, constaté qu'il ne résultait d'aucun des éléments produits que l'embolie pulmonaire, […], puisse être imputée à un événement extérieur à la personne de Mme Y […] Par ces motifs, rejette le pourvoi'.

64 Cass., 15 January 2014, ECLI:FR:CCASS:2014:C100011: 'Attendu que, pour retenir que la responsabilité du transporteur aérien n'était pas sérieusement contestable, l'arrêt relève que, même si la cause de la chute reste inconnue en l'état du seul témoignage de Mme X…, cette chute constitue un accident, qui résulte forcément d'un événement extérieur, soudain et imprévisible, dès lors qu'il n'est ni allégué, ni prouvé que M. X… aurait été victime d'un malaise emportant celle-ci; Attendu qu'en se déterminant ainsi, par des motifs impropres à caractériser l'imputabilité du dommage à un accident survenu à l'occasion des opérations d'embarquement, la cour d'appel a privé sa décision de base légale'.

65 Cass., 15 January 2014, ECLI:FR:CCASS:2014:C100009: 'Attendu que, pour retenir la responsabilité du transporteur aérien, l'arrêt, après avoir constaté que l'intéressée n'invoquait pas d'incident de vol, mais seulement des douleurs ressenties lors des phases de descente et d'atterrissage, relève que le lien de causalité entre le voyage réalisé et les atteintes auditives en cause a été démontré par les consultations réalisées par celle-ci, le jour même de son arrivée à destination, auprès d'un médecin généraliste, puis, quelques jours plus tard, auprès d'un spécialiste ORL, ainsi que par deux rapports d'expertise judiciaire, le dernier ayant spécialement conclu que les causes de l'otopathie barotraumatique diagnostiquée sont dues, non pas à un éventuel état pathologique antérieur de la victime, mais aux conditions de vol, les effets combinés des conditions de climatisation, de recyclage et de circulation de l'air dans les avions, avec la répétition des phases de compression, étant des facteurs de nature à favoriser les barotraumatismes; Attendu, qu'en se déterminant ainsi, par des motifs impropres à caractériser l'imputabilité du dommage à un accident qui serait survenu lors des opérations de vol, la cour d'appel a privé sa décision de base légale'.

contrast to the *Husain* decision in the United States,[66] the *Cour de cassation* has not interpreted that an omission could validly qualify as an accident.[67]

The flexible criterion for application of the term 'accident', suggested by the American Supreme Court in *Saks*, does not appear to have been retained in every civil law jurisdiction. For example, the respective highest Courts in Austria[68] and in Germany[69] each required a connection to a risk inherent to air transportation. This position was initially seconded by the Rapporteur of the draft submitted to the 1929 Warsaw Conference.[70] This view is shared by the modern French doctrine which contends that an 'accident' must also be in direct relation with air carriage.[71] A similar position can also be found in the Belgian doctrine, which considers that, since the fault-based regime of the 1929 Warsaw Convention was replaced by a risk-based regime in the 1999 Montreal Convention, the term 'accident' could therefore be interpreted restrictively to exclude events which do not have any direct, or sufficiently direct, links with transportation operation.[72]

66 *Olympic Airways v. Husain, Individually, and as Personal Representative of the Estate of Hanson, Deceased, et al.*, 540 U.S. 644 (2004).

67 Cass., 8 October 2014, ECLI:FR:CCASS:2014:C101159: 'Attendu que […] l'arrêt, après avoir rappelé les termes du compte-rendu d'incident, selon lesquels, en sortant de l'avion, la passagère, qui portait un bébé dans les bras, a manqué la marche, glissé et, est tombée, se blessant à la cheville droite, en déduit l'existence d'un accident au sens de la Convention de Montréal, en ce que, d'une part, cette chute n'est pas le résultat d'un malaise et, d'autre part, il ne saurait être reproché à Mme X… une faute dès lors que, se trouvant avec un enfant dans les bras, elle ne pouvait pas forcément voir le sol et qu'il appartenait dans ce cas au personnel de bord de l'aider voire de la décharger de l'enfant pour qu'elle puisse débarquer sans encombre; Attendu qu'en statuant ainsi, par des motifs impropres à caractériser l'imputabilité du dommage à un accident qui serait survenu lors des opérations de débarquement, ce dont il résultait l'existence d'une contestation sérieuse, la cour d'appel a violé les textes susvisés'. *A contrario*, in a 2016 decision, the Court of Appeal of Amsterdam suggested a certain omission could be sufficient to trigger carrier liability. However, this decision is to be read carefully, as the Court underlined that the passenger had to demonstrate the omission. *See*, Gerechtshof Amsterdam, 3 May 2016, ECLI:NL:GHAMS:2016:1750.

68 Oberster Gerichthof, 2 July 2015, 2 Ob 58.15s.

69 Bundesgerichthof, 21 November 2017, X ZR 30/15, ECLI:DE:BGH:2017:211117 IXZR30.15.0.

70 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 160: 'Comme il s'agit de la responsabilité engagée à l'occasion d'un contrat de transport *déterminé*, la Convention ne s'applique évidemment qu'aux dommages causés par le matériel affecté à *ce* transport pour l'exécution du contrat'.

71 *See*, Pascal Dupont, *Manuel de droit aérien – souveraineté et libertés dans la troisième dimension* 383 (Pedone, 2015): 'Le dommage corporel subi par un voyageur, lorsqu'il est consécutif à un accident défini comme un évènement extérieur à la personne du passager, doit être en relation directe avec le transport aérien, lequel comporte le vol proprement dit, auquel il convient d'associer les opérations d'embarquement et de débarquement'.

72 *See*, Jacques Naveau, Marc Godfroid, Pierre Fruhling, *Précis de droit aérien* 330-332 (2nd edition, Bruylant, 2006).

(iv) Court of Justice of the European Union

In 2019 in *Niki*,[73] the CJEU, in this section also referred to as the 'EU Court', was asked to rule on this controversial issue. Following the burning of a passenger by a hot beverage during a flight, it had to give its own view of the term 'accident'. The defendant contended that a cup of coffee falling from the folding tray table onto the passenger was not the 'materialisation of a hazard typically associated with aviation',[74] which was necessary to be considered as an 'accident' in Austria. The EU Court, seized by the highest Austrian Court, ruled in favour of an extensive interpretation, holding that an 'accident' under the 1999 Montreal Convention 'covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation'.[75] In doing so, the CJEU rejected the position adopted in Germany and in Austria, but did not clearly align itself with existing consensus in leading common law jurisdictions.

While the EU Court appears to have put an end to the controversy regarding the need for a direct link with hazards associated with aviation, its reasoning was nevertheless confusing. *First*, while the EU Court recalled the importance of a uniform application of the 1999 Montreal Convention,[76] it gave, with no reasoning, an initial gist of the term 'accident' that was quite distinct from the one commonly admitted in many jurisdictions. When the American Supreme Court referred to 'unexpected or unusual event or happening', the EU Court used the expression 'unforeseen, harmful and involuntary event'[77] in its reasoning, replacing the notion of 'unusual' by 'involuntary' yet kept by its Advocate General.[78] This change does not have a clear explanation and could be understood as any voluntary harmful event being outside the scope of the Convention, which would appear surprising in a uniform strict liability regime. *Second*, while there was a general view to consider that the event must be external to the passenger,[79] the EU Court, again without clear explanation, drafted its decisions in a way that could lead us to believe that death or injury resulting from the passenger's health could trigger carrier liability,[80] which in turn could only be exonerated therefrom pursuant to Articles 20 and 21 of said convention.

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

74 *Ibid*., point 17.

75 *Ibid*., point 43.

76 *Ibid*., point 32.

77 *Ibid*., point 35.

78 CJEU, 26 September 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:788 (Opinion), point 62.

79 *Ibid*., point 44.

80 CJEU, 19 December 2019, *GN v. ZU acting for Niki Luftfahrt*, C-532/18, ECLI:EU:C:2019:1127, point 38.

This is particularly curious given that these last two provisions are not event-orientated provisions, but damage-related ones.[81]

Despite the hierarchical place of the EU Court, this decision only responded to the question of whether the term 'accident' *in specie* required a hazard typically associated with aviation in a situation where an object used to serve passengers had caused bodily injury to a passenger. The EU Court was not therefore asked to give a definition of the term 'accident'. Consequently, the whole jurisprudence established in each Member State is not automatically overruled by this decision, and may remain diversified, despite the aim of uniformity of the Convention, as long as no hazard typically associated with aviation be requested.

In 2021, the EU Court fine-tuned its position regarding the scope of the 'unforeseen' event in *Altenrhein*.[82] It confirmed that the unforeseeability was to be looked from the operating range of the aircraft on board which the event occurred, and not from that of the passenger.

(v) Concluding Remarks

I can conclude from this overview that, despite the existence of a tendency towards an autonomous interpretation of the term 'accident', there is still not a single interpretation shared by all Courts.

While it can easily be assumed that the interpretations given by each Court initially depended on factual elements submitted to them, and that this may have therefore justified their variations, it appears that even in jurisdictions that have been inspired by the definitions provided by the American Supreme Court in *Saks*, certain variations still exist.

A possible explanation for some of these differences may also be that, when interpreting the term 'accident', Courts may be taking into account the effect that the absence of an 'accident' may have on the claim. The interpretation of 'accident' is not totally inseparable from the reading Courts may give to the principle of exclusivity.[83] In jurisdictions such as the United States or the United Kingdom,[84] which endorse a 'strict application' of the principle of exclusivity, one may see a trend towards a broader definition of the term 'accident'.[85] In parallel, in jurisdictions where there is no such strict reading of exclusivity – with the consequence that in the absence of

81 *See*, Robert Lawson, *The Montreal Convention 1999 at 21: Has It Come of Age or Passed Its Sell-by Date?*, 45 Air & Space Law 271 (2020).

82 CJEU, 12 May 2021, *YL v. Altenrhein Luftfahrt GmbH*, C-70/20, ECLI:EU:C:2021:379.

83 *See*, sections 2.5.3.2 and 4.3.2.

84 *See*, section 4.3.2.2.

85 A broader definition of 'accident' could be used to avoid the consequences of a strict application of the principle of exclusivity. Several authors commented that a broader definition may, however, lead to a definition close to the one set out in the unsuccessful 1971 Guatemala City Protocol. *See*, Paul Dempsey, Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 211 (Centre for Research in Air & Space Law, McGill University, 2005); Elmar Giemulla, e. a., *The Montreal Convention* 29-8.1 (Kluwer, Supplement 9, 2014).

accident, the passengers could try to seek indemnification under domestic law – a narrower interpretation of the term 'accident' is often adopted.[86] The fact that the CJEU, which is known for rather loosely applying the principle of exclusivity,[87] adopted a broad interpretation of the term 'accident' in line with jurisdictions that recognized a strict reading, may raise the question of a possible change of views on this point of the EU Court in *Niki*. However, a broad interpretation of 'accident' does not automatically entail a strict application of the principle of exclusivity. As mentioned above,[88] the CJEU often sees consumer protection as an additional purpose of the 1999 Montreal Convention and, as such, uses this purpose to guide its interpretation of that convention.

3.2.2.4 Conclusions

The above analysis illustrates the difficulty of applying autonomous terms without them being defined in the Conventions. Despite the fact that, as seen above,[89] a number of Courts rely on the definition provided by the American Supreme Court to determine whether an 'accident' occurred, there is still no common definition shared by all ratifying States. Regrettably, this situation leads to a fragmentation of the 1999 Montreal Convention.

3.2.3 The Use of Concepts Taken from Other International Instruments

After a lack of definition, another drafting element that could affect the uniform application of the Conventions may be that their drafters incorporated terms from other international instruments despite the autonomy of the Conventions.

Indeed, the 1929 Warsaw Convention was not drafted from scratch, and more than mere inspiration was taken from pre-existing international conventions, such as those from the rail sector.[90] The *Travaux Préparatoires* of the 1929 Warsaw Convention make this clear, stating that:

> Il y a une autre proposition qui consistait à prendre l'article 39 de la Convention de Berne. La commission a été d'accord pour se rallier à cette proposition.[91]

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86 *See*, Laurent Tran, *Le régime uniforme de responsabilité du transporteur aérien de personnes* 158 *et seq*. (Schultess, 2013); Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 189 (Schulthess, 2012).

87 *See*, section 4.3.2.3.

88 *See*, section 2.3.3.2.

89 *See*, section 3.2.2.3(4).

90 *See*, Daniel Goedhuis, *National Airlegislation and the Warsaw Convention* (Springer, 1937).

91 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 105. *See also*, *Ibid*., p. 130.

Although it was clearly established from an early stage that the terminology used in the 1929 Warsaw Convention was independent from the one encountered in other international transportation conventions,[92] it cannot be ignored that these would certainly have had an impact on the way the terms laid down in the 1929 Warsaw Convention have been understood and interpreted in States which were also Parties to these international conventions.

Thus, it cannot be ruled out that, while interpreting certain provisions of the 1929 Warsaw Convention, Courts were likely, at least initially, to use their knowledge of how identical terms and concepts were used in other international conventions, especially when it came to other international conventions regulating transport, such as the 1924 Bern CIM and CIV, which already had a well-established jurisprudence.[93] The use of other international conventions and their related case law might have led to divergent interpretations. This divergence would be particularly apparent between States that ratified the 1924 Bern CIM and CIV and those that did not.

Knowing that rail conventions were used in the drafting process, they may offer additional interpretation tools. References to rail conventions and their successive amendments, were, for instance, cautiously made in the United Kingdom while interpreting the term 'bodily injury'.[94] But such recourse raises several concerns. *First*, it questions the genuine existence of the reference to other instruments, as not all Courts develop their reasoning in detail.[95] *Second*, this should be put in perspective with the lack of ratification of rail conventions by all the Parties to the 1929 Warsaw Convention. Indeed, the rail conventions only concerned some European countries in 1929.

For these simple reasons, Courts should not transpose definitions or rely on case law developed under other instruments such as international rail conventions. While an examination of solutions adopted in other international instruments may be instructive, the *sui generis* nature of the liability regime established by the Conventions limits their use.[96] They could therefore only be used, after due consideration, as a supplementary means of interpretation pursuant to Article 32 of the 1969 Vienna Convention.[97]

92 *Ibid*., p. 91: 'Je tiens à faire cette déclaration, parce que je crois être une des personnes qui s'occupent le plus du droit aérien et je crois pouvoir dire que l'intérêt du droit aérien est de se développer librement, de n'être opprimé ni par le droit maritime, ni par le droit terrestre, ni par le droit des chemins de fer'.

93 *See*, Bela de Nanassy, *Le droit international des transports par chemin de fer* (Rösch, 1946).

94 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7, at 17.

95 *See*, for example, section 1.3.2.3(2)(iii).

96 *See*, sections 2.5.3.3 and 4.3.3.5(4).

97 *See*, 1.3.1.2(2)(ii).

3.2.4 The Interpretations of Terms of the 1929 Warsaw Convention and the 1999 Montreal Convention According to the *Travaux Préparatoires*

3.2.4.1 Preliminary Remarks

After the aforementioned drafting elements, the *Travaux Préparatoires* confirm that the drafters of the Conventions sometimes agreed that uniform rules, including terms encompassed therein, could be applied differently. Two main reasons have been used to justify this breach in uniform application: *first*, to permit Courts to apply rules and terms to the facts of the case; and *second*, because no common position has been reached.

3.2.4.2 Situational Application: The Example of Delay

During diplomatic conferences, it is possible that reaching a compromise produces a text that creates flexibility for interpretation by Courts. This flexibility is notably required when it is deemed that a case-by-case analysis by Courts is more practical than a fixed rule to pursue the goal of the Convention. The concept of 'delay' used under Article 19 of the Conventions[98] falls into this category.

In 1929, negotiators did not spend much time discussing Article 19. If the principle of liability in case of delay of passengers did not create difficulties, the question emerged as to when a delay would occur.[99] The delegations had noticed that some airlines contractually indicated their schedule, with the consequence that it would be clear when a delay occurred; while others did not or merely indicated that their schedules were not guaranteed.[100] In a scenario where no schedule was mentioned, it was admitted that the carrier had to fulfil his duty within a reasonable timeframe. Acknowledging that no formula could always determine when a delay occurred, the Rapporteur confirmed that this question would be left to the discretion of the Courts:

> Lorsqu'aucun délai n'a été stipulé, il faut qu'il remplisse ses obligations dans un délai raisonnable. Qu'entend-on par là? Aucune formule ne peut le déterminer, il s'agit d'une question d'appréciation de fait à solutionner par le juge; […].[101]

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98 The 1929 text provides that: 'Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises', translated in English as follows: 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods'. The 1999 version reads: 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, 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'.

99 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 37.

100 *Ibid*., p. 37-39 *in fine*.

101 *Ibid*., p. 38.

Despite the fact that the Polish representative claimed that such a margin of manoeuvre might not have been the best option,[102] no further discussions arose on this precise point.

In 1955, the question of liability in the case of delay focused on the amount of compensation associated with it.[103] Again, some carriers considered their timetables to not be part of the contract, with the consequence that, in their views, they should not be held liable for delays. At the time, this problem could be solved either by respecting contractual terms or by considering the mere existence of a liability provision in the Convention to void a 'no time tables guaranteed' contractual clause. Recognizing that this situation had created 'considerable uncertainty',[104] a proposal was made to introduce the word 'unreasonable' before the word 'delay' to give more weight to Article 19. However, following a vote, the 1955 Hague Conference expressed the view that the word 'unreasonable' should not be introduced as it was already implied. This is a rare situation in which one of the conferences gives a semi-official interpretation, the trace of which can only be found in the *Travaux Préparatoires*.[105]

This clarification did not appear to be sufficient from the perspective of the 1999 Montreal Conference, however. One of the draft texts approved by the ICAO Legal Committee provided the following suggestion as a possible definition of 'delay':

> For the purpose of this Convention, delay means the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to expect from a diligent carrier to do so, having regard to all the relevant circumstances.[106]

During the 1999 Montreal Conference, the Chinese representative acknowledged that the lack of a common definition jeopardized the uniform interpretation of the concept of delay:

> […] while some States might have national laws which contained a definition of the term 'delay' and jurisprudence on which an interpretation of that term might be based, the lack of standard definition could lead to a multiplicity of interpre-

102 *Ibid.*

103 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 238.

104 *See,* the observations of the International Union of Aviation Insurers, *Ibid.*, p. 244.

105 *Ibid.*, p. 247: 'The President stated that, in the event of a negative vote on the proposal, the Conference would be understood as having stated that the word "unreasonable" was not necessary because it was already implied in Article 19 as at present drafted. The Conference rejected, by a vote of 27 to 2, the proposal of the Delegation of Greece to insert the word "unreasonable" before the word "delay" in Article 19 of the Convention'.

106 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume III, *Preparatory Material*, Montreal 1999, p. 213.

> tations. In order to ensure uniformity in its interpretation, she suggested that the definition proposed […] be retained in the draft Convention.[107]

The Chairman responded that having a common definition would be difficult, and that the best option was to leave the matter to be determined by Courts on a case-by-case basis:

> […] in view of the difficulty of finding a precise language which would cover all circumstances which could be characterized as 'delay', a pragmatic approach had been taken to the problem, it being decided that it was preferable to leave the term 'delay' without definition". […] Furthermore, it would be extraordinarily difficult to arrive at a definition given the jurisprudence in the area. […] It was considerations such as these which had led […] to conclude that it would be better not to have a definition of the term 'delay' in the draft Convention and to leave the matter to be determined by the courts on a case-by-case basis.[108]

The Chairman of the drafting committee concluded that: 'The general wording of Article 18 was intended to provide sufficient signposts'.[109]

This deviation from the key feature of the uniform rules of the Conventions led to various interpretations of the concept of delay. The divergences were not only in regards to the value of the contractual clauses inserted in the conditions of carriage, but also in the simple appreciation of what constituted a delay.[110] For instance, should a delay be limited to a delay upon arrival, or could it also be delay only at departure? The latter situation was, for example, examined in Germany by the District Court of Frankfurt, when an aircraft returned to the airport of departure shortly after taking off on schedule. As no information was rapidly provided as to when the flight could take off again, one of the passengers decided not to wait any further and booked a new flight with another carrier. Said passenger later claimed a refund of the price of the new ticket from the original carrier. The Court

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107 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. 83.

108 *Ibid*.

109 *Ibid.*

110 *See*, for a description of the different interpretations, Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 225-245 (Schulthess, 2012); Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 206-212 (Springer, 1937); Lawrence Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 100-104 (Kluwer Law International, 2000); René Mankiewicz, *The Liability Regime of the International Air Carrier - A Commentary on the Present Warsaw Convention System* 217-227 (Kluwer, 1981); Georgette Miller, *Liability In International Air Transport* 154-160 (Kluwer 1977); George Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States – from Warsaw 1929 to Montreal 1999* 228-231 (Kluwer, 2010).

held that the claim was to be analysed as a delay under the 1929 Warsaw Convention.[111]

This flexibility may also lead to additional breaches. In light of the agreed margin of manoeuvre, it may happen that the uniform rule be interpreted pursuant to domestic concepts, in violation of their autonomous nature. Such a scenario already implicitly occurred in the jurisprudence developed by the CJEU.[112] For instance, in the *IATA* case, when the CJEU was asked to rule on the validity of EU Regulation 261/2004 in light of the 1999 Montreal Convention, it held that: 'any delay […] may, generally speaking, cause two types of damage'.[113] The Court here assumed that the concept of delay was identical in both instruments. Since then, the concept of delay under EU Regulation 261/2004 has regularly been refined by the Court[114] with a further risk of contamination that cannot be ruled out.[115]

The above analysis shows that the admissibility of a margin of manoeuvre in the *Travaux Préparatoires* regarding the application of the concept of delay limits the possibility of having a uniform application of the Conventions.

3.2.4.3 An Unclear Common Position: The Example of Mental Injury

(1) Preliminary Remarks

Sometimes, the lack of common agreement leads to unfortunate situations where, despite the will to achieve a uniform position, the *Travaux Préparatoires* report what could be considered a failure in the negotiations on specific points. The case of mental injury under the 1999 Montreal Convention illustrates this situation.

While it was generally admitted in the literature that applicable domestic law governs the type of compensable damage in the case of death

111 Amstgericht Frankfurt am Main, 5 September 1997, 47 ZLW 247-249 (1998) cited in, Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 236 (Schulthess, 2012).

112 *See*, Jae Woon Lee, Joseph Wheeler, *Air Carrier Liability for Delay: A Plea to Return to International Uniformity*, 77 J. Air L. & Com. 43-103 (2012).

113 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. *See also*, section 4.2.2.2.

114 *See*, 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. This decision has been confirmed in subsequent decisions. Compare this to the case where the Court ruled a flight should be considered cancelled, when, despite its having taken off, it was returned to the gate and passengers were transferred onto other flights. *See*, CJEU, 13 October 2011, *Aurora Sousa Rodríguez and Others v. Air France SA*, C-83-10, ECLI:EU:C:2011:652.

115 *See*, section 4.2.2.2.

or injury,[116] the question of whether mental/psychological injury was covered under the concept of 'bodily injury' and could thus be compensated on the grounds of Article 17 of the Conventions was more complex.[117] The next sections will shed light on this question of compensation for 'mental injury' pursuant to the *Travaux Préparatoires* and case law developed by Courts.

(2) Travaux Préparatoires

The question of compensation for mental injury was briefly discussed for the first time in the context of preparations for the 1955 Hague Protocol. During the preparatory proceedings, the International Institute for the Unification of Private Law commented that: 'the expression "bodily injury" should be understood to mean any harm to the physical or mental integrity of the person'.[118]

During the 1955 Hague Conference, the delegation for Greece wished to make it clear whether injury not connected to physical damage, such as fear, could be compensated. He suggested the addition of the following sentence to Article 17: '…or any other mental or bodily injury suffered by

116 *See*, Huib Drion, *Limitation of Liabilities in International Air Law* 125 (Springer, 1954); Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 269 (Springer, 1937); Georgette Miller, *Liability In International Air Transport* 125 (Kluwer 1977); René Mankiewicz, *The Liability Regime of the International Air Carrier - A Commentary on the Present Warsaw Convention System* 187 (Kluwer, 1981). *See also*, the decision of the Supreme Court of the United States, *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. Compare this with the European decision, CJEU, 6 May 2010, *Axel Walz v. Clickair SA*., C-63/09, ECLI:EU:C:2010:251.

117 Article 17 of the 1929 Warsaw Convention provides that: 'The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger […]'; or in its authentic version: 'Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de tout autre lésion corporelle subie par un voyageur […]'. The wording was slightly amended in the 1999 version and reads: 'The carrier is liable for damage sustained in case of death or bodily injury of a passenger […]'. Dr. Yvonne Blanc-Dannery commented in 1933 that the word 'injury', which may be seen as redundant with the word 'wounding' in the 1929 text, reflected in reality the condition or aggravation that may have happened after the accident took place: 'Lorsque la blessure ou la mort sont consécutives à l'accident, il n'y a pas de difficulté. Mais si le décès ou la nécessité d'une intervention chirurgicale se produisent postérieurement, c'est-à-dire après que la période de transport aérien est terminée, la responsabilité est exactement la même. L'emploi du terme "lésion" après ceux de mort et de blessure englobe et prévoit les cas de traumatismes ou de perturbations dont les conséquences ne se manifestent pas immédiatement dans l'organisme et dont la corrélation peut être établie avec l'accident', in Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 62 (Pedone, 1933).

118 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 193.

a passenger…'.[119] However, as the proposal was not seconded, it did not reach the official discussion level and was therefore ignored.

In light of emerging jurisprudence granting compensation for mental injury in certain cases, considerable discussions surrounded the topic during the preparation of the 1999 Montreal Convention.[120] In one of the draft texts approved by the ICAO Legal Committee, it was suggested that Article 17 should be rephrased as follows:

> The carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board […].[121]

Despite this suggestion not being retained in the final draft submitted to the delegates, the fate of mental injury kept negotiators extremely busy throughout the 1999 Montreal Conference. In a joint comment, Norway and Sweden suggested the addition of the words 'or mental injury' in the draft text, noting that the exclusion of mental injury did not promote the unification of legal systems:

> The exclusion of mental injury does not promote unification of legal systems, which is one of the main objectives of this process. The reason for this is that the term 'bodily injury' is not construed in the same way in all legal systems. The present draft will therefore lead to different interpretation of the Convention in different stares. As a result the present draft may give rise to forum shopping.[122]

The United Kingdom also recommended inserting the following definition of mental injury:

> In this Article the term 'mental injury', in a case where there is no accompanying bodily injury, means an injury resulting in a mental impairment which has a significant adverse effect on the health of the passenger.[123]

The Minutes of the 1999 Montreal Conference report that, although in principle, adding mental injuries to the wording of the text was widely accepted, the practical repercussions were raised with serious concerns.

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119 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 261.

120 The 1971 Guatemala City Protocol already replaced the word 'bodily injury' by 'personal injury', but never entered in force.

121 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume III, *Preparatory Material*, Montreal 1999, p. 92.

122 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume II, *Documents*, Montreal 1999, p. 97-98.

123 *Ibid*., p. 485.

The observer of the International Union of Aerospace Insurers noted an important risk of fraud:

> Fear of flying was a well recognized phenomenon without significant parallel in other modes of transport and could be easily construed by sympathetic medical opinion as an injury. The existence, or otherwise, of mental injury was very difficult to prove, giving rise to the possibility of fraud and expensive protracted litigation.[124]

He also emphasized that, while mental injuries were compensable in other modes of transport, these conventions established limited liability regimes,[125] contrary to the 1999 Montreal Convention.[126] Following many representatives' interventions, the Chairman observed that the *Travaux Préparatoires* should clearly indicate the common position to be agreed on, in order to avoid distinct interpretations by Courts. His words, as quoted below, are very clear on this point:

> […] the Group had now almost begun a process of recognizing the following: that bodily injury would be covered; that bodily injury which resulted in mental injury would be covered; but that mental injury *per se* would only be covered where it had a substantial adverse effect on health. […] One additional thing that it was necessary for the Group to do was to make sure that the records of the proceedings clearly indicated what it was that the Group agreed to; that would be vital in enabling an understanding as to what it was that the language which was being used was intended to cover; it could not be left to the Courts to subsequently interpret the text of Article 16, paragraph 1, independently of the Conference's 'travaux préparatoires'.[127]

However, the question of mental injury was later integrated into a 'draft consensus package', which included, amongst others things, mechanisms for compensation and limits of liability. At the end of the package discussions, the final text communicated did not contain any reference to mental injury. Given the unexpected result of the package negotiations, the Chairman concluded in a rather vague way that no clear consensus had emerged as to whether moral/psychological injury should be included in the scope of the Convention:

> […] a considerable degree of reservation had been expressed by some Delegations about expressing mental injury in a form in which it would be independent of bodily injury, therefore suggesting that, to the extent that that was admissible,

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124 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. 69.

125 *Ibid*., p. 69.

126 This point was also highlighted by Canada: '[…] the unfortunate situation was the regime of no-fault and unlimited liability which created a potential for abuse', *Ibid*., p. 73.

127 *Ibid*., p. 116.

> it would be necessary to circumscribe it greatly. […] All had recognized that under the concept of bodily there were circumstances in which mental injury which was associated with bodily injury would indeed be recoverable and damages paid therefor[e]. The Group had equally recognized that the jurisprudence in this area was still developing.[128]

The analysis shows that this lack of common agreement, as reported in the *Travaux Préparatoires*, may lead to a diversified jurisprudence that could jeopardize the purposes of the 1999 Montreal Convention.

(3) The 'Draft Statement' of the Conference Preparing the 1999 Montreal Convention

However, in light of recognition of the importance of the matter, the plenary session of the 1999 Montreal Conference adopted a draft Statement, which reads as follows:

> For the purpose of interpretation of the *Convention for the Unification of Certain Rules for International Carriage by Air*, adopted at Montreal on 28 May 1999, the Conference states as follows: 1. With reference to Article 16, paragraph 1, of the Convention,[129] the expression 'bodily injury' is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air; […].[130]

The rareness of such a draft Statement regarding the interpretation of the 1999 Montreal Convention confirms, by its very necessity, that the 1999 Montreal Conference did not succeed in adopting a clear-cut political agreement on the question of mental injuries.[131] To the author's knowledge, such a 'draft Statement' was never officially signed, with the consequence that its legal value is practically null.

(4) Declarations made by Argentina

This being said, the instrument of accession of Argentina in 2009 contained the following declaration:

> For the Argentine Republic, the term 'bodily injury' in Article 17 of this treaty includes mental injury related to bodily injury, or any other mental injury which

128 *Ibid*., p. 201.
129 *Id est* 17.
130 *See,* ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 243.
131 *See,* Sean Gates, *La Convention de Montréal de 1999*, RFDAS 439-446 (1999). Sean Gates was the observer for the International Union of Aviation Insurers at the 1999 Conference.

> affects the passenger's health in such a serious and harmful way that his or her ability to perform everyday tasks is significantly impaired.[132]

The legal value of this declaration is questionable. Indeed, no such declaration was required by the 1999 Montreal Convention, and no other State made one of its kind in favour or against the admissibility of mental injury.

According to Professor Iain Cameron, declarations of interpretation should not be assimilated to reservations even though they may be used to avoid reservation prohibition.[133] Professor Donald McRae considers there to be two types of interpretative declaration: one he calls 'mere interpretation declaration' and that only inform the position of a government, but whose interpretation can be rejected by Courts; and the other, a 'qualified interpretative declaration', which is in fact a disguised reservation.[134]

As the possibility of reservations is limited in the 1999 Montreal Convention,[135] the Argentinian declarations could be regarded as being inconsistent with the treaty. To my knowledge, no Argentinian decision has yet to be published regarding the value attributed to this declaration.

(5) Judicial Decisions

(i) Preliminary Remarks

As a preliminary remark, Courts might have been inclined to avoid directly interpreting the concept of 'bodily injury', and to have had recourse to the referral to domestic law set out in Article 24 of the 1929 Warsaw Convention and Article 29 of the Montreal Convention. As a matter of fact, the distinction between 'mental injury' and 'moral damage', also referred to as 'non-material damage', is slightly blurred and has not always been clearly delineated by Courts.[136] These Courts may therefore consider that any kind of damage could be compensated pursuant to domestic law, as per the above provisions of the Conventions, without analysing whether the term 'bodily injury' also include mental injury.

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132 ICAO, <https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> (accessed 18 August 2019).

133 Iain Cameron, *Treaties, Declarations of Interpretation*, Max Planck Encyclopedias of International Law 9 (2007).

134 Donald McRae, *The Legal Effect of Interpretative Declarations*, 49 British Yearbook of International Law 160 (1978).

135 *See,* section 3.3.2.

136 *See*, for example, *Bassam v. American Airlines, Inc.*, 287 F. App'x 309, 317 (5th Cir. 2008), where the Court held that, under the 1999 Montreal Convention, emotional distress for the loss of items in baggage cannot be compensated. This last decision should be compared to the 2010 *Walz* decision of the Court of Justice of the European Union, which held that the term 'damage', which underpins Article 22 of the 1999 Montreal Convention, that sets the limit of an air carrier's liability for damage resulting, *inter alia*, from the loss of baggage, must be interpreted as including both material and non-material damage.

The following section will only focus on the way Courts have interpreted the concept of 'bodily injury' under the 1929 Warsaw Convention and the 1999 Montreal Convention.

(ii) Prior to the 1999 Montreal Convention

Prior to the adoption of the 1999 Montreal Convention, the question of the scope of mental injury under the term 'bodily injury' was particularly discussed before American Courts.[137] Certain of these Courts admitted the inclusion of 'pure' mental injury, that is, without physical manifestation, under the term 'bodily injury'.[138] However, in *Floyd* in 1991, the Supreme Court of the United States ruled that pure mental injury could not be compensated. Said Court however expressed no view as to whether a mental injury that accompanied a physical injury could be compensated.[139] Since then, certain Courts in the United States have considered that mental injuries can be compensated provided they are caused by or flow from a physical injury.[140] A similar view was adopted in the United Kingdom by the House of Lords in *Morris*. In this case, Lord Steyn considered that, in a situation where a passenger suffered no physical injury but did suffer mental injury or illness, said passenger did not have a claim under Article 17.[141] However, he noted that, with the coming into force of the 1999 Montreal Convention, things might change:

> This is how matters stand at present. Limited progress towards the admission of claims for mental injury and illness must await the coming into operation of the Montreal Convention.[142]

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137 *See*, René Mankiewicz, *The Application of Article 17 of the Warsaw Convention to Mental Suffering Not Related to Physical Injury*, 4 Annals of Air & Space Law 187 (1979).

138 *Husserl v. Swiss Air Transport Company Ltd.*, 388 F. Supp. 1238 (S.D.N.Y. 1975), at 1250: 'But purpose and intent analysis itself is very useful. Although the draftsmen probably had no specific intent as to whether Article 17 comprehended mental and psychosomatic injuries, they did have a general intent to effect the purpose of the treaty and apparently took some pains to make it comprehensive. That they may have neglected one area should not vitiate the purpose of the Convention. There is no evidence they intended to preclude recovery for any particular type of injury. To regulate in a uniform manner the liability of the carrier, they must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17'.

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

140 *See*, for example, in *re Air Crash at Little Rock Arkansas, on June 1, 1999*, 291 F.3d 503 (8th Cir. 2002), the Court ruled that, under the Warsaw text, compensation could only be claimed for mental injuries that arose from physical injuries; in *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2nd Cir. 2004), the Court decided that mental injuries that accompanied, but were not caused by bodily injuries, could not be indemnified under the 1929 Warsaw Convention.

141 *Morris v. KLM Royal Dutch Airlines*, (2002) UKHL 7.

142 *Ibid.*, at 31.

This exclusion of mental injuries under the term 'bodily injury' was affirmed in other jurisdictions, such as South Africa, where the High Court sitting in the Cape of Good Hope denied passengers the right to any compensation after their feelings had been hurt by the crew during a flight.[143]

Taking an opposite approach, the Supreme Court of Israel held in 1984 that pure psychological injuries could be compensated under Article 17 of the 1929 Warsaw Convention.[144]

(iii) Under the 1999 Montreal Convention

Since the adoption of the 1999 Montreal Convention, jurisprudence continues to work on this particular question.[145]

In the United Kingdom, the Supreme Court confirmed its earlier position in *Stott*:

> Bodily injury (or lésion corporelle) has been held not to include mental injury, such as post-traumatic stress disorder or depression (*Morris* […]). The same would apply to injury to feelings.[146]

In the United States, case law continued to broaden the scope of mental injury acceptable under the umbrella of 'bodily injury'.[147] In *Doe*, the 6th Circuit Court held that mental anguish was compensable, as long as it resulted from an accident that also caused bodily injury, even though the mental anguish might not flow from such bodily injury.[148] In *Jacob*, the 11th Circuit Court underlined that subsequent physical manifestations of an earlier emotional injury were not compensable under the 1999 Montreal Convention.[149] In Australia, in a case involving Post-Traumatic Stress Disorder, the New South Wales Court of Appeal held that such a disorder

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

144 Supreme Court, 22 October 1984, RFDAS 232 (1985) - translated in French. The interpretation method used by the Supreme Court remains questionable insofar as the Court took into consideration existing French law and French case law to interpret the Warsaw Convention, assuming that since the Convention was drafted in French, French law could be used as guidance. *See*, section 4.3.3.5.

145 *See*, for example, Mckay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 Vanderbilt Journal of Transnational Law 1043 (2008); Nandini Paliwal, *Interpretation of the Term 'bodily injury' in International Air Transportation – Whether recovery for Mental injury is tenable under the Warsaw System and Montreal Convention*, The Aviation & Space Journal 2 (April 2018).

146 *Stott v. Thomas Cook Tour Operators Ltd*, (2014) UKSC 15, at 28.

147 *See*, for a recent overview of American case law, Andrew Harakas, "Air Carrier Liability for passenger injury or death occurring during International Carriage by Air: An Overview of the Montreal Convention of 1999", in Andrew J. Harakas (eds), *Litigating the Aviation Case* 23 (4th edition, American Bar Association, 2017).

148 *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017). *See*, David Krueger, *Mental Distress for Airlines Lawyers: The Sixth Circuit's Decision in Doe v. Etihad*, 31:2 The Air and Space Lawyer 4-7 (2018).

149 *Jacob v. Korean Air Lines Co. Ltd*, 606 F. App'x 478 (11th Cir. 2015).

could be compensable, provided that there was brain damage. However, the Court noted that a mere biochemical change was not sufficient to be considered a bodily injury.[150]

A notable exception to this common view comes from Spain, where the Court of Appeal of Madrid held in 2008 that pure mental injury, resulting from two aborted take-offs, fell within the concept of 'bodily injury'.[151]

(iv) Is an Evolutionary Interpretation Possible?

In light of this last decision and with regards to the 'draft Statement' prepared by the plenary of the 1999 Montreal Conference, one wonders whether Courts are indeed allowed to adopt an evolutionary interpretation of the term 'bodily injury'.[152]

The 'draft Statement' is, however, in opposition with the literal meaning, context, purposes and object of the 1999 Montreal Convention, which requires the adoption of a uniform approach in its interpretation and application.[153] It also stands in contradiction with longstanding case law in many different jurisdictions.[154]

I confirm that the choice not to include mental injury in the 1999 Montreal Convention under the term 'bodily injury' was the outcome of negotiations on the consensus package, which resulted in a series of specific liability thresholds that accommodated the need for balance between passenger and carrier rights.[155] The intention was clearly to adopt common liability thresholds, and not to include mental injuries. Should 'mental inju-

150 *Pel-Air Aviation Pty v. Casey,* [2017] NSWCA 32, at 52.

151 Audiencia Provincial Madrid, 1 February 2008, ECLI:ES:APM:2008:10106: '[…] por lesión corporal ha de considerarse no solamente la lesión física, sino también la psíquica. De lo contrario se llegaría al contrasentido de que en base al Convenio de Montreal pudieran indemnizarse los daños morales derivados de simples lesiones físicas de muy escasa trascendencia (o de daños sufridos en el equipaje), pero quedaran sin indemnizar secuelas psíquicas (que en ocasiones pueden llegar a ser incluso invalidantes) sufridas por un pasajero como consecuencia de lo acaecido en un transporte aéreo internacional'. This decision concerned two passengers who suffered anxiety following two aborted take-offs and decided not to pursue their journey from Madrid to Edinburgh. They sought compensation for material damage (the price of their tour in Scotland and the taxi costs back home from the airport) but not for moral damage (the anxiety itself). *See*, Belén Ferrer Tapia, *El contracto de transporte aéreo de pasajeros: sujetos, estatuto y responsabilidad* 189 (Dykinson, Madrid, 2013).

152 Evolutionary concepts are generally limited to general or generic terms, such as 'modern world' or 'well-being', in opposition to specific terms. *See*, International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* 50 (2018).

153 *See*, Chapter 2 and 1969 Vienna Convention, Article 31(1).

154 *See*, 1969 Vienna Convention, Article 31(3). *See also*, International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* 54 and 55 point 20 (2018). The ILC refers to the exclusion of evolutionary interpretations of the term 'bodily injury' in domestic courts.

155 *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 850 (2004).

ries' now be considered as included, the substantive rules of the Convention would have to be discussed once again, particularly with regards to the choice of a strict liability regime.

In my view, the wording of the 1999 Montreal Convention is clear. When adopting that standpoint, I also take into consideration later instruments of international law, which make a clear distinction between bodily injury and mental injury.[156]

(v) Conclusion

In short, different interpretations of the term 'bodily injury' by Courts shows how a lack of precise political agreement may lead to fragmentation of the Conventions.

Excluding 'mental injury' from the scope of 'bodily injury' does not automatically entail the exclusion of moral damage, understood under domestic law. Moral damage may still be granted pursuant to domestic law, provided the accident caused bodily injury. This reading, which I believe is in line with the wording of the 1999 Montreal Convention and the intentions of its drafters, permits a more uniform application of the text.

3.2.4.4 Concluding Remarks

The examples of delay and bodily injury demonstrate that the lack of a common position, at least as it transpired from the *Travaux Préparatoires*, may be a source of fragmentation of the Conventions. Yet, as submitted, these Conventions were designed to create a uniform application of their provisions.

3.2.5 The Unclear Formulation of the Demarcation between the Uniform Rules and the *Renvois* Rules: The Example of Limitation of Actions

3.2.5.1 The Two-Year Limit to Initiating Legal Proceedings

The formulation of a provision is another element that may have led Courts to interpret the uniform rules in distinct ways. An example can be taken from the application by Courts of the provisions regarding the limitation of actions. Looking at the 1929 Warsaw Convention, Article 29 provides that:

> 1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at destination, […].

156 *See*, for example, Convention on Compensation for Damage Caused by Aircraft to Third Parties, 2 May 2009, Montreal, ICAO Doc 9919, not in force; Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, 2 May 2009, Montreal, ICAO Doc 9920, not in force.

> 2. The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.[157]

Article 35 of the 1999 Montreal Convention is slightly similar to the English version, as it states that:

> 1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at destination, […].
> 2. The method of calculating that period shall be determined by the law of the court seised of the case.

These provisions are, in fact, strictly similar in the French versions.[158]

One immediately notices that while the Conventions set out a uniform time limitation of two years for actions, they also provide that the computation method be subject to domestic law.

The following section will examine whether this formulation generated divergent interpretations of the uniform rule. To this end, references will be made to the *Travaux Préparatoires* and judicial decisions related to the 1929 Warsaw Convention and the 1999 Montreal Convention.

3.2.5.2 Prior to the 1999 Montreal Convention

(1) Travaux Préparatoires

Initially, it was foreseen in the draft text submitted to the 1929 Warsaw Conference that suspension and interruption causes would be determined by the law of the Court seized of the case.[159] But, during said conference, the Italian delegation suggested changing this paradigm in favour of an unbreakable two-year limit.[160] As cited below, before the adoption of this amendment, the French delegate, while seconding the Italian proposal, voiced that the *renvoi* to domestic law concerned the manner of seizing the Court within the indicated timeframe. He noted that in certain jurisdictions a preliminary conciliation was requested, while this was not the case in other jurisdictions:

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157 The French text reads: '1. L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination […]. 2. Le mode de calcul du délai est déterminé par la loi du tribunal saisi'.

158 Which, with respect to the Warsaw text, is the only authentic version.

159 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 173: 'Le mode de calcul de la prescription, ainsi que les causes de suspension et d'interruption de la prescription sont déterminés par la loi du tribunal saisi'.

160 *Ibid*., p. 75.

> Il faudrait tout de même indiquer que c'est la loi du tribunal saisi qui fixera comment, dans le délai de deux ans, le tribunal sera saisi, parce que dans tous les pays du monde les actions ne sont pas exercées de la même façon. […] En France, il y a le préliminaire de conciliation; dans d'autres pays le renvoi au tribunal civil est indispensable; mais je suis bien d'avis qu'il faut supprimer l'interruption de la prescription et je me rallie à la proposition Italienne.[161]

It stands to reason, then, from the *Travaux Préparatoires* of the 1929 Warsaw Convention, that the time limit to be established would be unbreakable, with the consequence that no suspension or interruption would be allowed.

(2) Judicial Decisions

A substantial number of Courts acknowledged this principle and considered the time limit established to be unbreakable, and that it therefore was not supposed to be suspended or interrupted.[162]

However, certain Courts have argued that the second paragraph of Article 29 of the 1929 Warsaw Convention authorized them to adapt this limit pursuant to their domestic procedural law.[163] This is particularly the case in France, where the *Cour de cassation* held in 1977[164] that, despite having considered the contents of the *Travaux Préparatoires*, nothing in the text of the Convention expressly indicated that the two-year limit could not

161 *Ibid*., p. 76.

162 *See*, for example, in the following States: Argentina: Supreme Court of Justice, 16 October 2002, *Natasi Grace Jane E. c. Aerolineas Argentinas S.A. s/ Daños y Perjuicios*, N. 148. XXXVII. REX; Belgium: CA Bruxelles, 2 May 1984, Journal des Tribunaux 550 (1984), ECLI:BE: CABRL:1984:19840502.2; Germany: Bundesgerichtshof, 2 April 1974, European Transport Law 777 (1974); Israel: Supreme Court, 22 October 1984, RFDAS 232 (1985); Madagascar: CA Tananarive, 9 March 1972, RFDAS 325 (1972); United Kingdom: *Laroche v. Spirit of Adventure (UK) Limited,* (2009) EWCA Civ 12, at 70; United States: *Fishman v. Delta Air Lines Inc,* 132 F. 3d 138 (1998); Switzerland: Federal Court, 10 May 1982, RFDAS 365 (1983).

163 *See*, for a description of the different nature of the time limitation set forth in the Conventions under domestic legislation, Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national* 324-327 (Schulthess, 2012).

164 In a previous decision, with respect to a non-international flight, the *Cour de cassation* already ruled that the limit established by the Convention only governed contractual claim before civil jurisdictions; with the consequence that the two-year limit did not apply in the case of criminal proceedings. *See*, Cass., 17 May 1966, 65-92986.

be suspended or interrupted pursuant to domestic law.[165] This position was reaffirmed on several occasions.[166]

What may be considered as an unclear structure supposed to establish a demarcation between the uniform rule and the rule of *renvoi* also led to less variant decisions, that nevertheless had a very low degree of predictability. This is particularly the case in Luxembourg, where the *Cour de cassation* decided in 2015 that, even though the two-year limit could not be suspended or interrupted, Article 29 of the 1929 Warsaw Convention would not be infringed upon in the situation where several claims were introduced two years after the crash of an aircraft, but within domestic law limits, insofar as at least one claim was lodged in the specified timeframe.[167] One argument raised on this point was that the limit established in the 1929 Warsaw Convention was essentially aimed at unequivocally informing the carrier in a short time period of its duty to indemnify.

3.2.5.3 Under the 1999 Montreal Convention

(1) Travaux Préparatoires

Despite only minor changes to the English wording of this provision in the 1999 Montreal Convention, its *Travaux Préparatoires* unfortunately shed more ambiguity on this facet. While the Preparatory Material makes it clear that: 'To avoid different interpretations, it may be appropriate to clarify that this provision does not entitle a Court in any circumstances to interrupt or suspend the two-year period',[168] the Minutes do not reflect this point clearly. The delegate for Greece expressed this concern as follows:

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165 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; Attendu, cependant, que si la Convention de Varsovie du 12 octobre 1929, […], 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 […]; Par ces motifs casse et annule'.

166 *See*, for instance, Cass., 1 July 1977, 75-15443; Cass., 26 April 1984, 82-12048; Cass., 24 May 2018,16-26.200.

167 Cass., 21 May 2015, 27/2015.

168 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume III, *Preparatory Material*, Montreal 1999, p. 71.

> […] the limitation period of two years stipulated in Article 29 had caused problems in jurisprudence in the past. If this was a statute of limitations which could be suspended by national domestic legislation, [he] believed this should be clarified so as not to leave such an ambiguity in the scope of the Convention.[169]

The delegate for Namibia hence suggested that:

> […] a provision be inserted in Article 29 to make that point clear, i.e. that nothing contained in a preceding paragraph would affect the power inherent in a court seized of the case, to condone non-compliance with the time-limit referred to in paragraph 1 of that article.[170]

The Chairman responded that domestic law could indeed interfere in the computation method:

> […] the method of calculating the period would be determined by the law of the court seized of the case, and that it may well be that a court seized of the case, in determining its method of calculation, would in fact interpret it to mean that insofar as there had been some act which would prevent the normal period of calculation being done, by virtue of fraud or otherwise, it would be the relevant law of the forum to make that determination.[171]

This situation, in his opinion, could occur under certain circumstances, such as imprisonment of the claimant, but would not be different from the previous practice.[172]

(2) Judicial Decisions

Minor changes in the English version do not seem to have been considered sufficient reason to re-examine in depth case law developed earlier in certain jurisdictions. For example, in 2018, the Federal Court of Australia confirmed pre-existing case law established under the 1929 Warsaw

169 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. 188.

170 *Ibid*., p. 188-189.

171 *Ibid*., p. 189.

172 *Ibid.*, p. 236: […] it related to the exercise in jurisdictions to deal with time limits on the basis that there might be aspects which would render it fraudulent or inequitable. […] many Courts did indeed exercise that jurisdiction. In terms of private international law, in terms of limitations of action, the matter was viewed as a procedural one, as a classification to be determined by *lex fori*. It was not without significance that that language had been used for the last seventy years in Article 29 of the Warsaw Convention, as well as in its successors. […] no doubt that, if any action came up before a Court under circumstances where the claimant had been precluded from bringing suit as a result of imprisonment, kidnapping or matters of that kind, then a Court, in the exercise of its inherent jurisdiction, in exercise of *lex fori*, would come to the conclusion that time did not begin to run until the claimant were free to be available'.

Convention, and held that the time limits of the 1999 Montreal Convention were unbreakable.[173] Similar decisions can be found in other jurisdictions, such as in the United States[174] and in Russia.[175]

However, the possibility of suspending or interrupting the two-year limit is still discussed in certain jurisdictions. In Spain, for example, the question arose of whether this provision was to be considered as falling within the category of 'prescripción' or 'caducidad'.[176] Although the highest Court has not officially put an end to this controversy, the Court of Appeal of Madrid held in 2015 that – in light of the foreign Warsaw and Montreal jurisprudence, the doctrine, and hopes of achieving uniformity – the time

173 *See*, *Bhatia v. Malaysian Airline System Berhad*, (2018) FCA 1471.

174 *See*, for example, *Dickinson v. American Airlines, Inc*., 685 F. Supp. 2d 623 (N.D. Tex. 2010); *Narayanan v. British Airways*, 747 F.3d 1125 (9th Cir. 2014); *Von Schoenebeck v. Koninklijke Luchtvaart Maatschappij N.V*., 659 F. App'x 392 (9th Cir. 2016), appeal before the Supreme Court denied.

175 Moscow City Court (Московский городской суд), 15 May 2017, N 4г/ 10-1239/2017, cited in: International Air Transport Association, 21 *The Liability Reporter* 21 (2018). It is interesting to note that the Moscow City Court, acting as a cassation instance, adopted a literal interpretation of the provisions, in total opposition to the decision of the French *Cour de cassation* of 14 January 1977 detailed above. The Russian Court pointed out that if the suspension or interruption were allowed, the Conventions would have explicitly indicated it: 'Варшавская и Монреальская конвенции в императивной форме предусматривают максимальные сроки предъявления иска. Оснований для приостановления и перерыва срока исковой давности, равно как и возможности его восстановления, Конвенции не содержат. Если бы намерение было иным, то на это прямо было бы указано в названных Конвенциях'. It is worth mentioning that the Court gave consideration to the goal of uniformity of the Conventions to decline the application of domestic legislation: 'Из изложенного следует, что в целях интересов перевозчика и стабильности гражданского оборота, установлен единый срок исковой давности, который не может произвольно продлеваться по правилам внутреннего законодательства государств-участников, так как цели унификации норм ориентируют на нежелательность применения норм национального права, особенно в случаях, когда имеется достаточно четкий и ясный текст международного договора'.

176 To the opposite of 'caducidad', the 'prescripción' would allow the computation to be interrupted or suspended. *See*, Rodolfo González-Lebrero, *The Spanish Approach to the Limitation Period or Condition Precedent in the Montreal Convention on International Air Carriage of 28th May 1999*, 3 The Aviation & Space Journal 5 (2013); Belén Ferrer Tapia, *El contracto de transporte aéreo de pasajeros: sujetos, estatuto y responsabilidad* 323-326 (Dykinson, Madrid, 2013).

limit established by Article 35 was unbreakable.[177] This view was shared by the Court of Appeal of Tarragona in 2018.[178]

Taking an opposite view, other Courts still consider that the time limitation set out in the 1999 Montreal Convention may be suspended or interrupted pursuant to domestic law. This is the case, for instance, in Portugal, where the Court of Appeal of Lisbon held in 2017 that the time limits of the 1999 Montreal Convention could be subject to suspension or interruption in accordance with Portuguese Civil Code.[179]

3.2.5.4 Concluding Remarks

The preceding analysis demonstrates yet again that an unclear structure of provisions, notably between uniform rules and referrals to domestic law, may sometimes lead to distinct interpretations, which are not necessarily in line with the content of the *Travaux Préparatoires*, and which erode the

177 Audiencia Provincial de Madrid, 18 May 2015, ECLI:ES:APM:2015:7272: 'En primer lugar, debemos analizar los cambios operados en su conjunto, porque la supresión del término "caducidad" no es la única modificación operada frente al anterior artículo 29 CV. […] En segundo lugar, ya hemos señalado que la norma convencional, aplicable a Estados tan diversos como China, Qatar, los Estados Unidos de América, Perú o Pakistán, por poner algunos ejemplos, no puede interpretarse adaptándola al Derecho interno, fijando plazos como de prescripción o de caducidad, refiriéndose a la habitual aplicación en el Derecho español de plazos prescriptivos a las acciones indemnizatorias, o poniendo como ejemplo los plazos de prescripción de la Ley de Navegación Aérea (por cierto, mucho más breves). En todo caso la interpretación debe efectuarse conforme a las reglas establecidas en la Convención de Viena sobre el Derecho de los Tratados (artículos 31 y 32). Para la interpretación del Convenio de Montreal resulta especialmente relevante el análisis de los criterios jurisprudenciales elaborados en relación al Convenio de Varsovia. […] En la actual aplicación del Convenio de Montreal en otros países, como los Estados Unidos de América, se mantiene que el plazo fijado por el artículo 35 CM no es susceptible de suspensión […] y se destaca como objetivo del Convenio de Montreal la necesidad de lograr uniformidad en su aplicación, de manera que atender a la suspensión de los plazos en función de la legislación de cada Estado Parte desvirtúa por completo dicho objetivo, concluyendo que el texto del Convenio resulta perfectamente claro en cuanto el periodo de dos años para solicitar cualquier indemnización, establecido como condición previa, no puede resultar desvirtuado por la aplicación de criterios suspensivos […]'. The case went up to the Supreme Tribunal, which sought a preliminary ruling before the Court of Justice of the European Union (Tribunal Supremo, 19 July 2019, ECLI:ES:TS:2018:8522A). However, the parties agreed to withdraw the case. *See*, Tribunal Supremo, 29 January 2019, ECLI:EC:TS:2019:442A.

178 Audiencia Provincial de Tarragona, 26 July 2018, ECLI:ES:APT:2018:1024: '[…] estamos ante un plazo de caducidad y no de prescripción […]'.

179 Tribunal da Relação de Lisboa, 11 May 2017, ECLI:PT:TRL:2017:1704.15.9T8AMD.L1.8.1E: 'Destarte, tendo a presente acção com fundamento a responsabilidade civil contratual (resultante da recusa de embarque) é aplicável o prazo de dois anos de prescrição, a contar da data de chegada ao destino, da data em que a aeronave deveria ter chegado ou da data da interrupção do transporte, nos termos do artigo 35° da Convenção. […] Deste modo, caso não viesse a ocorrer qualquer circunstância que suspendesse ou interrompesse o prazo de dois anos, a prescrição ocorreria no dia […] (artigo 279°, alínea c) do Código Civil)'.

aim of the uniform rules. A clearer demarcation between what constitutes a uniform rule and what is subject to domestic law would have prevented such fragmentation of the Conventions from occurring.

3.2.6 Confidence in a Uniform Interpretation: The Example of Multiple Possible Fora

3.2.6.1 Preliminary Remarks

An additional source of fragmentation may come from the possibility of claims related to the same event being simultaneously heard by Courts in different jurisdictions. The following sections will examine decisions under the 1929 Warsaw Convention and 1999 Montreal Convention.

3.2.6.2 Prior to the 1999 Montreal Convention

The 1929 Warsaw Convention set forth that an action for damage can be brought, at the option of the plaintiff, before several determined fora. Article 28 of the 1929 Warsaw Convention provides that:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.
> 2. Questions of procedure shall be governed by the law of the Court seised of the case.[180]

The draft text submitted to the 1929 Warsaw Conference was slightly different.[181] As explained in 1928 by the Rapporteur, in case of death, any action should have been brought before the first Court regularly seized of

180 The French version reads: '1. L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination. 2. La procédure sera réglée par la loi du tribunal saisi'.

181 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 172: 'L'action en responsabilité devra être portée, au choix du demandeur, dans un des Etats Contractants soit devant le tribunal du siège principal de l'exploitation ou du lieu où celui-ci possède un établissement par le soin duquel le contrat a été conclu, soit devant celui du lieu de destination ou, en cas de non arrivée de l'aéronef, du lieu de l'accident. En cas de mort, toutes actions devront être portées devant le premier tribunal qui aura été régulièrement saisi. La procédure sera réglée par la loi du tribunal saisi; toutefois, aucune formalité particulière ou caution ne peut être exigée du demandeur à raison de sa nationalité'.

the case.[182] The issue was delicate: on the one hand, it was feared that the maximum liability limit would not be respected, if the case was brought before several jurisdictions; on the other hand, a situation where a decision had been delivered but could not be enforced in another jurisdiction, needed to be avoided.[183]

The proposal for a single jurisdiction in the case of death was abandoned, because it was held to be rather theoretical.[184] This being said, it was discarded only insofar as the drafters contemplated the case of litigation before several fora in the case of death of a single specific passenger.

This possibility of having several competent fora in a scenario with multiple deaths was raised by the delegate for Japan:

> On dit dans le texte 'toutes actions'; ce texte n'est pas très clair. Est-ce que vous voulez dire 'toutes actions relatives à un seul décès'? s'il y a trois décès de personnes appartenant à trois nationalités différentes: un Américain, un Japonais, un Suisse, est-ce que quand une action a été introduite dans un pays, comme la France, je suppose, tous les ayants-droit devront aller en France?[185]

This remark promptly led to negative reactions from several delegations.[186] The above position can be understood – bearing in mind that at this time it was impractical for the family of the victim to litigate abroad and to enforce a foreign decision -[187] even if it theoretically allowed a possible fragmentation of the not yet born uniform regime.

Things have changed since then and a typical example[188] of such fragmentation can be found in the opposing ways the French *Cour de cassation*[189] and the English House of Lords[190] treated the claims of victims of British Airways Flight 149, which landed in Kuwait at the time of hostilities with

182 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 165-166: 'En ce qui concerne la compétence du tribunal, le projet retient le tribunal du siège de l'exploitation ou du lieu où celle-ci possède un établissement par les soins duquel le contrat a été conclu, et le lieu de destination. En cas de non arrivée de l'aéronef, le tribunal du lieu de l'accident peut également être rendu compétent. La compétence du domicile du défendeur a donc été remplacée par une formule plus pratique pour l'exploitation de l'entreprise de transports. Le projet précise d'ailleurs que l'action doit être portée devant un tribunal d'un des Etats Contractants. Il prévoit en outre qu'en cas de mort, toutes actions devront être portées devant le premier tribunal qui aura été régulièrement saisi'.

183 *Ibid*., p. 79-85.

184 *Ibid*., p. 84-85.

185 *Ibid*., p. 83.

186 *Ibid*.

187 This point was also discussed at the 1955 Hague Conference, *see*, ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 259-261.

188 There are many others, *see*, for example, Michel Pourcelet, *The International Element in Air Transport*, 33 J. Air L. & Com. 83 and the references (1967).

189 Cass, 15 July 1999, 97-10268.

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

Iraq and were held hostage during several weeks in Baghdad. Whereas passengers were indemnified in France, their claims were dismissed in the United Kingdom.

3.2.6.3 Under the 1999 Montreal Convention

The 1999 Montreal Convention, after keeping the four fora agreed upon in the 1929 Warsaw Convention, and the two adopted in the 1961 Guadalajara Convention,[191] established one additional jurisdiction known as the 'fifth jurisdiction'.[192] This newcomer[193] permits, under limited conditions, to bring action in a territory where, at the time of the accident, the passenger holds principal and permanent residence. The United States strongly advocated for such an additional jurisdiction, arguing, among others things, that it would bring passengers further legal certainty.[194]

During the 1999 Montreal Conference, the delegate for Egypt noted that a fifth jurisdiction was not needed, explaining that:

> In the case of an accident, a carrier could be subjected to appear before many courts in different jurisdictions, […].[195]

The delegate for France highlighted that the coexistence of parallel proceedings increased the risk of ending up with opposite decisions:

> […] rather than advancing the unification and internationalization of law with a view to ensuring the identical treatment of persons under a single worldwide legal system, the result would be the further fragmentation of international law.[196]

Intense discussions continued around the adoption of this new forum.[197] There was a fear that a practice of forum shopping would develop. It was suggested that the doctrine *forum non conveniens*, a domestic procedure law standard in many common law jurisdictions, could mitigate this risk.[198]

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191 *See*, section 4.2.1.2.

192 1999 Montreal Convention, Articles 33 and 46.

193 Although already discussed in the 1971 Guatemala City Protocol.

194 ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume II, *Documents*, Montreal 1999, p. 102: 'The passenger's home State is where most claimants are located, and that country's courts would usually apply the laws and standards of recovery that would be anticipated by such passengers or claimants'.

195 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. 143.

196 *Ibid*., p. 105.

197 *Ibid*., p. 143-187, 205, 235.

198 *See*, *Ibid*., p. 108. The Chairman also wondered whether it would be appropriate to codify and incorporate such doctrine in the convention. *See*, *Ibid*., p. 148,149 and 158. The American delegate expressed concerns in this regard as it could raise ratification issues in jurisdictions where the doctrine was unknown. He also underscored that a codification might have altered existing jurisprudence. *See*, *Ibid*., p. 159.

Practice shows that the application of this doctrine did not bring the anticipated enhanced certainty. In 2005, a West Caribbean Airways flight from Panama to Fort-de-France in the French West Indies crashed in Venezuela. Several actions were introduced before American jurisdictions, which denied competence on the grounds of the doctrine *forum non conveniens* and, in substance, referred the case to the Courts of Fort-de-France. The French *Cour de cassation* eventually held that, given that Article 33(1) of the 1999 Montreal Convention provided that the action had to be brought 'at the option of the plaintiff', the French jurisdictions were not competent insofar as they were not the claimants' choice.[199]

Another example can be taken from litigations that followed the disappearance in 2014 of Malaysia Airlines flight MH370, which led to several actions being introduced in tandem before American and Malaysian Courts. As the action in Malaysia was said to be a protective measure in the event American jurisdictions denied competence, claimants requested to stay the Malaysian proceedings pending American litigation. With regards to the specific elements of the matter, the Court of Appeal of Malaysia considered that there was not sufficient grounds to justify putting the Malaysian suit on hold.[200]

3.2.6.4 Concluding Remarks

The existence of multiple possible fora in the Conventions shows that the intent to achieve a uniform application of the Conventions was once again met with obstacles from the drafting stage.

199 Cass., 7 December 2011, 10-30919: 'Attendu que l'option de compétence ouverte au demandeur par les textes susvisés s'oppose à ce que le litige soit tranché par une juridiction, également compétente, autre que celle qu'il a choisie; qu'en effet, cette option, qui a été assortie d'une liste limitative de fors compétents afin de concilier les divers intérêts en présence, implique, pour satisfaire aux objectifs de prévisibilité, de sécurité et d'uniformisation poursuivis par la Convention de Montréal, que le demandeur dispose, et lui seul, du choix de décider devant quelle juridiction le litige sera effectivement tranché, sans que puisse lui être opposée une règle de procédure interne aboutissant à contrarier le choix impératif de celui-ci; […]'. *See also*, Sandra Adeline, *The forum non conveniens doctrine put to the test of uniform private international law in relation to air carrier's liability: lack of harmony between US and French decision outcomes*, 18 Unif. L. Rev. 313-328 (2013).

200 Court of Appeal of Malaysia, 5 July 2017, *Huang Min & orz v. MAS & orz*, W-01 (IM) (NCVC)-330-08/2016, ASEAN Legal Information Portal, Source: <https://www.aseanlip.com/malaysia/general/judgments/huang-min-and-31-others-v-malaysian-airline-system-berhad-and-6-others/AL17593> (accessed in 2019).

3.3 Other Factors Causing Fragmentation

3.3.1 Preliminary Remarks

Next to the drafting elements examined above, factors which are not based on semantic choices have also limited the ability of the Conventions to fully deploy and realize their aim of uniformity from the time of their signing.

The Conventions, singular in their nature of being international public instruments regulating private law relations, face typical international public law limits, such as reservations and declarations, while, at the same time, are deprived of the possibility that their uniform application could be ensured by a single common Court or by clear specific interpretation mechanisms.

3.3.2 Reservations and Declarations

The first non-drafting elements that may limit the uniform application of the Conventions are reservations and declarations.

Reservations are defined by the 1969 Vienna Convention as:

> […] a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[201]

In substance, reservations allow each State to be part of an international convention with certain *ad hoc* adjustments. Declarations are not defined in the 1969 Vienna Convention. However, as discussed above,[202] they can be considered as either disguised reservations or political statements with limited impact in international public law.

It follows that if many different reservations and declarations were made admissible, they would undermine the whole purpose of the Conventions.[203]

During the 1929 Warsaw Conference, the possibility of allowing reservations in the text was discussed. The delegate for Italy voiced the concern that such an inclusion would jeopardize the envisaged uniformity:

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201 1969 Vienna Convention, Article 2(1)(d).

202 *See*, section 3.2.4.3(4).

203 On the effect of reservations, *see*, Malcolm Shaw, *International Law* 693 (8th edition, Cambridge University Press, 2017); Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit International Public* 195-203 (8th edition, LGDJ).

> Il reste dans le procès-verbal que la Délégation italienne considère qu'une Convention pour unifier certaines règles ne peut insérer des réserves qui troublent précisément l'unification. En effet, s'il s'agit d'unifier on ne peut admettre que cette unification n'existe pas ou que cette unification soit boiteuse.[204]

It was however decided, given the purpose of uniformity, to refuse on principle any reservations unless specially allowed.[205] Thus, the Additional Protocol to the 1929 Warsaw Convention only authorizes reservations with respect to State flights. Article 40 of the 1929 Warsaw Convention also authorizes High Contracting Parties to declare that said convention does not apply to all or any of its overseas territories. Similar provisions are found in the 1955 Hague Protocol.[206]

In the same vein, Article 56 of the 1999 Montreal Convention provides that States can submit a declaration if they have two or more territorial units in which different systems of law are applicable in relation to matters dealt with by the convention. If submitted by a State, such declaration would have then to indicate whether the convention extends to all its territorial units, or to only to one or more of them.[207] With respect to reservations *per se*, Article 57 of the 1999 Montreal Convention specifies that:

> No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:
> (a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or
> (b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

Theoretically, one could be satisfied with the limits imposed on the type of declarations and reservations allowed in the 1999 Montreal Convention. However, despite their limitations,[208] they have not prevented Argentina from submitting an interpretative declaration with respect to the term

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204 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 152.

205 *Ibid*., p. 122-124.

206 Articles XXV and XXVI. This last Article is more limited than the reservation authorized in the Additional Protocol to the 1929 Warsaw Convention, as it only permits States to declare that the Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, where the whole capacity has been reserved by or on behalf of such authorities.

207 Several declarations were submitted.

208 There were suggestions to introduce opt-out provisions, which eventually were not accepted. *See*, ICAO Doc 9775, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, 10 – 28 May 1999, volume I, *Minutes*, Montreal 1999, p. 105.

'bodily injury' in Article 17 of the 1999 Montreal Convention, as discussed earlier.[209]

This might be an isolated case; however, it may be viewed as a precedent for others to further depart from the text, which, as regularly stated above, is designed to create uniformity.

3.3.3 The Lack of Uniform Jurisdiction and Interpretation Mechanisms

3.3.3.1 Preliminary Remarks

As the question of reservations is nevertheless very limited in practice, the genuine non-semantic flaw of the Conventions stands in the absence of common jurisdiction and/or specific interpretation mechanisms.

3.3.3.2 Lack of Uniform Jurisdiction

At the time of the 1929 Warsaw Conference, the possibility of enforcing a decision in another jurisdiction was discussed. The drafters of the 1929 Warsaw Convention were aware that sometimes an action would have to be introduced in a certain jurisdiction, but that the final decision would have to be enforced in another, for example where the debtor's assets could be found.[210] This situation was explored when the competence of the place of the accident was contemplated as a possible forum. The existence of different fora is a response to this lack of automatic recognition of foreign decisions, as the plaintiffs would then have a greater chance to introduce their action in a State where a final decision could easily be enforced.

Notwithstanding the above, the creation of an international specialized Court would have had the advantage of solving this question, but more essentially, would have prevented the existence of conflicting, or at least opposing decisions. Another substantial advantage of a common global Court would have been to provide a uniform interpretation of the Conventions.[211] Such a common global Court would have indeed prevented, or at least mitigated, what Professor Michel Pourcelet named in 1964 the 'désunification judiciaire'.[212]

The idea of such a common global Court is not new, but has always been thwarted by national resistance. As a matter of fact, an international

209 *See*, section 3.2.4.3(4).

210 *See*, for example, ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 79-80.

211 Suggestions will be made in these regards below. *See*, section 5.3.1.

212 Michel Pourcelet, *Transport Aérien International et Responsabilité* 222 (Les Presses de l'Université de Montréal, 1964).

aviation Court for private law matters[213] was already discussed at the time of the negotiations of the 1952 Rome Convention, but no common agreement was reached at this stage. Since none of the delegates were willing to risk delaying the signing of the agreed-upon text, the 1952 Rome Conference merely made the following recommendation to the ICAO to examine this question:

> (a) instruct the Secretariat and the Legal Committee to study a system of settlement, at least in appeal proceedings, of international private law disputes that may arise either from the Convention signed this date, or from any other aviation convention either by the establishment of a special permanent tribunal, or by establishment of a special *ad hoc* tribunal, or by arbitrators acting under uniform rules of procedure to be developed, or by resorting to any other existing international institution;
> (b) make an immediate enquiry from States to ascertain the objections that may exist against such systems of settlement of disputes arising in connexion with international civil aviation. [214]

During the preparation of the 1955 Hague Conference, despite efforts made by the Netherlands to insist on the recommendation made in 1952,[215] no such recommendation was submitted to the 1955 Hague Conference. As pointed out by the Dutch delegate, such an idea created nervousness:

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213 For public law matters, by 1919 the International Commission for Air Navigation already had a certain judicial role with respect to disputes on technical annexes. Later, the ICAO Council was vested with quasi-judiciary powers with respect to certain disputes. *See*, René Mankiewicz, *L'organisation international de l'aviation civile*, 3 Annuaire Français de Droit International 383-417 (1957); Bin Cheng, *The Law of International Air Transport* 100-105 (Stevens & Sons Limited, London, 1962); Paul Dempsey, *Public International Air Law* 666-740 (Institute and Center for Research in Air & Space Law, McGill University, 2008). The role of the International Court of Justice has also been confirmed with regards to the interpretation of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *see*, ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 9; *ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 115. For a commentary of this decision, *see*, Peter Bekker, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States), Preliminary Objections, Judgements*, 92 The American Journal of International Law 503-508 (1998). For a confirmation of the ICAO council's quasi-judicial role, *see*, International Court of Justice, *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, 14 July 2020. *See also*, section 5.3.1.

214 ICAO Doc 7379, Conference on Private International Air Law, Rome, September-October 1952, volume II, *Documents*, Montreal April 1953, p. 278.

215 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p 272.

> As soon as the word 'international' was pronounced, there were a number of countries which became nervous and thought that their sovereign rights might be endangered.[216]

The possibility and feasibility of a common jurisdiction, which the ICAO Council declined to investigate a few months earlier,[217] was, however, brought up again during the debates. A division appeared between civil law jurisdictions, which were mostly in favour, and common law jurisdictions.[218] As a result, no major steps were taken in that direction, with the notable exception that, in the Final Act of the 1955 Hague Conference, it was agreed, as cited below, to lay out in the resolutions and recommendations that the question of enforcement of judgements deserved further consideration:

> The Conference, Considering that neither the Convention Warsaw nor the Protocol to amend the said Convention signed at The Hague on 28 September 1955, contains rules relating to the execution of judgments rendered under the Convention or the Protocol, Invites the International Civil Aviation Organization to consider whether it is desirable to include, in the Warsaw Convention, rules relating to procedure in cases arising under the Convention, including the execution of judgments.[219]

The idea of creating an international Court never again reached such a high political level. Professor Paul Chaveau, when preparing a draft convention for the establishment of an aviation-specific dispute resolution body before the 1955 Hague Conference, took into consideration the arguments which he considered as generally voiced against the project of a global aviation Court.[220] These arguments can be summarized as follows:

1. inadmissible substitution to national competent Courts;
2. pragmatic difficulties due to the geographical distance between the Court and the plaintiff, witnesses and, generally speaking, actors in the litigation;

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216 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal September 1956, p. 264.

217 ICAO Doc 7379, Conference on Private International Air Law, Rome September-October 1952, volume II, *Documents*, Montreal, 1953, p. 277-278. The ICAO Legal Committee requested the Council include the subject in the work programme. On 31 March 1955 the Council decided to not comply with this request, *see*, ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 272.

218 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume I, *Minutes*, Montreal, September 1956, p. 264-268 and 342-343.

219 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal, September 1956, p. 30-31.

220 *See*, Paul Chauveau, *Rapport sur la création d'une Cour internationale pour la solution des difficultés nées de l'interprétation et de l'application des conventions internationales en matière de Droit aérien*, RFDA 465-481 (1955).

3. Constitutional barriers;
4. and lack of an automatic enforcement of foreign decisions.

In a detailed analysis of the interest in the establishment of a common jurisdiction, Professor Otto Riese noted that said draft convention encountered strong opposition, notably by the ICAO Legal Committee.[221] Despite the optimism of many authors,[222] the idea never succeeded in surmounting national resistance.

3.3.3.3 The Lack of Common Interpretation Mechanisms

After the adoption of the 1929 Warsaw Convention, the IATA – which was in charge of the preparation of uniform documents of carriage – asked the CITEJA[223] in 1933 to give its interpretation on the concept of 'arrêts prévus' under Article 3 of the convention.[224]

Following the IATA question, the Third Conference – which led notably to the adoption of the 1933 Rome Convention – expressed the wish that an analysis be conducted on the potential role of the CITEJA as an advisory source of interpretation on private air law conventions.[225] From that perspective, the Rapporteur Albert de la Pradelle suggested amending the CITEJA internal rules,[226] and, during the XII session of the CITEJA in 1937, submitted a draft convention which would have given the CITEJA the option of providing interpretative advice with respect to private air law

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

222 *See*, for example, Nicolas Mateesco Matte, *Traité de droit aérien-aéronautique* 59 (2nd edition, Pedone, 1964); Huib Drion, *Towards A Uniform Interpretation of the Private Air Law Conventions*, 19 J. Air L. & Com. 423 (1952).

223 For a detailed description of its working methodology, *see*, Le Comité International Technique d'Experts Juridiques Aériens, *Son origine, son but, son oeuvre* (Publications du Comité International Technique d'Experts Juridiques Aériens, 1931); Stephen Latchford, *The Warsaw Convention and the CITEJA*, 6. J. Air L. & Com. 79 (1935).

224 Albert de la Pradelle, *L'interprétation des Conventions Internationales de droit privé aérien à titre d'avis consultatif par le C.I.T.E.J.A.*, Revue Générale de Droit Aérien 456 (1934).

225 'C) La Conférence, Considérant l'intérêt pour tous les usagers de l'aéronautique de pouvoir être, le cas échéant, éclairés sur les textes élaborés par les Conférences Internationales de Droit Privé Aérien; Prie le C.I.T.E.J.A. d'examiner, en vue de la Quatrième Conférence de Droit Privé, si, dans quelle mesure et de quelle manière, il pourra donner son avis sur l'interprétation des textes de Conventions Internationales de Droit Privé Aérien lorsqu'il en sera sollicité par une administration publique ou un organisme international sans qu'il soit porté atteinte au droit du pouvoir judiciaire saisi d'un différend', quoted in Albert de la Pradelle, *L'interprétation des Conventions Internationales de droit privé aérien à titre d'avis consultatif par le C.I.T.E.J.A.*, Revue Générale de Droit Aérien, 459 (1934).

226 For proposed changes in 1934, *see*, Albert de la Pradelle, *Rapport relatif à l'interprétation des Convention de droit privé aérien*, Revue Générale de Droit Aérien 793 (1934); Michel Smirnoff, *La Comité International Technique d'Experts Juridiques Aériens, Son Activité, Son Organisation*, 139-145 and 227-229 (Pierre Bossuet, 1936).

conventions if so required by governments, international Courts or other international official bodies. This preliminary draft convention regarding the role of the CITEJA in the interpretation and enforcement of private air law conventions was as follows:

> Avant-Projet de Convention relatif à la collaboration du C.I.T.E.J.A. à l'interprétation et à l'exécution des Conventions internationales de Droit Privé Aérien
>
> I. Interprétation
>
> Article Premier – Au cas où l'un des Etats représentés au C.I.T.E.J.A. ou l'un des tribunaux internationaux ou tout autre organisme officiel à caractère international qui aurait à connaître d'une Convention de Droit Privé Aérien aurait demandé au C.I.T.E.J.A. son opinion sur le sens à donner aux termes et dispositions de cette Convention, le C.I.T.E.J.A. est autorisé à fournir tous éclaircissements à titre purement consultatif en utilisant les travaux préparatoires des Avants-Projets de Convention, ainsi que tous éléments d'interprétation.
>
> Article 2 – (1) La demande adressée au Comité est transmise par les soins du Secrétariat Général à une Commission permanente désignée par le C.I.T.E.J.A. Celle-ci prépare le projet de réponse.
> (2) Le Comité, sur le Rapport de cette Commission, se prononce à la majorité des membres présents.
> (3) La réponse est motivée; elle est transmise non seulement à l'auteur de la demande, mais à tous les Etats représentés au C.I.T.E.J.A. auxquels il appartient de la rendre publique.
> (4) Toute opinion dissidente, également motivée, peut, si son auteur le désire, être jointe à la réponse.
>
> II. Exécution
>
> Article 3 – (1) Si la Conférence, au cours de laquelle est adoptée une Convention Internationale de Droit Privé Aérien, confie au C.I.T.E.J.A. la préparation de tout texte d'exécution commun à tous les Etats parties à la Convention pour aider à la mise en vigueur de cette Convention, le C.I.T.E.J.A. procède de la manière suivante: le Secrétariat Général saisit de la question la Commission chargée de l'élaboration de la Convention; celle-ci arrête à la majorité un projet de texte qu'elle soumet au C.I.T.E.J.A., qui l'adopte à la majorité sans qu'il soit fait mention autre part qu'aux procès-verbaux de toute opinion dissidente.
> (2) Le texte ainsi préparé par le C.I.T.E.J.A. doit être accepté par chacun des Etats parties à la Convention pour avoir force obligatoire à son égard.
>
> Article 4 – Si le gouvernement chargé de recueillir les signatures et de recevoir le dépôt des ratifications d'une Convention Internationale de Droit Privé Aérien croit devoir, dans le silence de la Conférence, confier au C.I.T.E.J.A. la mission prévue à l'article 3, il appartient au C.I.T.E.J.A. d'y procéder de même manière que suivant cet article et avec les mêmes effets.

> Vœu
>
> Pour permettre de suivre l'exécution des Conventions Internationales de Droit Privé Aérien, tout Etat partie à la Convention est prié de communiquer au Secrétariat Général du C.I.T.E.J.A., aussitôt que possible, tout document législatif, réglementaire, administratif ou judiciaire, relatif à cette exécution. [227]

Given the resistance mounted by a number of States such as the United States and the United Kingdom, and internal procedure points, the preliminary draft convention did not make it as far as a diplomatic conference.[228]

However, in 1946, the plenary session of the CITEJA adopted two new projects of conventions, conferring upon it certain powers in connection to the interpretation of private air law convention. These draft conventions were referred in vain to the PICAO Secretariat for further action.[229]

According to Professor Huib Drion, during the preparation of the 1955 Hague Conference, the ICAO 'Warsaw' Sub-Committee suggested in 1952 the insertion into Article 25 of the following provision:

> Contracting States shall co-operate to secure, as far as possible, a uniform interpretation of this Convention.[230]

This provision did not pass different tests and was not reflected in the draft proposal submitted to the 1955 Hague Conference.

During the 1955 Hague Conference, while considering the topic of international dispute settlement, negotiators finally agreed to revert the question back to the general terms of international bodies and organizations responsible or interested in the development of international private air law. The Final Act of the 1955 Hague Conference indeed provides, amongst the different resolutions and recommendations, that:

> The Conference,
> Considering that the uniform interpretation of the Warsaw Convention and of the Protocol to amend the said Convention as well as of other existing private air law conventions, is of vital importance for the unification of private air law aimed at by these conventions,
> Considering Also that the international nature of the situations to which these conventions apply, especially in connection with the distribution of the amounts to which liability is limited in some of these conventions, raises certain serious

227 Report of the session published in the Revue Générale de Droit Aérien 605-617 (1937).

228 For a detailed description of the evolution of the draft text, *see*, Stephen Latchford, *Pending Projects of the International Technical Committee of Aerial Legal Matters*, 40 The American Journal of International Law 280-302 (1946).

229 *See*, Stephen Latchford, *Pending Projects of the International Technical Committee of Aerial Legal Matters*, 40 The American Journal of International Law 299-300 (1946).

230 Huib Drion, *Towards A Uniform Interpretation of the Private Air Law Conventions*, 19 J. Air L. & Com. 423 (1952).

> problems which cannot easily be solved otherwise than by means of some international legal forum,
> Considering Further that the problems envisaged in the foregoing are complicated that a complete study will require much time,
> Recommends that such international bodies and organizations, as are responsible for or interested in the development of private air law, commence as soon as possible to study the problems involved in the promotion of uniform interpretation of the international private air law conventions and in the international settlement of disputes arising under said conventions.[231]

Since then, the 1969 Vienna Convention has been adopted. It contained several provisions regarding the way international conventions must be interpreted.[232] The next chapter will explore whether the principles of interpretation of said convention are sufficient to ensure a uniform interpretation of the Conventions.

3.4 Conclusions

This chapter questioned the existence of factors that could have prevented, or still prevent, the Conventions from being uniformly applied from the moment of their signing. The analysis carried out confirmed the existence of such obstacles and identified them.

The major drafting factors examined prevent the Conventions from being uniformly applied and occasionally enable domestic law to sneak in. Non-drafting factors, such as reservations, declarations and the absence of a specific uniform jurisdiction or at the latest common interpretation mechanisms, may also be seen as impediments to a uniform application from an early stage after the signing of the Conventions.

Whereas the aim of uniformity of the 1929 Warsaw Convention suffered from shortcomings, these were understandable given the fact that the text adopted in 1929 had been discussed rather rapidly and was not deemed to last many decades.[233] At that time, it was above all a question of letting the practice develop before improving provisions. The successive waves of modifications after the Second World War, including the 1999 Montreal Convention, only partially improved these internal factors of fragmentation. As a matter of fact, other needs appeared to be more urgent, such as revisions to monetary limits, to the detriment of overall improvements in the name of uniformity. The ambition of the pioneers, particularly of the CITEJA – which had projects aiming at the creation of a fully efficient legal environment for international private air law – was thus thwarted.

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231 ICAO Doc 7686, International Conference on Private Air Law, The Hague, September 1955, volume II, *Documents*, Montreal September 1956, p. 31-32.

232 *See*, section 1.3.1.2(2).

233 ICAO Doc 7838, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, *Procès-Verbaux*, Varsovie, 1930, p. 62, 85, 104.

The effectiveness of the uniform application of the Conventions essentially depends, therefore, on the behaviour of those having ratified the Conventions and the Courts which, despite the obstacles described, have to ensure their uniform application.

The next chapter will examine how such missions have been carried out, and other pitfalls on the road of the Conventions.