

UNIFORM APPLICATION OF THE CARRIAGE BY AIR CONVENTIONS AND TREATY RULES OF CONSTRUCTION

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Abstract

Applying the carriage by air conventions requires interpreting their provisions and terms. There are several rules of interpretation. The most related rules are the Vienna rules and principles of treaty interpretation. Analysing the courts' decisions regarding the carriage by air conventions show that these courts applied the Vienna rules in order to preserve the uniformity of application of air conventions. Most importantly, these rules were applied while interpreting the Warsaw Convention despite the fact that this Convention was enacted long time before the Vienna rules were adopted. The main reason is that the Vienna rules are merely codification to the pre-existing international rules of interpretation. Since the carriage by air is performed in reliance on the carriage contract, the rules of interpretation of a contract were preserved also in the process of their interpretation. However, the rules of interpreting domestic statute are not preserved as they would affect the uniform application of the carriage by air conventions.

Key words: Treaty construing, Carriage by Air Conventions, Contracts interpretation, statute interpretation.

1 INTRODUCTION

The international carriage by air is mainly governed by international conventions. The essential object of agreeing these conventions was to provide a set of rules which should be applied uniformly by the different state parties to such conventions. In order to keep the uniformity of the international carriage by air conventions, their provisions should be applied and interpreted¹ in the same way in the state parties. The uniform application of such conventions will avoid discriminating between air passengers and will promote the development of this industry. An important factor in achieving this goal will be by assuring that the same rules of interpretation are applied by the courts in the different state parties. The Vienna Convention on the Law of Treaties 1980² was agreed in order to provide a uniform set of rules and principles of treaty interpretation.³ These rules and principles have unique character, which distinguishes them from the rules of interpreting domestic status or commercial contracts. In this paper, summary of each of the rules and principles of interpreting domestic status and commercial contracts will be presented to show the differences between them and the rules of treaty interpretation. The reasons for visiting the rules of interpreting domestic statute and commercial contract are the following. Firstly, although the contract of international carriage by air is regulated by a convention, its contractual characteristic is preserved. On the other hand, the carriage by air

¹ 'Interpreting' and 'construing' international conventions are both synonymously used by the law personnel. Hereby, both will be used in this paper.

² United Nations Convention on the Law of Treaties Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980. Hereinafter, it will be referred to as the Vienna Convention 1969.

³ Different terms are used in referring to the guidelines of treaty interpretation of the Vienna Convention 1969. For example, 'rules' 'principles' 'canons' and 'customs' are systematically used by many authors. Each term of them implies different characteristics on the content if taken as terms of art. Therefore, the use of 'rules' when referring to the provisions of articles 31-33 should not be taken as defining their character. They are not exclusive of other compatible principles and techniques for treaty interpretation. RK Gardiner *Treaty Interpretation* (Oxford University Press Oxford 2008), 38. 'Practice in the application of articles 31-33 shows that courts and tribunals habitually refer to these provisions as "rules" while often applying them more as "principles"'. RK Gardiner *Treaty Interpretation* (Oxford University Press Oxford 2008), 37. For more information on the confusion in terminology in this regard, see *ibid* pp 36-38. In order to avoid any misrepresentation to the Vienna Guidelines on the treaty interpretation, both 'rules' and 'principles' will be used in this paper.

conventions are often incorporated into the domestic laws of the state parties. In this case, the court, in particular in the United Kingdom, will find itself interpreting an international convention as well as a domestic statute. The extent to which the domestic rules of interpretation will interfere in the process and in the outcome of interpreting the international conventions will be discussed in this paper.

This paper will be divided into three sections and a conclusion. The first section will highlight the importance of the uniformity of application of the carriage by air Conventions, the proposed aim of these Conventions. This will be followed by displaying the Vienna rules and principles of interpretation as mentioned in articles 31-33 of the Vienna Convention 1969 in the second section. The second section includes also the application of the Vienna rules and principles on the Warsaw's Convention concept of 'bodily injury' by the US and UK courts will be discussed to show to what extent these courts correctly applied these principles. The third section will provide a comparison between the Vienna rules and principles of interpretation and those of interpreting domestic statutes and commercial contracts. The final part will the concluding remarks and suggestions.

2 THE REQUIREMENT FOR UNIFORMITY

Enacting an international convention seeks usually to create a set of provisions which are hoped to be applied uniformly by all member states of that treaty.⁴ In order to preserve the uniform application of the provisions of such treaties, the international community produced specific rules and principles of interpretation that are designed to be applied by different courts in the different legal systems. These rules and principles were codified in the Vienna Convention 1969, which was enacted in 1969 and entered into force in 1980.⁵ It emphasised on the role of treaties in maintaining peace and security as well as in developing friendly relations and achieving cooperation among nations.

The Vienna rules and principles of construction were based on the universally recognised principles of free consent, good faith⁶ and the *pacta sunt servanda*⁷ rule.⁸ One of its aims was affirming that disputes concerning treaties should be settled by peaceful means and in conformity with the principles of justice and international law.⁹

Before analysing the Vienna rules and principles of interpretation, it is useful to show the uniformity element in the carriage by air conventions and its importance. Since late 1920s, the

⁴ The uniformity of application was preserved in *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72 (HL) and *R v Secretary of State for the Home Department* [1999] 3 W.L.R. 1274 (CA).

⁵ <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (10/10/08)

⁶ The principle of good faith in the process of interpreting an international treaty was maintained by the different national and international courts. For example, *R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport*. [2005] 2 AC 1 (HL), *Fujitsu/ Designation of inventors*(J08/82) [1979-85] E.P.O.R. A111 (Legal Board of Appeal), *Opel Austria GmbH v Council of Ministers of the European Communities* (T115/94), [1997] 1 C.M.L.R. 733 (the Court of First instance of the European Communities-Fourth Chamber), *AUNAC/Designation of states in a divisional application* (J22/95), [2002] E.P.O.R. 40 (Legal Board of Appeal).

⁷ This is a Latin phrase describes a significant general principle of international law. It means “treaties shall be complied with,” http://www.judicialmonitor.org/archive_0908/generalprinciples.html (05/06/17).

⁸ The Preamble of the Vienna Convention 1969. The Vienna Convention 1969 provides guidelines on many issues such as concluding treaties, formulating reservations, entry into force of a treaty and interpreting and amending a treaty. The interpretation section will be the focus of this paper.

⁹ *Ibid.*

overriding purpose of the private international aviation law was to unify its rules in a single unit under which all disputes would be resolved uniformly no matter where they arose.¹⁰ The title and the preamble of both the Warsaw Convention and the Montreal Convention make it crystal clear that the main purpose of such agreements is to achieve the uniformity of their application among their parties. It is worth noting that as a matter of law, the Conventions apply only to the international carriage unless the state party incorporates them into its domestic law.

The Preamble¹¹ of both, the Warsaw Convention and the Montreal Convention affirms the purpose of uniformity. The Warsaw's Preamble provides that it 'recognised the advantages of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier'.¹² The Preamble of the Montreal Convention also laid emphasis on the aim of harmonisation and unification by recognising:

...the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12th October 1929, hereinafter referred to as the 'Warsaw Convention', and other related instruments to the harmonization of private international air law.¹³

The uniformity aim sought by the Warsaw Convention, according to Professor Milde, is achieved in four major areas.¹⁴ It unified the format and the legal significance of the documents

¹⁰ PS Dempsey and M Milde *International Air Carrier Liability: The Montréal Convention of 1999*, ((McGill University Montreal 2005), 1.

¹¹ The preamble assists in determining the object and the purpose of the treaty. I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 127.

¹² The Preamble of the Montreal Convention.

¹³ International Civil Aviation Organisation International conference on air law (Convention for the unification of certain rules for international carriage by air) (ICAO Montreal 1999) Vol II, 317.

¹⁴ PS Dempsey and M Milde *ibid*, 58.

of the carriage by air.¹⁵ Most importantly, it unified the regime of the air carrier's liability, the limits of carrier's liability and the jurisdiction.¹⁶ These four areas also seem to be achieved by the Montreal Convention.

After highlighting the importance of the Vienna rules and principles in relation to interpreting the carriage by air conventions, the following section will examine these rules and principles.¹⁷

3 THE VIENNA RULES & PRINCIPLES OF INTERPRETATION

Interpretation of a treaty is a way of applying it when its meaning is not clear. An academic scholar described the interpretation of a treaty as part of the performance of that treaty.¹⁸ Sometimes, there is mix between the words 'interpret, interpretation' and the words 'apply, application'. Lord McNair in his book *Law of Treaties* criticised this mix by saying that strictly speaking, a treaty is said to be applied when the meaning is clear. Interpretation, in his lordship opinion is 'a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meaning'.¹⁹

3.1 Background on the rules of treaty interpretation:

The rules and principles of interpretation of international treaties are provided in articles

¹⁵ Chapter II of the Warsaw Convention 1929.

¹⁶ Chapter III of the Warsaw Convention 1929.

¹⁷ For a detailed study of these rules and principles, see, for example, F G Jacobs 'Varieties of Approach to Treaty Interpretation: with special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp L Q 318; A Aust *Modern Treaty Law And Practice* (Cambridge University Press Cambridge 2000); R Gardiner 'Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines* (1980)' (1995) 44 Int'l & Comp L Q 620; I M Sinclair 'Vienna Conference on the Law of Treaties' (1970) 19 Int'l & Comp L Q 47.

¹⁸ A Aust, *ibid*, 187.

¹⁹ McNair *Law of Treaties* (Oxford University Press USA 1986), 365.

31-33 of the third section of the Vienna Convention 1969. These three articles were adopted in the final analysis of the conference leading to the Vienna Convention 1969, by a unanimous vote. This agreement represents a clear affirmation by the international community that, for purpose of treaty interpretation, the prime emphasis must be placed on the text of a treaty as representing the authentic expression of the will of the parties.²⁰ This also affirms Lord's Diplock conclusion that the Vienna Convention 1969 did in fact codify the existing rules and principles of interpretation under the international common law.

In order to decide what approach of interpretation the Vienna Convention 1969 has adopted, a brief summary of the three approaches to interpretation will be provided in the following. The first approach is the subjective approach that looks primarily at the actual intentions of the parties. The textual approach or the objective approach, on the other hand, places emphasis on the actual words of the treaty. The third approach is the teleological approach that seeks to interpret the treaty in the light of its object and purpose.²¹ The variety of the elements in the process of interpreting an international convention shows that the Vienna's Convention approach is not an absolute textual one. Its textuality is subject to a variety of important qualifications that are themselves subject to a condition that they cannot be invoked to contradict the text.²² The purposive approach, according to article 31 (1) of the Vienna Convention 1969, also plays an important role during the interpretation of a treaty under the Vienna Convention 1969. Overall, it is highly important to note that a convention should be

²⁰ I M Sinclair 'Vienna Conference on the Law of Treaties' (1970) 19 Int'l & Comp L Q 47, 65.

²¹ The three approaches were mentioned in F G Jacobs 'Varieties of Approach to Treaty Interpretation: with special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp L Q 318, 319.

²² F G Jacobs 'Varieties of Approach to Treaty Interpretation: with special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp L Q 318, 338.

taken as a whole during the interpretation process.²³ Its text; preamble; annexes; subsequent agreements; subsequent practice and the relevant rules of international law are all primary sources and should be taken into account in the light of the object of a convention.²⁴

The rules and principle of interpretation have been applied by several international courts such as the International Court of Justice,²⁵ the European Court of Justice,²⁶ the European Court of Human Rights,²⁷ the Court of Justice of the European Communities²⁸ and the European Patent Office²⁹. The rules and principles of interpretation of the Vienna Convention 1969 are also admissible when interpreting a treaty by an English court, it is believed.³⁰ Using these rules and principles is most likely to achieve the 'correct'³¹ or best outcome.³² However, the application of these rules and principles is not a mechanistic guarantee of reaching the correct interpretation.³³

In order to achieve this 'correct' and 'best outcome' interpretation of a treaty, the principle of good faith dominates the entire process of interpretation according to the Vienna Convention 1969, including the examination of the text, the context and the subsequent

²³ *Revenko v Secretary of State for the Home Department* [2001] Q.B. 601 (CA)

²⁴ Article 31 of the Vienna Convention.

²⁵ See for example, *The Maritime Delimitation and Territorial Questions (Case concerning maritime delimitation and territorial questions between Qatar and Bahrain)* [1995] I.C.J. Rep 6.

²⁶ See for example, *Commission of the European Communities v Netherlands (C-523/04)* [2007] 2 C.M.L.R. 48.

²⁷ *Grand chamber judgment: Saadi v United Kingdom* (13229/03) [2008] 47 E.H.R.R. 17. (European Court of Human Rights).

²⁸ See for example, *Metalsa Srl v Public Prosecutor (Italy) (C312/91)* [1994] 2 C.M.L.R. 121, *R. v Secretary of State for the Home Department Ex p. Flynn* [1995] 3 C.M.L.R. 397 (Queen's Bench Division).

²⁹ See for example, *IBM/Computer Programs (T1173/97)* [2000] E.P.O.R. 219.

³⁰ R Gardiner 'Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines* (1980)' (1995) 44 Int'l & Comp L Q 620, 628. See for example, *Regina (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18 (HL), *R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport* [2005] 2 A.C. 1 (HL), *Revenko v Secretary of State for the Home Department* [2001] Q.B. 601 (CA).

³¹ M Freeman *Legislation and the Courts* (Dartmouth England 1997) 125.

³² R Gardiner 'Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines* (1980)' (1995) 44 Int'l & Comp L Q 620, 628. See also, F G Jacobs 'Varieties of Approach to Treaty Interpretation: with special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp L Q 318, 333-334.

³³ M Freeman, *ibid*, 125.

practice.³⁴ Some authors concluded that the principle of good faith represents a qualification to the textual approach, the one that its very nature is hardly open to abuse.³⁵ Good faith is a rudimentary term eludes a definition. It can be illustrated, but not defined and must be applied to the circumstances of each case.³⁶

In order to maintain the uniformity application of the Warsaw Convention and the Montreal Convention, the Vienna rules and principles of interpretation are to be applied. Before displaying the Vienna rules and principles of interpretation, it is useful to discuss the applicability of those rules and principles as regards the Warsaw Convention, which came into force before agreeing the Vienna Convention. This will be followed by an analysis of those rules and principles and their application regarding the interpretation of the Warsaw Convention and the Montreal Convention.

3.2 *The applicability of the Vienna Convention on the Warsaw Convention*

The Warsaw Convention was enacted in 1929, long time before agreeing the Vienna Convention in 1969. This situation raises an important question, which is whether the Vienna rules and principles are applied to the Warsaw Convention, and its amendments that were agreed before the entry into force of the Vienna Convention 1969. According to article 4 of the Vienna Convention 1969,³⁷ its rules and principles will not be applied retrospectively to the conventions that are concluded before its entry into force. The Vienna Convention entered into force in 1980,

³⁴ I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 120.

³⁵ F G Jacobs 'Varieties of Approach to Treaty Interpretation: with special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 Int'l & Comp L Q 318, 334.

³⁶ Lord Hobhouse in *Earl Russell (Cross Appeal) Appellant; v Countess Russell Respondent*. [1897] A.C. 395, 436. (HL)

³⁷ Article 4 provides that 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.'

long time after enacting the Warsaw Convention in 1929. Lord Diplock in *Fothergill*³⁸ considered this issue and concluded that the Vienna rules and principles of interpretation represent the existing customary rules and principles of interpretation and therefore, they are applicable to the Warsaw Convention and its amendment of the Hague Protocol 1955. Even though the Vienna Convention on the Law of Treaties applies only to treaties that were concluded after it came into force, the fact that its articles 31 and 32 does no more than codifying the already-existing public international law rules and principles implies that it would apply to the Warsaw Convention and Protocol of 1955, concluded Lord Diplock.³⁹ As an international custom, the rules and principles set forth in the Vienna Convention 1969 are not only relied upon to those conventions concluded before them, but also they could be applied by a state which is not a party to the Vienna Convention.⁴⁰ Agreeing with this conclusion, the authors of *International Air Carrier Liability: The Montréal Convention of 1999* stated that as the fundamental provisions of the Vienna Convention 1969 codify the customary international law of treaties, the Convention is, in principle, applicable even for States that have not ratified it.⁴¹

The main issue here is to what extent did the House of Lords and the US Supreme Court applied these rules and principles correctly? It is worth noting that the only authentic text of the Warsaw Convention is in French.⁴² In United Kingdom, the carriage by air Act 1961 sets forth both the English⁴³ and the French texts of the Warsaw Convention.⁴⁴ Courts, which dealt with

³⁸ *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

³⁹ Lord Diplock in *Fothergill*, *ibid*, 282.

⁴⁰ A Aust, *ibid*, 10.

⁴¹ PS Dempsey and M Milde *ibid*, 45.

⁴² Article 36 of the Warsaw Convention.

⁴³ The accuracy of the English translation of the French text of the Warsaw Convention in the Carriage by Air Act 1932 was disputed by the Court of Appeal in *Corocraft Ltd. and Another v Pan American Airways Inc.* [1969] 1 Q.B. 616, 652-256 (a case concerning articles 8, 9, 22 and 23 of the Warsaw Convention). As regards article 17 of the Convention, the US Supreme Court in *Floyd* concluded that the English text is a correct translation. It found that ‘Bilingual...dictionaries suggest that a proper translation of “*lesion corporelle*” is “bodily injury”’. *Floyd*, *ibid*, 536.

such cases, looked at both texts of the Convention. In fact, they paid more attention to the French text as it is the text to prevail in case of inconsistency between the two texts⁴⁵ and it reflects the common understanding of the parties.⁴⁶ For example, the US Supreme Court in *Floyd* recognised that it ‘must consider the “French legal meaning” of “*lesion corporelle*” for guidance as to the shared expectations of the parties to the Convention, because the Convention was drafted in French by continental jurists’.⁴⁷ The French legal sources that were consulted in order to arrive at a proper interpretation of the term ‘*lesion corporelle*’ or ‘bodily injury’ were the linguistic dictionaries,⁴⁸ the negotiating history of the Warsaw Convention and the French legal sources which are the legislation, the judicial decisions and the scholarly writing.⁴⁹ The question that arises here is under which category of the Vienna rules and principles of interpretation, if any, these sources of interpretation will come. To answer this question, the interpretation of the House of Lords and the US Supreme court in interpreting the Warsaw Convention will be addressed in the following.

⁴⁴ M Clarke in his book *Contracts of Carriage by Air* (LLP London 2002), described this situation as an alien where there is not one (con)text to study but two, p 20.

⁴⁵ Article 1 (8) of the Carriage by Air Act 1961 (c.27).

⁴⁶ ‘Although French legal usage was to be considered in arriving at accurate English translation of treaty, which had been drawn up only in French, court was bound to apply French law for revelation of proper scope of terms as translated’. The US Court stated in *Rosman v Trans World Airlines Inc* (1974) 34 NY 2d 385.

⁴⁷ *Floyd*, *ibid* 536.

⁴⁸ The court recognised that the definitions which are taken from linguistic dictionaries may be too general for purposes of treaty interpretation. Therefore, it did not play an important rule. *Floyd*, *ibid*, 537.

⁴⁹ *Ibid*, 535-6.

3.3 *The ordinary meaning of the terms in their context in the light of the purpose of the Warsaw/Montreal Conventions*

Article 31⁵⁰ of the Vienna Convention 1969 provides the general rule of interpretation. It sets forth a list of sources, which are considered as primary sources in the process of interpretation. Article 31 (1) of the Vienna Convention provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁵¹

High importance is given in the first step to the context of the treaty. The context as defined by the Convention includes the text of the treaty, its preamble,⁵² its annexes, and any subsequent agreement between the parties in connection with the conclusion of the treaty. Sinclair believed that '[t]he true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from the text'.⁵³

The object of interpreting a treaty is to ascertain the meaning that is intended by its parties for terms in which the agreement was expressed. According to article 31 of the Vienna Convention 1969, terms in the treaty should be given their ordinary meaning in the context of the

⁵⁰ Article 31 of the Vienna Convention 1969 was applied in *Piersack v Belgium (A/53)* [1983] 5 E.H.R.R. 169 (European Court of Human Rights).

⁵¹ This section of article 1 of the Vienna Convention was relied on by national and international courts such as *Bentham v Netherlands (8848/80)* [1984] 6 E.H.R.R. 283 (the European Commission of Human Rights), *El-Yassini v Secretary of State for the Home Department (C-41/96)* [1999] All E.R. (EC) 193 (European Court of Justice), *Sahin v Turkey (44774/98)* [2007] 44 E.H.R.R. 5 (European Court of Human Rights), *Maaoui v France (39652/98)* [2001] 33 E.H.R.R. (European Court of Human Rights).

⁵² The importance of the Preamble was noticed by many courts. For example, in *Commission of the European Communities v Council of the European Union (C-281/01)* [2003] 1 C.M.L.R 15 (the European Court of Justice-Fifth Chamber).

⁵³ I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 121.

treaty as a whole.⁵⁴ Looking at the whole text of any legal instrument and starting with the ordinary meaning of the words used is a custom that English courts used to follow. The object and purpose of a treaty are of great value as regards the interpretation process.⁵⁵ With regards interpreting a treaty, it is concluded that a broad meaning rather than a legal technical meaning is to be taken into account. Affirming this conclusion, the House of Lords in *King* stated that:

[W]hat one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference ... It would not be right to search for the legal meaning of the words used, as the Convention was not based on the legal system of any of the contracting states. It was intended to be applicable in a uniform way across legal boundaries.⁵⁶

Courts tend to look in the first step at the ordinary meaning⁵⁷ of terms in a convention. In order to decide what the ordinary meaning is, some customary principles and rules can be consulted. For example, *Contra proferentem* which provides that ‘if it possible to interpret a provision in two ways, the meaning which is less favourable to the party which proposed it, or for whose benefit it was included, could be adopted while interpreting an international treaty. This principle is applied more often to standard contracts.⁵⁸ The House of Lords in *King* and the US Supreme court in *Floyd* looked firstly at the primary sources of interpretation as presented in article 31 of the Vienna Convention 1969. They started with the text of the treaty, the term ‘bodily injury’ in article 17 of the Warsaw Convention. The ordinary meaning, as regards

⁵⁴ ‘The text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part’. I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984) at 127.

⁵⁵ R Gardiner ‘Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines* (1980)’ (1995) 44 Int’l & Comp L Q 620, 627.

⁵⁶ *Morris v. KLM Royal Dutch Airlines King v. Bristow Helicopters Ltd*, [2002] 2 A.C. 628. para. 77.

⁵⁷ The Federal Court in Australia in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd’s Rep. 537, agreed that primarily regard is to be to the ordinary meaning of the terms in their context and in the light of the object and purpose of the convention.

⁵⁸ A Aust, *ibid*, 201.

interpreting this term has been looked at in English, in French, in isolation⁵⁹ and in the context.⁶⁰ Correctly, the United States' Court of Appeals in *Rosman* summarised the general rule of interpretation under the Vienna Convention 1969 by stating that the regard is to be given to the context in which the term occurred and circumstances under which the agreement was made; and language was to be taken according to its ordinary and natural meaning.⁶¹ This conclusion was affirmed by the US Supreme Court in *Floyd*, as regards interpreting the term 'bodily injury'. It started with the text of the Warsaw Convention and the context in which the written words are used.⁶²

The primary rule of treaty interpretation by adopting the ordinary meaning of terms in a treaty will be ceased if the parties of the treaty intended them to have special meaning, according to article 31 of the Vienna Convention. Article 31 provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...(4) A special meaning shall be given to a term if it is established that the parties so intended'.⁶³ The main reason for creating this rule, according to the academic authors Dempsey and Milde, is that '[t]he specific words of a treaty must be given a meaning consistent with the contracting parties' shared expectations'.⁶⁴ One may wonder what is meant by the rule 'special meaning' and when it should be applied. The only factor that determines which term in a treaty should have a specific or special meaning, according to the Vienna Convention 1969, is the shared intentions of the parties. These intentions might be found in the context, preamble, purpose and object, any subsequent practice

⁵⁹ In isolation means in isolation of national legislations. M Clarke *ibid*, 21.

⁶⁰ *Ibid*, 20-22.

⁶¹ *Rosman, ibid*.

⁶² *Floyd, ibid*, 534.

⁶³ Article 31 of the Vienna Convention.

⁶⁴ PS Dempsey and M Milde *ibid*, 53.

and in the application of the convention. One may argue, I believe, in this case what is the difference between the ordinary meaning and the special meanings of a term if both meanings are to be concluded from the same source. What is ordinary or special in any case depends on the parties' intentions. It seems mistakenly, that the special meaning in this case is treated as if it is an exception to a general rule. It would be more convenient to consider it as an ordinary meaning in that particular case. This confusing situation was recognised within the International Law Commission.⁶⁵ Even though the International Law Commission had some concerns as regards the adoption of the rule of special meaning, on balance, the Commission concluded that adding this section will emphasize that the burden of proof as regards the special meaning of a term lies on the party invoking that meaning.⁶⁶

Looking for the ordinary meaning of the context of a treaty in the light of its purpose,⁶⁷ in our example the Warsaw Convention, is a paramount rule in the process of interpretation. The title and the sub-headings, as parts of the context, were found to be extremely useful in helping to find one's way around the text. Therefore, they played a significant role in the treaty interpretation.⁶⁸ There are two elements for the title of a treaty, its designation (name) and a description of its purpose.⁶⁹ The Warsaw's Convention title is '*Convention for the Unification of Certain Rules Relating to International Carriage by Air*'. This title indicates that uniformity and harmonisation of the rules of the carriage by air are the main purposes of the Convention. As can be seen, the purpose and the object of a treaty are the spirit that controls the process of treaty interpretation. They are highly recognised by the Vienna Convention 1969 where they

⁶⁵ I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 120.

⁶⁶ Year book of the International Law Commission (1966-II), 222, mentioned in I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984) at 120 footnote 46.

⁶⁷ Article 31 (1) of the Vienna Convention.

⁶⁸ A Aust, *ibid*, 340. Heading are also useful in contract interpretation unless they create ambiguity. K Lewison *The Interpretation of Contracts* (Sweet & Maxwell London 2004), 144.

⁶⁹ A Aust, *ibid*, 332.

considered as primary sources in the process of interpreting a treaty.⁷⁰ The US and UK courts paid great attention to this controlling element in the process of treaty interpretation. They interpreted the Warsaw Convention in the light of its purpose of uniformity.⁷¹ The apparent purpose of the Warsaw Convention was uniformity among its diverse adherent nations. Limiting the carrier's liability was designed to assure that only regulated burden be borne by air carriers and to afford more definite basis for passenger recovery; therefore, the liability provisions were thus to be interpreted to promote uniformity both of substance and application of the Convention.⁷²

the House of Lords in *King* and the US Supreme Court in *Floyd* as regards the meaning of the term 'bodily injury', will be analysed in order to discover the extent of reserving the purpose of uniformity of the Warsaw Convention. An important inquiry is to discuss whether the Warsaw Convention only intended to financially limit the carrier's liability in the event of an accident or it went beyond that to limit his liability as to the head of recoverable damages.

The Montreal Convention, on the other hand, used the same terminology of the Warsaw Convention in many occasions. This situation raises the question of whether the interpretation of these terms under the Montreal Convention is identical to that one of the Warsaw Convention. The initial conclusion suggests that the interpretations will not be the same in both Conventions.⁷³ First, courts when applying the Vienna rules and principles of interpretation on the Montreal Convention should bear in mind that the purpose of the Montreal Convention is

⁷⁰ Article 31 of the Vienna Convention.

⁷¹ The purpose of the Warsaw Convention was recognised by courts that dealt with the interpretation issue. For example, *King, ibid*; *Sidhu v. British Airways Plc.* [1997] A.C. 430 (HL) and *Floyd, ibid*.

⁷² *Rosman, ibid*.

⁷³ For example, some writers in the field of interpreting transport law suggested a 'comparative convention' approach. M Clarke *ibid*, 28.

different from that one of the Warsaw Convention. The common intentions of the parties and the purpose of the Montreal Convention mainly sought the balance between the interests of air carrier and the passenger. Expressly, it aimed at providing more protection to the passenger. Warsaw Convention, on the other hand, aimed at protecting the fragile air industry in its infancy. Therefore, even though the two Conventions use the same terminology, the application of the Vienna rules and principles, I believe, should lead to different interpretations. The US Court of Appeal in *Ehrlich*, the first major US decision to interpret the Montreal Convention indirectly⁷⁴ recognised this difference in purpose between the two Conventions. The court stated that:

[W]hereas the ‘primary aim of the contracting parties to the [Warsaw] Convention’ was to limit ‘the liability of air carriers in order to foster the growth of the ... commercial aviation industry’...the contracting parties to the Montreal Convention expressly approved that treaty because, among other reasons, they recognized "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution... Hence, commentators have described the Montreal Convention as a treaty that favors passengers rather than airlines.⁷⁵

It should be noted that according to article 31 (2) of the Vienna Convention, the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. The relating provisions of the Preambles of the Warsaw Convention and the Montreal Convention were discussed above.⁷⁶ For the purpose of treaty interpretation, the context includes any agreement relating to that treaty which was

⁷⁴ PS Dempsey and M Milde *ibid*, at 54. It should be noticed that in *Ehrlich v. American Airlines, INC.* 360 F.3d 366, United States Court of Appeals, (2nd Cir. 2004), the case was governed by the Warsaw Convention and the interpretation of the Montreal Convention was not applied in the case.

⁷⁵ *Ehrlich, ibid.*

⁷⁶ *Supra*, 63.

made between all the parties in connection with the conclusion of the treaty.⁷⁷ An example of such agreement is the Final Act of the Montreal Convention. According to article 31(2)(b) of the Vienna Convention, the context includes also ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’. It is understood that such sources of interpretation form part of a convention and therefore, they should be treated as primary sources of interpretation.

The list of primary sources of treaty interpretation includes also: any subsequent agreements in relation to the convention, any subsequent practice in its application and any relevant applicable rules of international law.⁷⁸ Article 31(3) of the Vienna Convention 1969 provides that the following shall be taken into account, together with the context:

- a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- c) any relevant rules of international law applicable in the relations between the parties.

The Vienna Convention treats the subsequent agreements between the parties to a convention as part of the context of that treaty. The protocols, which amended the Warsaw Convention, for the purpose of interpretation, could be considered subsequent agreements. The issue of regarding the Protocols amending the Warsaw Convention as part of the later is

⁷⁷ Article 31(2)(a) of the Vienna Convention 1969.

⁷⁸ According to article 31(3) of the Vienna Convention these elements are equally important and are to be taken into account with the context of the treaty. However, M Clarke in his book *Contracts of Carriage by Air* (LLP London 2002), categorise these elements as supplementary means of interpretation, 25-28.

expressly confirmed in each one of these Protocols. Courts in the United Kingdom tend to respect and apply this rule of treaty interpretation. The House of Lords in *the Giannis NK*⁷⁹ stated that:

...because of the desirability of uniformity of construction by the courts of different countries when dealing with words in an international convention and when dealing with the same words in statutes dealing with the same subject matter, the English courts should adopt an interpretation which is consistent with the approach repeatedly taken by the courts of the U.S.A.⁸⁰

The general rule is that any subsequent agreement regarding the interpretation of a treaty; any subsequent practice in its application and any relevant rule of international law are to be taken into account with the context as a primary source of interpretation.⁸¹ The subsequent practice is a very important element in the interpretation of any treaty.⁸² It promotes the purpose of the Convention in achieving uniformity amongst its parties. An example of the subsequent practice in the application of a treaty is the courts' decisions. It is noteworthy however, that '[R]egard must be had to the level of the court deciding the case in question and the process of law reporting'.⁸³ In reliance on this rule, the US court of Appeal in *Ehrlich* stated that '[If] the plain text [of a treaty] is ambiguous, we [may] look to other sources, such as the "post[-]ratification understanding of the contracting parties" to elucidate the treaty's meaning'.⁸⁴

If the ordinary meaning of the terms in their context and in the light of the purpose of the Convention could not provide a definite interpretation to the convention, court may rely on the

⁷⁹ *Effort Shipping Co. Ltd. Respondent v Linden Management S.A. and Others Appellants (the Giannis NK)* [1998] A.C. 605 (HL).

⁸⁰ *Ibid*, 608. (HL)

⁸¹ Article 31 (3) of the Vienna Convention.

⁸² A Aust, *ibid*, 194.

⁸³ Fountain court Chambers *ibid*, 33.

⁸⁴ *Ehrlich*, *ibid*, 391.

secondary sources of interpretation. Article 32 of the Vienna Convention 1969 regulated this rule. In the following, the application of these sources to the Warsaw Convention will be analysed.

3.4 *Supplementary means of interpretation/ the preparatory works:*

Article 32 of the Vienna Convention 1969 furnishes the supplementary means of interpretation that are to be approached in case of ambiguity. These supplementary means are also useful when the application of the primary means leads to palpably absurd or unreasonable results. Article 32 of the Vienna Convention provides that:

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

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

It should be noted that the supplementary means of interpretation are merely aids of interpretation and should be approached with special care.⁸⁵ The importance of this source of interpretation was highly recognised in the process of interpreting the Warsaw Convention. Relying on the preparatory work or the *travaux préparatoires*, as a supplementary source of treaty interpretation, is excusable only when there is ambiguity or obscure in the meaning or if the interpretation leads to absurd or unreasonable result.⁸⁶ Lord Wilberforce in *Forthergill*⁸⁷ recognised that it is justifiable to have regard to the *travaux préparatoires* in order to resolve

⁸⁵ A Aust, *ibid*, 201.

⁸⁶ 'The preparatory work (*travaux préparatoires* or *travaux* for short) of a treaty is not a primary means of interpretation, but it is an important supplementary means'. A Aust, *ibid*, 197.

⁸⁷ *Forthergill v Monarch Airlines Ltd* [1981] AC 251.

ambiguities or obscurities.⁸⁸ The Fountain court Chambers believed that referring to the *travaux préparatoires* should be rare and if so, on a condition that the material involved is public, accessible and clearly points to a definite legislative intention.⁸⁹ The House of Lords in *King* pointed out also that caution is needed in the use of this source.⁹⁰ Lord Hope in *King* stated that the fear of not sharing a common view between the delegates requires treating the preparatory works of a convention with caution.⁹¹ The preparatory works should point clearly and indisputably to a definite intention on the part of the delegates as to how the point at issue should be resolved, explained Lord Hope.⁹² The silence of other Delegated on a Delegate's point of view reflects in little value to that point of view.⁹³

The preparatory works are not defined in the Vienna Convention 1969.⁹⁴ They are described by Lord McNair as 'an omnibus expression which is used rather loosely to indicate all documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation'.⁹⁵ Besides, in some cases, they include also records of the work of independent bodies of experts.⁹⁶ Preparatory works are said to afford evidence of the common intentions of the parties.⁹⁷ An academic author commented that:

...that is not to say that the intention of the delegates would displace a clear meaning or that their intention is what the Vienna rules identify as the Holy Grail in the quest

⁸⁸*Ibid*, 278.

⁸⁹ Fountain court Chambers *Carriage by air* (Butterworths, London 2001), 31 and 33.

⁹⁰ *King*, *ibid*, para. 79.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ The preparatory works is believed to be purposely not defined in the Vienna Convention. D J Harris *Cases and Materials on International Law* (Sweet and Maxwell London 2004), 840.

⁹⁵ Lord McNair, *The Law of Treaties*, (1961) p 411, mentioned in R Gardiner 'Treaty Interpretation in the English Courts since *Fothergill v Monarch Airlines* (1980)' (1995) 44 Int'l & Comp L Q 620-621, footnote 8.

⁹⁶ D J Harris, *ibid*, 840.

⁹⁷ McNair in his well-known work 'The Law of Treaties', mentioned in D J Harris, *ibid*, 840

for interpretation. However, the precise solution in the instant case is not the real cause for interest here. What is lacking is an indication of the basis on which the courts look at preparatory work and their object in doing so.⁹⁸

The main problem is that ‘the official minutes of the carriage by air conventions tell a less conclusive story’, the US Court of Appeal stated in *Ehrlich*.⁹⁹ For example, during the Montreal Conference, each delegate to the Montreal Conference expressed the situation according to his state’s point of view without trying to find a compromising solution to the matter.¹⁰⁰ Ian Sinclair¹⁰¹ correctly concluded that ‘in the case of general multilateral conventions, a search for common intentions of the parties can be likened to a search for the pot of gold at the end of rainbow’.

3.5 *Interpreting a convention that is authenticated in more than two languages:*

Finally, article 33 establishes the rules and principles of interpretation of treaties authenticated in two or more languages. Article 33 of the Vienna Convention, which provides that:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which

⁹⁸ M Freeman *ibid*, 126.

⁹⁹ *Ehrlich, ibid*, 391.

¹⁰⁰ For more details of the divergence of these views, see *International conference on air law* (Convention for the unification of certain rules for international carriage by air) Vol I MIN (International Civil Aviation Organisation Montreal, 10-28 May 1999). Doc 9775-DC/2.

¹⁰¹ I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 130.

the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Unlike the Warsaw Convention, the Montreal Convention is done in more than two authenticated languages.¹⁰² All the language texts of the Montreal convention are equally authentic.¹⁰³ According to article 33 (3) of the Vienna Convention 1969, there is a logical presumption that the terms of a treaty should have the same meaning in each authentic text. If there is a difference of meaning between these texts, the meaning, which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.¹⁰⁴

To summarize, applying the Vienna rules and principles of interpretation might result in a different interpretation of the same terms used in different convention. For example, applying these rules and principles in good faith, the author argues, could entitle the Montreal passenger to be compensated for his or her real proven injury if they managed to prove the other elements of the carrier's liability. Protecting passengers, the purpose of the Montreal Convention, includes among other things, his right to get a fair compensation for his proven loss.¹⁰⁵ If the passenger managed to prove his loss by the help of medical sciences, there should be no problem in compensating him or her even though their loss does not manifest itself physically.

The final section of this paper will investigate the differences, if any, between the Vienna rules and principles of treaty interpretation and those ones of interpreting a domestic statute and the rules of interpreting commercial contracts.

¹⁰² The large number of the authenticated languages of the Convention might open the door for more divergence in the application of the rules set out by the Convention. This situation implies that the drafting is not easy. 'For the multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests'. A Aust, *ibid*, 184.

¹⁰³ See article 57 of the Montreal Convention.

¹⁰⁴ Article 33 (4) of the Vienna Convention.

¹⁰⁵ Article 29 of the Montreal Convention expressly precludes punitive, exemplary or any other non-compensatory damages.

4 THE RELATIONSHIP BETWEEN THE VIENNA RULES AND OTHER RULES OF INTERPRETATION

As a fact, international carriage of passenger by air is exclusively governed by the rules set forth in the international conventions between its parties.¹⁰⁶ These rules as implemented in the passenger's ticket constitute the conditions of the contract of the carriage by air between the passenger and the carrier. This situation implies that the freedom of the parties in formulating the carriage contract is, to some extent, restricted by the conventions' provisions.¹⁰⁷ However, the rules provided for in the carriage by air Conventions do not supplant the contract between the parties nor does it change the contractual nature of the relationship between the parties. This situation leads to the question of whether the superiority nature of the treaty over the contract implies that all disputes arising in accordance with the performance of such contract will be governed only by the treaty's provisions. In other words, to what extent the rules of interpreting contracts are relevant during interpreting the carriage by air Conventions.

On the other hand, the issue of interpretation of treaty provisions will come before a court as part of the state's law to be applied to the matter in dispute only where legislation directly or by implication makes the treaty provisions part of the law within the state party, the United Kingdom¹⁰⁸ in this research. The United Kingdom implemented the Warsaw Convention by the Carriage by Air Act 1932 (Sch 1), which was repealed by the Carriage by Air Act 1961. In

¹⁰⁶ It will be more accurate to say that this statement applies to certain rules of the carriage by air, as the Conventions do not cover all rules of international carriage by air. 'The title of the Convention, "Convention on the Unification of Certain Rules Relating to International Carriage by Air", suggests that it is only intended to unify "certain" specific rules, but not all rules, relating to international carriage by air'. PS Dempsey and M Milde, *ibid*, 59.

¹⁰⁷ Articles 23, 32 and 33 of the Warsaw Convention 1929 and articles 26, 47 and 49 of the Montreal Convention introduce restrictions on the freedom of contract on the carrier.

¹⁰⁸ M Freeman, *ibid* 122. 'In other cases, a treaty may be part of the relevant background but will not be interpreted by a court as having any dispositive role in the disputed matter.' *Ibid*.

addition, the Montreal Convention 1999 was reproduced by a schedule to the Carriage by Air Act- Order 2002, SI 2002/263. The question that arises here is, to what extent the rules of interpreting domestic laws are relevant during the interpretation process of an international convention. The main issue is whether the court will treat the provisions of such Acts as merely parts of the Act itself or they will keep their international characteristic. These two issues of interpreting contracts and domestic status will be briefly discussed in turn in the following.

4.1 *The Vienna rules V. contract interpretation rules*

Interpreting a contract in definition is ‘the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract.’¹⁰⁹ This definition implies that contracts should be interpreted objectively taking into account the surrounding circumstances existing at the time of the formation of the contract. This objectivity can be concluded from the requirement of the reasonable test in the process of interpreting the contract. This test implies that terms of a contract should not be interpreted literally. Explaining the difference between the literal meaning of a word and the meaning that a reasonable man would presume was provided by Lewison as the following:

[T]he meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.¹¹⁰

¹⁰⁹ K Lewison *The Interpretation of Contracts* (Sweet & Maxwell London 2004), 4-5.

¹¹⁰ K Lewison, *ibid*, 12.

It is worth noting that the reasonability test, which dominates the process of a contract interpretation, can be part of the concept of good faith in treaty interpretation. Sinclair concluded that '[I]t is often said that the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable'.¹¹¹ Therefore, the interpretation of an international treaty in this regard is similar to the interpretation of a contract.

Like the treaty interpretation, the starting point in the process of contract interpretation is the text or the terms of the contract. Parties to a treaty or a contract are presumed to intentionally have used the particular words in the treaty or in the contract.¹¹² The general rule in interpreting both, a treaty and a contract, is that the words are to be given their natural and ordinary meaning.¹¹³ This rule reflects the common sense proposition in implying that it is not easy to accept that people have made linguistic mistakes, particularly in formal documents, stated Lewison.¹¹⁴ On the other hand, Lewison continued to say, 'if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention¹¹⁵ which they plainly could not have had'.¹¹⁶ In case of ambiguity, it is legitimate to look at dictionaries and other materials in order to elucidate the meaning of the written words in the contract.¹¹⁷ This mean of interpretation has been also followed by the House of Lords in *King* and by the United States in *Floyd* in

¹¹¹ I Sinclair *The Vienna Convention on the Law of treaties* (Manchester University Press Manchester 1984), 120.

¹¹² Words used in the contract should be reflecting the intentions of the parties. 'The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract, in so far that has been agreed or proved'. K Lewison, *ibid*, 22-24.

¹¹³ Article 31 of the Vienna Convention.

¹¹⁴ K Lewison, *ibid*, 13.

¹¹⁵ Whether a given set of circumstances is within or outside the Intentions or 'contractual stipulations' of the parties must be decided as a question of fact. Such cases are often decided as a matter of first impression. K Lewison, *ibid*, 125.

¹¹⁶ *Ibid*, 13.

¹¹⁷ *Ibid*, 120.

interpreting the Warsaw Convention. This source of interpretation matches up both contracts and treaties interpretation.

The importance of the context in both a treaty and a contract is paramount. According to the Vienna Convention 1969, the context of the document rather than the text alone is the primary source of interpretation. The same rule is being applied as regards contract interpretation. The importance of this rule appears when determining the meaning of a word or a term. Even where a word has a single primary meaning, the choice between the different meanings is determined by the context in which the words are used.¹¹⁸

Finally, it is important to note that the famous rule in contract interpretation *Ejudem Generis* rule¹¹⁹ was expressly mentioned by courts in the process of interpreting the Warsaw Convention.¹²⁰ Noticeably, the Vienna Convention 1969 does not expressly mention nor it excludes this rule. Applying it by the House of Lords in *King* might have been depended on the interpretation of a contract or by considering it as a custom rule of the international law as mentioned in article 31 (3) (c) of the Vienna Convention 1969.

It is important to notice that it is not perfectly concise to say that all contract interpretation rules are applicable to a treaty interpretation. As a rule, legal terms in a contract should be given their technical meaning in law unless there is something in the context to displace the presumption that it was intended to carry its technical meaning.¹²¹ Applying this rule to a treaty interpretation is difficult. The difficulty arises when trying to apply a specific legal system to a

¹¹⁸ K Lewison *ibid*, 141.

¹¹⁹ This rule implies that 'If it is found that things described by particular words have some common characteristics which constitutes them a genus, the general words which follow them ought to be limited to things of that genus'. K Lewison *ibid*, 224.

¹²⁰ See for example *King*, *ibid*.

¹²¹ K Lewison, *ibid*, 132.

term in an international treaty. The special nature of agreeing a treaty makes it impossible to depend on the technical meaning of a legal term when interpreting it. In rare circumstances, the negotiating parties of an international convention will agree on a specific legal meaning of a term. In such cases, their intentions will be shown in the form of the special meaning of that term in the text of the convention or in the preparatory works of that particular convention.

This quick overview of the contract interpretation rules shows that there is a large degree of similarities between its rules and the Vienna rules and principles on treaty interpretation. There is nothing in the Warsaw Convention, any of its subsequent amendments or in the Montreal Convention to suggest that the Convention supplants the contract between the parties. In fact, many of its provision confirm the contractual nature of the relationship between the parties to contract of carriage.¹²² However, it must be recognised that we are not dealing merely with a contractual regime, but with a regime exclusively regulated by an international convention. Nevertheless, too wide an impact must not be given to the Convention – at least not wider than the convention claims for itself. With that in mind, it can be concluded that interpreting the Warsaw Convention and the Montreal Convention in the end is not more than interpreting a contract, which has specific characteristics.

4.2 *The Vienna rules V. the rules of interpreting domestic legislations*

When a treaty is incorporated into a national law of a state party, an important question arises on whether the court is interpreting an act or a treaty. Because of the noticeable diversity of the rules of interpreting domestic laws among the world's states, the subject will be discussed from the angle of the United Kingdom rules of interpretation.

¹²² See articles on tickets and notably the provisions of article 3.

It is important to clarify the relationship between the Vienna rules and principles of interpretation are creations of public international law and domestic laws in the United Kingdom. According to Lord Denning, the rules of international law are to be incorporated and applied in the United Kingdom without the need for the House of Lords to transform them and make them part of the English law. The Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria*¹²³ overviewed the different schools of adopting international conventions into the English law by asking:

[W]hat is the place of international law in our English law? One school of thought holds to the doctrine of *incorporation*. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of *transformation*. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the Judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops...As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise, I do not see that our Courts could ever recognize a change in the rules of international law.¹²⁴

¹²³ [1977] 1 Lloyd's Rep. 581. (CA).

¹²⁴ *Trendtex Trading Corporation v Central Bank of Nigeria*, [1977] 1 Lloyd's Rep. 581, 591. (CA)

The issue of which rules of interpretation are to be applied when interpreting an international convention within the United Kingdom is believed not to be clear yet.¹²⁵ The reason is that usually international conventions, in particular the Warsaw Convention and the Montreal Convention, are reproduced by a schedule to an Act or in subordinate Legislation.¹²⁶ The crucial point is whether English rules of statutory interpretation are to be applied while interpreting the text of these Acts and Legislations or the rules of public international law as were mentioned in the Vienna Convention 1969. The important query here is whether treaty provisions become ordinary statutory provisions or they retain something of their character as creatures of public international law.¹²⁷ The fact that the rules and principles of construing international convention are different from those ones of construing domestic legislation¹²⁸ makes the issue in question a fundamental one.

The statutory interpretation rules under English law can be summarised as the following. The general rule is that, an English judge in the process of interpreting a Statute gives effect to the grammatical and ordinary meaning or, where appropriates the technical meaning of the words in the general context of that Statute.¹²⁹ He may consider the implied meaning of the words, and may have the power to alter, ignore or add words if applying the previous provisions resulted in unreasonable or unworkable application of the Statute.¹³⁰ If the application of these meanings contradicts the purpose of the Statute, the judge may apply any applicable secondary meaning.¹³¹

¹²⁵ See for example the article of R K Gardiner in M Freeman *ibid*, 127.

¹²⁶ The Warsaw Convention was incorporated into United Kingdom by the Carriage by Air Acts 1961 and 1967. The Montreal Convention was incorporated by the Carriage by Air Acts 2002. For more information on how international conventions are incorporated into the English law.

¹²⁷ M Freeman *ibid*, 124.

¹²⁸ King, *ibid*, para. 51.

¹²⁹ S R Cross *Statutory Interpretation* (3ed ed Butterworths London 1995), 49

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

It is clear that the principles of interpreting a statute or a treaty similarly give important to the context, the ordinary meaning and the purpose of the statute or the treaty. However, in the process of interpreting an international convention, the judge has very limited power comparing to the one interpreting a statute. He cannot alter the interpretation of an international convention if the application of the Vienna rules and principles results in unfairness or unreasonability of the application of that convention.

Another important difference is that domestic acts reflect the intentions of the lawmaker in that particular sState, whereas international conventions are the combination of the intentions of several State parties from different legal systems. In this case, interpreting international conventions should not be bound by the rules of a specific legal system, as the convention was not based on the legal system of any of the contracting States. It was intended to be applicable in a uniform way across legal boundaries; therefore, it would not be right to search for the legal meaning of the words used.¹³² On the other hand, treaties would be interpreted broadly¹³³ by adopting a reasonably flexible approach in construing their provisions, as English courts do.¹³⁴ ‘In situations of this kind the language used should be construed on broad principles leading to a result that is generally acceptable ... But this does not mean that a broad construction has to be given to the words used in the Convention’, Lord Macmillan stated in *Stag Line Ltd v Foscolo Mango*.¹³⁵

¹³²King, *ibid*, para 77.

¹³³ The broad interpretation was also affirmed in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (the Rafaela S)* [2005] UKHL 11 (HL).

¹³⁴ Fountain court Chambers *ibid*,32.

¹³⁵ *Stag Line ibid*, 350. The principle of liberal interpretation of international conventions was highlighted several times by courts in the United Kingdom. For example, Lord Wilberforce in *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd* [1978] A.C. 141, 152 stated ‘I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or

The type of primary sources that are to be approached as regards the interpretation of a domestic law and a treaty is different. This divergence becomes significant when a matter is connected with the importance of recognising the subsequent practice as being a primary source in the process of interpreting a treaty. The role that subsequent practice play in the process of interpreting a treaty and the extent of recourse to supplementary means of interpretation, to give examples, demonstrate a significant divergence between the later and the rules of interpreting a Status.¹³⁶

It can be seen that there are many differences between the interpretation of a domestic Status in the United Kingdom and the Vienna rules and principles of interpretation. However, the issue of deciding which rules are to be applied is still disputed. Some academic writers claim that there are still some problems on deciding which set of rules of interpretation are to be applied. They argue that courts had failed to take a clear position on whether the ordinary rules of statutory interpretation or the rules of public international law in the Vienna Convention apply when considering words in, or taken from, a treaty. Their point of view is that problems remain over the interpretation of treaties in the United Kingdom for the following reasons.¹³⁷ Firstly, they allege that the relationship between public international law and domestic law has never been adequately defined. Secondly, it is not clear whether it is the treaty itself that is to be interpreted or the statutory reflection of it. There are variety of methods of giving effect to treaties. For example, in the United Kingdom, the two methods *incorporation* and *transformation* have been in use raising the question of whether the text of the treaty is

by English legal precedent, but on broad principles of general acceptance.’. The courts in the United States also affirmed this principle in *Rosman, ibid* and in *Floyd, ibid* where it stated that ‘Treaties are construed more liberally than private agreements, and to ascertain their meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties’ *Floyd, ibid*, 534.

¹³⁶ M Freeman *ibid*, 125.

¹³⁷ *Ibid*, 127.

reproduced or transformed. The variety of methods of giving effect to treaties in legislation, it is claimed, presents an unclear picture of whether the treaty or the legislation is the substantive instrument to be interpreted when the words in issue originate in a treaty.

The issue of deciding which set of rules is to be applied as regards the carriage by air Conventions or indeed the Carriage by Air Acts as incorporated in the United Kingdom, the author of this paper believes, is not more than theoretical one.¹³⁸ Many factors could support this point of view. Firstly, the Carriage by Air Acts have transformed the exact wording of the French and the English texts of the Warsaw Convention and its amendments and the authenticated English text of the Montreal Convention. This incorporation might impliedly indicate that the treaty as a production of the public international law is the one, which is intended to have effect. The House of Lords in *Fothergill v Monarch Airlines Ltd*¹³⁹ affirmed this point by deciding that an international convention must be construed purposively, according to broad principles of general acceptance. Furthermore, the main object of agreeing international conventions in general and the carriage by air Conventions in particular, is to unify the rules of law in that particular field. This uniformity might be affected if each court in the State parties followed its domestic rules of interpretation while interpreting such conventions. The House of Lords in *Sidhu*¹⁴⁰ clarified this issue by recognising that:

[T]he Convention (the Warsaw Convention) is expressed to be 'a Convention for the unification of Certain Rules Relating to International Carriage by Air'; however, it provides a uniform and exclusive international code relating to the liability of air carriers in respect of loss, injury and damage sustained in the course of, or arising out

¹³⁸ Even in non-aviation cases, courts seem to accept that the interpretation of international conventions is not to be controlled by domestic principles. *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114 (CA).

¹³⁹ [1981] AC 251, 279, 281-282.

¹⁴⁰ *Sidhu, ibid.*

of, international carriage by air and is to be applied by the courts of all high contracting parties without reference to the rules of their own domestic law.¹⁴¹

Professor Cheng in recognising that the purpose of the carriage by air Conventions in securing the uniformity of their application among the State parties, believed that no reference to the domestic law of one of the contracting states could be done. These Conventions will be taken apart from their purpose if they are not treated as the outcome of the international society. In the process of interpreting these Conventions, the relevant elements such as the text, the context, the objects and purposes as well as the preparatory works are to be taken into account. Professor Cheng noticed that ‘...the purpose of drawing up an international convention designed to become a species of international legislation would be wholly frustrated if the courts of each State were to interpret it in accordance with concepts that are specific to their own legal system’.¹⁴² Besides, it noticeable that Courts, in particular the House of Lords, had no doubt whatsoever on what rules are to be applied when interpreting the carriage by air Acts.¹⁴³ The House of Lords expressly refused to apply the rules of interpreting domestic Acts while interpreting the Warsaw Convention. An international Convention must be construed according to broad principles of general acceptance, and not according to domestic law or legal precedent, the House of Lords confirmed in many cases.¹⁴⁴ Finally, the fact that the House of Lords in *King* followed the same rules as the United States Supreme Court did in *Floyd* indicates that the international rules and principles of interpretation have been followed.¹⁴⁵

¹⁴¹ *Sidhu*, 444.

¹⁴² Bin Cheng, *Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris*, II Annals of Air & Space L. (1977). Mentioned in Dempsey, 144, footnote 141.

¹⁴³ See for example *King*, *ibid*.

¹⁴⁴ See *James Buchanan*, *ibid*, 152; *Stag Line* *ibid*, 350 and *Fothergill v Monarch Airlines Ltd* [1981] AC 251, (Lord Diplock p 279- 282).

¹⁴⁵ *King*, *ibid*.

It is noteworthy that the differences between the two sets of rules of interpretation do not mean that courts tend to ignore the rules of interpretation of domestic laws. To this end, the feature of 'generally always speaking' and its consequences, the rule applied as regards the interpretation of domestic laws, has been respected in the process of interpreting international conventions. It is not a rule of law but a principle of construction that statutes as generally speaking documents which means that they should be interpreted in the light of the contemporary social and scientific world.¹⁴⁶ 'Given that the rationale of the principle is that statutes are generally intended to endure for a long time, one can readily accept that multilateral international trade conventions, which are by statute incorporated in our law, should be approached in a similar way', Lord Steyn states in *King*.¹⁴⁷

5 CONCLUSION

By conclusion, the study in this paper showed the importance of the Vienna Convention 1969 in interpreting the carriage by air Conventions and in preserving the aim of uniformity among these Conventions. Indeed, the Vienna rules and principles of interpretation have been applied by the courts in the majority of states, including those who did not sign or ratify the Vienna Convention 1969. The main reason behind this conduct might be the fact that these rules and principles merely codified the pre-existing international customary rules and principles of interpretation. These rules and principles are applied on most of the cases related to international carriage by air and have a priority on any domestic rules of interpretation. Besides, they are prioritised over the rules of interpreting commercial contracts, albeit the conditions of the carriage by air are produced by a contract. These rules and principles were correctly followed

¹⁴⁶ *Ibid*, para 25.

¹⁴⁷ *Ibid*, para. 25.

and applied by courts in both the United States and United Kingdom in relation to the interpretation of the carriage by air conventions, albeit the United States is not a party to the Vienna Convention 1969.



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